Articles

Right to Resistance and Terrorism – the Example of Germany

By Georg Gesk⁎

I. Introduction: Paradox in Law

The right to resistance against state power is very often characterized by actions against an existing legal order that is perceived as being unjust and therefore both – illegitimate and illegal. Terrorism, on the other hand, is often defined as politically motivated violence that is prosecuted by state power according to the law and although the terrorist views his actions as being justified by the perceived illegitimacy of state power, the state by itself is not willing to accept such a point of view – henceforth the prosecution. Therefore we can often find situations where both sides claim legitimacy and legality, mutually excluding each other's positions. This situation is only one of many that epitomize and exemplifies the more common problem of paradox in law: any society that aims at harmonizing conflicts through law will find itself in the not so comfortable position that the basic principle of justice – the quest for treating similar things alike – inevitably leads to cases where we have to face a direct conflict of laws. Either one law is just and therefore ought to apply, or the other, but we will not be able to apply both at the same time, since they may turn out conflicting results.

In the realm of logic, it was Goedel's theorem that finished Hilbert's project of turning formal logic into an all-encompassing reason (*Letztbegründung*) of science, since it will produce paradox that it is unable to solve on its own.[1] Therefore formal logic by itself is insufficient to solve the problem of paradox in science. Tarski solved the riddle by introducing two different levels into the paradox and therefore disentangling conflicting propositions (but without being able to recover formal logic as a general, infallible foundation of science).[2]

⁎ Taiwan, Hsuan Chuang University, Department of Law, Associate Professor and Chairman. Email: gexl@hcu.edu.tw.

[1] *See* Kurt Gödel, *Über formal unentscheidbare Sätze der Principia Mathematica und verwandter Systeme I* (On formally undecidable propositions of mathematical principles and related systems I), 38 MONATSHEFTE FÜR MATHEMATIK UND PHYSIK 173-198 (1931).

[2] By differentiating between the levels of object language and meta-language, Tarski had been able to solve paradox in formal logic; *see* Alfred Tarski, Grundlegung der wissenschaftlichen Semantik (The scientific foundation of semantics, 1936), *in* ALFRED TARSKI, COLLECTED PAPERS II (Steven Givant & Ralph McKenzie (eds.) 259-268 (1986).

https://doi.org/10.1017/S207183220001806X Published online by Cambridge University Press

At the same time, jurisprudence created not only one but several methods of solving the problem of paradox in the realm of norms. One of the major advantages of Kelsen's concept of norm hierarchy is its ability to create priorities within a given norm system and thus functioning in a structural way almost exactly as Tarski proposed for the realm of formal logic.[3] On the same trajectory, we see the development of jurisprudence going on and trying to solve the problem of conflicting norms within the same level, i.e. the constitution. A more recent example to avoid the conflict of paradox norms is Alexy's theory of basic rights[4] that tries to put forward other categories to solve the riddle of paradox in norms, such as the degree of affectedness of basic rights, further enhancing prior concepts of core meaning and periphery. Even the tradeoff between absolute effect of human dignity (*Menschenwürde*) and limited scope(s) of applicability of the concept of human dignity within each and every basic human right in more recent judgments of the German constitutional court can all be interpreted as being elaborate means to avoid the occurrence of otherwise unsolvable paradox and therefore to avert paralysis within the execution of state power.[5]

In the case of terrorism, we face a very high potential of paradox situations where we assert the right to resistance (or i.e. in the historical circumstances of China even the right to revolution) on one hand, and combat terrorism against state authority on the other. We can see this contradiction subvert the UN and prevent it from concerted action in the case of Syria[6], we saw this contradiction influencing reactions to the uprisings in Libya and Tunisia, and we see this very paradox being the main stumbling block that prevented the UN from agreeing upon a common and internationally binding framework against terrorism. So in order to find solutions for these pressing issues, it might be worth to have a closer look at situations, where a single legal framework successfully combines right to resistance and anti-terrorist action without blocking itself or losing its credibility.

---

[3] It is noteworthy that Kelsen proposed to avoid norm contradiction through norm hierarchy in 1934, 2 years before Tarski solved the problem of paradox in formal logic; *see* HANS KELSEN, REINE RECHTSLEHRE (Pure Theory of Law) 62 *ff.* (1934).

[4] *See* ROBERT ALEXY, THEORIE DER GRUNDRECHTE (Theory of Fundamental Rights, 1985).

[5] *See* Hans-Jürgen Papier, *Der Schutz der Menschenwürde - Auswirkungen auf die rechtliche Praxis* (The protection of human dignity – impact on legal practice) National Taiwan University Lecture (2011).

[6] Although the General Assembly adopted Resolution 66/253 on 15 February 2012, within this resolution, the UN "strongly condemned" continued widespread and systematic human rights violations by the Syrian authorities' on one hand, whilst calling for all sides to cease bloodshed on the other. It thus reflects the problem of the need for differentiation between the dual notions of prosecution/state terror vs. terror/ resistance. However, this resolution is non-binding; a legally binding condemnation of said 'human rights violations by the Syrian authorities' was rejected in the UN Security Council, due to the double veto by Russia and China on 5 October 2011, and on 4 February 2012; *see* i.e. United Nations Security Council, 6711th Meeting, UN S/PV.6711, available online at: http://www.un.org/ga/search/view_doc.asp?symbol=S/PV.6711 (last accessed: 31 August 2012).

https://doi.org/10.1017/S207183220001806X Published online by Cambridge University Press

Germany had a severe terrorist problem in the 1970s and 80s, but it had never given up on the constitutionally guaranteed right to resistance, thus lending us the opportunity to look for specific ways in dealing with related norms and their application. In the following, this article outlines the German way of dealing with the problem in order to prevent state institutions from a one-sided approach, and thus trying to reassure the public that there is not only room for state led anti-terrorism, but an efficient guaranty for the right to resistance, held and realized by citizens. On this basis, we gain insights in ways to prevent both concepts – terrorism and right to resistance – from becoming an active paradox in law. The result of this strategy is an avoidance of paradox, effectively preventing both arguments to nullify each other. It thus may help us not only to prevent paradox situations in law on a national level, but in international conflicts too. On these grounds, the author puts forward some suggestions that might turn out to be useful in the attempt of the international community to proceed towards formulating ideas for a future UN Covenant on Anti-Terrorism.

