5th Conference of the Presidents of the Courts of Appeal of the European Union, 2017, 's-Hertogenbosch

How to combine antiterrorism laws with the protection of human rights. The experience of an Italian prosecutor's office.

—Giovanni Salvi, prosecutor general, Court of appeal of Rome

Foreword

Italy has not experienced a serious terrorist attack in recent years, in spite of strong exposure to terrorist threats. Penal repression and preventive means have proven effective.

Is that due to a particular Italian approach to dealing with organized forms of criminality? Could Italy be considered a model other countries should follow? Within which terms and limits?

My presentation will try to answer these questions, starting from the experiences of the Rome prosecution office's pool. The focus is on internal terrorism and international terrorism considered within national borders. The connections between terrorism, as above considered, and conventional or unconventional warfare on a battleground (like Syria or Libya) are discussed only when relevant (for example, interactions with intelligence, State secrets, and so on).

A large part of the presentation is devoted to how different threats require different approaches and tools of inquiry.

I focus my discussion on the importance of understanding the reasons on the ground for different movements; within such reasons, in my view, an important role is played by ideological motivations. A global, comprehensive approach to terrorism shall be grounded on the thorough comprehension of each individual movement's specificity.

Political carefulness requires an attentive use of the language, in order to avoid criminalization of whole areas or identities and to distinguish radicalism from terrorism. At the same time, we must be aware of the wider implications of the relationship between terrorism and its ideological, political, cultural, and even personal roots.

I analyze some of the peculiarities in the Italian situation, starting from the heritage of dictatorship in criminal law and the unique institutional environment, which sees prosecutors and judges belonging to the same body, the judicial authority.

In this context, a *fil rouge* consists of the way human rights and the rule of law were maintained even in the worst periods of terrorist attacks.

As the basis of a successful approach, there are a number of circumstances, from institutional (such as the relationship between the state's bodies and coordination in investigation and in sharing information) to historical (such as hardly punished crimes against the state, grounded in the dictatorship period).

The existence of an internal threat, Mafia-type organizations like Cosa Nostra, determined a continuous exchange of experiences between the two fields, enhancing law enforcement

agencies (LEAs) and the prosecutors' skills, investigative ability, political determination, and assessment of the importance of international cooperation.

International cooperation was one of the most important achievements in dealing with transnational threats such as the Mafia and terrorism. In this field, Italy was years ahead, becoming a leading country in Europe.

Dealing with Mafia-type organizations underscored the relevance of preventive measures, mainly in the patrimonial field: seizing criminal assets and "following the money" became a strict priority, soon transferred to the antiterrorism field.

An important role was played by the shared belief, in the public opinion and within the political parties, that a comprehensive approach must be followed, carefully avoiding excesses in repression.

A long period of interferences determined a deep gap between judiciary and intelligence, which resulted in recurrent conflicts before the Constitutional Court and in a lack of effectiveness in collecting information.

New forms of terrorism are now stimulating a reconsideration of such a conflict, bringing about a season of confidence and cooperation. My presentation is grounded on my dual experience as a prosecutor in Rome and Catania and as a judicial authority in charge of authorizing collection of information by secret agencies.

I was required to discuss my presentation from the point of view of an acting prosecutor who has been in the field for more than thirty years. It is not an easy task. Writing my presentation turned out to be a difficult test. I hope I will be able to present such a qualified audience with a synthesis of a long history of tragic events, within clear limits and without causing misunderstandings.

Italy as a "model" in dealing with terrorism?

Italy has had to tackle terrorist threats, in different forms, since the 1950s. A particularly virulent attack occurred during the '70s, when terrorism accompanied the explosion of what was called the Mafia War ("Guerra di Mafia") between different groups within *Cosa Nostra*. The result was a growing engagement of public powers against criminality and the application of preventive and repressive instruments from one legal area to the other. Not understanding such connection could make it difficult to get the complexity of the Italian choices. Other European countries faced different forms of terrorism, based on their specific political context, like Great Britain, Spain, or Germany; France has been dealing for decades with different forms of terrorism, based on the Algerian troubles. These threats were not less serious than the Italian one, considering number of attacks and victims, political effects, and persistence over time. Nevertheless, none of them faced at the same time widespread criminal organizations, reaching territorial control over entire regions like Sicily, Campania, and Calabria with strong transnational connections.

Some consider Italy as model[1]. Certainly the track followed in the last thirty years (in the organized crime field based on the experiences of the USA, whose Law Enforcement Agencies built a good relationship with the Italian judiciary[2]) has been a basis for the international approach that emerged from the conventional instruments. Consider as an example the Palermo Convention on Transnational Crime (2000), which provides a definition of associative crimes that is grounded in the Italian experience with Mafia-type organizations[3]; in the terrorism field, the anticipation of penal punishment, through the provision of associative or specific crimes, could be considered an Italian legacy, at least in part.

This highly experienced apparatus allowed Italy to deal with the new threat of jihadist terrorism after September 11, without derailing from the main track of the rule of law. Italy refused the approach of "War on Terror" and pursued the legal path of penal punishment, aided by a series of preventive measures born as tools against organized crime. Significant successes have been achieved, with dozens of defendants convicted in the courts and the substantive prevention of attacks within the national territory up to now.

As we will see, not everything was perfect. Italy has been condemned by the European Court for Human Rights for its participation in the extraordinary rendition of Abu Omar; the expulsion of people suspected to belong to terrorist organizations is under scrutiny by the ECHR, with more than one negative judgment; and some scholars consider the penal punishment of material conducts in an anticipated form to be a violation of constitutional principles. The idea itself of a "fight," conducted by the judiciary, has been questioned as in contrast with a strict constitutional interpretation of the rule of law. The last concern could be considered a misinterpretation of the real distribution of responsibility between the judiciary and the government; an important role in understanding the complex issue rests in the peculiarity of the Italian institutional system, where in Italy prosecutors belong to the same career of judges and are considered a judicial authority, as well.

At the same time, it should be considered that, although Italy won battles against organized crime in the '90s and terrorism in the '80s, the costs were terrifying. We counted hundreds of victims; among them were some of the most dedicated judges, prosecutors, and law enforcement officers[4].

Not less important, the diffusion of violence heavily affected the democratic process. The kidnapping and murder of former prime minister Aldo Moro, with five members of his detail, interrupted the political process of an agreement between the Christian Democratic Party (DC) and the Communist Party (PCI) in 1978, radically changing the political and institutional situation and leaving behind a sea of suspicions, conspiracy theories[5], and accusations that still

[1] For a media statement, see E.N. Luttwak, *Doing counterterrorism right*, in *Nikkei Asian Review*, September 30, 2015, later posted in the same review as *Italy has lessons to teach in counterterrorism*.

[2] Judge Giovanni Falcone is considered an FBI hero and his statue stands in the main FBI building.

[3] The Italian legislation provides a more precise definition of a Mafia-type association, in art. 416 bis Penal Code, enforced by art. 1 Law September 13, 1982, no. 646, said Rognoni-La Torre. The law cost its promoter, Member of Parliament, Pio La Torre, his life. He was killed by Cosa Nostra in Palermo on April 30, 1982

[4] Twenty-four judges and prosecutors were killed in the fight against terrorism and organized crime; LE officers paid an even higher toll.

[5] The dangers to an open society from conspiracy theories are well known.

last today[6]. The *strategia della tensione*[7] that started in 1969 with the Milano bombing and went on for ten more years, until the Bologna bombing on August 2, 1980, was a unremitting threat to the integrity of the country and one of the main causes that gave rise to left-wing (LW) terrorism, as a way to contrast the impending coup d'état.

Too many specific elements characterize the country, from the institutional environment to the presence at the same time of different forms of political[8] violence, to allow us to consider Italy as a model, if the term means an experience that should be followed.

Within the specificity of the Italian institutional background (one could say "anomalies," compared to other the European countries), the constitutional principle of penal action as mandatory is of utmost importance. The principle's consequences extend to a number of related issues, such as the autonomy of the prosecutor's office (and the fact that it belongs to the judiciary), the structure of the relationship between the prosecutor's office and the judicial police, the responsibility for the investigation, the structure of the preliminary investigations, and the role of the judge in controlling the investigations. In countering terrorism, the above-mentioned consequences involve the distribution of responsibilities and affect flexibility in the public powers' actions.

Nevertheless, Italy may be considered a case study of importance, where it is possible to follow the main trends of different approaches, difficulties faced, and solutions found. In one respect, I think that our experience could be really considered a "model": having kept firm the respect for Human Rights and the constitutional provisions on liberties, even in the worst period of daily violence.

Since its first decisions, the Constitutional Court, established by the Constitution and entered into force only in 1956, stressed the constitutional meaning of national security[9]: "An interpretation of 'security' as concerning solely physical integrity must be rejected, as this would be too restrictive; it thus appears rational and in keeping with the spirit of the Constitution to interpret the term 'security' as meaning a situation in which the peaceful exercise of the rights and freedoms so forcefully safeguarded by the Constitution is secured to citizens to the greatest extent possible. Security therefore exists when citizens can carry on their lawful activities without facing threats to their physical and mental integrity. 'Living together in harmony' is undeniably the aim pursued by a free, democratic State based on the rule of law…. With regard to public order, without entering into a theoretical debate on the definition of this concept, it is sufficient to point out that, for the purposes of Article 16 of the Constitution and Section 157 of the Public Safety Act, danger to public order cannot result merely from the conduct of social or political nature—which is governed by other legal rules—

[6] A new investigation into the case is still pending in the General Prosecutor's Office of Rome, generated by continuous revelations, often not relevant; two prosecutors and myself, as prosecutor general, are in charge of the proceeding.

[7] Tension strategy, as we will see in a while.

[8] For the limited effects of these considerations, a Mafia-type attack should be considered political, involving political matters and interests from a number of different points of view. A good synthesis of the issue can be found in J. Dickie, *Cosa Nostra*, *A history of Sicilian Mafia* (2004), a short, readable but accurate description of the struggle against the Mafia, overcoming the former complicities, written by an English scholar, who maintained his astonished inquisitiveness.

[9] Security is now at very core of antiterrorism politics; concerns for misuse of the polysemic word render important the effort for accurate definitions.

but must result from outward signs of intolerance or rebellion vis-à-vis legislative rules and legitimate orders issued by the public authorities, since such conduct could easily give rise to situations of alarm and to violence indisputably posing a threat to the 'security' of all citizens, whose freedom of movement would become limited as a result. To sum up, the expression 'health or security reasons' in the text of Article 16 of the Constitution must be interpreted as referring to facts posing a danger to citizens' security as defined above[10]."

The Constitutional Court set up the principles safeguarding rights related to freedom, even in periods of emergency[11].

