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Substantive provisions of German Law criminalizing forms of terrorism in the Global Era

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formas de terrorismo na Era Global*

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Substantive provisions of German Law criminalizing forms of terrorism in the Global Era

Prescrições substantivas do direito alemão criminalizando formas de terrorismo na Era Global

PATRICK M. PINTASKE*

Abstract

Terrorism is one of the most difficult and challenging topic in criminal law in the beginning of the 21st century. The countries all over the world are afraid of becoming a place for terrorist activities. The most effective way to deter terrorist attacks is to find a global strategy in different areas of our society. The IFCCCLGE wants to work out a new convention. Therefore a new norm can be formulated. But in criminal law the global strategy has to take into consideration the already existing national criminal law rules because new criminal regulations need to be necessary. Therefore all national systems should be analysed by a working definition of terrorism and pointed out which regulations are able to handle the problem of terrorism. The following paper will show which provisions of the German criminal code (StGB) come into consideration to fight terrorism.

Keywords: Terrorism; Convention; Germany; German criminal code; Working definition.

Resumo

O terrorismo é um dos temas mais difíceis e desafiantes do Direito Penal no começo do Século XXI. Os países no mundo todo estão com medo de se transformarem em um lugar para atividades terroristas. A maneira mais efetiva de deter os ataques terroristas é encontrar uma estratégia global em diferentes áreas da nossa sociedade. O IFCCCLGE quer trabalhar em uma nova convenção. Assim uma nova norma poderá ser formulada. Mas no Direito Penal a estratégia global deve levar em consideração as regras de Direito Penal já existentes porque novas normas penais podem ser necessárias. Deste modo, todos os sistemas nacionais deveriam ser analisados por uma definição operacional de terrorismo, apontando-se quais regulações são capazes de lidar com o problema do terrorismo. O presente artigo irá mostrar quais dispositivos do Código Penal alemão (StGB) vêm à consideração para combater o terrorismo.

Palavras-chave: Terrorismo; Convenção; Alemanha; Código Penal alemão; Definição operacional.

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A. Introduction

Since the events of 11 September 2001 (9/11) in the United States, terrorism has been one of the central themes of international criminal law. The attacks in Madrid in 2004, London in 2005 and 2007, and Moscow in 2010 and 2011 have all presented reasons for terrorism as a manifestation of criminality to remain in the focus of international criminal law discussion.

The International Forum on Crime and Criminal Law in the Global Era (IFCCLGE) has for its Third Session in 2011 set itself the ambitious goal of drawing up a single anti-terror convention for proposal to the United Nations. My paper therefore deals with the substantive provisions of the German anti-terrorism strategy. I first attempt to unite various terrorist activities under a single working definition (B), and then to formulate a norm for a international convention (C.). Thereafter I analyze the relevant norms from the German Criminal Code (henceforth StGB) (D). It will become evident which substantive offence provisions are drawn upon for the prosecution of terrorism, and what developmental tendencies they show. The paper that follows is meant to serve as a basis from the German perspective for the discussion of the harmonization of substantive criminal law provisions necessary in order to produce a draft convention.

B. A working definition of terrorist activity

Any discussion of which provisions of the German criminal code cover the various manifestations of terrorism requires settling on a definition of terrorism itself. The difficulty of this is that in German law, though the term appears frequently,¹ it is never defined further. German law is not alone in its lack of a clear understanding of the definition of terrorism. A survey of other legal systems and of European and public international law makes it clear that no single, generally-applicable definition of terrorism has yet gained acceptance.²

On the one hand, this state is understandable, given the constantly changing manifestations and tactics of terrorism.³ Even in Germany, this change can be seen in the development of terrorism from the activities of the “Red Army Fraction” (RAF) in the 1970s through to the Islamist terrorism of today.⁴ On the other, it remains necessary to establish a definition of terrorism based on its contemporary activities and behaviours. A starting point is the detailed and convincing work of the German terrorism expert *Mark Zöller*.⁵ He has worked to establish the essential elements of modern terrorism “with respect to public international law, European, and comparative-law standards and orientation”, and has used that framework and the essential elements it produces to “synthesize a working definition to enable criminal law to correctly encompass terrorism at the start of the twenty-first century”⁶. Zöllers definition states that

Terrorism is

- The intentional use or threatened use of violence against persons or the use of violence against property;
- which is capable in its methodology or consequences of seriously damaging a state or an international organization; and
- whose purpose is significantly to intimidate the populace or to illegally threaten, attack the basic structures of, or significantly harm a state and its public institutions or an international organization:
- in order to achieve ideological ends.