II. Constitution and Right to Resistance

Under European law tradition, most scholars that witnessed the Nazi era were not only traditionally assuming that there is some natural or 'supra-national' law as some kind of nebula outside positive law and therefore being of minor importance for reasoning in court, but were actively propagating this thought as being a binding force in positive law once more. According to the concept of supra-national law, there are legal principles and guidelines whose existence is a fact that is out of reach of any given legislature. Because the resistance to fascism found itself very often outside of Nazi-dominated legislatures and therefore outside positive law, especially German society as a whole and German jurisprudence in particular were weary of the possibilities to abuse positive law in the hands of an authoritarian state. Due to that, post-war society was very assertive of supra-national law which is beyond the reach of state legislation. As documents of the 1950s and 1960s show, foundations of such a supra-national law were not only thought as being given in natural law, but in other sources of law as well.[7]

Since legitimate behavior was seen as more than being just legal behavior with national laws as frame of reference, it was nothing but consequent that the German Basic Law (Grundgesetz) wanted to balance any legislation on 'emergency rule' with a 'right to resistance' (Widerstandsrecht) and thereby to prevent any future political leader to repeat Nazi experience and abuse emergency rule to the point where human rights are harmed or outright abolished on a large scale. After WW II, German sovereignty was first executed by the victorious allied powers and then gradually shifted to the emerging German state(s). The three Western parts formed the Federal Republic of Germany in 1949, with the Soviet

[7] *See* WERNER MAIHOFER, NATURRECHT ODER RECHTSPOSITIVISMUS? (Natural law or legal positivism?, 1972).

https://doi.org/10.1017/S207183220001806X Published online by Cambridge University Press

Occupation Zone forming the German Democratic Republic and only in 1991 joining the federation. One major shift in the emancipation of post war Germany was achieved in 1968/69 when the Federal Republic of Germany made provisions for emergency situations and thus made it clear that it had consolidated as a 'democracy able to defend herself' (wehrhafte Demokratie).[8] However, skepticism towards such self-assuring state power prevailed in large parts of society. In order to minimize possible critique, the right to resistance was no longer thought of as a supra-national right, but explicitly included in the Basic Law as Art. 20 IV. According to this provision, 'any German has the right to resist anyone that tries to abolish this [democratic, social and federal] order, if there is no other remedy possible.'

We see here the first part of above paradox coming to life, because the constitution directly confers the right of resistance to state power to its very own citizens. However, literature has much criticized this article[9]. One major objection is that it is obsolete, because in a democratic society, there is no need for resistance, and in a non-democratic society, any right to resistance will be actively denied by state authority. If there is an instance of large-scale political transition towards a different form of governance, either side will claim being legitimate and thus create a situation of non-decidability.[10]

However, development within Germany shows that this norm is not as useless as it might seem. Art. 20 IV Basic Law states that a right to resistance against state power is limited to situations where no other remedies are available, which in fact supposes the democratic state with its forms of political participation, judicial resolution of grievances etc. as already obsolete.[11] In order to show that a political process with the aim of integrating issues onto the political agenda is possible and a right to resistance therefore not (yet) existing, many commentators refer to the right and the freedom to demonstrate when

[8] After the Weimar Republic had not been able to effectively defend herself, the German emigrant Karl Loewenstein (*see* Karl Loewenstein, *Militant Democracy and Fundamental Rights*, *in* 31 AMERICAN POLITICAL SCIENCE REVIEW 417-433, 638-658, 5 BVERFG 85 (1937)) was the first to call for a "militant democracy," this concept of democratic theory was in part implemented in the German Basic Law (see Art. 79 III, Art 20 I, II, Art. 9 II, Art. 18, Art. 21 II; the concept was later vindicated by the German Constitutional Court. For more information, *see* ANDREAS KLUMP, FREIHEIT DEN FEINDEN DER FREIHEIT? (Freedom of the enemies of freedom?), available online at: http://www.extremismus.com/texte/streitbar.htm (last accessed: 31 August 2012).

[9] *See i.e.* Friedrich Schnapp, *Art. 20, Rn. 79*, *in* GRUNDGESETZ KOMMENTAR (Basic Law Comment, Ingo Münch, Philip Kunig (eds.), 6th ed., 2012.

[10] On the paradox of this constitutional provision, *see* Karl-Peter Sommermann, *Art. 20 Abs.4, Rn. 339*, *in* KOMMENTAR ZUM GRUNDGESETZ (Comment on Basic Law) (Hermann Mangoldt, Friedrich Klein (eds.), 2nd ed., 2010).

[11] In this respect, *see i.e.* Scholz on constitutional limits to political forms of strike; Rupert Scholz, *§ 151, Rn. 109*, *in* Josef Isensee & Paul Kirchhof, HANDBUCH DES STAATSRECHTS, VOL. VI (Handbook of Political Rights, Vol. VI, 2nd ed., 2001); similarly, *see* Karl-Peter Sommermann, *Art. 20, Rn. 356f*, *in* KOMMENTAR ZUM GRUNDGESETZ (Comment on Basic Law) (Hermann Mangoldt, Friedrich Klein (eds.), 2nd ed., 2010).

https://doi.org/10.1017/S207183220001806X Published online by Cambridge University Press

discussing Basic Law Art. 20 IV.[12] When doing so, their aim of discourse is to draw a line between legitimate democratic political process and forms of illegal resistance to state power. They assume that the right to demonstration has to be restricted significantly either without pretext or as a consequence to demonstrations that turn sour by being abused by small groups of people in order to pursue an agenda of violence against state authority. Only if harsh restrictions to the right to demonstrate are put into place, a reason for resistance might occur.

If we decode most recent instances of large scale demonstrations and their repression in the Arab world, we find a situation that seems to support the position of German courts and judicial commentaries: as soon as large scale demonstrations against the abuse of state power (regardless if this abuse is a subjective fact in the mind of demonstrators or an objective fact in society) are treated as violations of the public order and therefore suppressed, the reason for resisting state institutions gains power and weight. As in the case of Tunisia, Egypt, and Libya, it has actually led to regime change.

It is therefore wise to link the right to resistance and the right to demonstration and to assume, that a right to resistance is not relevant to the point where it might be implemented in concrete action as long as freedom of expression is guaranteed in the form of freedom to demonstration.[13] As the German example shows, the latter ought to be complemented by the freedom of association, including the right to organize (new) political parties and to engage in free and equal elections. These include social movements that led to the founding of political parties in Germany are i.e. the Green Party. More recently, new and underrepresented views concerning regulation of the Internet led to the formation and electoral success of the so called 'Pirate Party'.[14] The fact, that protest movements like the anti-nuclear power movement had been able to organize themselves not only for a short period of time at the fringes of society, but to create long term networks, to set up political parties, and to enter mainstream politics gives participants in social movements that start outside of established political parties possibilities to influence society in a way they deem right. By doing so, they may introduce issues in parliaments and keep up a political agenda for 30 years. One such issue is nuclear energy, where the

[12] *See* Friedrich Schnapp, *Art. 20, Rn. 82*, *in* GRUNDGESETZ KOMMENTAR (Basic Law Comment, Ingo Münch, Philip Kunig (eds.), 6th ed., 2012).

