Antiterrorismus: The German Experience with Politically Motivated Violence

James I. Nelson
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In arriving at the decisions that we are now forced to make, we shall be guided by only one objective: the continued well-being of our country in a shared and free world. It is around this that everything revolves.

German Chancellor Gerhard Schroeder**

I. Introduction

Terrorism experts, an apparently huge class of individuals if their ubiquitous presence on television screens is any indication, tell us that terrorists lurk everywhere. On occasion, we are instructed that the threat is statistically insignificant and that we should go about our daily business in much the same way as we did prior to the attacks of September 11, 2001. The best perspective, as in most cases exhibiting extreme and contradictory perspectives, lies perhaps somewhere in the middle.

The United States has encountered terrorism on many occasions and in a wide range of incarnations. For the first time, however, Americans are confronted with an immediate and pervasive threat at home that originates from a foreign source. The nation's political leaders,

* The author spent the first two and half decades of his life in Germany. He experienced first-hand many of the security measures enacted at U.S. military facilities in Germany during that time, particularly in the wake of the RAF assassination attempt of General Kroesen and the retaliatory air strikes against Libya in response to that country's sponsorship of a bombing in Berlin. Most surreal is the memory of heavily-armed and Kevlar-wearing soldiers—detailed for the task from nearby Mannheim—guarding over his high school prom at the Heidelberg castle. The author holds the M.S. in International Relations with a specialization in international security studies.

** German Chancellor Gerhard Schroeder, Address to the Bundestag (German Federal Parliament) (Sept. 19, 2001) (translated by author).

accompanied by the above-mentioned experts and media pundits, are, at the time of this writing, engaged in the consideration of an expansive range of measures designed to, it is hoped, effectively counter future terrorist threats. Some critics warn that the proposed tactics do not go far enough to address the threat, whilst others caution that the constitutional rights and civil liberties that form the very foundation of America are threatened by the suggested measures.²

This comment does not purport to offer “correct” answers to the prevailing uncertainty; instead, it urges the reader to learn from the examples presented by the experience of one of the closest allies of the United States, the Federal Republic of Germany. Germany, unfortunately, has a wealth of experience in contending with the phenomenon of terrorism. There too, both foreign and domestic actors and groups have perpetrated this insidious form of violence. The measures taken by Germany have been incremental, arising in response to actual and perceived threats, and, as evidenced by realities on the ground, they have ultimately been quite effective. There is much to be learned from the German experience in terms of addressing which measures present the greatest likelihood of success.

The approach undertaken here is to address, initially, the inescapable query of what actually constitutes terrorism. Phrased differently: when is an act of violence terrorism and when is it not?

² A number of measures initiated by and/or implemented at the behest of the Bush administration have sparked debate. Three of these measures stand out: the widespread detention of individuals suspected of possibly having a part in the events of September 11, 2001 or information pertaining thereto; the decision to permit federal authorities to monitor conversations between suspected terrorists and their attorneys; and the Executive Order that permits secret military trials of suspected terrorists. The following excerpt, relating to detentions, illustrates the type of concerns revolving around these and other, similar issues:

It is unknown whether the detainees are considered conspirators in the worst act of terrorism in U.S. history, valuable witnesses or merely people who might have information because they crossed paths with the terrorists responsible for the deaths of about 5,300 people Sept. 11. A senior federal law enforcement official involved in the investigation, speaking on condition of anonymity, says the detention of material witnesses and others is “pushing the envelope” of civil liberties. The source says some people are being detained based on circumstantial evidence and held for a week or longer without legal representation or permission to contact family members. “Some of these people have done nothing more than give someone a ride in their car,” the official says. Defenders of the government’s tactics say authorities are doing the best they can under the law as they investigate an emotionally charged and complex case that is without precedent. Attorney General John D. Ashcroft said on ABC’s “Nightline” Oct. 11 that the government’s actions are consistent with the framework of law that we operate under.”

From that vantage-point, Section III considers the history of terrorism in Germany and the motivations of the terrorist actors that have operated there. Section IV presents an overview of the German legal system and the philosophical underpinnings of Germany's approach to counter-terrorism.

Section V then undertakes to address the central aspect of this comment: the German response to terrorism. This entails examination and analysis of a number of factors that include: the country's counter-terrorism laws and policy framework; the organization and coordination of resources; and governmental oversight and review. Section VI builds upon this framework in considering Germany's involvement and cooperation with international initiatives geared towards combating terrorism. European Union ("EU") and United Nations ("UN") initiatives have been the primary vehicles for Germany's cooperation in this arena and will be considered accordingly.

Section VII studies the contemporary state-of-affairs. Part and parcel thereof is consideration of the changing face of terrorism and a summary of Germany's newest counter-terrorism measures. Section VIII concludes this comment by offering a few suggestions, prognostications, and final observations.

II. What is Terrorism?

The study of terrorism has been described as "a huge and ill-defined subject [that] has probably been responsible for more incompetent and unnecessary books than any other outside the field of sociology . . . [i]t attracts phonies and amateurs as a candle attracts moths."3 These thoughts accurately reflect the fact that rational and pragmatic dialogue concerning terrorism is a rare occurrence. The topic has been sensationalized, mystified, and politicized by policymakers and the media; the latter's behavior, as a group, sometimes crosses boundaries of journalistic ethics and good taste and the former, as a group, too often utilize the phenomenon as a vehicle for unrelated components of their political agenda. The subject is ill-defined because so many definitions have been offered, with few proving to be satisfactory.4 Despite efforts to arrive at a broadly accepted definition of terrorism, consensus has

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3. V.S. Pisano, Contemporary Terrorism and the West, OCCIDENTE, Summer 1993, at 28 (photocopy on file with author) [hereinafter Contemporary Terrorism].
4. See NOEMI GAL-OR, INTERNATIONAL COOPERATION TO SUPPRESS TERRORISM 1 (1985). German Law does not define terrorism, but a working definition provided by German government officials states that terrorism is the permanent fight for political goals and change to the political system through assaults against persons and property. See GAO, infra note 56.
never been achieved. This may not appear to be an unlikely result in the international community, but, surprisingly, the same difficulty frequently manifests itself in homogeneous regions, as well as within states. In the United States, for example, various agencies have independently established different criteria to identify the occurrence of a terrorist event. The perceptions, and objectives, of an actor attempting to formulate a definition of terrorism directly influence the content and scope of that definition. The detached academic will likely attempt to provide a more scientifically precise meaning than an agency leader who has thoughts of increased funding or a national leader of a developing country concerned with strengthening a fragile hold on power against a threatening opposition group.

