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DOSSIÊ TERRORISMO

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MARK A. ZÖLLER*

Abstract

In order to be successful, the fight against international terrorism demands for a wide variety of instruments, ranging from the signing of international treaties and a well-balanced foreign policy to preventive measures like development cooperation with financially weak countries. Among these, the role of criminal law is not to be underestimated. Due to its unique legal consequences, like *e.g.* custodial sentences, it can be used to enforce the commandments and prohibitions of a legal system in case other measures and possibilities are failing to do so. An effective and constitutional strategy for combatting terrorism, therefore, always has to rely on the means of criminal law. However, in the ongoing discussion on how to deal with the terrorist threat it is usually taken for granted that terrorism or at least the use of the term is a natural part of the context of criminal law. The following statements are meant to challenge this assumption. They intend to show that the relationship between terrorism and criminal law is being complicated by the fact that we are dealing with two completely different concepts. All in all it has to be pointed out that there is no valid reason for the undifferentiated use of the word “terrorism” in the field of criminal law and criminal procedure so far.

Keywords: Describing terrorism; Terrorism in criminal law; German criminal law.

Resumo

Para ser bem-sucedida, a luta contra o terrorismo internacional demanda uma ampla variedade de instrumentos, abrangendo desde a indicação das ameaças internacionais e uma política para estrangeiros equilibrada até medidas preventivas como o desenvolvimento de cooperação com países financeiramente fracos. Entre esses o papel do Direito Penal não deve ser subestimado. Graças às suas consequências legais únicas, como *e.g.* sentenças punitivas, ele pode ser usado para reforçar os comandos e proibições de um sistema legal caso outras medidas e possibilidades falhem em fazê-lo. Uma efetiva e constitucional estratégia de combate ao terrorismo, além disso, sempre tem que contar com os meios do Direito Penal. Contudo, no progressivo debate sobre como lidar com a ameaça terrorista é geralmente tido como superado que o terrorismo ou pelo menos o uso do termo é uma parte natural do contexto do Direito Penal. Os argumentos seguintes desafiam essa pressuposição. Eles pretendem mostrar que a relação entre terrorismo e Direito Penal vem sendo complicada pelo fato de que estamos lidando com dois conceitos diferentes. De um modo geral, há que se apontar que não há, até o momento, razão válida para o uso indiferenciado do termo “terrorismo” nos campos do Direito Penal e do Direito Processual Penal.

Palavras-chave: Descrevendo terrorismo; Terrorismo no Direito Penal; Direito Penal alemão.

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1 The German legal situation

Just like in many other countries the German legal system neither defines nor uses the terms “terrorism” or “terrorist”. Accordingly, the German Criminal Code (Strafgesetzbuch – StGB) does not regard acts of terrorism or being a terrorist as a criminal offense of its own. The only reference made by the German legislator to the phenomenon of terrorism is made in Section 129a of the German Criminal Code (§ 129a StGB). But even this reference is not to be found in the wording but only in the title of this provision which reads “Forming terrorist organizations”. In short it is a criminal offense under Section 129a StGB to form an organization whose aims or activities are directed at the commission of certain severe offenses like murder, hostage-taking, causing serious physical or mental harm to another person or damaging and destroying property. It is also regarded as a crime to be a member of such an organization, support it or recruit others as members or supporters. And Section 129b StGB broadens the scope of application for this provision to organizations abroad. Therefore, it has to be concluded that the participation in terrorist organizations is punishable under German criminal law regardless of the fact where a particular terrorist group is geographically situated. This is important because today Germany does not have genuine German terrorist groups but is mainly used as an area of retreat and relaxation for Arab and Turkish terrorist organizations.