A recurrent concern, expressed by a part of public opinion and some scholars, is the transformation of the penal approach into enemy criminal law, accordingly with the well known definition of G. Jakobs[12]. The above-mentioned judgments of the Constitutional Court and the important role played by the Supreme Court of Cassation have built, in my opinion, precise borders, confining the anticipated penal approach within due process of law and the respect of human rights principles, as recognized by the European Court in statements referring mainly to the organized-crime field.

These borders are represented by the constitutional relevance of material acts as a basis for punishment, the need for an effective—even if potential, as imperilment—harm to the above-mentioned interests, the importance of *mens rea*, and making terrorism not a personal quality but the finality of actions. Such a finality should be the result of material conducts, as well.

Dedicated scholars, like M. Donini or F. Fasani, considered terrorism a field of criminal law transformation: not properly an enemy criminal law, but a legitimate "fight against." The authors aim to preserve ordinary law in a time of emergency, recognizing at the same time the specific characteristics of terrorists' acts and threats—not so far from Ackermann's *Supermajoritarian Escalator*[13], in the different perspective on constitutional rules in a period of emergency. This approach is grounded in the reality of a double standard in penalty and procedural rules.

As I will stress discussing internal terrorism, refusing such qualification to terrorists, not recognizing them with the status (and the "honor"[14]) of combatants, is a way of winning the battle for the conscience, while at the same time maintaining punishment and prevention within the due process of law, even if with some not decisive modifications to the standard of rules.

---

[10] Constitutional Court, Judgment June 14, 1956, n. 2, on personal preventive measures.

[11] The assessment of "emergency," with reference to the principle of reasonableness of measures adopted to face it, is grounded on the seriousness of the damage concretely found in the characteristics of the specific threat; Constitutional Court, February 1, 1982, n. 15

[12] See the synthesis of G. Jakobs's elaboration on this point in *On the Theory of Enemy Criminal Law*, Appendix D, in M. Dubber, *Foundational Text in Modern Criminal Law,* OUP 2014.

[13] B. ACKERMAN, *Before the Next Attack*: *Preserving Civil Liberties in an Age of Terrorism*, New Haven 2006, Yale University Press

[14] G. Roellecke, *The constitutional state in the struggle against terror*, JZ 2006, quoted in Jakobs, p. 419: "One honors and destroys enemies." In the synthesis of Jakobs, "the honoring consists precisely not in recognizing the enemy as a developed person according to the *local* order, but in the presumption that he is a person in *his* order".

Nevertheless, the warning is useful in order to keep in mind a danger around the corner, mostly in dealing with international terrorism, where the *otherness* of the actors can be more evident, making profitable a bargain between *their* freedom and *our* security.

Italian Choices

The penal approach to the terrorist threat is grounded in what are defined by the penal code as "crimes against the person of the State." The expression dates to the Fascist state's codification, in 1930, and is grounded in a long history going back to the origin of the Italian Kingdom, with its fierce war against banditry in the 19th century.

The legal technique is based on putting forward penal punishment of conduct aimed at attempting to harm the protected interests, like individual life and collective security. Part of such forward-putting is in punishing as a crime of association aimed at committing some crimes, specifically in this case "crimes against the person of the State." The wide provision, used to punish mere dissent during the fascist dictatorship, were progressively amended by legislative or judicial interventions. The most important guaranty is that conduct can be considered in violation of the law only on the basis of material action[15], unequivocally directed to endanger[16] the protected interests, provided by the Constitution, with a qualified *mens rea*. The action, supported by specific willingness, must be aimed at imperiling protected interests.

An important testing ground of such principles can be found in the associative crimes. Association as a crime is an important tool in the Organized Crime field, as well as in the terrorist one. The consolidated jurisprudence, grounded on an elaboration that lasted years, enucleated the so-called "structural paradigm".

In the field of our interest, therefore, the jurisprudence built a well-defined separation from mere agreement to commit a crime, grounding the conducts within the principles of harmfulness and materiality.

It should be mentioned that an offense in which mere agreement to commit a crime is punished is provided by the penal code, in the specific field of "political" crimes (crime against the person of the State). The reference is to art. 304 penal code – Conspiracy to commit offenses provided by art and 302[17] penal code; the crime is said "political conspiracy upon agreement", to distinguish the offense from the "political conspiracy upon association", provided by art. 305, penal code. The crime, in the past used mainly as point of reference with the art. 305, in order to stress the requirement of conducts of association, found its autonomous way in recent times. The only two judgments to which the provision has been applied were attacks with explosives, discovered in a preparatory phase. In the decision, the Supreme Court judges stressed the seriousness of the plan[18]. The same logic applies to the punishment of unsuccessful instigation to commit crime of terrorism or similar (art. 302 penal code).

Another example of forward-putting is the crime described by art. 280 penal code, where "everyone who attempts to the life or physical integrity of a person, with the finality of

[15] See, as an example, the recent judgment of the Supreme Court, Sez. 2, no. 25452 February 21, 2017, Beniamino.

[16] Sez. 1, judgment no. 47479 , July 16, 2015, Alberti

[17] Art. 302 refers to crimes against the State.

[18] Sez. 1, January 29, 2014, no. 16714, Bellomonte.

terrorism or subversion of the democratic order[19]" is punished; the penalty is more severe than the ordinary crime of attempt and the crime is considered committed if the conduct is fit to concretely imperil human life or integrity.[20]

Any crime provided by the law can be punished more severely if committed with the finality of terrorism or subversion (aggravating circumstances, according with art. 1 d.l. December 15, 1979 n. 625).

These provisions, that concern substantive law, were cited by others in the field of procedural law and the powers of the LEAs.

Remaining on our specific ground, on the one hand, the law extended the duration of detention before trial (within limits and under rigid scrutiny of a judge) and the terms of the preliminary investigations, allowing wiretapping and a wider range undercover operations.

Communication interceptions are lawful only on the basis of a specific warrant issued by the judiciary. The results can be used in court as evidence. Phishing cannot be authorized.

In a word, the law built a sort of double track to avoid special judges and prosecutors for serious crimes.

On the other hand, the law encouraged the cooperation of defendants and witnesses, providing significant reductions in sentences for the former.

The "rewarding approach," as it was mocked in Italy, produced endless debate. As a matter of fact, the most serious problems arose with Mafia-type criminality, where at the beginning handling the new tool depended on the professionalism of investigators and judges. In the field of terrorism, collaboration was often accompanied by a sincere reconsideration of the motivations at the basis of the criminal choices; such a new consideration was important in supporting the effectiveness of the cooperation.

The above-described approach turned out to be effective in facing the international terrorist threat and did not change in dealing with new forms of terrorism.

New crimes were introduced by the law, in order to deal with new organizations or new methodologies. The approach, nevertheless, remains the same and poses the same problems: how to strike the criminal conduct of terrorism in a preliminary stage of realization (preparatory acts) while restricting personal freedom as little as possible.

The forward putting and double-track approach turned out to be effective in dealing with new forms of terrorism and in implementing the indication coming from international sources. It is

[19] The concept of "democratic order" was introduced in 1979, instead of previous "public order," as part of a series of provisions that are a turning point in the democratization of the aforementioned legal provisions coming from fascism. Art. 11, law May 29, 1982 n. 304, established that *democratic order* must be interpreted as *constitutional order*.

[20] In 2003 a new crime was provided by the law, art. 280 bis penal code, on the stream of 280 penal code, aimed at punishing attempts to damage estates or goods, with the finality of terrorism (subversion is not considered).

worth underlining that even the latter followed the pattern of borrowing legal instruments from the organized crime field, applied to terrorism[21]

In 2001, the attacks on the Twin Towers caused the introduction of a new definition of international terrorism[22], aimed at dealing with the difficulties met in implementing the internal definition provided by preexistent laws. Extensions of preventive measures, as well as scrutiny of money laundering and terrorism financing measures, were introduced, in accordance with UN resolutions.

In 2005, as a consequence of the bombing in London, a decree law, soon approved and converted in law[23], provided a more accurate definition of international terrorism and introduced new criminal offenses (recruitment and training) and new aggravating circumstances (public provocation, already provided as a crime by art. 414 penal code). The decree implemented the provisions foreseen by the Warsaw Convention (Council of Europe, May 16, 2005).

Attacks by terrorists acting alone in different European countries brought about the Additional Protocol to the Warsaw Convention (October 22, 2015) and determined provisions aimed at combating self-training for terrorism. The offense has already been introduced in Italy by the Law no. 7, February 18, 2015, together with various procedural and preventive measures and a new criminal offense: transferring people for terrorism.

Evidence of the enhanced importance of internet communications brought the extension of interceptions and interference in the web, including undercover operations.

Collecting data and sharing them with the judiciary became a priority in the Secret Services' duties; therefore, their capacities were enhanced.

[21] As stated by the European Commission, Communication March 29, 2004: "a link should be established between measures to combat organized crime and terrorism."

[22] Law Decree October 18, 2001, no. 374, converted into law December 15, 2001, no. 438. The experience contributed to reaching a useful definition of terrorism. See Supreme Court, Sez. 5, judgment no. 46340, July 4, 2013, Stefani.

[23] So said Pisanu decree, D.L. n. 144, July 27, 2005, converted into law July 31, 2005 n. 155.

Origins and complexity of the threats

Someone could caricature the Italian approach with the expression *stick and carrot*: a mix of hard repression with the offer of an escape. The severe penalties provided for crimes committed with the aim of terrorism (the penalty expected for ordinary crimes can be increased by half; the associative or specific crimes are severely punished) can be reduced by a witness's cooperation or—in some cases—when the actor abandons the *iter* of the crime before its consummation[24].

Italy borrowed this perspective from the US experience, as well as that of undercover agents, but it was somehow reworked in the national context; not by chance, in the common language, the cooperating defendant is called *pentito*, which means "repented," a moral behavior far from the legal requirement. Someone can assume that the positive attitude for such behavior might be a Catholic heritage. The *carrot*, actually, is grounded in a more complex context in which the important thing is dealing with the causes and the origins of the problem.

Apart from a general moral assumption, coming from historical reasons, I think that the first appearance of a terrorist threat must have been really important in our field. In the two decades between 1950s and 1970s, a northeastern part of Italy, Alto Adige, claimed as national territory by Austria as South Tyrol, was hit by waves of actions that caused 21 people dead and dozens of casualties in 361 bomb attacks. That particular area was part of the Italian territory and yet the majority of the population there spoke German and many felt part of Austria.

Penal repression got good results[25] but it was immediately clear that such a form of terrorism would not be definitively solved with imprisonment. This statement is not grounded only in the role played by Austria, which refused the extradition of Italian citizens convicted of terrorist acts[26], giving grounds to the suspicion of backing the movement. Most importantly, the armed opposition was rooted in an ethnic and linguistic claim that could not be simply dismissed. My country strived for a more thorough solution, based on the recognition of a double-language standard and significant autonomy in the region. I really consider this approach a model that has revealed itself effective, isolating the terrorists and contributing to making the region one of the richest in the world. The two communities live in peace, with some tension but without violence.

