Articles

Expanding Criminal Laws by Predating Criminal Responsibility - Punishing Planning and Organizing Terrorist Attacks as a Means to Optimize Effectiveness of Fighting Against Terrorism

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A. Introduction

Going after terrorists, often means "fighting the unknown". The so-called "new threat" cannot be tracked back to known terrorists plotting against known government officials within national boundaries. The need for early investigation is clear, nothing more urgent than to forestall further terrorist actions. Today's sleeper can be tomorrow's terrorist. Hence, the argument herein is that new developments remain as consequent continuation perfecting well-known terrorist strategies and techniques. Instead of predating criminal responsibility the unknown needs to be identified. In refusing such identification current criminal law turns into a soft law reflecting actual social needs by preventing a future wrong. Current German criminal law on terrorism overextends appropriate borders in criminalizing chains of preparations. Punishment is carried out for "thinking different" by way of pre-crime, just symbolizing the wrong. The paper argues that even if criminal responsibility is predated in order to identify the unknown, it has to base on behavior, which can be understood as disorder outside the offender's interim sphere to qualify as criminal wrong. This applies to suspected terrorists and also to all other suspects of crime.

B. The Issue: Fighting against the Unknown

Lately, among German legal scholars, a new field of research is coming more distinctly into view, called *Vorverlagerung*[1] and within a certain context *Symbolstrafrecht*. Neither term

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[1] For a critical review of the term *Vorverlagerung*, *cf*. Arndt Sinn, *Vorverlagerung der Strafbarkeit – Begriff, Ursachen und Regelungstechniken*, *in* GRENZEN DER VORVERLAGERUNG IN EINEM TATSTRAFRECHT – EINE RECHTSVERGLEICHENDE ANALYSE AM BEISPIEL DES DEUTSCHEN UND UNGARISCHEN STRAFRECHTS, 13 (Arndt Sinn, Walter Gropp & Ferenc Nagy eds., 2011).

can be easily translated into English, but both may be defined in German. They describe developments of criminal law in which criminal responsibility is predated (*vorverlagert*) to its earliest stage of planning and preparing the commission of crimes. Such criminal law is being used to only denounce the "bad" as a *symbol* reacting on public demands for harsher criminal sanctions in its final stage resulting in "Enemy Criminal Law" (*Feindstrafrecht*)[2] or it is being used to only *symbolize the wrong*, whereas its use comes away empty-handed. Not surprisingly, enactments and amendments of *terrorism offenses* are primary targets of such criminal law.

While traditionally substantive criminal law defines crimes and establishes punishment for *violation* of certain and important interests (*Rechtsgütern*), as killing another person or interfering with the property of others, defining and targeting *terrorism offenses* may be different. Besides establishing punishment for *terrorist action,*[3] criminal law can also specify the "terrorist element" defined as an aggravating subjective circumstance (specific intention), establishing higher punishment.[4] But increasingly criminal laws are being used to 'fight against' terrorist interventions – planning and preparing – in order to prevent terrorist attacks.

Indeed, preventive action against the commission of crimes has to be seen as a necessary element to guarantee law and order. However, how far government officials through legislation may go in order to *prevent* the commission of crimes must be discussed. The discussions on surveillance of public places in Great Britain can demonstrate that.[5] But preventing terrorist attacks by means of substantive criminal law differs from guaranteeing law and order by means of preventive surveillance measures, because the offender faces punishment *before* he/she commits any terrorist act. The question is whether and to what extent such provisions are to be seen as proportionate measures in democratic societies.

Going after terrorists challenges every society. It often means "fighting the unknown." This seems even more true since the so called "new threat" by terrorists can no longer be tracked back to known terrorist groups plotting against known government officials within

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[2] For a critical review of the term *Feindstrafecht*, *cf.* Manuel Cancio Meliá, *Terrorism and Criminal Law: The Dream of Prevention, The Nightmare of the Rule of Law*, 14 NEW CRIMINAL LAW REVIEW (NCLR) 108, 110 (2011).

[3] *Cf.* 18 U.S.C. § 2331(1)(A), (5)(A). But, US Federal Law has at least 80 different definitions of terrorism and a number of different definitions of terroristic acts. *See* ALEX PETER SCHMID, POLITICAL TERRORISM (1988); J.J. Lador-Lederer, *Defining "Terrorism"—A Comment*, *in* TERRORISM AND POLITICAL VIOLENCE, 5, 9 (Henry Hyunwook Han ed., 1993).