Perhaps the most accurate way to "define" terrorism is to give consideration to the qualities that characterize it. A functional definition might be proposed at the outset: politically motivated criminal violence perpetrated by clandestine groups or by clandestine means. Thus, one

5. See Contemporary Terrorism, supra note 3.
6. See id.
7. The United States Department of Defense defines terrorism as "the calculated use of violence or the threat of violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological." See The Terrorism Research Center, The Basics of Terrorism, at http://www.terrorism.com/terrorism/bpart1.html (last visited Oct. 15, 2001). The United States Department of State adheres to the definition provided in 22 U.S.C. § 2656f(d), where terrorism is defined as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience." That definition is further refined by the description of "international terrorism" as "terrorism involving citizens or the territory of more than one country." See U.S. DEP'T OF STATE, 2000 PATTERNS OF GLOBAL TERRORISM, available at http://www.state.gov/s/ct/rls/pgtrpt/2000/ (last visited Oct. 15, 2001).
8. When first affording attention to the subject of terrorism, people are often surprised at the lack of agreement over precisely what behavior constitutes "terrorism." There are a number of reasons for this absence of consensus, three of which are particularly important. First, given its pejorative connotation, the term terrorism elevates what may be a routine crime to a dire social problem, or relegates what may be a legitimate political movement to the fringes of society. Secondly, by affixing the label "terrorist" to a group or category of behavior, a government increases its power by virtue of the phenomenon that citizens tend to be more amenable to heavy-handed governmental tactics when they perceive such tactics as a response to terrorism. Otherwise unacceptable measures—such as curtailed civil liberties—are suddenly acknowledged to be a necessary evil because they are designed to combat an even greater evil. On the intra-governmental level, the heads of agencies or departments have come to realize that terrorism is a "golden goose": associating a mission with counterterrorism equates to the influx of funds for the agency or department. Relating to this tendency is a third factor, a pervading lack of precision that serves to complicate matters, as in the case of using the term terrorism to describe what drug traffickers do to society. See JONATHAN R. WHITE, TERRORISM: AN INTRODUCTION 5, 6 (2d ed. 1998).
9. Telephone Interview with Dr. Vittorfranco S. Pisano (B.A., Fordham University; Dott. di Giur., University of Rome; Master of Comparative Law, Georgetown
encounters characteristics such as political, criminal violence, clandestine, and groups. The central tenet of such an attempt at a definition is the requirement that political objectives comprise the basis of the definition. Criminal violence can be seen to be an essential component as it stands in juxtaposition to the legitimate or lawful use of force.\textsuperscript{10} Clandestinity, both in the organizational respect and in the sense of the acts committed by the terrorist group, is an important variable in that it underscores the difference between the terrorist group and others who seek political change. Terrorists who plan and operate under cover are quite different than the sometimes violent political factions that are prepared to act in the open or the disgruntled mob that is collectively drawn into violent behavior.\textsuperscript{11} The last important aspect of this definition is that terrorist acts are committed by groups.\textsuperscript{12} Notwithstanding the case of Timothy McVeigh, should one choose to characterize the Oklahoma City Bombing as the work of a single person, individuals acting on their own should not be considered terrorists since the goal of bringing about and playing a central role in political change or upheaval is quite beyond the reach of a solitary actor. Put simply, terrorism is an activity practiced by movements in the pursuit of political power; the larger the group, the greater its effectiveness.\textsuperscript{13}

This approach to defining terrorism is similar to that adopted by the United States Department of Defense (“DOD”). The DOD definition of terrorism is “the calculated use of violence or the threat of violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.”\textsuperscript{14} A possible criticism of the DOD definition is the distinction made between political and religious or ideological motives. While religion or ideology may be manipulated by the terrorist, it is debatable that these factors, rather than primarily political objectives, form the ultimate raison d’être for the terrorist group.\textsuperscript{15}

\textsuperscript{10} Id. (“When a military force or police agency makes use of violence it does so with a legal mandate; the violence committed by a terrorist group in pursuit of its political aims is not sanctioned in any legal sense, hence it is criminal.”)

\textsuperscript{11} Id.

\textsuperscript{12} Id.

\textsuperscript{13} Id.

\textsuperscript{14} See The Basics of Terrorism, supra note 7.

\textsuperscript{15} See generally White, supra note 8, at 5-9.
Most definitions leave unsaid an important evolutionary dynamic that must also be present. Terrorist movements have at their genesis a radical or revolutionary subculture that provide individuals with the desire, ability, and means to exploit political, social, historical and/or religious grievances. The existence of such a subculture gives rise to subversive agitation that, in turn, gives birth to a terrorist group itself.

III. Terrorism in Germany

The year 1968 marked the advent of terrorism in Germany. Terrorism in Germany was the result of a gradual, decade-long evolution. At its source was the importation by young Germans of American pop-culture and its tenets of young rebellion. This rebellion was magnified by college-aged German radicals who became an outspoken protest movement that, ironically, had perceived U.S. injustices as its biggest grievance. Violence became a mode of expression when these increasingly militant radicals subordinated the value of human life to the importance of their political beliefs. Part and parcel of these beliefs were hostility towards the U.S. military presence in Germany and the “cyclic revival of the ecological, anti-nuclear, anti-