Understanding what lies behind the phenomenon is a priority, but this is not always as easy as it was in the case of Alto Adige.

---

[24] See art. 308 and 309 penal code. The approach is now followed by the 2017/541 EU Directive on terrorism, as seen below.

[25] The application of associative "crimes against the personality of the State" was discussed in the Court of Cassation (Sezioni Unite – Grand Chamber) in one of the first decisions about associative crimes related to terrorism: Judgment n. 1, 14/18 March 1970, Kofler.

[26] This refusal was the occasion of a very interesting discussion in court about the legal limits of the actions of the Secret Services. During the investigation concerning the Stay Behind Structure (*Gladio* Case), led by the Procura di Roma, a plot aimed at kidnapping one of the convicted terrorist was discovered. The officers of the Military Secret Service (SISMI) were prosecuted. The court dismissed the charges because of the withdrawal of the officers from the action: the crime charged was, in fact, the conspiracy to the purpose of an *armed band* and consequently the special provision of not punishment provided by art. 308 penal code was applied. The judgment was given by the Court of Assise of Rome, November 19, 1994, n. 44, Inzerilli e altri.; a brief discussion of the issue can be found in our *Une alternative à la «guerre contre le terrorisme». L'expérience italienne*, Esprit, 2007.

Sometimes the previous experiences become an obstacle in penetrating a new phenomenon. Positive results in a field can lead to applying the same methods to another; that can be misleading, with effects that can result not just in a lack of efficiency. The worst thing is that a mistake in evaluating the threat can result in repression more intensive than needed (which can affect constitutional rights and at the same time expand the consensus area of the subversive movement). In the field of political-oriented conduct, as terrorism is, we must be careful in balancing the interests in play and considering the constitutional relevance of those that can be compromised.

Left-wing terrorism in Italy was simple enough to interpret. It was rooted in a long, shared history. It was possible to understand its main intellectual references and the ideology at its basis. A large part of the population shared its language, behavioral attitudes, and organizational choices. Reading the documents of the Red Brigades, for example, was laborious (maybe tiresome…), but it was within our capacities and gave the investigators a good basis for comprehending the organization[27]. Nevertheless, the previous experience of the use of disinformation by some Law Enforcement Agencies in the climate of the Cold War, as we soon will see, led some in the public opinion to consider the terrorists as provocateurs; they were dismissed as part of a larger right wing conspiracy aimed at discrediting left wing parties, socialist and communists, commanding over 40% of the ballots in Italy. The battle for the public conscience was won when the Red Brigades became simply such, that is their communist hallmark was fully recognized, and no more the *so-called Red Brigades*. This effort of true language[28] resulted in the murder of Guido Rossa, a member of the Communist Party who denounced the cell operating in his factory. The penal defeat of the left-wing organizations was accompanied by the progressive isolation of their ideals and behaviors within the collectivity.

Since the kidnapping of the prosecutor Mario Sossi, in Genova in 1974, it was clear that the left-wing organizations had within their strategic targets the goal of forcing the state to politically deal with them – recognizing their status as combatants in a civil war. At the beginning, not all state stakeholders remained firm and some concessions were promised. Francesco Coco, prosecutor general, refused to free—as established—militants of *Gruppo XXII Ottobre* and paid with his life and the lives of his escort (two police officers)[29]. The experience was important four years later, in 1978, when Aldo Moro was kidnapped. This time the political forces were been nearly unanimous in holding a firm position, at least at the beginning.

Different threats require different approaches

The significant thing at this stage in my presentation is to underline how important it is to understand the political and strategic approach of the terrorist groups, identifying main targets, perspectives, and strategies, and at the same time their weaknesses. Respecting human rights and the rule of law, even in exceptional situations, was not only a duty and a necessity for a democracy; it was at the same time the only way to demonstrate the falsehood of the narrative

[27] Understanding the jihadist terrorism is much more difficult, as we will see in a while.

[28] Being wrong on the name results in being wrong on the thing, as well…

[29] The Red Brigades on June 8, 1976 carried out the murder.

on the inevitability of the civil war, caused by the irreversible descent of the state into a disguised dictatorship.

The issue was the subject of discussion in the public opinion and within the judiciary and the LEAs, as well. Someone asserted that it was impossible to deal with a terrorist threat with a penal approach, respectful of the ordinary guaranties; they asked for a *droit d'exception*. On the other side, even within the judiciary, that conclusion was considered as a fact: being impossible to respect the people's rights and the ordinary procedural provisions, the judiciary should not be involved in such a war. In a media synthesis: *neither with the State, nor with the Red Brigades*.

The Red Brigades joined this debate by killing two of the most dedicated magistrates, Guido Galli[30] and Emilio Alessandrini[31]. They were killed not because they were considered evil persecutors but exactly because, on the contrary, they were fully respecting the defendants' rights and so perpetuating what the terrorists claimed was the deception of the bourgeois democracy[32].

Fulvio Croce had been killed two years before for the same reasons. As president of the lawyers of Turin (president of *Consiglio dell'Ordine degli Avvocati*), he took charge of the defense in the main trial against the chiefs of the Red Brigades. The defendants refused the trial and threatened with death all the lawyers that kept being appointed by the court. All the lawyers resigned. In our procedural system, professional defense is needed and mandatory otherwise the trial becomes not valid. Fulvio Croce accepted the appointment and started a professional and accurate defense, even proposing a constitutional question concerning the right of self-defense. The commitment to civil rights cost him his life[33]. He allowed, with the acceptance of the appointment that was refused by others, a fair trial, in spite of the narrative from the terrorist group of a political process as part of a civil war.

The knowledge accumulated in the investigations about the Red Brigades and similar groups, which were rigidly centralized, divided in cells, strongly committed, and hardly debating, made it difficult to deal with what was happening in the much wider area of radicalism. The new ideologies of personal welfare, built on the ideology of "needs to be satisfied," in opposition to the value of the labor, supported by the old left wing, determined the appearance of violent radicalism, *Autonomia Operaia* and similar, which operated in a completely different way, according to an ideology emerging on their ground.

[30] Guido Galli was killed by *Prima Linea*, a BR-like organization, on March 19, 1980 in Milan.

[31] Emilio Alessandrini was killed by the same group in Milan on January 29, 1979.

[32] It is difficult to find a more clear definition of this political approach than the document claiming the assassination of Alessandrini: "Alessandrini helped increase in an effective way the efficiency of the prosecutor's office of Milan; he built his career on the investigations of Piazza Fontana, which were at their beginning the watershed with the ancient reactionary management of the Judiciary; then, when the State dumped the not more useful old Fascists, those investigations now became an attempt to give new democratic and progressive credibility to the State…. Alessandrini was one of those individuals which capitalistic command uses in order to rebuild itself as efficient military or judiciary machine and as controller of social and proletarian behaviors in the perspective of intervention when proletarian and workers' struggle decide to be antagonistic and subversive."

[33] The chief prosecutor, Bruno Caccia, was killed in 1983 as well, by a Mafia-type organization.

The switch was not immediately understood. The movement was dealt with by using the same approach that had revealed itself so effective in the past. That determined a well-known clash between the prosecutor's office and the investigative judge of Padua in 1979.

Also, investigations on right-wing terrorism are a good example of how important it is to focus on ideological motivations and on the political strategy of different groups.

Countering Right-Wing Terrorism: The experience of the Investigative Pool of Rome

In the '60s, Italy was shaken by the waves of libertarian trends coming from other European countries and from the USA.

New music, new family customs, new ways of life were conspiring to transform the complex Italian system of political relationships, built during the Cold War. Italy was a strategic asset for Western policy, as it lay at the center of the Mediterranean Sea and at the border of a sensitive area, facing Yugoslavia. Italy was defined as the soft belly of the West, with its powerful communist party. The Italian Communist Party (PCI) was the strongest in Europe but at the same time the most open to a democratic approach, well rooted as it was in the evolving Italian society. Therefore, it was ready for radical transformation into a democratic party, starting what was defined *Eurocommunism*. The declaration of its secretary, Enrico Berlinguer, become a renowned statement: *I appreciate the Soviet Union but I feel myself safer under the NATO umbrella* (1976).

Such a *gentrification* of a communist party was perceived as treason by a growing leftist movement, fed by joung protest (*contestazione*) and a hard movement within the working class, disputing the leadership of the unions, at that time aligned with the three main ruling political forces: DC (Christian Democratic), PCI, and PSI (Socialist Party).

In such dynamism, right-wing terrorists aimed at creating the preconditions for a military pronouncement, a *coup d'etat*[34].

At the end of the '60s, bombs on trains or in crowded places became daily events.

The most shocking attack occurred when two bombs exploded in Rome and Milan, at the same time, on December 12, 1969. Twelve people were killed in Milan, the center of working-class politics. The attacks were not claimed; at the very beginning of the investigation, they were attributed to an anarchist organization, the *Circolo 22 Marzo*.

The political climate of the country changed dramatically: from the spring of the '60s we entered the winter of the '70s.

Italy found itself in a nightmare, between "rattling of sabers" and the recurrent threat of a *coup*, murders, and slaughters, culminating in the summer of 1980, with the bombing at the Bologna Railways Station, that caused 85 deaths and hundreds of wounded.

[34] In 1967 a similar putsch was carried out in Greece by coronels of the army. That event become a myth within right-wing extremism.

The investigations were very difficult from the beginning, due to the continuous interference of the military secret services. The history of such contamination of democracy would require a dedicated presentation. Nevertheless, it is important to keep in mind some fixed points:

- The involvement of secret apparatuses (of the military or of the Ministry of Interior) was found in every case of Right Wing terrorism or plot
- This involvement has been ascertained by judicial decisions, even where the defendants were acquitted
- The involvement consisted of misdirection of the judiciary (as in the case of Bologna bombing, where the highest officers in the military secret service (SISMI) were convicted) or indirect participation (as in the attempted coup of December 8, 1970 or in the slaughter of Brescia)
- State secret was used many times in order to hinder the judiciary in its proceedings or trials
- The interference was one of the main causes of the acquittal of RW defendants

As examples of such involvement, I can quote here two significant cases.

1. Peteano slaughter: In 1972, three *Carabinieri* were killed by a trap car bomb, triggered by a pull mechanism. The slaughter was organized by the RW *Ordine Nuovo*, but immediately attributed by the first investigators to the LW group *Lotta Continua*[35].

Years of dogged investigations, led by the investigating judge of Venetia, brought the conviction of the *Ordine Nuovo* mobsters for the slaughter and of two high officers of *Carabinieri* for misleading the judges, as well.