[13] In order to have a constitutional right to resistance, the German Constitutional Court (Bundesverfassungsgericht) insists upon all other remedies being exhausted (5 BVERFGE 85 (377)), in other words, as long as a right to demonstration exists, there are other remedies, and therefore it is no situation of resistance against state power; further on this, *see* Karl-Peter Sommermann, *Art. 20 Abs.4, Rn. 348*, *in* KOMMENTAR ZUM GRUNDGESETZ (Comment on Basic Law) (Hermann Mangoldt, Friedrich Klein (eds.), 2nd ed., 2010).

[14] The Pirate Party (Piraten Partei) first entered a local parliament (Berlin) on 18 September 2011. Since then, they habve entered other regional parliaments in Saarland (25 March 2012), Schleswig-Holstein (6 May 2012) and Nordthrhein-Westfalia (13 May 2012).

https://doi.org/10.1017/S207183220001806X Published online by Cambridge University Press

German anti-nuclear protest movement had not only helped in creating the Green party, but successfully achieved a multi-party consensus towards the abolition of nuclear power. This result shows that even a rejection of the combined forces of political majority decisions and economic capital interests can be overcome and integrated into existing structures as soon as they have channels to express and to organize themselves. The integration of dissenting ideas into the political decision process made it possible that a majority of protesters did not have to resort to desperate means. It is thus an important success story of the integration of differing social opinions into politics in face of stiff resistance by vested interests.

III. Criminal Law and Terrorism

One very crucial point in solving the potential conflict between political elite and grass-roots developments from turning into broad scale resistance to state power was the distinction between the freedom to exercise the constitutionally guaranteed right to demonstration and criminal prosecution of outbursts of illegal violent behavior. When social movements are to be prevented from being alienated, but being integrated into mainstream society, they are in dire need for expressing their point of view and for creating an organizational platform that might enable them to enter into a dialogue with vested political powers. As the German experience shows, even at times violent demonstrators can integrate into politics as soon as their right to demonstrate is acknowledged. This right has to be guaranteed even if parts of demonstrations are turning into violent outbreaks nurtured by disappointment and alienation of some of their participants. However, in order to keep up with the protection of third party interests and with public order, related instances of violence are treated as criminal behavior and therefore met, opposed and tried by police, prosecutors and courts.

One major problem for state power was not the question of how to react against a criminal act of violating clearly defined values such as human life, property and so on, but how to react to a support infrastructure that made such instances of violence very vitriolic. There was the problem of drawing a line between still legal forms of demonstration, including related organizing and drumming up support, and illegal forms of violent behavior against police, certain objects (or institutions and institutional representatives) of symbolic value. In the case of Germany, protests against government support for the Shah were met with excessive police force[15], leading in some parts to a radicalization of demonstrators to the

[15] One of the protesters of an anti-Shah demonstration was Benno Ohnesorg, who was shot dead by a police officer on 2 June 1967. One outspoken leader of the German student (protest) movement was critically injured by two shots to his head on 11. April 1968. These instances of state violence were answered by an increase in violence on behalf of the protest movement. The first incident that later was interpreted as the starting point of German post-war terrorism is the arson attack on 2 Frankfurt shopping malls on 2/3 August 1968. For links between the German protest movement and the growing problem of German terrorism in the late 1960s, *see* Rudolf Walther, *Ein direkter Weg von der Spassguerilla zum Terrorismus?*,BUNDESZENTRALE FÜR POLITISCHE BILDUNG,

https://doi.org/10.1017/S207183220001806X Published online by Cambridge University Press

conclusion that they crossed the point where resistance to state authority was necessary. The use of excessive force by persons that were seen as being linked to the 'state apparatus' created a climate, where radical elements advocated the need for 'fighting back', not only vis a vis some individual perpetrators, but against the state itself. Thus a terrorist movement formed and posed a major threat to German state power and society for at least two decades.[16] In the wake of this home grown German terrorism, the German legislator supplemented the German Criminal Code (Strafgesetzbuch, StGB) with provisions against terrorism. While violence against persons, institutions, and other objects are punishable regardless of their connections to any terrorist group, prosecution as a mere reaction to severe damage was perceived as being too late. When terrorists aim at influencing public through violence, any violence that achieves a certain degree of intended destruction is a success in the eyes of the terrorist. So in order to prevent society from harm and to deprive terrorists of their subjective communicative success, criminal prosecution had to start earlier. It was on these reasons that new provisions were introduced into the StGB, turning the mere organizing of a group with terrorist aims into a criminal act and thus facing up to the threat to public security that arises before any acts of violence are actually committed. Again it was the historically disparate evolution of terrorist threats in Germany and abroad that led to a parallel normative structure later on: todays § 129a StGB aims at dealing with terrorism in the interior and was in its current aim introduced into the StGB in 1976, while § 129b StGB is directed at countering terrorism abroad and was introduced in 2002, in part constituting a common European reaction to the events of 9-11.[17]

When § 129a StGB was first introduced into German criminal law[18], it was directed at members of illegal political organizations. In order to commit a crime, somebody had to participate in organizations that had first been formally established by its members and later formally been dissolved via court order. Obviously, potential targets of this article had not been terrorist organizations working clandestine and trying to hit the public out of the

---

DEUTSCHE GESCHICHTE NACH 1945 (2008), available online at: http://www.bpb.de/geschichte/deutsche-geschichte-nach-1945/68er-bewegung/51795/spassguerilla-terrorismus?p=0 (last accessed: 31 Augsut 2012); Die 68er Bewegung, *Interview with Gerd Langguth*, BUNDESZENTRALE FÜR POLITISCHE BILDUNG, DEUTSCHE GESCHICHTE NACH 1945 (2007), available online at: http://www.bpb.de/geschichte/deutsche-geschichte-nach-1945/geschichte-der-raf/49198/die-68er-bewegung?p=2 (last accessed: 31 August 2012).

[16] The last remnants of the most important German terrorist group – the so-scalled RAF (Red Amy Faction) – announced itself dissolved on 20 April 1998, almost exactly 30 years after the attempted assassination of Rudi Dutschke and the arson attacks at Frankfurt. *See* Wolfgang Kraushaar, DAS ENDE DER RAFBUNDESZENTRALE FÜR POLITISCHE BILDUNG, DEUTSCHE GESCHICHTE NACH 1945, http://www.bpb.de/geschichte/deutsche-geschichte-nach-1945/geschichte-der-raf/49302/das-ende-der-raf (last accessed: 31 August 2012).

[17] *See* ABl EG Nr. L 164, at 3; for a more comprehensive illustration of the subject matter, *see* JAVIER ARGOMANIZ, THE EU AND COUNTER-TERRORISM – POLITICS, POLITY AND POLICIES AFTER 9/11 (2011).