17. Id.
18. See White, supra note 8, at 190. On April 3, 1968, the founders of the Baader-Meinhof gang, the progenitors of the Red Army Faction (“RAF”), set fire to two department stores with incendiary bombs. These individuals, ideologues of the left and students at the Free University of Berlin, had previously relied upon the student protest movement and group confrontations with police to express their political beliefs. Id.
19. See generally Schura Cook, Germany: From Protest to Terrorism, in TERRORISM IN EUROPE 154-78 (Yonah Alexander et al. eds., 1982).
20. See id.
21. See id.
22. See id.
23. V.S. Pisano, Terrorism in Western Europe, in TERRORIST DYNAMICS: A GEOGRAPHICAL PERSPECTIVE 66 (V.S. Pisano, ed., 1988) [hereinafter Terrorism in Western Europe] (photocopy on file with author). At the height of the Cold War, more American soldiers were stationed in Germany than in any other European country. Pisano emphasizes that the American targets of the RAF stood out:

In 1972, the RAF bombed the U.S. Army V Corps Headquarters in Frankfurt, killing one person and injuring 13, and the U.S. Army European Headquarters (USAREUR) in Heidelberg, killing three persons and injuring five. In 1981, it bombed the U.S. Air Force European Headquarters in Ramstein, injuring 20 persons, and fired a Soviet RPG-7W rocket launcher in Heidelberg against the armored limousine of General Frederick Kroesen, the USAREUR Commander-in-Chief, slightly injuring him and his wife. In 1984, it bombed U.S. military installations in Frankfurt, Wertheim, Wiesbaden, and Mannheim. In 1985, near Wiesbaden, it murdered U.S. Army SP4 Edward Pimental to obtain his military identification card and bombed the U.S. Air Force base in Rhein-Main, killing two persons and injuring eleven.
military, pacifist movement.”

As the activities of the Baader-Meinhof Gang grew in both frequency and gravity, the German government focused upon the threat that the group presented to the safety of the populace; German law enforcement agencies were subsequently able to effectuate a series of arrests of key members of the terrorist group. Notwithstanding these arrests, the group, now called the Red Army Faction (“RAF”), demonstrated a remarkable resiliency, as evidenced by continuing bombing attacks. The RAF’s activities were carried forth via the replacement, in the field, of the imprisoned leaders, but also by virtue of the fact that the incarcerated members of the group were able to continue to exert an influence over activities from within the walls of their specially constructed prisons. It was later realized that the attorneys who represented the imprisoned terrorists and who frequently paid them visits were conveying orders to RAF subordinates on the outside in addition to smuggling contraband materials into the prison.

In 1977, allies of the RAF, who were comprised of ideologically similar groups and individuals, from both Germany and neighboring European countries, hijacked a commercial airliner and executed the pilot. Soon thereafter, the RAF itself kidnapped and murdered Hanns-Martin Schleyer, a prominent German industrialist. These and other similar actions were of immense importance in the German government’s struggle against terrorism as they served to unequivocally turn the vast majority of public opinion against left-wing terrorist groups operating in Germany and other European countries. The targets in the RAF’s ongoing campaign included: “judges and prosecutors, political figures, businessmen, and government officials, as well as property of

24. See id. at 64.
25. See White, supra note 8, at 191. Andreas Baader and Ulrike Meinhof were amongst those arrested; prior to their apprehension they renamed their group the Red Army Faction. Id.
26. Id.
27. Id.
28. Id.
29. See Terrorism in Western Europe, supra note 23, at 65. Pisano notes that RAF members saw themselves “as the elitist vanguard of the proletariat [that] condemn[ed] revolutionary spontaneity, adopted a rigid [organizational] structure, stress[ed] long-range operational planning, and tend[ed] to be highly selective in their choice of targets.” Id.
31. See White, supra note 8, at 191. White explains that, prior to this series of attacks, RAF “members were painted [by the media and various propaganda outlets] as misunderstood romantics of the revolutionary left.” The acts of violence perpetrated in 1977 and later, “exploded” that image. Id.
symbolic nature.\textsuperscript{32}

In addition to the RAF, German left-wing terrorism also manifested itself in the form of the June 2 Movement and the Red Cells (a.k.a. \textit{Rote Zellen}, or RZ).\textsuperscript{33} The three groups operated independently until 1980 when the June 2 Movement was absorbed by the RAF.\textsuperscript{34} The RAF’s ability to recuperate from setbacks stemming from successful law enforcement efforts was due in large part to the structure of the organization. This structure has been characterized as having had “three membership tiers: legitimate citizens, active terrorists, and jailed members,” with the group having been “cemented by legitimate members who maintain[ed] contacts between those in jail and those conducting operations.”\textsuperscript{35}

In the early 1980s, the frequency of RAF actions decreased and the group entered into a drawn out period of decline that was punctuated by intermittent acts of violence.\textsuperscript{36} By 1985, the group faced extinction.\textsuperscript{37} Perhaps in recognition of this fact, the group attempted to revitalize itself by exclusively targeting NATO interests and via the staging of hunger strikes by imprisoned members.\textsuperscript{38} These measures and others, such as forging alliances with left-wing terrorists in other European states, ultimately proved unsuccessful.\textsuperscript{39} In 1992, the RAF issued a “peace proclamation” that heralded the end of the group’s nearly twenty-five year period of violence.\textsuperscript{40}

The RAF’s diminishing activity in the 1980s was compensated for by the aforementioned Red Cells, a group that never established ties with the RAF.\textsuperscript{41} Both groups existed at the extreme left of the political spectrum, yet the two differed significantly in their core beliefs,\textsuperscript{42} with