The investigations unveiled the existence of the Stay Behind structure (GLADIO Case). Suspicions arose about the involvement of members of GLADIO, in consideration, moreover, that the devise used to trap the car and the explosive could have been stolen from the hidden deposit (NASCO) of Aurisina, which was found to have been manipulated. The president of the experts' board in charge of the technical investigation, Marco Morin, was convicted, having altered the samples of explosive, in order to exclude the identity of the Aurisina ones. The name of Morin was found In the GLADIO Archives.

The involvement of GLADIO per se in the event was never ascertained.

2. Brescia slaughter: On June 20 of the current year, after 43 years, two of the perpetrators of the slaughter (8 dead and 102 wounded; May 28, 1974) have been convicted and given life sentences. Carlo Maria Maggi was a leader of Ordine Nuovo (ON), and Mauro Tramonte, a militant of the same group, was an informant of SID (Military Secret Service at the time). Other ON militants were definitively acquitted in previous trials, due to continuous interference in the investigations, that later emerged clearly.

The knowledge of the difficulties met by the judiciary may explain why in our penal code a new crime was established in 2016, *frode processuale e depistaggio* (procedural fraud and—

[35] During the following investigations, a cooperating defendant declared that the ON militants greeted with fat laughs the news on the TV about the supposed involvement of Lotta Continua. One of them said: "another slaughter of the reds!"

literally—de-tracking), art. 375 penal code. In the most serious cases, the penalty can reach 12 years of imprisonment[36].

A constant in the RW terrorism at the end of the '60s and the first half of the '70s is the attempt to attribute the terrorist attacks to LW organizations, in what was called *strategia della tensione* (strategy of tension). It is difficult to understand the way LEAs, including prosecutors' offices, coped with these threats, without considering the interconnections between these forms of terrorism and the geopolitical context of Europe (and Italy, particularly).

The Chilean golpe in 1973 had immediate effects in Italy. It persuaded the PCI to abandon the perspective of a majority government, following an electoral victory. A 51% of the electorate was not enough: a *coup* was around the corner… More thoroughly, PCI general secretary Enrico Berlinguer pointed out that only the convergence of the main ideal identities of the Italian culture and politics could allow the reform of the country, overcoming the internal and international oppositions. It was the idea of a Great Agreement, which would remain in Italian history (*Compromesso Storico*). The first steps of such a Great Agreement led to a new political season, abruptly interrupted by the Red Brigades with the kidnapping and murder of Aldo Moro[37], former prime minister and president of the *Democrazia Cristiana*, with five police officers of his detail.

The *Compromesso Storico* strategy was grounded in the experience of national unity in the months following the end of the war and the liberation from Nazi-fascism (1943-1945). The main political forces cooperated in drafting a new constitution that could guarantee each force's rights and interests in the case of electoral victory of others. This joint effort was not merely instrumental, but it was grounded in the postwar feeling of the need for a better world, based on the merging of different identities. The *Compromesso Storico* thus touched deep chords, even if the hope for unity was to be rapidly lost in the impending Cold War.

The Chilean dictatorship, established after the coup there, felt itself threatened by the new warmer feeling between DC and PCI, positively affecting the opposition abroad. The Chilean Secret Service attempted to kill the principal player abroad in the Christian Democratic opposition, Bernardo Leighton, former vice president of the republic in exile in Italy, on October 10, 1975. The attack was carried out by order of the chief of the Chilean Secret Service (DINA),

[36] The Court of Cassation examined the crime in its first decision on the issue, May 17, 2017 n. 24557. "*Depistaggio"* is a neologism, born with reference to conducts aimed at misleading the investigations.

[37] The real reasons for the murder of Piersanti Mattarella have not yet completely assessed in the trials. Mattarella was president of the Autonomous Region of Sicily and was killed in Palermo on January 6, 1980. Mattarella was brother to the current president of the Italian Republic, Sergio. It cannot be excluded that the assassination was another step in the contrast of what remained of *Compromesso Storico* politics, considering that Mattarella was governing with the support of the Sicilian Communist Party. The alliance was grounded in a renovated effort by Mattarella and a minority of the Sicilian Christian Democratic Party in confronting the strong power of the Mafia within the island's politics. A few weeks before being assassinated, Mattarella delivered an important speech in the presence of the president of republic, Sandro Pertini, in which he reaffirmed his commitment to fighting the penetration of the Mafia in political affairs. Therefore, the killing can be at the same time a Mafia-type assassination and a terrorist attack against a policy. Such a perspective could explain the role supposed to have been played by a commando of NAR. A terrorist's scope and methodology would have been asserted for the first time 14 years later, when the prosecutor's office of Rome charged the defendants with the 1993 slaughters with the specific accusation of terrorism and Mafia-type crime; the defendants were then convicted and the aggravating circumstances affirmed.

Manuel Contreras Sepulveda; it is supposed that Pierluigi Concutelli, acting with the help of Stefano Delle Chiaie, (both right wing terrorist whose names we will meet soon) pulled the trigger; the wife of Leighton, Ana Fresno Obole, was shot in the head as well[38].

In such a complex environment, Vittorio Occorsio, deputy prosecutor in Rome, in 1974 started his investigation on *Ordine Nuovo*. In the past, he had been in charge during the first part of the investigation into the 1969 bombing in Rome and Milan (the Piazza Fontana affair). In the beginning, he followed the track indicated by the Ministry of Interior, pointing to the anarchist *Circolo 22 Marzo*. Suddenly he discovered that the *Circolo* was infiltrated by a RW group, *Avanguardia Nazionale*, leaded by Stefano Delle Chiaie.

With this background, he conducted a dogged investigation into *Ordine Nuovo*, considering it a powerful and dangerous fascist group. The conviction of the leaders brought to the dissolution of the organization, by order of the Minister of Interior.

Occorsio was then following his investigation on the relationship between the fascist groups, organized crime (in the extortion and kidnapping field), and the Masonic Lodge Propaganda 2 (P2, whose president, Licio Gelli, would be sentenced in the Bologna bombing case) when he was killed on July 10, 1976. Pierluigi Concutelli, who used an Ingram pistol-machine coming from the Spanish Secret Service, as was revealed in the investigation, carried out the murder.

When Occorsio was killed, it was difficult to understand the real political meaning of the terrorist act. Revenge, for sure. But also something of deeper and new: the passage of RW terrorism from being ideally collateral to some state agencies to direct confrontation with the state. *Ordine Nuovo* perceived the dissolution of the organization, depending on the work of Occorsio, as a signal of the end of a historical phase.

In the new context of *Compromesso Storico* and consequent restoration of full legality within LEAs, ON decided that the hope for a military pronouncement was lost. AN and ON tried to merge without any success.

The lesson coming from the murder was not easy to be completely understood. The investigators continued to use the outline sorted out in years of work in dealing with the RW. In the meanwhile, a new generation of young terrorists was coming out. They had experienced street fights with LW extremists and borrowed from them ways of organization and thinking that were different from the old ones. That led them to a new political approach, recently defined by one the main mobsters as "low-intensity warfare, first against leftists, then against the state[39]."

[38] In the first half of the '90s, Manuel Contreras was sentenced to 20 years; abroad operations director Edoardo Iturriaga Newmann, 18 years; and Michael Townley (the "American," then a cooperating defendant) 14 years in prison. Concutelli and Stefano Delle Chiaie had been acquitted in a previous trial for lack of evidence, before the witnesses of Townley and others; nevertheless their responsibilities were incidentally stated in the decisions of the Court of Rome in the trials on the Chilean defendants. On the basis of the evidence collected by the Italian authorities, Chilean officers have been convicted for the assassination with car bombs of General Mario Praz, killed in Buenos Aires with his wife September 30, 1974; the chief of staff of the Chilean Army under Allende; and the Ambassador Orlando Letelier, killed in Washington with Ana Moffit on September 21, 1976. The investigations unveiled the *Operacion Condor*, a secret operation involving the dictatorships of Chile, Argentina, Paraguay, and Uruguay, aimed at kidnapping and suppressing militants of the opposition abroad.

[39] Audio surveillance January 25, 2013.

Mario Amato was the prosecutor in charge of investigating myriad of terrorist attacks in Rome, growing by the day in intensity, number, and costs. The interpretative tools, elaborated when dealing with well-structured, military-style organizations like ON and AN, revealed themselves to be ineffective in dealing with the new, unpredictable, apparently disorganized young terrorists.

A number of different acronyms claimed the attacks. In the beginning, the wave of attacks was interpreted as part of an old strategy, often considered provocation, in a replay of the *strategia della tensione*.

Mario Amato, instead, tried to understand what was really going on; he collected evidence from different cases, apparently not linked even marginally, and connected one another in a detailed investigation.

Such an effort was conducted in isolation, despite his request to be joined by other prosecutors and helped by specialized police.

In a dramatic hearing by the *Consiglio Superiore della Magistratura* (CSM, High Council for the Judiciary), on June 13, 1980, he described the poor conditions in which he was forced to work, the isolation and the controversies by lawyers and defendants who portrayed him as a persecutor of young political adversaries, hailing from good society. He pointed out the unitary minds behind the apparent dissemination of acronyms; he predicted that something much more serious was going to happen.

He was killed ten days later when, alone and without a detail protection, he was waiting for the bus to go to the office. It was a shame for the prosecutor's office; the chief prosecutor was forced to resign and important decisions should have been taken, as we will see shortly.

Amato was killed by members of *Nuclei Armati Rivoluzionari* (NAR, Armed Revolutionary Nuclei), the same group and the same people who carried out the Bologna bombing, a few weeks later [40]. His forecast was tragically confirmed.

The murder of Amato brought about a drastic shift in the investigators' approach.

First, it was definitively agreed that fighting terrorism (and OC, organized crime, as well) could not be the task of single, isolated magistrates.

A pool of prosecutors was set up in the *Procura della Repubblica* of Rome; a similar pool was created in the investigating judge's office. The former started working as a group, collecting and analyzing evidence and sharing investigative tools and methodologies. The most important decisions were issued collectively.

A dedicated task force was created within the LEAs, coordinated by the prosecutors' pool.

[40] The group killed dozens of people; in Rome, among the investigators, they killed the police officer in charge of the investigations, Francesco Straullu, along with one of his team, Ciriaco Di Roma; and attempted to murder Michele Guardata, member of the pool that continued the work of Amato, with five police officers of his detail. Later attacks were prevented by the arrests of the commando members.