Thus, the German Criminal Code takes for granted that something like a terrorist organization exists and has to be sanctioned by criminal law. Unfortunately, however, the adjective “terrorist” is being used without defining the correspondent noun “terrorism”. This results in the inconsistency of relying on normative references without identifying the necessary measure of value. By solving the puzzle what “terrorism” means in the context of criminal law the law practitioner in Germany is pretty much being left alone. Not even the latest criminal offenses¹ that have been added to the German Criminal Code in 2009² in order to strengthen the prosecution of preparatory measures for possible terrorist attacks (*e.g.* training in so called “terror camps” in the Middle East) refer to the term “terrorism”. It seems as if the German legislative avoided the term “terrorism” and all possible doubts and discussions regarding its meaning like the plague. Instead it uses the new paraphrase “serious violent offence endangering the state”.³

A first approximation to the current German understanding of terrorism in the context of criminal law can be made by comparing the abovementioned Section 129a StGB to Section 129 StGB which refers to the forming of “criminal organizations”. According to Section 129 StGB a person participating in an organization whose aims or activities are directed at the commission of criminal offenses in general shall be prosecuted for his or her participation in a *criminal* organization. In case the organization aims at the commission of especially *grave* criminal offenses, which are being substantiated in Section § 129a I and II StGB (*e.g.* genocide, murder, manslaughter or arson), it “almost magically” turns into a *terrorist* organization. It, therefore, has to be concluded that – according to German criminal law – a criminal organization can all of a sudden turn into a terrorist organization if the severity of the offenses intended to be or already committed by their members surpass a certain threshold of gravity. In the end this would imply that regular crime and terrorist crime only differ by the seriousness of harm being done or at least intended. But such a result would not match the empiric data on terrorist behavior available so far and turn a blind eye towards the typical intentions and the motives of terrorist offenders. It would especially not be able to explain why most national criminal law systems, including the one in Germany, respond with more intensity to terrorist related crimes and punish terrorist offenders more severely than regular criminals, even though the offenses committed as well as their outcome may be comparable. So, let us take a closer look at the characteristics of a terrorist.

2 The Characteristics of a Terrorist

At first sight, terrorists are just like any other criminal offenders. They commit a wide variety of acts or omissions that are being classified as criminal offenses by the national legislator. Terrorists commit murder or assault other human beings, they damage property, take hostages or tend to the illegal use of weapons and explosives. In this regard they actually are just like all the other criminal offenders. It is, however, their motive and particular agenda that is so special about them and makes an ordinary offender a terrorist.⁴ Terrorism is more than just the fact that people commit serious crimes. It means that these people act in pursuit of their own political, religious or any other ideological objectives. A terrorist wants to induce a certain state of society according to his or her own beliefs and standards. Therefore, in the context of criminal law it would indeed be advisable to avoid the term “terrorism” and speak of “terrorist motivated crime” instead.⁵ Let us take a look, for instance, at an Islamist assassin who places a car bomb at a government building. Of course he or she intends to kill or at least wound as many people as possible and cause severe damage to property. But this does not happen as an end in itself or for selfish reasons rooted in the personality of our assassin. Instead, the Islamist terrorist regularly strives for a certain ultimate goal. This goal is usually to be found in the return to a state of true belief, since this is regarded as the solution for all political, social and economic problems witnessed by him or her in everyday life. Islamist acts of violence regularly aim at the reinstatement of the caliphate, a theocratic form of government based on the traditional Islamic law, the so called *shari’a*. In pursuit of this ultimate goal the terrorists commits *any* crime that seems suitable and necessary to reach this purpose. It therefore has to be stressed that the unique feature of a terrorist cannot be described by objective criteria alone, e.g. the severity of his offenses, the cruelty of his actions or the number of his casualties. It is, instead, his *personal motive* which goes beyond the immediate result of his actions that characterizes him as a terrorist.

A “terrorist motivated crime” is not characterized exclusively by the terrorist’s orientation towards an indirect ultimate goal like for example a certain state of government. To achieve this ultimate goal a terrorist has to reach an important milestone first. This milestone is the *spreading of fear and terror*. This point of view is rightfully being shared by the EU Council Framework Decision of 13 June 2002 on combating terrorism.⁶ Article 1 I states that the acts referred to in points (a) to (i) can only be classified as “terrorist offenses” in case they,

given their nature or context, may seriously damage a country or an international organisation where committed with the aim of seriously intimidating a population, or unduly compelling a Government or international organization to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization.

Through the commission of criminal offenses the terrorist intends to influence the public opinion by means of intimidation. Terrorism – as we all know – is a form of communication⁷ and with experience from the last decades it is safe to say that it is a quite successful communication strategy. The term “communication” is derived from the Latin word “communicare” and means “to share, to inform, to let someone participate in something or to make something common”.⁸ It represents a social act that includes other people. And that is exactly what terrorists do. What they really care about is not the single criminal offense per se but the *communicative impact* and the *inclusion of their audience* in the information about this crime.