[18] BGBL I, 739 (30 August 1951).

https://doi.org/10.1017/S207183220001806X Published online by Cambridge University Press

veil and cover of secrecy, but political parties that had engaged in serious acts of anti-constitutional, violent behavior. This version proved an ineffective tool against politically motivated violence and hence was abolished[19] without any substitute. A first version of an article dealing with terrorist violence as we know it nowadays was introduced into German Criminal Law on 18./20.09.1976. After Germany experienced a wave of serious criminal attacks against public officials by the so called Baader-Meinhof/RAF group, it became apparent that activists exposed due to their hits on certain targets were only part of the problem and that all these activists had to rely upon an infrastructure of support, may it be financial, logistical, informational, or of any other kind. Therefore, the German legislature saw it necessary to introduce legal provisions that allowed for curbing not only upon the terrorists themselves, but upon the terrorist environment too.

Within chapter 7 of 'crimes against public order', the German legislator added related provisions directly after forbidden membership in criminal gangs. Systematically this position shows that Germany treats terrorist groups as a special kind of criminal gang. German legal commentaries point out, that the question of whether a gang is classified as an ordinary criminal gang or as a terrorist group depends upon their level of criminal activity.[20] If they aim at committing serious crimes listed in § 129a StGB, they are a terrorist group, in case they aim at less violent crimes, they are a common criminal gang. To put it in other words, whilst Art. 129 StGB prosecutes the participation in any gang that aims at committing crimes, Art. 129a StGB tries to deal with gangs that show a far more severe criminal potential[21]. Although § 129a II StGB insists upon a specific terrorist intent and is therefore different to § 129 StGB (organizing of a criminal gang)[22], the only semantic occurrence of 'terrorism' is in the headline of this article.[23] Any reference at political aims, i.e. the intimidation of the public, or coercion of institutions through of announcing future violent action etc. is restricted to § 129a II, III StGB, which means §129a I StGB stating the 'organizing of a gang that aims at murder…. is to be punished by 1 to 10 years of imprisonment' is applicable to anybody and does not deplore on any specific political etc. intent. It is therefore totally sufficient to organize a gang and to aim at murder, abduction etc. in order to get punished on reason of committing a crime according to § 129a StGB I.

[19] BGBl I, 593 (5 August 1964).

[20] *See* Thomas Fischer, *§ 129a, Rn 5*, *in* STRAFGESETZBUCH UND NEBENGESETZE (Penal code and by-laws, 58th ed., 2011).

[21] Some authors explicitly explain the nature of § 129a StGB as being an aggravated form of crime (*Qualifikationstatbestand*) when compared to § 129 StGB; *see* Matthias Krauß, *§ 129a Rn. 2*, *in* STRAFGESETZBUCH – LEIPZIGER KOMMENTAR (Penal code— Leipzig commentary, Heinrich Wilhelm Laufhütte, Ruth Rissing-van Saan & Klaus Tiedemann (eds.), 2009).

[22] *See* Jürgen Schäfer, *§ 129a, Rn. 2, 57f*, Münchener Kommentar zum Strafgesetzbuch (Munich Commentary on the Criminal Code, Wolfgang Joecks, Klaus Miebach (eds.), 2012).

[23] Criticizing this header with its focus on political motivations as being misleading, *see* Thomas Fischer, *§ 129a, Rn 2*, *in* STRAFGESETZBUCH UND NEBENGESETZE (Penal code and by-laws, 58th ed., 2011).

https://doi.org/10.1017/S207183220001806X Published online by Cambridge University Press

On the other hand, § 129 StGB just states that organizing a gang that aims at committing crimes without further specifying any specific crimes shows, that we find a structure where both articles can be used alternatively with the only difference being the intended crime.

Apart from successfully carrying out murder, abduction, or other forms of serious crimes, the mere intent of doing so may already qualify for organizing a terrorist organization. According to the original version of § 129a II StGB in 1976[24], any group aiming at committing such crimes may qualify as a terrorist group; any participation in such a group – regardless of whether crimes had been carried out or not – is in itself punishable. Even supporting such a group without being a member oneself is punishable[25]. According to the importance of relevant members, the degree of punishment varies from 6 months to 5 years of prison for common members and from between 5 to 10 years of prison for leading figures within the group.

This article was frequently revised. The first two of all in all 7 subsequent changes[26] were merely technical in nature since they kept up with changes in references to other parts of the German Criminal Code. A substantial amendment came into effect on 01.01.1987[27], when the framework for more severe sentences was introduced (1 to 10 years of prison for ordinary members, at least 3 years of prison for leading figures). Before that date, assistance to and promotion of terrorist activities was part of the notion of membership in a terrorist group. However, due to the fact that terrorism in Germany changed face and grew into a form of decentralized terrorism that was kept alive by a field of sympathizers that did offer support, but refrained from directly participating in severe criminal activity, instances of assistance to and promotion of a terrorist group was put into an extra passage (§ 129a III StGB); punishment of related activities was kept at the pre-reform level of 6 months to 5 years of prison. The next reform[28] was once again merely keeping up with changes in references to other articles of the German Criminal Code. Parallel to the introduction of the so called Law on Crimes against Peoples (Völkerstrafrecht), new revisions took place[29]; crimes that had been previously dealt with inside the framework of the German Criminal Law were specified further and moved to special legal provisions. The

[24] BGBl I, 2181 (18 August 1976).

[25] For a distinction of member and supporter in context of § 129b StGB that follows parallel lines of argumentation but asks for international involvement, *see* Christoph Safferling & Timo Ide, *Prosecuting Terrorism Financing in Germany: Bundesgerichtshof* (German Federal Court of Justice), Judgment of 14 August 2009 – 3 StR 552/08, *in* 11 GERM. L. J. 1296 *ff.* (2010), available online at: http://www.germanlawjournal.com/index.php?pageID=11&artID=1298 (last accessed: 31 August 2012).

[26] BGBl I, 373 (28 March 1980); BGBl I, 393 (13 April 1986).

[27] BGBl I, 2566 (19 December 1986).

[28] BGBl I, 164 (26 January 1998).

[29] BGBl. I, 2254 (26 June 2002).

next step was a further criminalization of the terrorist environment, since the drive for recruitment of members and peoples assisting terrorist activities was defined as a separate crime (§ 129a III StGB).[30]

The current version of § 129a StGB passed legislation on 28.12.2003.[31] This piece of German legislature is a direct reaction upon the terrorist attacks on the World Trade Center in New York.[32] The definition of what comprises terrorist activities (and is therefore punishable by law) was widened once again. Even the attempt at organizing a terrorist group with the aim of intimidating political institutions, may they be national or international, or intimidating the – largely unspecified – public through threats of serious terrorist attacks was defined as a separate crime, punishable with 6 months to 5 years of prison (§ 129a III StGB).