This does not apply to military action or the deployment of the security forces of a state in furtherance of its legally established duties under public international law.⁷

The approach of this definition, which requires only violence or the threat of violence against persons (and property) connected with an objective criterion of capability and two subjective criterion – of certainty

and of the intent to achieve ideological ends⁸ – is especially appealing in light of its potential to capture a large range of terroristically motivated acts of violence, and it will serve as the basis for this paper.

C. Formulating a norm for an international convention

The question then raised is how to mirror these elements of the definition of terrorism within the substantive provisions of an international instrument. The most obvious systematic solution, which draws on the model of the current conventions on international organized crime, would be to define the term ‘terrorism’ in an initial general part which would then obligate signatory states to implement a corresponding provision in their respective criminal statutes. The definition of the term can be drawn from Zöllers above, and the implementation provision could read something like:

Art. xy [of the Draft Convention]

Criminalization

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the acts of terrorism.

This formulation would not compel states party to introduce their own definitions of terrorism, but would set a minimum standard for the criminalization of terrorist activities if it were included. The ratification of a convention that includes such a provision would be decided, at least in Germany, by whether German law presently adequately criminalizes terrorist activities or whether a possible loophole needs closing in the form of a separate offence of terrorism. Thus I now propose, insofar as is sensible, to engage with individual substantive provisions of terrorism offences (what German jurists call the substantive criminal law of terrorism, or *Terrorismusstrafrecht*⁹).

D. Provisions of the German criminal code (StGB)

1 **Murder with terrorist motive: §§ 212 and 211 StGB**

In cases of (attempted) murder or the murder of multiple individuals in a terroristically motivated act, the *actus reus* elements of the offence of (attempted) manslaughter under § 212 StGB are met, as are the *mens rea* elements, since recklessness with regard to the act’s possible fatal consequences (*dolus eventualis*) is enough.¹⁰

The offence of murder under § 211 StGB carries a mandatory life sentence and requires the presence of one of the statutory indices of murder. Terrorist acts could, depending on the individual case, encompass one or more of malice, cruelty, means presenting a danger to the general public, or the catchall base motive criterion.

Killing with malice, where the victim is deprived of the opportunity for self-defence,¹¹ was established by the Federal Supreme Court (*Bundesgerichtshof*, BGH) in the *Motassadeq* case¹² with respect to the passengers in the hijacked aeroplanes on 11 September 2001, since the defendants, “at the moment they took control of the aeroplane and therefore committed the first assault on the life of the passengers and crew”¹³, consciously took advantage of the unsuspecting nature and therefore helplessness of the victims in order to commit the killing. The passengers had no further realistic chance of successfully defending themselves from the attackers and saving their own lives.¹⁴ Furthermore, malicious killing is presumed when the perpetrator sets off an explosive device in a crowd of people without being recognized, or when soldiers or security forces on patrol are attacked, even if they are under a current warning about likely terrorist activity.¹⁵

Cruel killing, under German law signified by the infliction of particular pain or physical or psychological torture arising out of depravity that in duration and degree far exceed the measure required to bring about

death,¹⁶ comes into question when hostages are required to film video messages for their governments on pain of death, or when their decapitation is recorded and distributed on video.¹⁷

For the subjective criteria (intent, depravity) the test is whether the suffering of the victim was part of the intent of the perpetrator, which could prove difficult to establish with respect to consequences as out of control as the collapse of the World Trade Center towers following the aeroplane impacts on 11 September 2001.¹⁸