As a means for sharing pieces of evidence, an archive was contributed to by all prosecutors. It was considered as a precise duty. In few years, information technology made it possible to transform such a paper archive into a database, accessible through a specific program (very laborious at the time… We are talking of the last years of the '80s). It became the first comprehensive database within the judiciary not centered on a single proceeding. By that time, it was progressively expanded to connected areas, like organized crime. The digitized records were shared with other offices, which fed it with their own data. Giovanni Falcone found the archive useful for the investigations into the assassination of the president of the *Regione Sicilia*, Piersanti Mattarella, killed in Palermo[41] in 1980.

In 1993 the archive become the model for the more advanced research system of *Direzione Nazionale Antimafia* (Antimafia National Directorate), even if it was by then out of date in its structure and programs. In 2004 the archive was restored as a sort of monument and dedicated to the memory of Mario Amato.

In the proceedings, the Roman pool used the investigative tools that had emerged from the experiences learned over the years, such as investigations on economic assets, wiretapping, and cooperating witnesses.

The most important lesson learned was that each criminal phenomenon should be investigated with specific methodologies: the subject of the research influences the way the investigation is carried out and vice versa. In fact, penetrating the organization allowed us to understand the real structure of a group, strictly linked to its political targets. That brought about the interpretation called "the archipelago theory": the myriad different acronyms claiming the attacks were not a spontaneous dissemination of a political proposal (said *spontaneismo armato*, armed spontaneity), as averred in the claims. They were centralized in a loose organization, in which the informal leadership was maintained in a few hands.

Such comprehension allowed us to get convictions for crimes, punishing different forms of conspiracy provided by the special part of the penal code.

Understanding a group's political ideology was as important as penetrating its organizational structure.

The target of NAR differed from that of the old fascist groups. The NAR were competing with the leftists on the same soil: young radicalism. As a consequence, they spoke a new language, based not on the search for an expanded consensus but on individual bonds.

A not dissimilar journey occurred within LW radicalism. The *Movimento del '77* (77 Movement), *Autonomia Operaia* (Workers' Autonomy), and other similar groups like *Indiani Metropolitani* (Metropolitan Indians) caused great confusion in the well-structured organizations like the Red Brigades. The latter had been forced by a rigid ideology to adopt a consequent organization (centralized, compartmented, fractioned into cells, with growing degrees of going underground depending on different tasks); the models were the experiences of the "betrayed" resistance against Nazi-fascism and the security apparatus of the PCI of the '50s. Ideological reasons required precise formulations of the internal political debate, the documents, the selection of

[41] Valerio Fioravanti and his comrades were indicted for the murder, committed by order of *Cosa Nostra*. They were then acquitted.

the targets, and so on to be thoroughly discussed within the group[42]. New left-wing movements dismissed the rigid approach, trying to gain consensus through different forms of libertarian identities emerging from the above-mentioned "theory of needs."

In the opposite field, the armed spontaneity considered as their target a large segment of young people, conservatives, anti-state, who referred to the fascist origins and considered themselves revolutionary individuals, bound by the ideas of honor and a personal ethic. Those ideas could be summarized in the concept of the Solar Man. The analogies with the LW autonomous movements are then very superficial: the differences between the two political and ideological approaches were self-evident in highly politicized Italy of those years.

The perfect coincidence between ideological assumptions and action is exposed in the document claiming responsibility for Captain Straullu's assassination (1981), signed NAR:

"We have no Power to reach, nor masses to educate; what really matters for us is only to respect our ethics according to which Foes must be killed and Traitors annihilated[43]."

The difference between the assassinations of Occorsio and Amato is great. In both, at the roots, there is revenge. In the former, however, lies the beginning of a new track, the cut of the ancient bargain: it is an understood declaration of war. Occorsio is a watershed: before his killing, the "old Fascist Tools" (as the militants of ON and AN were mocked by the young fascists) were "on the same side of the barricade" with anticommunist old-timers within the LEAs[44].

With Amato, the journey is completed: the fascists are at war, in a way similarly to LW terrorism. Nevertheless, the assassination patterns are different from similar attacks carried out by LW organizations like the Red Brigades. As we have seen, Galli and Alessandrini were killed for their engagement in the proceedings against terrorist groups, as well. Nevertheless, what prevailed in the motivation was not revenge nor individual affirmation of one's self, but the political impact of the actions as a form of participation in the broader debate about repression and guaranties.

The actions were similar but had completely different meanings.

Lessons learned

In crimes with a strong collective ideology, such as terrorism, some considerations coming from the above-mentioned experience should be kept in mind.

1. Any terrorist organization needs to maintain a continuous dialogue within the members of the group and with the public opinion, mainly with that sector of the public that is closer to the

[42] The Red Brigades, in their last fires, carried out the assassination of Massimo D'Antona on May 20, 1999—followed in 2002 by the murder of Marco Biagi. Important pieces of evidence were collected during the investigations, by seizing the documents of an internal debate, considered evidently essential, notwithstanding the notorious capacity of the LEAs in countering terrorism and as a consequence the high probability that the documents would be recovered.

[43] The police captain Francesco Straullu cooperated with the investigative pool. He was hit by NAR in Rome on October 21, 1981. The volume of fire deployed by the commando was so destructive that the captain's body was so devastated they were unable to use the Indian spear they had planned to plant in Straullu's chest as a form of humiliation. Consider that the symbol was well understood within the radical area, even in the LW.

[44] The quotation came from a high-level member of a US LEA in South America, according to the testimony in Court of Assise of Vincenzo Vinciguerra, convicted for the Peteano slaughter.

involved interests. Different forms of communication can be employed, depending on the characteristics of the organization, the ideological references, the context contingencies (for example, the effectiveness of the penal repression), and the tools at disposal.

The investigators should be attentive in perceiving the signals of internal debate. An important warning it is to take what they say at face value, at least as a first approach. In other words, our previous schemes should not prevail over the reality of the debate.

The complex of communication must be considered. Nonverbal behaviors can be more explicative than long papers.

An example coming from our experience is the claim of an un-discriminated attack. The attack in itself has a meaning; it is a form of communicating. Therefore, the claim—or the absence of a claim—must be interpreted in that light.

The bombing of a crowded railway station is not an isolated event[45]: an interpretation that is not misleading requires a good knowledge of the context[46].

A bombing in a Shiite mosque in Iraq has a much more readable meaning.

Both are parts of a debate within the terrorist organizations: destroying a Shiite mosque can be a clearer message between Al-Qaeda and IS than one of their long documents about priorities in jihad.

2. The ideological apparatus at the basis of a terrorist organization is a real thing. It should be known and penetrated. The strategic vision of the organization and a part of the tactical decisions depends on such an apparatus.

In the *strategia della tensione*, the public opinion was the passive target to be terrorized, as a precondition of a military coup or—more probably—the political "stabilization" of the country.

In the *Ordine Nuovo's* vision, the murder of Occorsio would have galvanized a small group of militants, worried by the repression, while terrorizing investigators and public opinion.

In the NAR's approach, the target was the large area of the extreme right, much broader than the old fascist one.

3. Considering the differences can help in the principal task of a comprehensive approach to terrorism: to win the battle for souls. A soft narrative can be necessary for political contingencies, for example from the perspective of isolating the terrorists from their ideal and political environment or of avoiding dangerous reactions in the public opinion against a community. At the same time, such a narrative can obscure the need for identifying the deep

[45] This is true also if the attack is conducted by an isolated person, in a terrorist context, as we will see regarding the "lone wolves" within jihadist terrorism.

[46] Sometimes this is not enough. In the Bologna bombing, for example, understanding the discussion taking place within the RW organizations (the magazine *QUEX* was an important source) allowed the investigators to recover a *fil rouge*, linking the old mass-murdering strategy with the *spontaneisti* terrorists, like NAR. The real reasons for the massacre, though, have still not been ascertained.

motivations that are at the base of the movement and its connections with broader radical visions that can be widespread in sectors of the public and should have been dealt with.

4. In such a battle, investigators must consider that any action could have a broader outcome than expected. Measuring carefully the effective needs of repression (or better, the tools chosen for repression) is important in order to not push radicalized people in the wrong direction.

In the Italian case, firmly maintaining full respect for the rule of law was an important choice in a such direction, as shown by the assassination of two great magistrates, Galli and Alessandrini, who were firm in lawfully handling the proceedings, so as to avoid tipping the country toward civil war.

The strong repression of the dissenting (not terrorist) area can cause a backlash, creating a boomerang effect.

In our experience, it was not easy to gain consensus within the large area of the radical left without losing efficiency in repression. A clear example of these difficulties was the discussion, within the public opinion and the state "stakeholders", about how to handle the negotiation with the Red Brigades during the kidnapping of Moro. Should the state be firm, or should it somehow bargain using the political ransom requested?

International terrorism in Italy

The lessons learned in dealing with internal forms of terrorism are particularly important in the field of international terrorism. A further complication must be added to the problems solved in the past: the ideological, political, and even linguistic references of the latter are often far away from the ordinary capability of the investigators (not to mention the public opinion…). Linguistics is a much more complex issue than the knowledge of different languages and dialects spoken by people involved. The issue at stake refers to the deep cultural heritage consolidated in each term or reference. The consequence is the frequent use of terminology we are not accustomed to, with the probability of misunderstanding or—worse—of missing significance of that terminology.

In the '80s, the High Council of magistrates (CSM, *Consiglio Superiore della Magistratura*), at the time in charge of judges and prosecutors' professional training, organized workshops on the origins and ideological context of internal terrorism, which turned out to be really useful; now the High School for the Judiciary is facing the same problem.

This issue is extremely important in the present situation, where the terrorist ideology is day by day abandoning specific national, ethnic, and social claims; apocalyptic and millenarian visions make even more important to understand the deep roots of those references in a long tradition of interpreting radical Islam[47].

[47] This is one of the reason why the battle for consciences is so important in dealing with new forms of terrorism. If radical Islamism is at the roots, protecting secularism and moderate Islam is a priority. Omar Saif Ghobash, *Letters to a Young Muslim* (Picador, 2017), extract in *Foreign Affairs*, January 2017, as "Advice for Young Muslims: How to Survive in an Age of Extremism and Islamophobia." Ghobash, UAE ambassador in Russia, writes to his 17-year-old son, outlining the causes of the crisis within Islam: *How should you and I take responsibility for our lives as Muslims? Surely, the most important thing is to be a good person. And if we are good people, then what connection could there be between us and those who commit acts of terrorism, claiming to act in the name of Islam? Many*

Lone Acting Terrorists, as an example, cannot be taken as pure radicals, or in other words, as islamization of radicalism; social or personal motivations are only a part and not the most significant one in the real comprehension of the phenomenon. This approach is merely descriptive but has no explanatory potential. It added nothing to the interpretation of the phenomenon. The deep motivation of the single person cannot be penetrated outside of the religious context and the cultural references of such a context.