To give an example: The car bomb attack on a school bus in Israel or a military convoy of the German Armed Forces (“Bundeswehr”) in Afghanistan as a single event does not have the potential impact to bring

whole states like Israel or Germany down on their knees. With regard to whole states these “pinpricks” lack the necessary military and strategic significance. Usually a terrorist is fully aware of this fact. But through his actions not only does he send the message: “I killed twenty of your schoolchildren or ten of your soldiers!” The terrorist also states that he or the organization he belongs to can strike at any time, at any place and against anyone. Or in short: “Anyone can be a victim at any time.” And all this may happen until all enemies have been destroyed or the ideological goals have been achieved. Thus, the essential message of terrorism to the state and its citizens is the following: “You are not safe!”. And this message is meant to undermine the existing structures of power. Terrorists hope that the government body they fight against will eventually lose its support by the people, as soon as they realize that the state is not capable of protecting its citizens against terrorist acts.

This is the perfidy of modern terrorism. At the same time it contrasts the type of terrorism we have experienced in Germany in the past. Before the rise of Islamist terrorism throughout the western world, Germany had to face another terrorist challenge. From the beginning of the 1970s until the end of the 1990s a national leftist group called “Red Army Fraction (RAF)” was responsible for 34 deaths, countless wounded and billions of Euros in damages to property.⁹ But their agenda and modus operandi were quite clear. The RAF-assassins usually chose their targets and victims with great care. They wanted to hit high-ranking representatives of the political and social system of the Federal Republic of Germany. The killing of the president of the German employer’s organization *Hanns-Martin Schleyer* in 1977 or of *Alfred Herrhausen*, spokesman of the managing board of Deutsche Bank, in 1989 are typical examples for terrorist attacks with a high degree of symbolic value as far as the victims are concerned. In contrast to the traditional strategy of this first wave of terrorism in Germany, the representatives of a modern terrorism in the 21st century, especially the obscure Al-Qaeda network, have been able to take this communication of terror to another level. The strategic concept of modern terrorism includes the victimization of innocent people, i.e. people that have not been involved in the underlying conflict. The goal is not the targeted killing of well-known representatives of the combated structures of power like politicians, prosecutors or financial leaders. In terms of a communication strategy it seems to be much more powerful to destroy the lives of randomly chosen members of the community – people like you and me: passengers of a commercial airplane, commuters waiting at a subway station or customers at a post office. This is communication as well. The message is being sent that nobody is safe and everybody may become a victim. Modern terrorism comes with a significant change of the meaning of the whole concept of terrorism. It displays a shift of perspective from the individuality of the victim to a supra-individual symbolism of the outcome of the respective criminal offense.

3 Why terrorism works

All endeavors to develop a comprehensive strategy to deal with the phenomenon of terrorism by means of criminal law, therefore, have to differentiate between *two separate levels*: the superficial *level of the commission of crimes* and the ulterior *level of communication*. A perfect example for this need to differentiate can be found with the events shadowing the Olympic Summer Games in Munich 1972: A commando of the Palestine Liberation Organization (PLO) entered the Olympic Village, killed two Israeli athletes and took nine others as hostages. After a failed rescue attempt a bloodbath took place at the airport of Fürstfeldbruck during which all hostages and five of the eight hostage-takers were killed. At first sight the whole terrorist action seemed to be an enormous failure. All terrorists had been killed or captured and none of their demands to release 236 Palestinians from Israeli prisons and five inmates in Germany had been met. But on a communicative level the Munich attack turned out to be a sensational success story. The attention of about 6.000 media representatives from all over the world gathered in Munich to report on the Olympic Games was diverted to the situation of the

Palestinian Liberation Movement which had mostly been ignored until then.¹⁰ The extensive media coverage led to an enormous increase in membership numbers for all Palestinian terror organizations.¹¹ And one and a half years later the PLO was even granted as special observer status with the United Nations.