\begin{itemize}
  \item \textsuperscript{32} See Terrorism in Western Europe, supra note 23, at 66.
  \item \textsuperscript{33} See White, supra note 8, at 191.
  \item \textsuperscript{34} See id.
  \item \textsuperscript{35} Id. at 192 (citing Hans-Josef Horchem, \textit{Terrorism in West Germany}, in CONFLICT STUDIES 186 (1986)).
  \item \textsuperscript{36} Id.
  \item \textsuperscript{37} Id.
  \item \textsuperscript{38} White, supra note 8, at 191.
  \item \textsuperscript{39} Id.
  \item \textsuperscript{40} Id.
  \item \textsuperscript{41} See Terrorism in Western Europe, supra note 23, at 67.
  \item \textsuperscript{42} See generally David Schiller, \textit{Germany’s Other Terrorists}, TERRORISM 9, 1987, at 87-99. Schiller explains that the members of the Red Army Faction had as their inspiration Marighella-style leftists. These individuals held that Latin American revolutions would take place in urban environments and be effectuated via popular revolt. The revolts were to be triggered by violent acts conducted by underground operatives, thereby obviating the need for the larger scale guerilla-style tactics claimed indispensable by revolutionaries such as Ernesto “Che” Guevara. Carlos Marighella was the most well-known advocate of this approach. Marighella, initially a Brazilian public office holder and the leader of that country’s communist party, became renowned as a revolutionary terrorist leader who was killed by Brazilian Police in 1969. Marighella’s two major
the Red Cells often denouncing what they perceived to be the RAF membership’s intellectual arrogance. Unlike their high-minded counterparts, the Red Cells sought support from the lower rungs of society (i.e., the urban poor and the unemployed). The Red Cells differed markedly from the RAF in organizational structure (part-time members, with regular jobs and sans police records, existing in loosely affiliated cells), tactics (greater frequency of attacks geared at symbolic property rather than persons), and objectives (to serve as a catalyst for a popular uprising). Given these differences, the group presented an entirely different challenge for Germany’s legal and law enforcement communities. The zenith of Red Cells’ activity came in the late 1980s, but they too proved unable to survive beyond the early 1990s.

Right-wing terrorism has not proven to be a significant problem in Germany. Neo-Nazi or rightist terrorist attacks have taken place since the early 1980s, including a number of murders, but they have been infrequent and the groups perpetrating the attacks are characterized by their lack of organization and their tenuous nature. This relative absence of right-wing terrorism in Germany should not be misunderstood to mean that right-wing violence does not occur on a regular basis in Germany. Xenophobic violence, directed at immigrants and Gastarbeiter (foreign laborers) is certainly on the rise in Germany, particularly since the German reunification and largely as a result of, for example, the misplaced resentment of unemployed and undereducated youths. This behavior, akin to mob violence when committed by two or more individuals is not, however, “terrorism.”

works were For the Liberation of Brazil and The Minimanual of the Urban Guerilla, two titles that had a tremendous influence on later generations of terrorists.

43. See White, supra note 8, at 191.
44. See Schiller, supra note 42, at 87-99.
45. See Terrorism in Western Europe, supra note 23, at 67.
46. Id. at 68. One of the few groups that had to be reckoned with was the Militaer Sport Gruppe Hoffman (Military Sports Group Hoffman). This group was founded by a man named Karl Heinz Hoffman in the late 1970s and was defined by the devotion of its members to a strict regime of intensive military training. Hoffman, accompanied by fifteen of his followers, traveled to Beirut, Lebanon, in 1979 where they received terrorist training from the former leader of Black September. Upon their return, the group murdered two German citizens; in response, the German police immediately went into action against the group and, in short order, arrested most of its members. As a result of those arrests, and more that followed, the group became defunct by the mid-1980s. See White, supra note 8, at 198.
48. In making this point, the initial remarks concerning the definition of terrorism are raised. The definition for terrorism proposed at the outset is instructive: politically motivated criminal violence perpetrated by clandestine groups or by clandestine means.
While the vast majority of terrorist violence in Germany has stemmed from domestic left-wing sources, the country has also been the scene of international terrorism. In their heyday, groups like the RAF were thought to have links with foreign groups beyond the boundaries of Europe, but these links were widely considered to be difficult to initiate and maintain due to "linguistic differences, diverse environmental conditions, geographical distances, communication gaps, frontier-crossing problems, identity documents requirements, and overall logistical and financial considerations." When connections were discovered to exist, they tended to be ones of ideological solidarity, shared political objectives, intelligence sharing, logistical support, and/or training. Operational cooperation between a German terrorist group and one from beyond the periphery of Europe has not manifested itself to any appreciable degree.

Germany, however, has been forced to contend with terrorist attacks committed unilaterally by groups from parts of the world beyond Europe, particularly from the Middle East, the Magreb, and Eastern Europe. The most horrific attack was undoubtedly the seizure and subsequent murder of Israeli athletes at the 1972 Munich Olympics by members of Black September, a Palestinian group.

IV. Overview of the German Legal System

Germany's Grundgesetz, or Basic Law, serves as the country's constitution. The country is administered via a federalist system in which authority is shared by the centralized federal government and the sixteen Laender, or states. Not unlike federal agencies in the United States, Germany's parliamentary government features a variety of federal ministries responsible for the provision and oversight of a wide array of...
government services. As in most parliamentary governments, the executive branch plays the dominant role in matters of policy-making, with selected members of the legislative branch also serving in the chancellor’s cabinet.

The primary German approach to contending with individuals accused of terrorist violence is to prosecute suspects for the commission of acts that violate general criminal laws, such as murder, arson, kidnapping, or hijacking, rather than specific “terrorist” offenses. Legislation geared specifically towards terrorism is mainly of a proactive nature; it tends to be designed to empower law enforcement and to facilitate procedural efficiency in the state’s efforts against terrorism.

Germany’s Laender do not have their own criminal or criminal procedure laws, but they rely solely on the German Criminal Code and the Criminal Procedure Code, which are both federal laws. As such, German criminal law is characterized by uniformity and is quite different from that found in the United States, where, in addition to federal criminal law, each of the fifty states has its own criminal law. With the exception of the Bundesgerichtshof (Federal Supreme Court of Justice), an appellate court, all relevant German criminal courts are those of the respective Laender.