Similar considerations should be made on the topic of some recent forms of attack, like the use of common tools (cars, kitchen knives, and similar); the structures of the organizations are conditioned by these references, as well. The experience of *spontaneismo armato* could be useful, if not used to simply transfer its meaning from one field to others: at the ground of *spontaneismo* and of new forms of international terrorism (as in reticular organizations and terrorists acting alone) there are some similarities, even in the ideological basis: the Solar, differentiated man for the RW, and the individual obligation for defensive jihad of the leaderless individuals, in the latter.

The differences are so many and so deep that a mere confrontation can be misleading.

It is beyond the limits of this presentation to discuss the issue. What is important is pointing out the need for specificity.

Understanding how deeply the threat has changed in recent years can provide us with stronger means for dealing with it. Even in the international field, terrorism experienced in the 20th century is completely different from now. A consequence of this poor comprehension of the difference is at the root, as an example, of some parallels with agreements reached in the '80s between Italian intelligence and Palestinian organizations and the current situation: no agreement is now possible, even if sought (which is not the case), due to the very diversity of the present terrorism.

Italy has experienced international terrorist threats since the '70s of the last century. The worst attack hit Fiumicino's_airport in 1985, where 13 people were killed, together with three terrorists. A Palestinian group, led by Abu Nidal, carried it out. Few weeks earlier, on October 7, 1985, a PLO commando captured the Achille Lauro cruise ship. The terrorists killed Leon Klinghoffer, a particularly vile action, since the Jewish American citizen was paralytic.

Muslims protest against and publicly condemn such crimes. Others say that the violent extremists who belong to groups such as the Islamic State are not true Muslims. "Those people have nothing to do with Islam," is their refrain. To my ears, this statement does not sound right. It seems like an easy way of not thinking through some difficult questions. Although I loathe what the terrorists do, I realize that according to the minimal entry requirements for Islam, they are Muslims. Islam demands only that a believer affirm that there is no God but Allah and that Muhammad is his messenger. Violent jihadists certainly believe this. That is why major religious institutions in the Islamic world have rightly refused to label them as non-Muslims, even while condemning their actions. It is too easy to say that jihadist extremists have nothing to do with us. Even if their readings of Islamic Scripture seem warped and out of date, they have gained traction. What worries me is that as the extremists' ideas have spread, the circle of Muslims clinging to other conceptions of Islam has begun to shrink. And as it has shrunk, it has become quieter and quieter, until only the extremists seem to speak and act in the name of Islam. We need to speak out, but it is not enough to declare in public that Islam is not violent or radical or angry, that Islam is a religion of peace. We need to take responsibility for the Islam of peace. We need to demonstrate how it is expressed in our lives and the lives of those in our community. I am not saying that Muslims such as you and I should accept blame for what terrorists do. I am saying that we can take responsibility by demanding a different understanding of Islam. We can make clear, to Muslims and non-Muslims, that another reading of Islam is possible and necessary."

The reaction of the country was not effective. The LEAs were not prepared, as emerged during the fiery gunfight at Fiumicino, and the political relationships in the Middle East made it difficult to deal with the issue[48]. The Abu Abbas case, where a hard confrontation took place between Italy and the USA, revealed such difficulties.

Contacts between Italian terrorist organizations, mainly the Red Brigades, and Palestinian organizations have been asserted in some proceedings. The Palestinian contribution, however, was not relevant in the growth of the Italian organizations.

Much more effective were the Italian efforts against the new forms of international terrorism since the '90s.

These efforts were based on the experience of penal repression of internal criminality.

The main problem in the implementation of the legal provisions was the difficulty of transferring to international forms of terrorism the concepts related to internal ones. The associative crimes considered in the penal code in this field, in fact, were tailored on the offenses of constitutional values and not tailored to organizations based abroad. Some uncertainty that arose in the matter was definitively solved in 2005, when the law introduced a new provision, punishing every form of terrorism with the more severe penalties of the *delitti contro la personalità dello Stato*.

However, it is matter of ongoing discussion between the scholars and the jurisprudence[49] if and how the provided forms of associative crimes, tailored on past experiences, can deal with the increasingly loose forms of organizations, from the cellular to the reticular ones.

The weak forms of organization experienced with the above-mentioned *spontaneismo armato* can be helpful, if we remain clear about specificities and differences.

A serious challenge to the effectiveness of the "forward putting/anticipatory" penal approach was the jurisprudential uncertainty about how to punish the gray zone: people dealing with a criminal organization, taking advantages from such a relationship, but not properly belonging to the organization itself.

The "external participation" in a criminal organization was considered for the Mafia-type organizations. The crime was based on the combination of the general provision of material conducts contributing to the crime (art. 110 Penal Code), that punishes every conduct that willingly contributes to the conduct described by the incriminating law, and the specific crime of conspiracy.

[48] Suspicions of an agreement with the main Palestinian stakeholders in order to grant safety to the country were based on the good relationships Italy had in the Middle East. As an example, officers of the highest level within the SISMI were convicted for a covert operation aimed at interfering with the impending presidential election in the USA. The operation was nicknamed "Billygate," from the name of Billy Carter, brother of the US President, Jimmy Carter, who was heavily damaged by the scandal. The operation was based on the relationships of the Secret Service with the Libyan government.

[49] The Court of Cassation issued a dissonant judgment, requiring structured cell organization as a minimum (Sez. 5, Sentenza n. 48001, July 14, 2016, Hosni).

In the famous case *Contrada v. Italy – 3*, the ECHR recently stated that the crime is based on a previous law (so there is no violation of the principle of *no punishment without law*); at the same time, however, the court found that divergent interpretations of the law, at the time of the facts (1980's), made the punishment for association unforeseeable by the members of the collectivity.[50] Therefore, the Court of Cassation declared the sentence "unenforceable."[51]

Notwithstanding that now the legal provision of the crime must be considered as clearly established by the law, the range of possible uses of the same in the terrorist field is hardly reduced by the series of new provisions intended to punish any form of contribution, even if individual and without direct contact with the organization.

The new crimes are grounded on the experience of the recent attacks in Europe and the apparition of *Individually Acting Terrorists* or *Terrorists Acting Alone*. These expressions—better than *Lone Wolf*—represent different kinds of relations with the organization, from total absence to direct and continuous direction from a distance, using tools like the web or encrypted mobile phones.

The new provisions specifically dealing with preparatory conduct turned out to be effective in reducing the relevance of extended application of associative crimes.

I would like to stress that the European Union now definitively shares the anticipatory approach, as well as measures in favor of a defendant's cooperation. The 2017/541 Directive on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA[52], makes it mandatory for the member states to consider punishable a terrorist offense, even if not actually committed (art. 13); they shall take the necessary measures to ensure that attempting to commit serious offenses (recruitment and training among them) are punishable (art. 14).

The above-mentioned directive provided penalty reductions if the offender renounces terrorist activity or provides the administrative or judicial authorities with information that they would not otherwise have been able to obtain, helping them to prevent or mitigate the effects of the offense, identify or bring to justice the other offenders, find evidence, or prevent further offenses[53]. We had some cases of cooperating witnesses, even in the field of international terrorism. Motivations are partially different from that of internal terrorism. As underscored by Armando Spataro[54], the main similarity is in the perception of wrongness of his own conduct, considered in the more general ideological context; of similar importance is the feeling of belonging to a new group, where he can feel solidarity and confidence.

[50] ECHR, April 14, 2015

[51] Court of Cassation, Sez. 1, July 6, 2017.

[52] Approved March 15, 2017.

[53] EU 2017/Directive, art. 16.

[54] A. Spataro, "Why Do People Become Terrorists. A prosecutor's experiences," *Journal of International Criminal Justice*, 6 (2008), 507-524.

The importance of the web in the terrorist strategy (mainly by the IS groups) is dealt with in specific provisions that allow LEAs to use undercover operations and interference in the websites.

A very important topic in dealing with encrypted communication (like Instagram, WhatsApp, and the like) is the lawfulness of the use of viruses (like Trojan) apt to control any device with a web or telephone connection, like mobile phones, desktops, and so on. In a recent decision, the Court of Cassation upheld this investigative tool and its use as evidence, but within narrow limits[55]. A law contemplating the whole issue will soon be enforced[56].

The first judicial implementations of the new offenses appear to be respectful of the constitutional principles about the need for material conduct, clearly described by the law and dangerous for the vital interests of the society (offensiveness principle); in addition, *mens rea* must be asserted as specifically directed to commit terrorist acts.

Carefulness is important, considering that "terrorist" is an easily eligible category for "enemy criminal law"; Islamic terrorism is an even more dangerous field of possible border crossing, due to its perceived otherness.

Regarding the new offenses provided by the law since 2005, the interpretation given by the courts (mainly the Cassation Court) requires careful compliance with the fundamental principle of due process of law provided by the Constitution.

Training[57] and self-training[58] could be punished only if adequate for the purpose and willingly executed. Collecting data should not be enough if not followed by material conducts, unequivocally aimed at acquiring those skills useful in committing terrorist attacks[59].

The court considers similar requirements necessary in the offenses of recruitment[60].

---

[55] Court of Cassation, SS.UU (Grand Chamber), July 1, 2016, no. 26889

[56] Law June 23, 2017 no. 103.

[57] In accordance with the not yet enforced EU Directive 2017/541, *Article 7 Providing training for terrorism*: *"*Member States shall take the necessary measures to ensure that providing instruction on the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or on other specific methods or techniques, for the purpose of committing, or contributing to the commission of, one of the offences listed in points (a) to (i) of Article 3(1), knowing that the skills provided are intended to be used for this purpose, is punishable as a criminal offence when committed intentionally."

[58] EU Directive 2017/541, *Article 8 Receiving training for terrorism: "*Member States shall take the necessary measures to ensure that receiving instruction on the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or on other specific methods or techniques, for the purpose of committing, or contributing to the commission of, one of the offences listed in points (a) to (i) of Article 3(1) is punishable as a criminal offence when committed intentionally."

[59] See Supreme Court of Cassation, Sez. 5, judgment no. 6061, July 19, 2016, Hamil. In the same direction, read Sez. 1, judgment no. 4433, November 6, 2013, El Abboubi.

[60] Sez. 1, judgment no. 40699, June 9, 2015, Elezi. The concept of recruitment in Italian penal law is less wide than in the EU 2017 Directive: *Article 6 Recruitment for terrorism*: "Member States shall take the necessary measures to ensure that soliciting another person to commit or contribute to the commission of one of the offences listed in points (a) to (i) of Article 3(1), or in Article 4 is punishable as a criminal offence when committed intentionally."

The organization of a journey aimed at terrorist goals is punishable[61].

Incrimination of public condoning of terrorist crimes (art. 414 penal code – apology) is allowed, in the interpretation of the court[62], only when the apology constitutes a present danger because of its form and content[63].