Modern terrorism mainly works due to the fact that we are all living in a globalized media landscape. Terrorists systematically use worldwide operating media like television, newspapers or the internet to multiply their message of terror. They know that the killing of American, British or German soldiers even in far away countries like Afghanistan will be the breaking news in the popular newscasts, newspapers or web forums of the victim's home countries only a few hours later. In the end terrorists fight us with our own weapons, especially our craving for sensation. The worst thing that can happen to a terrorist organization is that no one takes notice of its activities. It should not be forgotten that the extensive mass media coverage of terrorist attacks all over the world takes place for one reason only: the existing demand of the consumers – which is us. Let us – just for a brief moment – imagine that a terrorist attack takes place and no one really cares about its background or the perpetrator's motive. The dead would be buried and mourned, the wounded would be treated and all damages to property would be repaired. The law enforcement authorities would do their job and try to bring those responsible to justice – just like after every other crime. Maybe you would find a short report on page 5 of the local newspaper but no mass hysteria or media hype would be generated. As crazy as it sounds: it would be the beginning of the end of modern terrorism.

4 The problematic term “terrorism”

The explanations so far should already have shown *two reasons* for the fact why many law systems like the one in Germany try to avoid the use of the term “terrorism” in the context of criminal law. First of all, the characteristics of terrorism as a concept are to be found within the *subjective* elements of a crime. This means they are mainly related to the *mens rea* and therefore hard to prove in a court of justice. And second of all, the nature of terrorism is *not a legal concept*. It is rather a communication strategy using criminal behavior for ideological purposes lying outside the field of criminal law.

In addition to this a *third aspect* has to be taken into account, however. This third aspect is related to the problematic term “terrorism” itself. There are good reasons why the UN member states have failed in their countless attempts to adopt a comprehensive definition of terrorism so far and why legions of scholars and legal practitioners have filled a small library trying to define the indefinable.¹² Two main reasons for this terminological uncertainty can be mentioned. The first reason would be the *constant change in the semantic meaning of the word “terrorism”* throughout a 2000 year history of ideologically motivated violence.¹³ While during the French Revolution, the German National Socialism or the Russian Stalinism the reign of terror produced *by the state* was the focal point for the usage for this term, it has been a synonym for *private* violence since the middle of the 20th century. The second reason is to be found in the fact that “terrorism” is a heavily politicized term¹⁴ primarily being used from a victim's perspective.¹⁵ This is a lesson to be learned from the Palestine conflict. Here both parties – Israelis and Palestinians – accuse each other of being terrorists. In our everyday language terrorism is used for the purpose of exclusion. To be named as a terrorist means to be denied the legitimacy of your actions and ideas. Those who are stuck with the label “terrorist” for a significant amount of time suffer from an enormous deficit in social acceptance. Those, on the other hand, who manage to establish themselves as guerilleros, partisans or freedom fighters in the arena of international media coverage will experience a decisive competitive edge in the pursuit of their goals. The often quoted sentence “One man's terrorist is another man's freedom fighter” by former US-President *Ronald Reagan* may still be the best description of this intricate system. Therefore, it can be concluded that the use of the problematic term

“terrorism” in the context of criminal law will almost inevitably impose unclear and politically influenced criteria to legal provisions.

5 Conclusions

The relationship between terrorism and criminal law can best be described by the image of *two intersecting circles*. The commission of criminal offenses is a necessary but not a sufficient condition for terrorist behavior. Most terrorist attacks can easily be captured by the national legal provisions in written criminal codes or common law practice. But terrorism is not a legal concept by nature and therefore goes beyond *actus reus* and *mens rea* as they are usually being defined by the legislator. To capture the essence of terrorism it would be necessary to add further subjective elements to the legal description of the respective crime. These additional elements would be the will to spread fear and terror in order to reach the ultimate ideological goal of the offender. But the question remains if it is really advisable to add such a subjective category to existing elements of crime. The German legislator for example in forming the German Criminal Code has waived this option so far. And there are good reasons for this polite restraint. The essence of what a society considers to be terrorism at a certain time is the combination of certain acts and omissions to an ulterior meaning by an ideological purpose. Therefore it seems to be legitimate not to penalize this ulterior unity of meaning but the single elements instead, *e.g.* killing, assault, damage to property or participation in terrorist organizations. As long as there is no criminal offense called “terrorism” and the term is not being used in the elements of crime of any other offense there will be no need to add additional subjective elements with regard to the phenomenon of international terrorism. In Germany, as mentioned before, the title of Section 129a StGB speaks of “terrorist organizations”. Without a comprehensive definition of the underlying concept of terrorism this remains a structural discontinuity that should be rectified.