57. See id. As the chancellor is also the head of the majority political party, the majority faction in the parliament does not independently guide the formulation of policy to any appreciable extent. Id.
58. See id. The GAO report cites the rationale for this approach provided by officials in Canada, where terrorist acts are treated in like fashion: “treating terrorism as ordinary crime removes the political element and thereby dilutes the effectiveness of the terrorist act.” Id.
60. See Krey, supra note 59, at 593.
61. Id. Unlike the United States Supreme Court, Germany’s Bundesverfassungsgericht (the Federal Constitutional Court) does not hear final appeals; that function is one reserved to the Bundesgerichtshof. Germany’s Basic Law limits the Bundesverfassungsgericht’s jurisdiction to constitutional issues (i.e., questions concerning the Basic Law). See Library of Congress, supra note 54. While several hundred local courts, the Amtsgerichte, deal with minor criminal offenses, it is the regional courts, the Landesgerichte, that initially hear weightier criminal matters—such as those related to terrorism. At the next level are the state appellate courts, the Oberlandesgerichte, which also have original jurisdiction in cases of treason and anti-
Citizens are guaranteed certain civil rights and liberties via the Basic Law and federal statutes; for example, the police are prohibited from subjecting suspects to physical abuse, torture, drugs, deceit, and hypnosis.\(^\text{62}\) If an individual is arrested, he or she must be afforded an appearance before a judge within twenty-four hours of arrest, at which time the judge must either issue an arrest warrant, wherein the basis for the arrest is specified, or else order the police to release the person from custody.\(^\text{63}\) If the judge issues an arrest warrant, the suspect may then identify a person whom the authorities must notify of the arrest.\(^\text{64}\) Though a person accused of a criminal offense is entitled to free access to legal counsel, this right, as is further discussed below, has been curtailed somewhat where the individual is suspected of having committed terrorist violence.\(^\text{65}\) As in the United States, criminal trials are public matters and individuals are protected against double jeopardy.\(^\text{66}\)

V. Germany's Response to Terrorism

The response of the German federal legislature to terrorism has evolved in a gradual and incremental manner. As discussed above, in prosecuting those accused of committing terrorist violence, primary reliance is placed upon general criminal statutes. Notwithstanding this practice, a number of important laws have been enacted since the early 1970s that specifically target the particular dangers presented by terrorists.

A. 1974 Ergaenzungsgesetz zum 1. Strafverfahrensreform-gesetz.\(^\text{67}\)

The Ergaenzungsgesetz zum 1. Strafverfahrensreformgesetz (Supplementary Law to the First Law on the Reform of the Criminal Procedure Statute) was enacted as a consequence of Red Army Faction defendants being represented by an inordinate number of defense attorneys.\(^\text{68}\) In some cases, RAF members were represented by as many as a dozen lawyers each.\(^\text{69}\) Aside from the fact that the sheer number of attorneys involved in a proceeding often resulted in numerous procedural constitutional activity. The Federal Supreme Court of Justice, the Bundesgerichtshof, is the final court of appeals in criminal matters. \(\text{Id.}\)

62. See LIBRARY OF CONGRESS, supra note 54.
63. See id.
64. See id.
65. See id.
66. See id.
67. §§ 137.1, 138(a), 146, 231(a) StPO (German Criminal Procedure Statute).
69. Id.
delays, some of the attorneys were also suspected, and sometimes accused, of assisting their incarcerated clients by relaying communications, orders, and instructions to operatives outside the prison walls, as well as to other imprisoned RAF members.\(^7\)

The 1974 Supplementary Law addressed these problems. The Law provides that each defendant in a terrorism-related trial can have no more than three defense attorneys;\(^7\) it put an end to the practice of one attorney representing numerous terrorism suspects;\(^7\) it makes it possible to remove or exclude a defense attorney when there is reason to believe that the attorney is conspiring with his or her client for criminal purposes;\(^7\) and it makes it possible to try defendants in absentia.\(^7\) The last provision was designed to counteract disruptive behavior by defendants during court proceedings or where, due to self-inflicted injuries (e.g., hunger strikes), the suspected terrorist cannot be present at trial.\(^7\)

The general intent of the Supplementary Law is to prevent procedural abuses, to streamline proceedings, and to prevent trials from deteriorating into chaotic spectacles.\(^7\) As proceedings held in the years following its enactment have demonstrated, the Supplementary Law appears to have satisfied its underlying aims.\(^7\)

**B. 1976 Antiterrorismusgesetz\(^7\)**

Germany's next step was to enact the *Antiterrorismus gesetz* (Antiterrorism Law), in which it criminalized the formation of any terrorist group, which has been defined as the establishment of "groups whose purposes or activities are aimed at the commission of murder, manslaughter, genocide, or other serious offenses."\(^7\) The law is significant in several respects. First, simply organizing such a group, or being a member of one, is sufficient to subject an individual to the

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71. § 137.1(2) StPO.
72. § 146 StPO.
73. § 138(a) StPO. At least two lawyers were sentenced for smuggling weapons and ten others were charged with exploiting their legal position to promote terrorism. See Gerhart Hoffmeister & Frederic C. Tubach, *Germany: 2000 Years; From the Nazi Era to German Reunification* 178 (1992).
74. § 231(a) StPO.
77. See id.
78. § 129(a) StGB (German Penal Code); §§ 112.3, 148.2 StPO.
maximum punishment of a ten-year prison sentence; no proof of the  
commission of a violent act is necessary for a conviction.\footnote{80}  
Second, the law reduced due process protections for terrorist suspects  
by lowering the standard of proof required to be shown by the state  
in order to detain a suspect prior to trial; thus, suspicion suffices  
where, ordinarily, the requirement is that there is a legitimate flight  
risk or a danger of criminal collusion.\footnote{81} Particularly  
interesting, in light of the contemporary controversy in the United  
States regarding a similar government tactic,\footnote{82} is a third  
characteristic of the Anti-terrorism Law: it makes it possible for  
the German government to monitor communications between a terrorist  
suspect and his or her attorney.\footnote{83}

C. 1977 *Kontaktsperregesetz*\footnote{84} and 1978 *Gesetz zur Aenderung der  
Strafprozessordnung*\footnote{85}

The third stage in Germany's counter-terrorism effort came as a  
direct response to the RAF's kidnapping of Hanns-Martin Schleyer, a  
prominent German industrialist who was also the president of the  
*Bundesvereinigung der Deutschen Arbeitgeberverbaende* (German  
Employer's Union).\footnote{86} Schleyer did not survive the abduction,  
but, while he was still believed to be alive, German authorities suspected  
that incarcerated RAF leaders had not only initiated the kidnapping  
but also continued to direct the kidnappers from behind prison  
walls.\footnote{87} To prevent these "management" activities, the  
*Kontaktsperregesetz* (Law Banning Contacts) provided "a legal basis  
for cutting off from the outside world those members of the RAF  
avaiting trial."\footnote{88}  