I consider the apology as a matter of maximum importance, bound with the possibility punishing the instigation to commit crimes, considered in the Italian penal law as a form of conspiracy. In the specific context of radical Islamic terrorism, the two linked provisions can be applied to the main forms of communications, going far beyond the mere expression of ideas. We must carefully consider that a command coming from a person dressed with the required religious authority is binding for those who recognize his authority.

As an example of the use of the web with the aim of aggregating people and giving instructions, we can quote the proceeding of the Rome prosecutor's office, in the case *i7ur*. This was the name[64] of a website whose activities had been intercepted for a long time. The investigation allowed a complete reconstruction of the way a terrorist website is built and organized and how it works. Important pieces of evidence concern the link between the website operated in Italy and the main site, operated abroad by IS; the authorization required to use name and symbol; and the credit the Italian controller acquired through his connections with religious people abroad and the political use of poetry.

The Abu Omar case requires a specific reference. It is a clear example of different approaches in dealing with the terrorist threat.

The real name of Abu Omar is Hassan Mustafa Osama Nasr[65]. He was the imam at a mosque in Milan and was under investigation by the Milan prosecutor's office when he suddenly disappeared. At first, the investigators suspected he had fled, or worse, engaged in direct illegal activity. It soon became clear he had been kidnapped.

---

[61] EU Directive 2017/514, *Article 10 Organising or otherwise facilitating travelling for the purpose of terrorism, "*Member States shall take the necessary measures to ensure that any act of organisation or facilitation that assists any person in travelling for the purpose of terrorism, as referred to in Article 9(1) and point (a) of Article 9(2), knowing that the assistance thus rendered is for that purpose, is punishable as a criminal offence when committed intentionally."

[62] Sez. 1, judgment no. 47489, October 6, 2015, Halili.

[63] Public provocations to commit terrorist acts are punishable according with 2008/919/GAI Framework Decision, art. 3, & 1, a), accomplishing with art. 5 EU Convention on Terrorism. The new Directive provides in art. 5: "Member States shall take the necessary measures to ensure that the distribution, or otherwise making available by any means, whether online or offline, of a message to the public, with the intent to incite the commission of one of the offences listed in points (a) to (i) of Article 3(1), where such conduct, directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences, thereby causing a danger that one or more such offences may be committed, is punishable as a criminal offence when committed intentionally."

[64] *i7ur* is the synthesis in Arabic words for *Seven Virgins Lovers*.

[65] The Judgment of ECHR, February 23, 2016, *Nasr and Ghali v. Italy*, n. 44883/09, contains a complete narration of the entire case from a factual and juridical point of view. See also the reports from the Parliamentary Assembly of EU, Marthy, and of the Parliament, Fava. The prosecutor in charge, Armando Spataro, discussed the case in his really interesting, *Ne valeva la pena [It was worth it],* Milan, 2010.

Dogged investigations revealed that Abu Omar was victim of an extraordinary rendition, forcibly abducted from Milan to Egypt where he was subject to torture and inhumane treatment as a suspected terrorist. The investigators (the judiciary law enforcement agencies, directed by Armando Spataro, vice chief prosecutor of Milan, one of the most experienced prosecutors in Italy with a deep knowledge of organized crime and terrorism) identified the American commando, the chain of responsibility, and the complicity within the Italian police and the Secret Service officers; in the proceedings they used all the investigative tools experienced in the field, like wiretapping and collecting telephone, credit card, and check-in data.

The investigative judge in Milan issued arrest warrants and started the pre-trial phase. A forced stop arrived from the president of the Council of Ministers, who opposed the state secrecy, even if the agency SISMI had already disclosed the "secret" information during the investigations. The opposition to state secrecy opened a long history of conflicts of attributions between the judiciary and the government, resolved by the Constitutional Court in substantial favor of the latter.

Italian-national defendants were dismissed on the basis of the state secrecy, while the US citizens, CIA operatives or responsible people, were convicted[66]. The convictions of the US citizens have not been enforced.

The illegal abduction of Abu Omar severely endangered the relationships between Italy and the USA; it introduced reciprocal suspicion in a field of previous confidence, rooted in years of effective cooperation. Not least, it interrupted a successful penal investigation into Abu Omar and the people acting around his mosque. The investigating judge of Milan described in harsh words the consequences of the abduction on an ongoing investigation. In fact, when it was possible to resume the investigation, after Abu Omar's release, it was also possible to obtain the conviction of the defendant[67], charged with associative crimes and related offenses, and dismantle the terrorist network. The investigators seized important documents, describing the *modus operandi* of the terrorist groups.

I would like to stress that the Italian judiciary did not accept the use of unwarranted violence and of illegal means in dealing with terrorism.

I can quote another case, in the same kind. In December 1981 the Red Brigades kidnapped the US General James Lee Dozier. He was freed by the Special Forces of the Italian State Police. The investigators ascertained that information about where general was kept prisoner had been gathered from arrested terrorists using intimidation and violence. The police officers who committed such acts were prosecuted and convicted, even though an amnesty was applied[68] at the end of the trial.

Coordination in investigations

An important part in effectiveness of LEAs effort lies in a very experienced system of sharing of information and coordination of investigations.

[66] The president of Republic pardoned all the convicted US citizens.

[67] In 2015 the Court of Cassation upheld the Court of Appeal judgment. Abu Omar was sentenced six years in prison.

[68] A very recent law established torture as an autonomous crime, aggravated when the author is a public servant: law July 14, 2017, n. 110. Before this law, torture could be punishable under different common provisions.

In the ’70s, no forms of coordination between prosecutors or investigative judges were provided, in the organization of the bureaus or in the procedural code. The culture of coordinating investigations was far from the habit of our judiciary, partly because of historical reasons but mainly because of the relationship between prosecutors and judges, between investigations and trials. No rigid separation was considered. The prosecutors’ independence, as well as the judges’, was strictly related to the constitutional principle of penal action as mandatory. That implied, if not in theory certainly in fact, that the idea of the judiciary as a “widespread power,” resident in each judge at the moment of adjudication, extended itself to the prosecutors as well.

When the need for a real coordination became evident in the investigations on *Cosa Nostra* and on terrorism, investigative judges and prosecutors started to discuss the main issues in meetings they convened in which they shared acts and information. The lawfulness of that spontaneous coordination was questioned as well as the appointment of more investigative judges to the same proceedings.

At the same time, the LEAs began a process of thorough renovation, building national structures based on specialization and supplied with centralized archives.

The resistance to a similar effort within the judiciary was based mainly on the concern about its role of guarantee for single defendants: the judiciary should not deal with phenomena but with individuals and crimes.

Specific provisions were introduced into the penal procedural code, allowing—and making it mandatory, as well—the sharing of information. At the end of a long journey, two parallel great innovations were introduced. On the LEAs side, the creation of the *Direzione Investigativa Antimafia* (DIA, Antimafia Investigative Directorate) that worked with the dedicated structures in the *Carabinieri, Guardia di Finanza e Polizia di Stato* . A corresponding structure was created within the Prosecutor's Office, the *Direzione Nazionale Antimafia* (DNA, Antimafia National Directorate), aimed at allowing an effective coordination between the District Antimafia Prosecutor Offices, spread nationwide. In 2015, the DNA was assigned terrorism as a field of action (DNAT).

The coordination within the judiciary was made possible by the radical modifications in the procedural code introduced in 1989, when the investigative responsibility was entirely attributed to the prosecutor, while the investigative judge was given the difficult task of controlling the many steps of the proceedings and issuing warrants affecting civil rights.

It could be concluded regarding the issue that Italy made an intermediate choice between centralization of investigations or their diffusion in all the prosecution offices. It was a constrained decision, considering the strong opposition to a DNA with direct investigative powers at the very beginning of its creation in 1992[69]. The opposition was particularly forceful against extending the attributions to terrorism, a field in which concerns about a political use of a centralized organization were widespread. It was possible to overcome such opposition only when it became clearer, after 25 years of implementation, that the DNA was not in contrast

[69] The creation of DIA and DNA was strongly pursued by Giovanni Falcone, then director general in the Ministry of Justice. Such determination determined an equally strong reaction within the judiciary and some of the political forces, contributing to the isolation of the judge in the weeks before his assassination with his wife and five police officers protecting him.

with our institutional context. The need for effective coordination and the pressure of international terrorism did the following.

Regarding the international relationships, it is not all clear and uneventful. On one hand, the transnational character of organized crime forced Italy to be at the cutting edge in the search for international cooperation and standardization of rules and offenses. On the other, the role provided for in the Constitution makes each prosecutor's office a judicial authority, without a proper hierarchic structure; as a consequence, links with Italian offices are very difficult for foreign authorities. Personal relationships are often more effective than formal ones.

Preventive measures

A critical aspect of the Italian comprehensive approach to terrorism could be found in the preventive measures.

An important preliminary remark: in Italy, preventive measure are proposed by specialized police or by prosecution offices (like Antimafia Directorates) and issued by a tribunal; the measure is revised by the Court of Appeal and the Court of Cassation (three degrees of jurisdiction) and should be grounded not on suspects but on material acts (such as liaisons with Mafia-type or terrorist organizations, owning, even indirectly, assets not correspondent to legitimate incomes, when the owner has been convicted for serious crimes and so on), revealing behaviors dangerous for the juridical good, constitutionally protected. Due process of law is granted in every phase of preventive proceedings.

In a very recent decision, *DE Tomaso v. Italy*, the ECHR considered the legal ground of the personal preventive measure too poorly described by the law to grant serious judicial scrutiny. The case is too recent to evaluate the consequences of the decision, thoroughly debated now between scholars and the judiciary. It must be stressed that the decision regards only a specific kind of measure, said of "generic danger," while the "qualified danger measures," like in the Mafia-type or terrorist field, have been upheld in previous decisions.

On the other hand, the above-mentioned ECHR decisions about expulsion of foreign citizens suspected of relations with terrorist organizations can partly affect the effectiveness of the mentioned measures.

The preventive approach comprehends specific patrimonial and personal measures based on evidence unrelated to crimes but related to dangerous conducts that can imperil national security, in the meaning and limits stated in the mentioned decisions of Italian Constitutional Court.

In fact, the Italian Antimafia Code provided for the application of preventive measures against terrorist offenses, in relation to "objectively relevant, direct preparatory actions to take part in a conflict in a foreign territory in support of an 'Organization pursuing terrorist purposes' as established by the Italian Criminal Code, art. 270 bis [70]."

[70] Translation from, F. Vitale, "A brief reflection on the fight against terrorism in Europe: between prevention and cooperation measures" in *Giurisprudenza Penale Web*, May 2017.

The Directive 2014/42 EU now requires measures on freezing and confiscation of instrumental assets and crime proceeds.