But the fact that additional subjective elements of crime do not *have* to be used by the national legislator does not necessarily mean that they *cannot* be used. What could not be done under the rule of German constitutional law would be penalizing just the fact that someone is or might be a terrorist. The German criminal law system is mainly ruled by the principles of a “Tatstrafrecht”.¹⁶ This means that the possibility of punishment is tied to the single action described in the legal elements of the crime. Punishment is seen as a response to the offender’s actions and not to his way of living or the dangers that may be expected from him for society in the future. Under the rule of law and the principle of liability a terrorist can only be prosecuted for his actions and not for his thoughts. The creation of an offense referring to elements of terrorism can only be considered constitutional as long as it keeps a clear distance from any form of thoughtcrime in the sense of *George Orwell’s* 1984. Legislators, therefore, have to pay special attention to the principle of certainty, another important aspect of the rule of law. They would only be allowed to speak of “terrorism” but not of “terrorists” to keep the necessary connection to the *acts* of violence in question. In case they use the term “terrorism” they would also have to deliver a precise and comprehensive legal definition.

This brings us to the final and most important question: *Should* the term terrorism be used in the context of criminal law? In my opinion the answer should be “no”. Even the rise of the islamist terrorism after the 9/11 attacks did not show a desperate need for the creation of new and specific terrorist offenses. The cases that have been tried so far made it clear that with the help of the existing legal provisions in the German Criminal Code or the Criminal Procedural Code terrorist suspects can be prosecuted quite effectively. Terrorism is not a legal term. It may be related to criminology but not to criminal law. It is basically a way of communicating through violence. Using the term terrorism in the context of criminal law will lead to the problem that all uncertainties and all political ballast connected to this concept will be transferred to the field of criminal law as well. But

even the abandonment of this term and the recourse to a more general description of terrorist motivation or subjective characteristics should be treated with the uttermost care. Firstly, because all subjective elements of crime are hard to prove in a court of justice, secondly because the ulterior goal of the offender usually is not a necessary element of the mens rea and therefore an aspect outside the scope of the law and thirdly because a special criminal law for terrorist offenders would do more harm than it could benefit the area of criminal prosecution.¹⁷ If terrorism is some form of communication strategy trying to reach a final ideological goal by spreading fear and terror it will be a bad mistake to react to such a strategy by permanently expending the state of emergency. The sacrifice of basic principles of the rule of law in the fight against terrorism – like a self-fulfilling prophecy – will slowly but steadily create a state of government gaining more and more resemblance to the picture of an illegitimate state that is being painted by the terrorists. Therefore, terrorists should be treated like all other criminals. They are nothing more and nothing less. This does not mean that the subjective characteristics of terrorist motivated offenders cannot be used in court, causing a positive discrimination for terrorists. The fact that an offender was willing to randomly kill innocent people *e.g.* influences the amount of his guilt and therefore the level of his sentence.¹⁸ But this is not due to the fact that he is a terrorist but only because of the general gravity of his wrongdoing. The most powerful weapon criminal law has to offer for the fight against international terrorism is *normality*. It is the quiet belief that the law enforcement authorities will do their best to bring those to justice who bring harm to society, no matter if they are dealing with terrorists, mobsters or petty thieves. It is the calmness in the eye of the storm we have to maintain. Otherwise the terrorists have already won the most important fight against democratic societies.