As a consequence, we see a legal definition of terrorist groups, that does not aim at violent acts already committed, (since these are subject to already existing penal provisions), but targets the terrorist environment with its organization, logistics, and support structure at a much earlier stage in order to prevent them from actually carrying out any attack. The notion of terrorist crimes as formed by § 129a StGB differentiates between the degree of involvement, the function within the organization, the intention in terrorist activities, and the type of target. It is therefore rather consequent that § 129a StGB is larger than the average of crimes listed in the German Criminal Code.[33]

Another very important feature of § 129a StGB is the focus of its definition of terrorism: the only important feature is the level and intent of violence, but originally there is not any reference to political aims of a terrorist gang. This non-political definition of terrorism reveals its advantages when we consider the difficulties of law enforcement agencies on the ground. They don't have to make political judgments in order to decide upon the question as to when taking action against a group that is suspect of organizing very serious

[30] BGBl I, 3390 (22 August 2002).

[31] BGBl I, 2836 (28 December 2003).

[32] In order to implement changes decided by the European Council, the actual amendments of § 129a StGB were promulgated by the German legislature within the 'Gesetz zur Umsetzung des Rahmenbeschlusses des Rates vom 13. Juni 2002 zur Terrorismusbekämpfung', which is a referral to the 'Council Decision on the implementation of specific measures for police and judicial cooperation to combat terrorism'; *see* BGBl I, 2836 (22 December 2003), compare ABl EG Nr. L 164, at 3.

[33] For a comparative study upon changes and statistical features of changes within German Criminal Law, *see* 葛祥林 (Georg Gesk), *法安定性與社政變遷之調和 - 德國刑事法規百餘年的立法政策* (The Balance between Legal Stability and Socio-Political Change – German Criminal Law after more than a Century of Legislative Policy), Research Paper, NSC 90-2414-H-002-009 (2002).

https://doi.org/10.1017/S207183220001806X Published online by Cambridge University Press

crimes. In most cases the problem of political prosecution does not occur at all, because a terrorist group is by definition a group that qualifies due to its violence, not due to its political thoughts, be they mainstream or not. During the 1970s and 80s, it was rather helpful that the German legislator had decided to exclude any political factor from the definition of terrorism, therefore it was in most cases not necessary to deplore on terrorist ideology in the courtroom, neither had there been any ground for terrorists to convince the public that German judiciary did enact cases of political persecution, a fact that relieved much pressure from police, prosecutors, and judges. It was therefore crucial for the active and effective guaranty of the right to demonstration to carve not into pressure of political condemnation, but to stick rigorously to a factual definition.[34] As a consequence of this attitude, it does no difference if a criminal gang (i.e. a drug gang) is indulging in police killings in order to intimidate institutions responsible for holding up public security and to get a free hand in dealing with their illegal business, or if a guerilla group tries at advancing extremist ideas by instigating public fear and killing police. Both groups are collective forms of premeditated murder and thus qualify as terrorist groups under § 129a I StGB. Only when deciding upon the severity of punishment, a judge may ask for the motives of a criminal act and thus give some room for political considerations. However, at this stage of a criminal trial, the principle decision of whether an action under consideration constitutes a crime or not has already taken place. Political considerations thus only influence the relative length of a prison term, but not the absolute question of whether an action qualifies as a crime or not.

This strict non-political line of the German legislator had to be abandoned as a consequence of the international reaction to the 9-11 attacks. The EU as a whole and Germany in particular had to realize that national institutions of criminal law enforcement are often in lack of relevant legal provisions when a terrorist group (ab)uses German territory to plan attacks abroad.[35] In the double absence of there being no prior criminal

[34] In order to give just one example of the conflict of criminal law on one hand and behavior that is subjectively perceived as being committed in good faith on the other hand, we may have a look at a special form of demonstration: civil disobedience accounts as a crime as long as an action violates values that are protected by criminal law. In all those cases, the prosecutor is not interested in matters of faith, but in holding up social order. This 'blindness' towards political or religious commitment is no suppression and no violation of fundamental human rights as long as there are legal ways to address related issues. For critique of and limits to civil obedience as a realization of the right to resistance, *see* Josef Isensee, *§ 13, Rn. 84*, *in*, Handbuch des Staatsrechts Vol. I (Handbook of Political rights, Vol. I, Josef Isensee & Paul Kirchhof (eds.), 1995).

[35] Since criminal prosecution depends upon having reasonable evidence for suspecting somebody has committed a crime, any case that is related to abroad will pose natural barriers for prosecuting suspects on the very fact that much of criminal evidence is located out of reach of national law enforcement agencies. In other words, since national law enforcement agencies are in lack of reasonable evidence, not even an investigation can be opened. Therefore transfer of criminal evidence, cross boundary definitions of crimes, as well as cross boundary cooperation of law enforcement agencies are essential in alleviating respective dangers. For a discussion of related issues, *see* Davide Casale, EU Institutional and Legal Counter-terrorism Framework, *in* 1(1) DEFENCE AGAINST TERRORISM REVIEW 49 *ff.* (2008).

behavior and being in lack of any potential national target, suspects and potential terrorists can hide in a cocoon of 'legal' behavior in a host society that makes interference from institutions of law enforcement rather complicated. Since criminal law is first of all national law, it protects only legal values (*Rechtsgüter*) inside national territory.[36] As an exception, legal values outside the sovereign territory have to be explicitly mentioned in order to receive criminal law protection. Therefore it was previously possible to threaten societies and institutions outside Germany without getting into conflict with German police, prosecutors, and courts. The introduction of § 129b StGB[37] on 22.08.2002 tries to solve this problem, since it explicitly extends the applicability of §§ 129, 129a to groups operating abroad, thus allowing prosecution of terrorist groups that are not targeting victims or objects within Germany, but in Europe or even outside Europe. However, terrorist activities outside the European Union are only subject to prosecution if they qualify as actions within strictly defined normative limits, or if the German Ministry of Justice explicitly approves of such action.[38]

The limitation of prosecution of persons that form an internationally operating terrorist group is worth a second look: in principle, any crime of §§ 129 or 129a StGB that is committed abroad may be prosecuted. However, unless perpetrators commit actions within Germany, or harm German citizens abroad, or are Germans by themselves, or have their whereabouts in Germany, their prosecution must be approved by the Ministry of Justice. To put it the other way round, if a foreigner lives in Germany and plans violent crimes against foreign nationals that are intended to be committed outside of Germany, the case does not necessarily have to be prosecuted, but needs approval by the German Ministry of Justice. Prosecutorial authorization may be granted for special cases, or for specified groups, for actions committed in the past, or for actions that are planned in the future. According to § 129b StGB, the Ministry of Justice has to consider whether or not the state power opposed is respecting human dignity, or whether or not related terrorist activities are harming the peaceful coexistence of peoples, when considering such approval.[39] This leaves the door open for an attitude of laissez faire (or even of actively

[36] Therefore, §§ 5 and 6 StGB only speak of the applicability of German Criminal Law on actions committed abroad and directed against national legal values (§ 5) or violating internationally recognized universal values (§ 6). However, since the UN has not succeeded in signing and enacting an international covenant on counter terrorism, applicability of § 6 (9) is very limited.