Also arising as a consequence of the Schleyer episode was the  
*Gesetz zur Aenderung der Strafprozessordnung* (Law on the Reform of

\footnote{80} See id.  
\footnote{81} See id.  
\footnote{82} Dan Egan, *Justice for All? Critics Say Ashcroft's Aggressive Methods to Fight  
\footnote{83} See Meyer, *supra* note 68, at 577.  
\footnote{84} §§ 111, 148.2 StPO.  
\footnote{85} §§ 111, 148.2 StPO.  
\footnote{86} See Rebman, *supra* note 76; see also Hoffmeister, *supra* note 73, at 176.  
\footnote{87} See Hoffmeister, *supra* note 73, at 176. The RAF's objective in kidnapping  
Schleyer—and in the hijacking of a Lufthansa passenger jet just six weeks later—was to  
force the government to release Andreas Baader and other RAF prisoners. The  
kidnapping ended with the murder of Schleyer at the hands of his kidnappers and the  
hijacking ended in a "spectacular rescue action" in Somalia, when a special unit of the  
German *Bundesgrenzschutzgruppe* (Federal Border Police), the GSG-9, stormed the  
airplane and liberated the hostages. See LIBRARY OF CONGRESS, *supra* note 54. With  
neither of the two operations successful, Baader and three other imprisoned RAF leaders  
committed suicide. Id.  
\footnote{88} See Meyer, *supra* note 68, at 577.
the Code of Criminal Procedure). The law permits law enforcement authorities to operate more restrictive road checkpoints and, by barring all physical contact between an attorney and a client incarcerated for terrorist activities, further restricts the attorney-client relationship in the context of terrorism.

D. 1986 Strafverfahrensaenderungsgesetz

The fifth terrorism-specific law introduced in Germany was an additional Code of Criminal Procedure reform law, the Strafverfahrensaenderungsgesetz of 1986. This amendment to the Code facilitates dragnet-like police operations by permitting authorities to compile dossiers on any individuals, both citizens and visitors to the country, suspected of involvement in terrorist activities, irrespective of whether the individual has a prior criminal record. By permitting the collection of up to three months’ worth of data on any such individual, counter-terrorism efforts are not hampered by the need to conduct ad hoc intelligence gathering and synthesis during critical periods when time is of the essence (i.e., during a hostage crisis).

E. 1986 Gesetz zur Bekämpfung des Terrorismus

Prior to the events of September 11, the most recent anti-terrorism legislation had been the Gesetz zur Bekämpfung des Terrorismus (Law on the Fight Against Terrorism). This 1986 law criminalizes certain conduct, such as “propagandizing violence by distributing writings or providing instructional guidance for the commission of a violent act at a meeting,” in order to prevent the instigation of violence via the printed media or public speech.

F. Overview of Terrorism-Related Legal Framework

The steps taken by Germany to counteract terrorist violence have imparted a distinct imprint upon the country’s substantive criminal law and criminal procedures. One can see that Germany has taken a two-pronged approach in its efforts. First, it has adhered to the default
approach of subjecting those accused of terrorist violence to general criminal charges, such as homicide and arson. When a criminal is found to have acted with terrorist intent, a harsher prison sentence may be imposed. Second, proactive criminal statutes, designed to address the fundamental root causes of terrorism, have been enacted, and these laws have placed general prohibitions on both anti-social and anti-constitutional behavior. By making it illegal to form or belong to a terrorist organization, Germany’s lawmakers have made the clear political statement that politically-motivated violence will not be tolerated. This is underscored by the fact that expressions and communications in support or promotion of achieving political objectives by violent means have been criminalized. Free speech concerns clearly play second fiddle to interests of public and state security.

G. Organization and Coordination of Anti-Terrorism Resources.

The Staatsministerien des Innern of the respective Laender (state-level ministries of interior) oversee police, intelligence, and emergency preparedness in their geographical jurisdictions. Each of these state ministries, in turn, is represented in a council of interior ministers, which is responsible for maintaining a unified approach to resolving issues that fall within the ministries’ sphere of authority. The federal appointee responsible for the development of a comprehensive policy framework and the coordination of the efforts of the state-level ministries is the Koordinierer der Nachrichtendienste des Bundes (Coordinator of State Intelligence Services). The person holding the position of Intelligence Coordinator is a cabinet-level advisor to the German Chancellor.

The Bundeskriminalamt (Federal Criminal Police Bureau), or BKA, shares jurisdiction with the Laenderkriminalaemte (state-level police agencies) in the area of maintaining domestic security. The BKA also collaborates with law enforcement authorities in Europe and beyond. The scope of the BKA’s authority is not unlike that of the United States’

97. See GAO, supra note 56.
98. See id.
99. See id.
100. See id. One might draw parallels between the duties and responsibilities of the German Coordinator of State Intelligence Services and those of both the U.S. Director of Central Intelligence and the Director of Homeland Security. Legislative oversight is conducted by a parliamentary standing committee on internal affairs that monitors the police and intelligence service compliance with relevant laws. See GAO, supra note 56. Judicial oversight comes via the Bundesrechnungshof (Federal Court of Audit). Id.
102. See id.
Federal Bureau of Investigation, in that state-level police hold initial responsibility for dealing with crimes committed within their respective jurisdictions, but, when criminal acts involve behavior that crosses state or international boundaries, the centralized BKA is relied upon to address the matter. The exception to this jurisdictional framework is that the BKA is responsible for the protection against and investigation of acts of terrorism and political extremism. As might reasonably be expected, the state-level police may be called upon to assist the federal police in the counteraction and investigation of terrorist violence. The BKA Gesetz vom 7. Juli 1997 (1997 BKA Law) codified the BKA’s oversight of numerous tasks, to include centralized criminal intelligence gathering, international law enforcement cooperation, witness protection, and the protection of the jurists of the Constitutional Court.

The most well-known German counter-terrorist organ is the Bundesgrenzschutz (Federal Border Guard), a para-military police agency that has evolved from its initial role of staffing border facilities to its present incarnation as a highly visible force that provides security at virtually all federal sites, which will include airports, and one that assists state-level police when large forces are needed. The Bundesgrenzschutz also encompasses the elite Grenzschutzgruppe 9, or GSG-9, one of the world’s premier special operations units.