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Notes

- ¹ Sections 89a, 89 b and 91 StGB.
- ² For further information on the “Gesetz zur Verfolgung der Vorbereitung schwerer staatsgefährdender Gewalttaten (GVVG)“ see e.g. Zöller, *Terrorismusstrafrecht*, p. 562-587; *Gazeas/Grosse-Wilde/Kießling*, NStZ 2009, p. 593 ff.; *Radtke/Steinsiek*, JR 2010, p. 107 ff.
- ³ According to Section 89a I 2 StGB a serious violent offence endangering the state shall mean an offence against life under sections 211 or 212 or against personal freedom under sections 239a or 239b, which under the circumstances is intended to impair and capable of impairing the existence or security of a state or of an international organization, or to abolish, rob of legal effect or undermine constitutional principles of the Federal Republic of Germany.
- ⁴ *Herzog*, Terrorismus – Versuch einer Definition und Analyse internationaler Übereinkommen zu seiner Bekämpfung, 1991, p. 93 ff.; *Cryer/Friman/Robinson/Wilmshurst*, An Introduction to International Criminal Law and Procedure, 2007, p. 290 f.; Zöller, *Terrorismusstrafrecht*, p. 146; *Kühne*, *Schwind-FS*, 2006, p. 103; *Weigend*, *Nehm-FS*, 2006, p. 162; *Sedgwick*, 30 *Studies in Conflict & Terrorism* (2007), p. 99; Zöller, GA 2010, p. 611; *dissenting Symeonidou-Kastanidou*, *European Journal of Crime, Criminal Law and Criminal Justice* 2004, p. 22; Spinellis, *Schlüchter-GS*, 2002, p. 829.
- ⁵ Zöller, GA 2010, p. 611.
- ⁶ OJ L 164, 22.06.2002, p. 4, as amended by the Council Framework Decision of 28 November 2008 (OJ L 330, 09.12.2008, p. 21).
- ⁷ See e.g. *Hoffman*, Terrorismus – Der unerklärte Krieg, 2006, p. 268 ff.; *Pawlik*, Der Terrorist und sein Recht, 12; for more details on the connection between terrorism and communication *Jenkins*, in: Carlton/Schaerf (Ed.): *International Terrorism and World Security*, 1975, p. 13 ff.; *Schmid/de Graaf*, *Violence as Communication – Insurgent Terrorism and the Western News Media*, 1982; *Greenberg* (Ed.), *Communication and Terrorism*, 2002; *Peterleitner*, Terrorismus als mediales Ereignis, 2010; *Shoshani/Slone* 31 *Studies in Conflict & Terrorism* (2008), p. 627 ff.
- ⁸ See the keyword “Communication” at Wikipedia, <<http://de.wikipedia.org/wiki/Kommunikation>>.
- ⁹ *Pflieger*, Die Rote Armee Fraktion, 2. ed. (2007), p. 255.
- ¹⁰ *Cooley*, Green March, Black September: The Story of the Palestinian Arabs, 1973, p. 126; *Hirst*, The Gun and the Olive Branch, 1977, p. 311; *Hoge*, in: Miller (Ed.), *Terrorism: The Media and the Law*, 1982, p. 96; *Hoffman*, *Terrorismus*, p. 119.
- ¹¹ *Schmid/de Graaf*, *Violence as Communication* 1982, p. 31.
- ¹² See – pars pro toto – *Alex P. Schmid*, who already in the first edition of his book “Political Terrorism: A Research Guide” from 1983 examined more than 100 different definitions of terrorism.
- ¹³ For a short history of the development of the term “terrorism” see Zöller, *Terrorismusstrafrecht*, p. 12 ff., 102.
- ¹⁴ *Hoffman*, *Terrorismus – Der unerklärte Krieg*, 2006, p. 15; *Mager*, *Terrorismusbekämpfung zwischen Freiheit und Sicherheit*, 2005, p. 17; *Wandscher*, *Internationaler Terrorismus und Selbstverteidigungsrecht*, 2006, p. 30; *Weigend*, *Nehm-FS*, 2006, p. 151; Zöller, JZ 2007, p. 764.
- ¹⁵ *Schulte*, *Terrorismus- und Anti-Terrorismus-Gesetzgebung*, 2008, p. 18.
- ¹⁶ See *Roxin*, *Strafrecht Allgemeiner Teil*, Band I, 4. ed. (2006), § 6 Rn. 1 ff.
- ¹⁷ For further information on the discussion about the need for a criminal law for enemies of the state (“Feindstrafrecht”) see Zöller, *Terrorismusstrafrecht*, p. 272 ff. with further references.
- ¹⁸ See § 46 StGB.