Killing by means which pose a danger to the general public requires that the method chosen in the specific case presents a danger to life and limb for an uncertain number of persons.¹⁹ The danger can arise from the nature of the means itself (explosives, poisoning of foodstuffs or water supplies, arson) or if the offender is not in a position to determine or limit the consequences of the causes he sets in motion (by breaking through a roadblock, for example, or driving onto the footpath or into sidewalk cafés with a motor vehicle)²⁰ German case law²¹ recognized in the case of the failed “suitcase bombs”²² on two German trains on 31 July 2006 a terrorist act²³ (though rejected the classification of the offenders as terrorists), and ruled that the means chosen presented a danger to the general public since their effects on neighbouring train cars were not foreseeable.²⁴

Killing with base motive arises when the motive for committing the killing would be considered by general moral conception to be of the basest level, characterized by uninhibited, animalistic selfishness and therefore particularly reprehensible – contemptuous, even.²⁵ It is signalled by a blatant discrepancy between the reason for the deed and killing itself.²⁶ In the context of terrorism, this will generally be easily established, since the international terrorist of the early twenty-first century has moved beyond the targeted killing of particular individuals wielding state power, and instead focuses on creating shock value in society at large through the killing or injury of as many people as possible.²⁷

From the foregoing it can be established that the offence of murder under §§ 211 and 212 StGB will capture the intentional killing (and attempted killing) done with terrorist motives and using terrorism-specific methods.

2 (Foreign) terrorist organizations under §§ 129a and 129b StGB

The offence dealing specifically with terrorism is § 129a StGB, “Formation of a terroristic organization”, though the title is misleading since the section itself contains no definition of such an organization. Unlike the criminal organization (§ 129 StGB), the distinguishing feature of the terroristic organization is its purpose, namely of committing the serious crimes named in the provision.²⁸ ‘Organization’ in the sense of §§ 129 ff StGB is usually defined as the organizational cooperation of at least three persons for a specific period of time, whose individual will has been subordinated to that of the group and who pursue common goals. Their relationship must also be such that they consider themselves and one another part of a single, unified group.²⁹ The criminal conduct in § 129a StGB includes founding³⁰ such an organization, participation in such an organization as a member (Abs 1 and 2)³¹, as well as the support³² or the recruitment³³ of members or supporters (Abs. 5).

Typical examples of involvement as a member include consulting on targets, accomplishing logistical tasks, renting premises used for these activities, participating in the selection of leaders, or acquiring supplies for the acts themselves.³⁴ Support includes delivery of weapons, explosives, or false identity documents; financial support or money-laundering activities; making supplies or tools available; or distribution of propaganda materials; but not bare expressions of sympathy.³⁵ For the recruitment of members or supporters, some concrete connection to the organization in question is necessary, so that an Islamistically-coloured call for jihad³⁶ (on the internet, for example) is not itself enough to constitute recruitment activities unless it is done by a particular representative person (Osama bin Laden, Aiman al-Zawahiri) so that it can be said to tie to a concrete organization.³⁷

It should be evident from these provisions that German law, in criminalizing terrorist conduct, has not focused on the commission of acts of terrorism itself as the point at which these special provisions of the law attach, but instead introduced substantive law provisions that intervene early in the preparatory phase.³⁸

3 Preparations for serious crimes against the state under §§ 89a, 89b StGB

A further focus for the criminalization of early-stage terrorist activity is the inclusion in the criminal code of the offences of preparation for a serious violent crime against the state (§ 89a StGB), as well as the formation of relationships for the purpose of committing (§ 89b) or of providing instructions for the commission (§ 91) of such an act.³⁹ The increasing danger of terrorism was the reason given by the legislator for adding these provisions to the criminal code,⁴⁰ but they lack a definition, instead relying on the manifestations named in § 89a Abs 1 S 2 as serious violent crimes against the state. These provisions, added to the StGB on 4 August 2009, have greatly expanded the substantive criminal law in a touchy area for the rule of law – the preliminary stages of criminal conduct – without tying them to a particular danger posed by terroristic group dynamics,⁴¹ since individuals acting alone are covered as well. They have been the subject of considerable criticism in German academic literature.⁴²