VI. International Initiatives and Cooperation

Prior to the terrorist attacks of September 11, 2001, the American experience with terrorism had been almost exclusively international in nature. In Germany, and throughout the rest of Europe, domestic
terrorism has proven to be the biggest threat. Accordingly, these disparate experiences have given rise to notably different perceptions and reactions, evidenced by the American tendency to "regard counter-terrorism as something akin to a moral crusade, [whilst] Europeans are far more skeptical of blanket approaches and rigid policies and instead adopt what they see as more practical and, in their minds, more productive approaches." While, in the wake of September 11, the United States government has taken forceful steps to enhance domestic security, the tendency towards moralistic references in framing the terrorist threat can be seen to persist.

Germany is part of a European cooperative effort against terrorism that has its roots in what was known as the TREVI Arrangement, concluded by the European Community ("EC") in 1976. The TREVI Arrangement provided for regular meetings of EC ministers of justice and interior, and other high-ranking government officials, whereby the participants could share and discuss security concerns and their possible resolutions. This cooperative European effort proved to be quite successful in combating terrorism: one of the highpoints was a 1987 joint operation, conducted concurrently in Germany, France, and Italy, that effectively eliminated the organizational infrastructure of the Islamic terrorist group Hezbollah in Western Europe. The TREVI Arrangement was replaced by the third pillar of the 1992 Treaty on European Union (the Maastricht Treaty) which, while not singling out the phenomenon of terrorism as an underlying rationale, does apply to immigration and asylum, policing, customs, and legal cooperation. Again, one can see in this provision the continental tendency towards applying general laws in counter-terrorism efforts. The 1992 treaty also mandated the institution of Europol, a European police office, to "facilitate cooperation between the national police forces of European Union (EU) member states and to provide a joint information-sharing system covering a variety of crimes, [to include] illicit drug trafficking, money laundering, and terrorism." Germany, as is the United States, is also a member of Interpol, an international police organization that, at

111. See id.
112. See id.
114. See Hoffman, supra note 110, at 71. TREVI is a French acronym for "Terrorism, Radicalism, Extremism, and International Violence." Id.
115. See id.
116. See id.
117. See id. at 71-72.
118. See GAO, supra note 56.
119. See Hoffman, supra note 110, at 72.
present, has a total of 178 member states. Interpol promotes measures similar to those of Europol; in the context of terrorism, Interpol’s former secretary general has described those measures as “intelligence collection and intelligence analysis again and again, undercover operations, satellite observation, phone and mobile-phone tapping, e-mail interception, and use of information technology.”

Germany is also a party to the 1977 European Convention on the Suppression of Terrorism, an agreement intended to counteract terrorism by fostering the cooperation of the judicial authorities of the respective member states. Specifically, it requires member states to prosecute individuals apprehended on the basis of a terrorist offense or else extradite them to the state in whose territory the crime was committed. While a fundamental weakness of the agreement is its provision that member states may reserve the right to refuse extradition for an offense considered a political crime, Germany has taken affirmative steps to limit the political offense exception.

Germany is a fully committed participant in the international community’s efforts against politically motivated violence, as reflected by its signing of each of the twelve multilateral conventions sponsored by the United Nations that are designed to combat terrorism. With the

120. Moises Naime, Meet the World’s Top Cop: Interpol’s Raymond Kendall Explains Why the World Has Him Worried, FOREIGN POL’Y, Jan./Feb. 2001, at 31, 32-33 (on file with author). Founded in 1923 as the International Criminal Police Commission (ICPC), the organization is now referred to by the ICPC’s telegraphic address, “Interpol.” Id. at 38.

121. See id. at 38.


123. See Meyer, supra note 68, at 575.

124. See id.

125. See id. Professor Meyer explains that: The Zustimmungsgesetz, or Law of Approval, of the convention passed the German Federal Parliament on March 28, 1978. This law provides that a serious offense is not to be deemed political if: 1) an offense results in death or serious bodily injury of the victim; 2) an offense endangers the life or physical integrity of a large number of persons; or 3) an offense is considered to be inhuman or involves the use of devices creating a collective danger to persons.

exception of two of the conventions, the ratification of which are pending at the time of this writing, the agreements have been formally adopted by the German legislature. In addition to these multilateral agreements, Germany has also entered into bilateral compacts on cooperation against terrorism and organized crime and on mutual assistance and extradition. Given the increasing concerns regarding the access of terrorists to weapons of mass destruction, it also bears noting that Germany is a party to a variety of United Nations agreements against the proliferation of chemical, biological, and nuclear weapons.

VII. Contemporary State-of-Affairs

The attacks of September 11 removed all doubt that the threat from terrorism has undergone a paradigmatic change. Emphasis has shifted from the ideologically motivated terrorist of previous decades to the contemporary zealot who is not only unconcerned with the catastrophic

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127. See supra note 126 and accompanying text.


129. Germany’s bilateral agreements on mutual assistance and extradition are with Australia, Austria, Canada, the Czech Republic, Israel, Italy, the Netherlands, Switzerland, and the United States. See Security Council Report, supra note 118, at iii.

The "traditional" terrorist committed violence to draw attention to a cause in the belief that people would sympathize with and rally to that cause if only they were made aware of the grievances upon which it was based. Terrorists of this sort operated under the assumption that indiscriminate mass killing would alienate those whose support they were attempting to rally to their cause. This rather rational and, correspondingly, predictable model for terrorist behavior can no longer be relied upon. The "new" terrorist does, however, take advantage of the same two asymmetrical advantages that have always made terrorists such formidable opponents: first, the defender must protect every conceivable vulnerability while the terrorist need only select an opportune target and then strike; second, the logistical and financial outlay incurred by the terrorist in launching an attack is a miniscule fraction compared to the cost that the state must bear in defending against and reacting to it. While the traditional terrorist remains a threat to be reckoned with, the new terrorist poses an exponentially greater danger.