[4] *See e.g.,* Wis. Stat. § 973.017(3)(e)(1)(a)-(c) (use of guidelines, consideration of aggravating factors in the context of criminal sentencing).

[5] Parallel discussions on the admissibility of undercover investigation evidence in order to prosecute crimes address borderlines of admissible investigation measures within rule-of-law states.

national boundaries.[6] While *terrorism* like this still exists, *new forms of terrorism* differ: attacks are planned (and committed) *by* the *unknown against* the *unknown*. Terrorist groups are often not identifiable as such[7] and their targets can be the general populace as well as government officials.[8] But whether this constitutes a *new form of terrorism* is questionable. Current forms of terrorism may be more brutal. Instead of fighting for independence, self-determination and statehood,[9] terrorists aim at destruction of the "enemy" and its civilization.[10] However, by all accounts, new developments still remain as consequent continuation perfecting well-known terrorist strategies and techniques.[11]
Legal researchers in this area have to ask whether the needs of law and order vindicate the need "to fight back" against the *unknown* and in punishing the *unknown*. They must ask, whether establishing punishment for planning and preparing crimes as well as for forming terrorist groups means diverging from strict principles of definiteness and clarity in criminal law, but essential within democratic societies.[12]

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[6] An example of a hierarchically structured group is the Red Faction Army (RAF), a terrorist group in Germany in the 1970s. More recent groups include Euskadi Ta Askatasuna (ETA) in Spain and the Irish Republican Army (IRA) in Northern Ireland. Current examples of groups of new non-hierarchically structured forms are the *Sauerland* Group (Stuttgart 2007) and the Taliban-Terror in Afghanistan lately resulting in killing former President Rabbani on September 20, 2011.

[7] This explicitly means that terrorist groups tend to not work on base of clear forms and hierarchical structures but interweaving with different religious, economic or social groups within a loose decentralized network, like Al-Qaida. Discussing this *see* David Tucker, *What is New about the New Terrorism and How Dangerous is It?*, 13 TERRORISM AND POLITICAL VIOLENCE 1, 3 (2001). And *see especially* MARK ZÖLLER, TERRORISMUSSTRAFRECHT 91, 92 (2009).

[8] Explicitly, human targets are not being chosen with the same specificity, they now include innocent and arbitrarily picked individuals. For an empirical discussion see James Piazza, *Is Islamist Terrorism More Dangerous?*, 21 TERRORISM AND POLITICAL VIOLENCE 62 (2009) showing that religious groups especially tend to carry out mass-casualty attacks, most notably the Sept. 11, 2001, attack on the Pentagon and the World Trade Center in the United States.

[9] One example of this may be the Kurdistan Workers' Party (PKK) in Turkey which has been fighting for an independent Kurdish statehood since 1984. The PKK is a terrorist group as defined in § 129a and 129b of the *deutsches Strafgesetzbuch* (German Substantive Criminal Code). *See* GERMAN SUBSTANTIVE CRIMINAL CODE [DEUTSCHES STRAFGESETZBUCH] [DSTGB] in the version promulgated on 13 November 1998, FEDERAL LAW GAZETTE [BUNDESGESETZBLATT] [BGBL.] I AT 3322, as amended by Art. 1 of the law of 25 June 2012, BGBL. I at 1374 (Ger.), *translated by* Michael Bohlander (2010), available at: http://www.gesetze-im-internet.de/englisch_stgb/index.html (last accessed: 31 August 2012); referring to the example given *see* BUNDESAMT FÜR VERFASSUNGSSCHUTZ [BFV] [FEDERAL OFFICE FOR THE PROTECTION OF THE CONSTITUTION], VERFASSUNGSSCHUTZBERICHT [REPORT OF THE OFFICE FOR THE PROTECTION OF THE CONSTITUTION] 288 (2010).

[10] *Cf.* MARK ZÖLLER, *supra* note 7, at 96; Ulrich Sieber, *Legitimation und Grenzen von Gefährdungsdelikten im Vorfeld von terroristischer Gewalt*, 29 NEUE ZEITSCHRIFT FÜR STRAFRECHT (NSTZ) 353 (2009).

[11] Clearly MARK ZÖLLER, *supra* note 7, at 98.