§ 89a StGB penalizes preparations for a serious act of violence against the state.⁴³ Since the principle of legal certainty in Art 103 Abs 2 GG does not permit a formulation wide enough to capture every possible preparatory activity, § 89a Abs 2 defines punishable preparatory acts legally. It sets penalties for: training and accepting training in a terrorist “training camp” (Nr 1); the manufacture, acquisition, passing on, or possession of weapons or certain other materials (Nr 2)⁴⁴; the acquisition or possession of significant objects or “ingredients” (hydrogen peroxide, e.g.) for the manufacture of weapons, relevant substances, or devices (Nr 3); and the financing of attacks.⁴⁵

§ 89b StGB makes it possible to use the force of criminal law against persons who lay the groundwork for violent crimes against the state as defined in § 89a Abs 2 Nr 1, for example in so-called terrorist training camps. It places an abstract danger to life and limb for potential victims at the moment of taking up or continuing contact to a terrorist organization with the goal of participating in a violent crime against the state, which is then used to justify criminalization.⁴⁶ § 89b categorizes preparatory acts (like taking up contact) as preparations, thus making “preparations for preparations” punishable by law.⁴⁷

The purpose of § 91 Abs 1 Nr 1 StGB is to stop the spread of instruction on serious violent crimes against the state, though it relies on the objective criterion of the suitability of the instruction, given how it is propagated (e.g. on an Islamist or far-right website), to encourage or motivate others to commit such an act. Receiving or acquiring instructions (by downloading them, for example) is also punishable. The German legislator is of the view that such instructions pose a danger to public order, since they can lead directly to preparation for major violent crimes against the state without further steps in between.⁴⁸ Instructions are said to provide “fertile psychological ground” for violent acts with serious consequences for society when easily-followable instructions for the commission of violent crimes are distributed.

Such a pushing-forward of the limit of substantive criminal law on terrorism requires, in a state subject to the rule of law, that the conduct being criminalized represents a high risk of danger and can be defined with sufficient specificity.⁴⁹ §§ 89a and 89b are the targets of considerable doubt where this is concerned.⁵⁰ Behind the broadening of the substantive law to include conduct far ahead of the actual act of terrorism lurks the legislator’s intention to sink the threshold of the *actus reus* for terrorism and thus gain easier access to procedural measures such as telecommunications and audio surveillance orders, grounds for pre-trial detention,

and asset seizure.⁵¹ The concomitant erosion of principles of the rule of law such as legal certainty through §§ 89a, 89b, and 91 is alarming indeed.

4 Cyberterrorism under §§ 303a and 303b StGB

Another modern and, with increasing worldwide networking over the internet and the increasing interdependence that comes with it, increasingly relevant form of terrorism is attacks on computer systems with terrorist motives or “cyberterrorism”⁵². In these attacks, the perpetrators’ goal is to use technical infiltration to damage or shut off national infrastructure networks (energy providers, emergency call centers, banks, water supplies, or military command centers) to intimidate the population or force states to take specific action, like the release of prisoners or withdrawal of armed forces deployed abroad.⁵³

German law deals with cyberterrorism chiefly through the offences of data manipulation (§ 303a) and computer sabotage (§ 303b StGB). Data manipulation⁵⁴ is the offence of illegally deleting, suppressing, rendering useless, or changing data,⁵⁵ as through the hacking and subsequent content manipulation of the home pages of government bodies.⁵⁶ Computer sabotage is the disruption through particular actions of computing processes of major significance for another party.⁵⁷ An aggravated form of the offence in § 303a Abs 2 StGB deals with computer processes belonging to businesses or government offices, and is the major provision on cyberterrorism.⁵⁸

Both variants punish preparations, meaning that when offenders lay the groundwork for data manipulation or computer sabotage by obtaining, selling, handing over, or otherwise making available passwords or other security codes or computer programmes whose purpose is the commission of such acts, they are also subject to criminal penalty (see § 303a Abs 3, § 303b Abs 5, both in connection with § 202c StGB).⁵⁹ Again, actions prior to the offence itself are captured by the criminal law.