Since the attacks upon the United States, Germany has taken a number of steps that build upon the already strong foundation for combating international terrorism. On September 19, 2001, the German cabinet adopted the "First Anti-Terrorism Package," which provided for enhanced air-traffic security. The "Second Anti-Terrorism Package" was passed by both the Bundestag (German Federal Parliament) and the Bundesrat (German Federal Council), and subsequently entered into force on January 1, 2002. The second "package" includes a wide array of new security provisions as well as regulations pertaining to the rights of foreigners in Germany; the intent of the latter being to prevent the entry of terrorists into the country and to enable law enforcement organs to identify terrorists already present in Germany. In light of the fact that a number of the terrorists who carried out the September 11 attacks, as well as several of their suspected

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132. See Bremer, supra note 113, at 23.
133. See id.
134. See id. at 25. Mr. Bremer notes that "[t]he September 11 attacks probably cost less than $2 million and caused over $100 billion in damage and business interruption." Id.
136. See id. The package mandated stepped up security at each of the country's thirty-seven airports, to include the 100% screening of hold baggage and the increased use of sky marshals to prevent hijackings. Id.
137. See id. at 2.
accomplices, had close ties to the German city of Hamburg, these tactics are well-justified. The measures introduced to achieve those goals include the placement of biometric characteristics in passports and personal identification cards, and increasing the amount of counter-terrorism intelligence to which police authorities have access.\footnote{139. See id.}

In the immediate aftermath of the September 11 attacks, Germany adhered to its established practice of international cooperation via the ad hoc creation of a “special task force of more than 600 police experts to deal with the Al-Qaida network, in close cooperation with the competent authorities of the United States of America, the United Kingdom and other partner states.”\footnote{140. See id. at 2.}

An additional approach to combating terrorism, the importance of which is increasingly deemed to be of paramount importance, is that of tracking and blocking the funds that are utilized to finance terrorist organizations and their operations.\footnote{141. See Bassiouni, supra note 131, at 17. Acts of terrorist violence that could result in harm of a catastrophic nature require funding beyond the cost of conventional weapons or explosives. Id. The lengthy and elaborate preparation undertaken by the many terrorists who participated in the September 11 attacks quite clearly required a significant amount of capital.}

To prevent and suppress the financing of terrorist acts, Germany has initiated legislative and administrative steps with the objective of counteracting non-transparent, global capital flows and financial transactions of criminal origin.\footnote{142. See generally Security Council Report, supra note 128, at 3-7.} Part and parcel of these objectives are amendments to the Kreditwesengesetz (German Banking Act); the adoption of a Geldwäschebekämpfungsgesetz (Law on the Prevention of Money Laundering); and continued reliance on § 129(a) of the German Criminal Code, which criminalizes the financing of terrorist activities.\footnote{143. See id.}

VIII. Conclusion

Germany’s evolutionary approach to grappling with the issue of terrorism is instructive. The facts on the ground reflect a degree of success in counteracting and, particularly with respect to domestic sources of terrorism, overcoming threats that is perhaps unmatched by any other country. Germany’s approach is one that reflects awareness that there is no such thing as immediate gratification when it comes to attaining security against terrorists. Rather than couch the struggle in the potentially counter-productive rhetoric of a war of “good versus evil,”\footnote{144. One observer has described the American employment of the term “war” to characterize the efforts against terrorism as one with potentially dangerous consequences:}
Germany's strategy has been to steadfastly adhere to the fundamental strategy of treating terrorism as it does any other serious crime.

Germany's counter-terrorism framework is unambiguous concerning the command and control of national resources vis-à-vis the preemption of terrorist acts and the response to those attacks that can be carried out. In contrast, in the United States the newly appointed Director of Homeland Security must wade through a morass of over forty federal departments, agencies, and bureaus that play a part in American efforts to counteract terrorism. While the German system acknowledges that the resources of many governmental agencies must be brought to bear on the dangers posed by terrorism, its efforts are closely coordinated and channels of communication between the ministries, both horizontal and lateral, are kept open and flowing.

In light of the changing nature of terrorism, it is Germany's embrace of international cooperation, and the manner in which it goes about doing so, that is particularly noteworthy. The German approach to international cooperation in this area is one premised upon pragmatism, shared resources, and open dialogue. To describe this approach, one might utilize the term "collaboration," rather than simply "cooperation." A collaborative model stresses the extensive exchange of information and resources, reliance upon the respective strengths of coalition members, and receptiveness to the adoption of novel strategies. Widespread adoption of such a collaborative approach undoubtedly hinges upon the ability of potential participants to discard entrenched viewpoints regarding certain international initiatives and proposed institutions. Today's terrorist is one that takes full advantage of globalism, in terms of both resources and potential impact. The international terrorist response must be in kind.

Human nature makes it unlikely that terrorism will ever be defeated or eliminated. So long as there exists the hunger for power, there will exist that minority that is willing to resort to violence in an attempt to acquire it. The danger, however, can be reduced. Doing so requires recognition of the fundamental reality that no state can go at it alone.

"[t]o declare that one is at war is immediately to create a war psychosis that may be totally counter-productive for the objective being sought. It arouses an immediate expectation, and demand, for spectacular military action against some easily identifiable adversary, preferably a hostile state—action leading to decisive results." See Michael Howard, What's In a Name?: How to Fight Terrorism, FOREIGN AFFAIRS, Jan./Feb. 2002, at 8.

145. See GAO, supra note 56. The GAO report also points out that "some federal resources to combat terrorism were being increased without a clear link to likely threats and that programs were being developed based on vulnerabilities, not likely terrorist attacks." Id.

146. The attacks of September 11 occurred on American soil but the impact was global: citizens of some eighty countries were killed that day. Underscoring the global
ramifications is evidence that, prior to September 11, Al-Qaida was involved in terrorist attacks and subversive activities in not only the United States and Germany, but also in Somalia, Kenya, Tanzania, Saudi Arabia, Yemen, the Sudan, Israel, Jordan, Pakistan, France, the United Kingdom, and, of course, Afghanistan. See generally Maureen F. Brennan, Avoiding Anarchy: Bin Laden Terrorism, the U.S. Response, and the Role of Customary International Law, 59 LA. L. REV. 1195 (1999).