[37] BGBl I, 3390 (22 August 2002).

[38] *See* in this volume, the contribution of Bernhard Kretschmer, *Criminal Involvement in Terrorist Associations – Classification and Fundamental Principles of the German Criminal Code Section 129a StGB*, 13(9) GERM. L.J. (2012).

[39] It is noteworthy that German criminal law has an important complement to §129b StGB, the so-called 'Völkerstrafgesetzbuch' (Law on Crimes against Peoples). Although the defendants Ignace Murwanashyaka and Straton Musoni had conspired and participated in mass murder and therefore qualified under § 129b I as members of a terrorist organization committing serious crimes, they were indicted according to the Law on crimes against peoples; concerning the law on crimes against people, *see* in general, CHRISTOPH SAFFERLING, INTERNATIONALES STRAFRECHT (International criminal law, 319 *ff.* (2011); concerning the indictment of Ignace

https://doi.org/10.1017/S207183220001806X Published online by Cambridge University Press

supporting groups) in cases where state power shows large-scale disrespect for human rights. One of the more recent examples for such non-interference with the planning and execution of non-state power that is directed against a government are the cases of Tunisia and Libya.[40] Another example of a national conflict where state government and large numbers of citizens, calling for democratic reform, are unable to regain mutual trust and where the Ministry of Justice might consider non-prosecution of the planning of violent attacks on state institutions is Syria.[41]

In early 2011, mass demonstrations with calls for democratic development evolved in Syria. Despite opposition to the existing regime was for months insisting upon peaceful acts of resistance such as demonstrations etc., many participants and organizers of demonstrations and other forms of civil obedience found themselves victims to state suppression.[42] In order to strengthen possibilities of democratic change, many Western states called on one hand for a strengthening of non-violent actions, on the other hand for a better organization of Syrian political opposition in exile, leading to the forming of a so called 'Syrian National Council'[43]. With a UN peace initiative – the so called 'Annan plan' –

Murwanashyaka and Straton Mussoni, *see* http://www.zeit.de/gesellschaft/zeitgeschehen/2011-05/ruanda-kriegsverbrecher- (last accessed: 31 August 2012).

[40] Tunisia, as well as Syria, are both states where recent large scale uprisings against a corrupt and at times undemocratic regime resulted in the over through of the existing regime and a subsequent attempt at organizing a more democratic form of government. In both cases, European governments were first relatively slow in their reaction. However, in the case of Libya they later even actively sought UN and NATO support for resistance against a Libyan regime that tried to militarily crush peaceful demonstrators and their grassroots organizations, thus not only respecting armed resistance as being a legal form of getting rid of an oppressive regime, but actively supporting it; *see i.e*. UN Security Council, Operation Unified Protector: Protection of civilians and civilian-populated areas & enforcement of the No-Fly Zone - October 2011, 8 UN Security Council Resolution 1973, §§ 4 (2011), available at: http://www.nato.int/nato_static/assets/pdf/pdf_2011_10/20111005_111005-factsheet_protection_civilians.pdf (last accessed: 31 August 2012).

[41] While isolated media reports on the US facilitating arms smuggling into Syria are hard to verify, US Secretary of State did confirm to finance communications equipment of the Free Syrian Army, thus directly supporting armed opposition against violent oppression of dissent by the Syrian government. In such a situation, it might be counterproductive if Germany treats organizing of violent resistance in Syria being equivalent to organizing a terrorist group; *see* Reena Ninan, *Hillary Clinton Says Syrian President Assad 'Must Go,'* ABC NEWS (1 April 2012), *see* http://abcnews.go.com/Politics/secretary-hillary-clinton-syrian-president-assad/story?id=16049737#.T_DGH_W6odQ (last accessed: 31 August 2012).

[42] Concerning non-violent action in Syria and state repression, *see i.e*. Al Jazeera and agencies, *Fresh violence hits Syrian towns*, AL JAZEERA (30 April 2011), available online at: http://www.aljazeera.com/news/middleeast/2011/04/20114309234489989.html (last accessed: 31 August 2012).

[43] The Syrian National Council was formed on 23 August 2011, in Istanbul as an umbrella organization of most Syrian opposition groups; *see i.e. Opposition unite behind Syrian National Council*, BBC NEWS (28 March 2012), available online at:

http://www.bbc.co.uk/news/world-middle-east-17533651 (last accessed: 31 August 2012).

failing[44], it became apparent that some western states were facilitating arms smuggling to the armed 'Free Syrian Army' and thus implicitly vindicating that the Syrian people have a right to resistance against an oppressive regime that was named as culprit in numerous acts of mass killings of civilians. In this situation, Western support of an opposition that in some parts resorts to violent acts of resistance may fit into foreign policy considerations and therefore constitutes an exception to prosecuting groups that organize themselves with the goal of pressuring foreign institutions by taking violent action or by threatening violent action. It thus may constitute an exception in accordance to § 129b StGB last sentence.

IV. Terrorism vs. State-Terrorism?

This leads us to the question of how to differentiate between illegal terrorism and legitimate resistance to state power on an international level. The question ought to be put exactly in a contrary way: when is state power against its own citizens justified and when does it step over the line and turn into acts of state terror? When looking at the German context, we find that most authors will agree to the notion, that NS legislation between 1933 and 1945 had the aim of distorting law in order to turn it into a means for racial etc. suppression. In the case of the East German totalitarian state (German Democratic Republic, GDR), courts went to great lengths in order to show, that perpetrators were guilty under both legal systems, thereby implying that GDR laws were not in their entirety a means to suppress people, but were selectively abused in order to achieve the goal of pressuring citizens into compliance with non-democratic forms of governance.[45] This shows how courts draw out differences in the evaluation of state power suppressing democratic opposition and as a consequence may have to deal with differences in argument when facing suspects that claim acts of violence against state power are justified since they constitute a lawful resistance to a non-democratic government.

In the same line of argument, we find worrying questions when looking at conflicts happening in front of our eyes and in part with German/NATO etc. participation. When the armed struggle of the 'Taliban' (with the assumption that at least a part of the political

[44] For adoption of the so-called Annan peace initative, *see* UN 2042 (2012); for UN assessment after the failing of this plan on the ground, *see* the report of the Secretary-General on the United Nations Disengagement Observer Force of 5 June 2012 (S/2012/403).