A recent judgment of the Court of Cassation gives us a good example of the connection between crime and prevention and of the material basis of a preventive measure. In repealing a decision of a Court of Appeal in relation to the existence of a terrorist criminal organization, the court stated that it is difficult to find precise boundaries between proselytism and indoctrination, which in any case must be considered mere "ideological preconditions for a truly functional link with the typical content of terrorist actions." At the same time, the court considered the elements of the substance of the case to be appropriate for the possible application of preventive measures under Italian law[71].

The lawfulness of the Italian preventive-measures system was stated by the ECHR in *Labita v. Italy*[72], considering the relevant legislation as indicating with sufficient clarity and precision the scope or the exercise mode of the discretion conferred on the courts, ensuring a sufficient degree of certainty in the "application of prevention measures." The court added that: "the eventual sentence of absolution does not necessarily deprive the prevention measures of any reason to exist: in fact, concrete evidence gathered at trial, even if insufficient to reach a conviction, may, however, justify reasonable doubt that the subject may in the future commit criminal offenses."

In Italy, this kind of measure was enacted within the anti-Mafia efforts. Assets (estates, factories, farmhouses, commercial centers, and so on) worth billions have been confiscated from Mafia-type organizations in recent years. The prosecutor's office of Catania, which I had been leading until 2015, is said to be the fourth largest "company" in Sicily—it is not really true, because administering a business that comes from the Mafia is not an easy task. The companies owned by the Mafiosi were often able to linger *in* the market only because they were after all *out* of the market itself, in other words, when the former mafia's companies are forced to pay taxes and fair salaries, shed illicit forms of financing, and so on, they lose the differential in economic competition.

Important fields of investigation are the financing activities of terrorist groups from areas controlled by IS or other land-based organizations, like smuggling of petrol or antiquities. There is strong commitment toward the resources coming from the smuggling of migrants; there is no evidence about the direct control of the traffic by terrorist organizations, but it is a serious hypothesis that smugglers must pay protection money to pass through the controlled territories.

At the moment, I am not aware of any significant patrimonial measures in the field of terrorism. The more significant perspective I can imagine is related to the main sources sustaining radicalism, coming from big institutions, often supported by the state. That is in the future, even if some investigation is already ongoing.

[71] Court of Cassation, July 14, 2016, n. 48001.

[72] *Labita v. Italy*, the Grand Chamber, April 6, 2000.

Relevant investigations into penal proceedings are being carried out against money laundering, especially relating to large amounts of crude oil, now smuggled from Libya (in the past from Syria as well). Such investigations are at the moment under secrecy.

Regarding the measures of personal prevention, the immediate implementation is much more at hand.

The above-mentioned judgment *De Tomaso v. Italy* contains a very detailed presentation of the Italian legislation on preventive measures, with thorough references to the relevant jurisprudence. I refer to that synthesis.

Intelligence or penal prosecution? Is it a real alternative?

An important role in dealing with terrorism is attributed to intelligence.

Dealing with new forms of Islamic terrorism makes this statement even more true. New challenges come from the indissoluble link between warfare in battlefield (like Syria) and terrorist acts elsewhere (returning foreign fighters; cells based abroad, in European countries; terrorists acting alone; web connections, and so on). Trials taking place in different countries posed the problems of the lawful use of pieces of evidence collected by intelligence[73], the protection of sources, and anonymity of the witnesses.

The Italian approach to the issue is influenced by institutional and historical causes. Prevention as a general issue is a field shared by the government and the judiciary. The latter is in charge of preventive measures affecting constitutional rights (i.e., anti-Mafia and antiterrorism patrimonial and personal measures for people considered involved but not punishable through a penal proceeding, wiretapping, and so on). The penal action, being mandatory, prevails on the secrecy of preventive activities, as a general statement, with due exceptions. Last but not least, the LEAs as a whole are under government scrutiny and under functional responsibility of the judiciary at the same time: as a consequence, prevention can easily drift to penal proceedings.

The *actio finium regundorum* between the two spheres is a difficult task. It gave place to serious conflicts that ended with more than one *conflitto di attribuzione tra poteri dello Stato*[74].

The main field of contrast was, in past decades, the use of the State secrecy to interrupt a judicial investigation or trial. It is a very interesting but quite knotty affair. To the limited scope of this presentation, it is enough to point out the following issues from the statement of the court:

1. The State secrecy does not have the capacity of interdicting the penal action;
2. Investigations can be carried out even if the secret is opposed, but the prosecutor is burdened with the principle of fair cooperation;
3. Consequently, the prosecutor cannot bypass the secret, obtaining by other sources or means the secreted information.

[73] Pieces of evidence collected by illicit means, like torture, are not at the stake, it being evident they cannot be used in court or in any judicial proceeding.

[74] "Attributions' conflict between powers of the State": in these cases between the judiciary (prosecutor or judge) and the president of the Council of Ministers, in his role as national authority for the State Security. The conflict is discussed in the Constitutional Court, which states which power and within which limits is in charge of the attribution.

These principles have been discussed within the Constitutional Court and in the Supreme Court of Cassation in the famous case of the extraordinary rendition of Abu Omar, already discussed in other parts of this presentation. In the opinion of a large number of scholars, the Constitutional Court incoherently followed the principles stated in its previous decisions, thereby leading to a too large interpretation of State secrecy. The implementation of the above-mentioned principles by the Constitutional Court was seriously questioned by the Court of Cassation, even if in the end it necessarily complied with the statement. The ECHR considered Italian conduct and proceedings as not complying with the art. 3 (prohibition of torture and inhuman or degrading treatment), art. 5 (right to liberty and security), art. 8 (right to respect for private and family life), and art. 13 (right to effective remedy)[75]. In the judgment, nevertheless, it is stressed the commitment of the Italian judiciary in pursuing the responsibilities, without any regard to national or foreign citizenship.

It is not easy to handle the legislation on State secrecy, due to the influence coming from the grim experiences of the 1970s and 1980s. The activities aimed at conditioning the democratic life of the country, carried out by the Secret Services over time (SIFAR; systematic filing of Parliament members; politicians; public servants to be used in the plot named *Piano Solo*; SID, whose officers and informants have been discovered everywhere in the attacks of the *strategia della tensione;* SISMI, whose highest officers have been convicted of misdirecting the judicial investigation on the Bologna Station massacre) determined the prohibition of the National Authority for the State Security (ANS) to set secret classification on subversive issues and consequently to *oppose* it to the judiciary.

Such a prohibition has been reduced in 2015 by the legislation on terrorism, but the main legal context remains the same and produces a climate of uncertainty within the agencies and of diffidence in the relationships with agencies of other countries.

In collecting pieces of information, the secret services have good capabilities, within the limits drawn by the law (called *garanzie funzionali*, which means limits to officers' activities, who are granted immunity, connected with the functions attributed to the agencies).

Different from the *garanzie funzionali* are the investigative activities that required previous judicial authorization, such as interceptions of communications or interviews with imprisoned people. The Prosecutor General's Office of Rome is in charge nationwide of these authorizations.

The information collected by the intelligence agencies cannot be used in court as evidence; the agencies can transmit the information to the judicial police and then—if collected in a lawful way—disclose it to the prosecutor and in the court.

Limited provisions supplied secrecy for informants in the trial, but the system as a whole is not aimed at preserving not even such a limited secrecy.

The complexity of the regulations on the relationship between the judiciary and the agencies, between secret and penal ascertainment, should in my opinion, be reassessed in order to answer to the challenges coming from any new forms of international terrorism and the consequent needs for a quicker cooperation.

[75] ECHR, *Nasr and Ghali v. Italy*, February 23, 2016

Nevertheless, on the basis of my—somehow "amphibious" —experience I can assert that joint efforts from the intelligence community, the police in charge of ordinary prevention, and the judiciary have been really effective in countering terrorism at its roots: hundreds of suspects in more recent years have been checked or investigated, and in many cases put on trial or expulsed in guaranteed proceedings[76].

Conclusions

The Italian approach to the terrorist challenge could be considered effective. Italy has not experienced a serious terrorist attack in recent years. In more than one case, such attacks have been prevented or interrupted in the execution phase, with the capture or death of the attackers. Such results have been achieved despite circumstances that could have made Italy an attractive target: the presence on Italian soil of a number of symbols of Christianity; the name itself of the capital, Rome, not casually chosen by IS as the title of its magazine; the waves of immigration; the thousands of miles of open sea borders; the presence of a large Islamic community; and so on.

Important efforts were implemented in dealing with the community and in countering the basis of radicalization; great efforts are aimed at dealing with radicalization in prison. Nevertheless, countries severely hit by terrorism have not made lesser efforts; in fact, Italy borrowed from these countries' models and means in countering radicalism. Therefore, this cannot be a satisfying justification. Neither are the specific characteristics of the Muslim community, where the first generation is largely prevalent, a conclusive explanation.

It is possible to argue that this lucky situation is grounded also in the effectiveness of the mix between prevention and repression. What is more important is the ***continuity of the efforts*** against terrorism. Italy never stopped paying attention to the issue, not even when the worst days were over.

Nevertheless, no one can assert that Italy is safe from terrorist attacks. It is always possible that a structured cell will reveal itself to be able to avoid detection; or terrorists acting alone will act within a very short time from deliberation to action, leaving a dramatically short time for prevention.

It is possible that in this very moment an attack occurs in Italy.

Would the Italian society be able to react firmly? The great resource in dealing with internal terrorism was the unity of the country. The agreement between the main political forces, even when a hard debate was taking place, was grounded in shared institutional behaviors and principles, built during the constituency phase of the republic.

Could the fragmented current political parties react with a similar attitude? Would the contested and apparently weak European Union be a safe environment for a political debate? Immigration is a good test for such question: Europe appears unable to answer with a single voice and national egotisms prevail over rationality.

[76] Italian legislation on terrorists' expulsion has been questioned by ECHR. The European Court found a violation of the Convention on Human Rights where Italian law allows defendants to be expelled to countries practicing torture (*Saady v. Italy*, 28.2.2008; *Ben Khemais v. Italy*, 24.2.2009; *Toumi v. Italy*, 5.4.2011).

The market of fear appears the most remunerative one, in the present conditions.

This is my real concern: the market of fear.

Let me conclude my speech with the words of a scholar who dedicated his life to the enhancement of human rights, Ronald Dworkin: "We must put the hurdle of emergency very high indeed. We must take care not to define 'emergency' as simple 'great danger' or to suppose that any act that improves our own security, no matter how marginally, is for that reason justified. We must hold to a very different virtue: the old-fashioned virtue of courage. Sacrificing self-respect in the face of danger is a particularly shameful form of cowardice [77]."

's-Hertogenbosch, September 15, 2015

[77] R. Dworkin, *Is Democracy Possible Here?*, Princeton University Press, 2006, p. 5.