5 Distribution of terrorism-related content

Besides its criminal-law relevance to the preparations for terrorism⁶⁰ and to acts of cyber-terrorism as described above, the internet plays an important role for terrorist activities as a platform for the distribution of related content. Information can be made available to interested parties, others can be called to violent action, and threats as well as forbidden content can be published.⁶¹

Insofar as the internet is used in support of a terrorist group, the relevant provision in German law⁶² is §§ 129a and 129b StGB, since such use can be considered recruitment (for members) or support (by non-members). Distribution of terrorism-related content and offence-supporting propaganda (e.g. the call to jihad as ‘the only option against enemies of Islam, the West’) is punishable as public inducement to criminal offences under § 111 StGB,⁶³ breach of public order through threats to commit crimes (§ 126 StGB), instructions for criminal offences (§ 130a StGB) or for acts of violence against the state (§ 91 StGB), or the reward or approval of criminal offences (§ 140 StGB).⁶⁴

Common to all these norms is the conspicuous focus on the preliminary phase of terroristically motivated acts of violence. For Zöller,⁶⁵ the offence of disrupting public order by threatening acts of violence (§ 126 StGB) serves as an early intervention against a general societal climate of fear, disorder, dissatisfaction, and insecurity. Instructions to commit offences (§ 130 StGB) can consist of as little as the availability on an Islamist website of handbooks on the construction of explosives, or even virtual training courses on the commission of acts of violence.⁶⁶ Even quite neutral instructions on the commission of violent crimes fall under § 91 StGB.

E. Summary and outlook

The foregoing should have removed any doubt that there is no generally applicable definition of terrorism. Nonetheless, a working definition has to be offered in order to describe terrorism as a criminological phenomenon. For this purpose, the definition set out by Zöller seems particularly suitable; the draft convention sought by the IFCCLGE Forum 2011 can use the definition as a basis, perhaps explicitly incorporating modern forms of terrorism such as cyberattacks. A possible convention can lead with an elaboration of the term ‚terrorism‘ in the form of a criminalization provision, obliging member states to follow with their own effective legal provisions.

I have shown that the present German law has no single *actus reus* for terrorism, instead setting out a variety of individual norms covering particular terrorist activities. Whether this path is the most sensible from the standpoint of criminal policy will have to be a matter for individual states, not one decided in the drafting of a convention. German substantive criminal law has shown the tendency to criminalize preparatory conduct rather than wait for the actual terrorist attacks before bringing in criminal liability, and this forward shift must be accepted as the legislature’s discretionary prerogative,⁶⁷ but only insofar as it respects the fundamental principles of the constitution, such as proportionality and the rule of law. These principles have probably been overstepped⁶⁸ by the new §§ 89a, 89b, and 91 StGB – German law provides a good example of effective⁶⁹ but constitutionally questionable provisions of criminal law. The tendency towards the forward shift of criminalization in German law serves as a warning of the consequences of chasing an undefined criminal phenomenon at any cost, and those consequences should not be forgotten in the construction of a draft convention.

Notes

¹ *Anti-Terrorismgesetz* (Anti-Terrorism Act) of 18.8.1976 (BGBl. I, 2181); *Terrorismusbekämpfungsgesetz* (Counterterrorism Act) of 19.12.1986 (BGBl. I, 2566); *Gesetz zur Bekämpfung des internationalen Terrorismus* (International Counterterrorism Act) of 9.1.2002 (BGBl. I, 361) and the *Terrorismusbekämpfungsergänzungsgesetz* (Counter Terrorism (Further Provisions) Act) of 5.1.2007 (BGBl. I, 2).

² On these European and public international law provisions as well as comparisons with Anglo-American law see Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 148 ff.

³ Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 209.

⁴ Commonalities discussed in Neubacher, *Terrorismus – Was haben “Rote Armee Fraktion” und “Jihadisten” gemeinsam?* in *Juristische Ausbildung* (JURA), 2010, p. 744 ff.

⁵ Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 209 ff.

⁶ Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 209.

⁷ cf Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 213. The bullet points are mine.

⁸ On these individual elements see Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 209 ff.

⁹ Details in Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 458 ff.

¹⁰ Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 458 f., which points out that the bodily harm offences (§§ 223 ff StGB) also come into play, but are normatively less problematic and anyway take a back seat to completed offences under §§ 211 or 212.

¹¹ BGHSt 2, 60 (61); 41, 72 (78 f.); Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 460.

¹² BGH, decision of 16.11.2006 (Az: 3 StR 139/06), in *Neue Zeitschrift für Strafrecht* (NStZ), 2007, 230.