[45] For parallel application of both West and East German law in one case (and therefore the vindication that East German law had been recognized as law with legitimate binding force), *see* in general, KLAUS MARXEN & GERHARD WERLE, GEWALTTATEN AN DER DEUTSCH-DEUTSCHEN GRENZE (Violence in German-German border), Vol. 2-1 XXXVII *ff.* (2002); for application in a concrete case, *see i.e.* LG Berlin (527) 2 Js 26/90 Ks (10/92), *in* KLAUS MARXEN & GERHARD WERLE, GEWALTTATEN AN DER DEUTSCH-DEUTSCHEN GRENZE Vol 2-2 (Violence in German-German border) 568, 573*ff*. (2002).

https://doi.org/10.1017/S207183220001806X Published online by Cambridge University Press

fundamentalist movement in Afghanistan is genuine Afghan and not of Pakistani origin) is directed against a regime, that was accused of vote fraud and showed at least (past) tolerance for cruel treatment of prisoners, the latter being in part committed by allied foreign powers, it might be misunderstood as a of legitimate form of resistance against an oppressive regime. Only the fact that the Taliban had been much worse saves the West from further questions to the subject; better having imperfect elections than no elections at all.

In the case of Syria, World opinion seems to be far more divided: at a time when we face widespread reports of killings of peaceful demonstrators, at a time when we see any fact finding mission from the outside being seriously hampered or totally forbidden at all[46], we had difficulties for quite a while in determining, if these killings constitute acts of state terror. So the question that arises is whether it is legitimate for the Syrian opposition to face repeated acts of serious violence against civilians committed by state power with armed resistance. For Germany, this is a clear situation where state authority may tolerate organizations to call for violence against foreign institutions and not to prosecute them for supporting a terrorist organization. To put it into the language of the § 129b StGB: mass killings of civilians by Syrian institutions show so much disrespect for human rights and leave so little hope for peaceful development of democratic forms of government, that resistance by the Syrian opposition (that fits the definition may be justified and prevent things from getting worse. When looking at the Syrian situation, we find political power not allowing political dissent for a long time. Because of this inability to voice dissent without facing indiscriminate killings, peaceful demonstrations and acts of state violence resulted in a development that is at the brink of all out civil war. Obviously, the Syrian government's claim that demonstrators and people related to civil disobedience are terrorists, disregarding the law shows, how the official Syrian definition of terrorism is in lack of independence from political judgments and political interference; opposing opinions had not been integrated into existing political power structures. The peaceful integration of mass protests into a political process of forming a new political party did not happen.

Still, the criteria of whether a terrorist group may be exempt from prosecution as lined out by § 129b StGB seems to be problematic. The legal norm does not state more than the interdiction to harm 'basic values of a state order that respects human dignity'. Related norms do not comment on how to asses or how to verify 'respect for human dignity'. It does not outline what kind of 'basic values' are protected internationally to a degree that

[46] Syria agreed to the Arab League deploring a monitoring mission to Syria on 19 December 2011 and suspended this mission on 29 January 2012, due 'to the critical deterioration of the situation'. *See* BBC News Middle East, *Syria FM: We weren't playing for time*, available online at: http://www.bbc.co.uk/news/world-middle-east-16246286 (19 December 2011), and *Arab League halts Syria mission*, available online at: http://www.bbc.co.uk/news/world-middle-east-16778534 (28 January 2012), BBC NEWS, available online at: http://www.bbc.co.uk/news/world-middle-east-16778534 (last accessed: 31 August 2012).

justifies cross-boundary prosecution, neither does it explain whether there are acceptable degrees of infringing upon such 'basic values'. Although the anti-government protests in Tunisia, Libya, and Egypt had been successful in obliterating previous regimes and installing publicly elected governments, we still have no clear concept or measurement for assessing a situation where disrespect for human rights by a repressive government is so obvious that suppressing opposition abroad is no longer justified.

But it is not only law that offers little help in solving this riddle – politics also does not offer much to solve related questions. The UN Security Council is most of the time held up in deadlock with one or more members opposing outspoken resolutions. It seems as if legal principles and taboos concerning sovereignty are more important than the livelihoods of faraway people.

At this point it is worth reconsidering Art. 20 IV German Basic Law[47]: as long as a state is not able or not willing to guarantee the right to peaceful demonstration in cases of controversial topics, there might occur a scenario where resistance against state power – with all the means that might be necessary in a given context – can obtain the predicate of 'legitimate' action. We see the classic situation of legitimate self-defense against violent crime like robbery put on a level that allows for self-defense against abusive and violent state authority.

V. Due Process of Law as a Means to Entangle Terrorism and State-Terrorism

If we are to overcome related problems, we have to draw a very clear line between illegitimate terrorist violence and legitimate state authority. The fact that actions are committed by state institutions or by members of such institutions does not prevent such actions from becoming acts of terrorism only because they can lay claim to the execution of state power (otherwise no revolution – neither the American one, nor the Chinese one – might ever be able to claim legitimacy for herself). So if we are to distinguish acts of violence and claim that a distinct act of violence is a terrorist act committed by a state and by those who act on its behalf, we have to acknowledge that such an act of violence can be opposed by anyone with any means. Otherwise, if there is no undue execution of state power, which means the execution of state power is legitimate, only non-violent opposition may be allowed. Therefore, any international agreement on terrorism has to take a stance on this second level of definition and make clear, what situations justify (even violent) resistance to state actions. Since state action is never legitimate per se only because we face an institutional subject, we have to put forward criteria different from

[47] *See* Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany), available online: http://www.bundestag.de/bundestag/aufgaben/rechtsgrundlagen/grundgesetz/index.html (last accessed: 31 August 2012).

https://doi.org/10.1017/S207183220001806X Published online by Cambridge University Press

just citing a subject with institutional (state) qualities. Instead we see state power in the need of explaining itself and show in what ways it is effectively restricting itself so human rights are guaranteed.

One of the most striking reasons for monopolizing power in the hands of state institutions was the assumption that state building will result in a legal framework, preventing anarchy of both, citizen and the state alike, and thus committing institutions to act in accordance to the law. As long as state institutions are bound by law, the problem of the arbitrariness of execution of power can be solved. State institutions that have to answer questions concerning their legitimacy are not free to do as they like, but have to reason and to defend their actions vis-a-vis other institutions and a larger public. Criminal law with its monopoly on the power to punish and to act retroactively upon violations of individual and collective rights or interests has a long-standing tradition within this discourse. There are only a very few other fields of knowledge that can trace their discourse concerning limits to arbitrary state action longer than criminal law. One of the first instances where this discourse became relevant to criminal law on the one hand and to constitutional law on the other was the English Magna Charta with its limits to arbitrary detention.