¹³ BGH NStZ 2007, 230 (233).

¹⁴ BGH NStZ 2007, 230 (233).

¹⁵ Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 460 f.; see also p. 463 ff. on the qualifications of malice that nonetheless do not undermine charges of murder.

¹⁶ BGHSt 3, 264; BGH, 21.6.2007 (Az: 3 StR 180/07), in *Neue Zeitschrift für Strafrecht* (NStZ), 2008, 29.

¹⁷ Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 465.

¹⁸ Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 467.

¹⁹ BGHSt 34, 13 (14); 38, 353 (354).

²⁰ Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 468.

²¹ OLG Düsseldorf, 9.12.2008 (Az: III-VI 5/07).

²² The bottles failed to explode only because of the offenders’ insufficient knowledge of chemistry.

- ²³ OLG Düsseldorf v. 9.12.2008 (Az: III-VI 5/07), Vorwort, S. 2.
- ²⁴ Zöllner also points out in *Terrorismusstrafrecht*, Heidelberg 2009, p. 469 that it was impossible to determine and would have been impossible to control exactly how many passengers were within the area that would have been directly affected by the suitcase bombs.
- ²⁵ BGHSt 2, 60 (62); 50, 1 (8).
- ²⁶ More on these criteria at Zöllner, *Terrorismusstrafrecht*, Heidelberg 2009, p. 472 ff.
- ²⁷ Zöllner, *Terrorismusstrafrecht*, Heidelberg 2009, p. 483.
- ²⁸ The qualifications that § 129a Abs 1 StGB places on § 129 StGB include particularly serious offences such as murder, manslaughter, kidnapping motivated by blackmail, hostage-taking, genocide, crimes against humanity, or war crimes. § 129a Abs 2 StGB also contains a catalog of offences, though these are subject to further qualification as to motive and (possible) consequences. § 129a Abs 3 dStGB deals with making threats of committing the offences listed in Abs 1 and 2. Abs 4 is a provision for ringleaders and background operatives. Under § 129b StGB, § 129a also applies to foreign organizations, such as Al-Qaida: BGH, decision of 10.3.2011 (Az: AK 5/11), in *NStZ-RR* 2011, 176.
- ²⁹ BGHSt 28, 147 (148 f.); 45, 26 (35). The desirability of a Europe-wide harmonized widening of the term is discussed in Zöllner, *Terrorismusstrafrecht*, Heidelberg 2009, p. 524 ff.
- ³⁰ Per BGHSt 27, 325 (327), leadership and direction-setting participation in the formation of the organization.
- ³¹ In the decision in BGHSt 18, 296 (300) defined as integration into the organization, subordination to its will, and engaging in long-term activities in furtherance of the criminal goals of the organization.
- ³² Per BGHSt 32, 243 (244) the support of the continuation of the organization or the achievement of its goals without being a member.
- ³³ The provision covers propagandic activities of non-members whose goal, as the average person to whom the communication is addressed would understand it, is to motivate others to join the organization as members or to motivate others to engage in activities in support of the organization. See Zöllner, *Terrorismusstrafrecht*, Heidelberg 2009, p. 536 and footnotes.
- ³⁴ OLG Karlsruhe NJW 1977, 2222 (2223); Zöllner, *Terrorismusstrafrecht*, Heidelberg 2009, p. 530 f.
- ³⁵ See more examples in Zöllner, *Terrorismusstrafrecht*, Heidelberg 2009, p. 533.
- ³⁶ In BGHSt 51, 345 the court dealt with this term as meaning not just battle waged by one or more terrorist groups, but a whole range of Islamic activities, even if they were not undertaken by terrorist groups.
- ³⁷ BGHSt 51, 345.
- ³⁸ On § 129a see Sinn, *Moderne Verbrechenverfolgung - auf dem Weg zu einem Feindstrafrecht?*, in: *Zeitschrift für Internationale Strafrechtsdogmatik* (ZIS), 2006, p. 107 (109), online at http://www.zis-online.com/dat/artikel/2006_3_18.pdf (accessed on 9.7.2011). On the shifting-forward of criminal liability with respect to terrorism see Bützler, *Die Vorverlagerung der Strafbarkeit am Beispiel der Terrorismusverfolgung aus deutscher Perspektive* in Sinn/Gropp/Nagy (eds.), *Grenzen der Vorverlagerung in einem Tatstrafrecht*, Göttingen 2011, p. 375 ff.
- ³⁹ All introduced by the Prosecution of Preparing Serious Violent Crimes Against the State Act (*Gesetz zur Verfolgung der Vorbereitung von schweren staatsgefährdenden Gewalttaten*, GVVG) of 30 July 2009 (BGBl. I, 2437).
- ⁴⁰ BT-Drs. 16/12428. The background was the failed attacks of the “Sauerland Group” in September 2007.
- ⁴¹ Zöllner, *Terrorismusstrafrecht*, Heidelberg 2009, p. 562.
- ⁴² On the ample evidence of this see Bützler, *Die Vorverlagerung der Strafbarkeit am Beispiel der Terrorismusverfolgung aus deutscher Perspektive* in Sinn/Gropp/Nagy (eds.), *Grenzen der Vorverlagerung in einem Tatstrafrecht*, Göttingen 2011, p. 375 (392); Haverkamp, *Staatschutzstrafrecht im Vorfeld* in Dölling u.a. (ed.), *Festschrift für Heinz Schöch zum 70. Geburtstag*, Berlin 2010, p. 381 (382).
- ⁴³ Crimes against the life of another (§§ 211, 212) or against personal freedom (§§ 239a, 239b) which are, in the circumstances, meant to and capable of compromising the existence or security of a state or an international organization, or to compromise, destabilize, or undermine the constitutional order of the Federal Republic of Germany (§ 89a Abs 1 S 2 StGB).
- ⁴⁴ Agents of contagion, poison, radioactive materials, (liquid) explosives, or particular devices necessary for the commission of the offence being prepared (fuses, for instance). See BT-Drs. 16/12428, 12.
- ⁴⁵ Details in Zöllner, *Terrorismusstrafrecht*, Heidelberg 2009, p. 566 ff.
- ⁴⁶ According to BT-Drs. 16/12428, 12; a view not shared in Zöllner, *Terrorismusstrafrecht*, Heidelberg 2009, p. 581; Gierhake, *Zur geplanten Einführung neuer Straftatbestände wegen der Vorbereitung terroristischer Straftaten* in *Zeitschrift für Internationale Strafrechtsdogmatik* (ZIS), 2008, 397 (404), online at http://www.zis-online.com/dat/artikel/2008_9_260.pdf (as of 9.7.2011); Gazeas/Grosse-Wilde/Kießling, *Die neuen Tatbestände im Staatsschutzstrafrecht* in *Neue Zeitschrift für Strafrecht* (NStZ), 2009, p. 593 ff.
- ⁴⁷ Zöllner, *Terrorismusstrafrecht*, Heidelberg 2009, p. 581; Gazeas/Grosse-Wilde/Kießling, *Die neuen Tatbestände im Staatsschutzstrafrecht*, in: *Neue Zeitschrift für Strafrecht* (NStZ), 2009, 593 (601); Bützler, *Die Vorverlagerung der Strafbarkeit am Beispiel der Terrorismusverfolgung aus deutscher Perspektive* in Sinn/Gropp/Nagy (eds.), *Grenzen der Vorverlagerung in einem Tatstrafrecht*, Göttingen 2011, p. 375 (394).
- ⁴⁸ BT-Drs. 16/12428, 13.
- ⁴⁹ The bases and limits of forward shift are discussed in Sinn, *Vorverlagerung der Strafbarkeit – Begriff, Ursachen und Regelungstechniken* in Sinn/Gropp/Nagy (eds.), *Grenzen der Vorverlagerung in einem Tatstrafrecht*, Göttingen 2011, p. 13 ff.; See also Sieber, *Legitimation und Grenzen von Gefährdungsdelikten im Vorfeld von terroristischer Gewalt* in *Neue Zeitschrift für Strafrecht* (NStZ), 2009, p. 353 ff.
- ⁵⁰ See for instance Radtke/Steinsiek, *Terrorismusbekämpfung durch Vorfeldkriminalisierung? – Das Gesetz zur Verfolgung der Vorbereitung schwerer staatsgefährdender Gewalttaten* in *Juristische Rundschau* (JR), 2010, p. 107 (109); Zöllner, *Neue Straftatbestände zur Bekämpfung des Terrorismus* in *Goldammer's Archiv für Strafrecht* (GA), 2010, p. 606 ff.; *ibid.*, *Terrorismusstrafrecht*, Heidelberg 2009, p. 585 and citations.
- ⁵¹ Zöllner, *Terrorismusstrafrecht*, Heidelberg 2009, p. 586, who rightly points out the additional motive of political security in being able to claim to “have done everything possible” in the event of a serious terrorist attack.
- ⁵² The term appears in Zöllner, *Terrorismusstrafrecht*, Heidelberg 2009, p. 418. See Gercke, “Cyberterrorismus“ – *Aktivitäten terroristischer Organisationen im Internet* in *Computer und Recht* (CR), 2007, p. 62 ff.