In order to distinguish criminal law from revenge, criminal law judiciary has developed ever more sophisticated institutional guarantees that try to balance the public interest in effective prosecution of crimes with a set of procedural guarantees of the accused. To name only a few: the presumption of innocence until proven otherwise, differentiation of judicial institutions in the dual powers of judge and prosecutor, all the elements of the Miranda clause etc., they all try to curb on arbitrary execution of state power. So if we are to prevent the 'war against terror' to turn into a combat of violence and counter violence that will end with no moral distinction between both sides (since both sides use covert actions, do not reveal the reasons for choosing certain targets, do not justify their actions through procedures that can be reconstructed by neutral observers (like courts), and do not allow for any reasoning between both sides), we have to try and reintroduce actions against terror on an international scale into a framework of due process. This due process cannot be limited to nationals living abroad, but has to comprise anybody that becomes a terrorist suspect.

VI. Possibilities for International Guaranties of Due Process

So if we want to push forward for a draft version of an international covenant of anti-terrorism, we have to consider material law as well as procedural law.

First, on the side of material law, we have to limit international measures against terror to more serious forms of crime. Any material definition of terrorism may try to parallel the

https://doi.org/10.1017/S207183220001806X Published online by Cambridge University Press

German StGB Art. 129a[48] with its definition of terrorism as an aggravated form of gang violence. In order to minimize political interference on the international level, we should be able to apply relevant norms with as little political considerations as possible. Therefore it might be wise to take an approach that does exclude any reference to political aims in its definition of terrorist actions or terrorist violence. This will relieve much pressure when dealing with mass demonstrations and forms of so called 'illegal gatherings'. As long as these forms of expressing ones opinion in public or of organizing members with similar views are non-violent, they have to be allowed regardless of any ideological or religious considerations. Nobody has the right to violate the right to life just because a victim does not share a certain point of view or a certain belief. If we think of the most recent example of the Arab uprisings against their autocratic rulers, we can state that nobody can expect the international society to call anybody a terrorist because he or she tries to make him- or herself heard – either on the internet or in demonstrations etc.

In continental European law, the right to resist infringements to one's own rights or to the rights of a third party is always a reason to legitimize violations of rights to others. If we face a robbery, we are legally entitled to defend ourselves. As the German Basic Law states in Art. 20 IV,[49] the same right has to apply against state terror. However, this demand of material law will not be fruitful for any draft, unless we can come forward with a procedure to assess situations of self-defense against state action. We might differentiate between two different sets of accusations: on one hand state institutions and state power is opposed via the exercise of democratic rights, on the other hand, state institutions and state power is opposed by violent actions.

As long as a so-called suspect is adhering to democratic forms of discourse, we have to deny such a case may be connected in any way to terrorism. Unless demonstrators or political activists advocate for severe forms of political discrimination, racism etc. and thus put themselves outside any democratic discourse, even a call for a new constitution has to be tolerated as a legitimate form of political participation. A restrictive material definition of terrorism that refers only to the respect of human rights and omits an endorsement of a specific political agenda might therefore solve some of the related problems.

In case somebody claims he has a right to defend himself against state power and has therefore the right to take even violent action, we have to consider procedural reciprocity in international affairs. We cannot adjudicate a claim of self-defense unless we can see what happened prior to a suspect terrorist action. As long as we consider it being part of 'internal affairs' to determine if demonstrations or state violence are legitimate forms of

[48] *See* Strafgesetzbuch (German Criminal Code), available online at: http://www.gesetze-im-internet.de/stgb/ (last accessed: 31 August 2012).

[49] *See* Grundgesetz für die Bundesrepublik Deutschland, *supra* note 47.

https://doi.org/10.1017/S207183220001806X Published online by Cambridge University Press

executing rights or power, the international community may try to ignore the problem. But once a terrorist suspect moves to another country or plans, organizes, and commits terrorist actions from abroad, we have to find a solution. In such cases, it will be necessary for states that want terrorists prosecuted abroad, or that ask for extradition, or that want to execute their own law in lawless swathes of failed and semi-failed states, to allow international inspections of the human rights situation on the ground. It will be hard to convince the international community that a state is a victim and not abusing its power as long as this state does not allow for independent investigations of alleged crimes. Such an investigation should not be understood as a call for foreign interference in the matters of sovereign states, but as a means to increase international credibility and accountability. Only when some states are confident enough to not fear their institutions will fail international scrutiny, other states will face the fact that their oppressive actions are neither tolerable nor legitimate if seen from an international perspective.

Another major obstacle to procedural justice is the lack of common ground between the terrorist and the state he opposes. Since neither side trusts the other and both reciprocally do not acknowledge any legitimacy of the other side, they are not able to cooperate in any legal procedure. The terrorist denies the jurisdiction of the court and the state does not accept limits to its power of pursuing terrorists. If the terrorist accepts the court, he has to deny the legitimacy of his struggle at least to a certain degree; if the state accepts procedural limits, it fears any procedural rights will be abused to obstruct justice and instrumentalize legal procedures for advocating terrorist ideals. The German national answer to this problem was the separation of the right to defense on one hand and the personal relationship between accused and lawyer on the other hand. Whenever a lawyer was suspected of serious collaboration with terrorist suspects and therefore becoming at least close to being a member of a terrorist gang, the judiciary had been able to break up the defense team and appoint a 'neutral' defense lawyer. In case of international terrorism, this might be a blueprint for introducing an international defense institution that acts as a safeguard for the procedural rights of the accused. So even if a jihadist does not see the need for a judicial process, since he is wanting to fight and kill 'infidels' and expects himself to be elevated to heaven in case he is killed, we should have more options than a simple shoot and kill where ever and whenever we can. At the same time, we can prevent the defense team from colluding with the accused in a criminal way and therefore to harm public interests for a second time.

VII. Conclusion: Proposals for a UN Covenant on Anti-Terrorism

If we sum up the above, we can put forward the following key points for a future UN covenant on Anti-Terrorism: the crime of international terror is any action by a person that aims or commits murder, serious harm to others, commits rape, abducts innocent persons or threatens to do so, when the attacker prepares any such action from outside the

https://doi.org/10.1017/S207183220001806X Published online by Cambridge University Press

targeted state and claims to have a moral obligation to do so. No religious, racial, or ideological reasons can legitimize the above crimes.

Further, if suspects claim to act in defense against serious abuse of state power, they will not be treated as terrorists on an international level but as innocents, unless this claim is refuted by an independent international inquiry. A state that denies an international inquiry into allegations of serious abuse of state power is barred from pursuing terrorists on an international level. Any prosecution of terrorists that does aim at court action in the country that engages in prosecution has to get approval by an international anti-terror organization. Unless an independent defense team has contributed to the decision of an international anti-terror organization, such organization cannot give approval to any action against suspected terrorists. Bilateral agreements between states can provide for different procedures, but they cannot be extended beyond the contracting states.

https://doi.org/10.1017/S207183220001806X Published online by Cambridge University Press