⁵³ Even though there are no known cases of successful cyber-attacks, there is some indication of plans for such attacks in the past. See Weimann, *Terror on the Internet*, Washington D.C. 2006, p. 147 ff.; Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 419. At the European level, the Cybercrime Convention (CCC) of 21 November 2001 should be kept in mind; it is discussed by Gercke, *Analyse des Umsetzungsbedarfs der Cybercrime Konvention in Multimedia und Recht* (MMR), 2004, p. 728 ff., 801 ff. This convention has been rejected by the United Nations: see Gercke, *Die Entwicklung des Internetstrafrechts 2009/2010 in Zeitschrift für Urheber- und Medienrecht* (ZUM), 2010, p. 633 (635).

⁵⁴ See for details Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, S. 421.

⁵⁵ But under § 202a Abs 2 StGB only those stored or transferred electronically, magnetically, or in an otherwise not directly readable format.

⁵⁶ Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 422.

⁵⁷ In more detail in Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 423 ff.

⁵⁸ Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 426. There is a further particularly aggravated degree when the offence disrupts the public supply of vital goods or service or compromises national security (§ 303b Abs 4 S 2 Nr 3).

⁵⁹ Criticism from Gröseling/Höfing, *Computersabotage und Vorfeldkriminalisierung - Auswirkungen des 41. StrÄndG zur Bekämpfung der Computerkriminalität in Multimedia und Recht* (MMR), 2007, p. 626 ff.

⁶⁰ The use of the internet as a means of communication is covered in German law by §§ 89a, b and §§ 129a, b StGB. If, however, the offenders break into access-restricted databases to acquire information for the planning or support of their terroristically-motivated violent acts ("hacking"), the use of the internet is as an information source and falls under the offence of data extraction (§ 202a dStGB). See Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 358 ff.

⁶¹ More in Weimann, *Terror on the Internet*, Washington D.C. 2006, p. 30; Hoffman, *The Use of the Internet by Islamic Extremists*, Santa Monica 2006; Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 373.

⁶² All of this is contingent upon German law's jurisdiction over internet offences. See the discussion in Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 431 ff.

⁶³ The statute reads "writings", but §11 Abs 3 StGB makes it clear that this includes representations in electronic form, such as display on a computer screen.

⁶⁴ On individual requirements see Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 379 ff.

⁶⁵ *Terrorismusstrafrecht*, Heidelberg 2009, p. 388.

⁶⁶ Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 393.

⁶⁷ Sinn, *Vorverlagerung der Strafbarkeit – Begriff, Ursachen und Regelungstechniken* in Sinn/Gropp/Nagy (eds.), *Grenzen der Vorverlagerung in einem Tatstrafrecht*, Göttingen 2011, p. 33.

⁶⁸ Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 508; see also Sieber, *Legitimation und Grenzen von Gefährdungsdelikten im Vorfeld von terroristischer Gewalt* in *Neue Zeitschrift für Strafrecht* (NStZ), 2009, p. 353 ff.

⁶⁹ There are no immediately evident and plausible alternatives to §§ 129a, b StGB and the abstract-danger offences. See Zöller, *Terrorismusstrafrecht*, Heidelberg 2009, p. 508 ff.