[12] Constitutional law and order is built on the rights of freedom and liberty to achieve social safety for all; *cf.* with a detailed historical argument Helmut Goerlich, *Zu Geschichte und Gegenwart der Konstitutionalisierung von Justizgrundrechten*, *in* BEITRÄGE ZUM DEUTSCHEN UND TÜRKISCHEN STRAFRECHT UND STRAFPROZESSRECHT – DIE ENTWICKLUNG VON RECHTSSYSTEMEN IN IHRER GESELLSCHAFTLICHEN VERANKERUNG 25 (Walter Gropp, Bahri Öztürk, Adem Sözüer & Liane Wörner eds., 2010).

C. Facts

According to the annual reports, released by the Office for the Protection of the Constitution, "fighting against" international and especially Islamic terrorism is being stressed to be the main focus of investigation.[13] Yet the new network character of terror groups with a loose non-hierarchical structure is being seen as the current threat justifying further measures.[14] Since 2001, German crime records changed in structure and now officially record "politically motivated criminality" –of which *terrorism crimes* are one part – within a separate statistic. Hence, it is difficult to directly compare statistical information to those of ordinary criminality.[15] However, statistics do not yet contain information on investigations against establishing contacts for the purpose of committing a serious violent offense endangering the state according to section 89b of the dStGB or investigations against preparing a serious offense endangering the state according to section 89a of the dStGB.[16] Tellingly, the 2nd Periodical Security Report of Germany 2007 indicates that BKA-investigators (Federal Criminal Police Office), since September 11th, 2011, followed approximately 25 600 terrorist tracks. In December 2005, 42 preliminary proceedings against "forming a (national) terror group" (§ 129a of the dStGB) were pending.[17] At the same time 84 preliminary proceedings against international terror groups (§ 129b of the dStGB) were pending, of which only 7 groups originated within the EU and 77 outside the EU. 71 out of the 84 international cases in total pertained to persons of Islamic background.[18] From these figures, security reports found a dramatic threat from Islamic terrorists and required further action to shatter terror structures and to prevent the planning of terror attacks in the run-up to actually committing the attack.[19]

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[13] *See* VERFASSUNGSSCHUTZBERICHT , *supra* note 9, at 3.

[14] VERFASSUNGSSCHUTZBERICHT , *supra* note 9, at 3. Argumentation reads that the network character functions as the basis for radicalization. The terror attack at Frankfurt Airport in April 2011 is one example, where U.S. soldiers were killed by a single offender, who had been radicalized through such networks.

[15] "Politically motivated criminality" (*politisch motivierte Kriminalität*) (PMK), introduced in 2001, is defined as "all kinds of criminality against the state, even if there is no proof of any political connection." *Cf.* VERFASSUNGSSCHUTZBERICHT, *supra* note 9, at 33.

[16] *Cf.* BUNDESAMT FÜR VERFASSUNGSSCHUTZ [BFV] [FEDERAL OFFICE FOR THE PROTECTION OF THE CONSTITUTION], VERFASSUNGSSCHUTZBERICHTE [REPORTS OF THE OFFICE FOR THE PROTECTION OF THE CONSTITUTION] (2006-2010).

[17] *Cf.* BUNDESMINISTERIUM DES INNERN [BMI] [FEDERAL MINISTRY OF THE INTERIOR] & BUNDESMINISTERIUM DER JUSTIZ [BMJ] [FEDERAL MINISTRY OF JUSTICE], SECOND PERIODISCHER SICHERHEITSBERICHT: LANGFASSUNG [2ND PERIODICAL SECURITY REPORT] 180 (2007).

[18] *Id.* at 180. By comparison 79 preliminary investigations of sections 129, 129a, and 129b of the dStGB, allegations involving 100 suspects, were pending in 2006: s*ee* DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT DRS.] 16/4007 (question by the German parliament) and BT DRS. 16/5537 (answer by the German government).

[19] *Cf.* 2ND PERIODICAL SECURITY REPORT, *supra* note 17, at 185.

D. Provisions: What is punishable according to German Criminal Law?

The German Criminal Code (dStGB) criminalizes "terrorist movements" for organizing in collaboration with others *in order to commit certain crimes*, which are to be seen as a terrorist threat (§ 129a of the dStGB: "forming of a terrorist association"). Additionally, since 2009, new sections 89a, 89b, and 91 of the dStGB provide for punishment if one plans or prepares through certain actions to commit a terrorist act as an "act endangering the state".[20] With the latest amendment of 2009, action in the run-up to terrorist attacks becomes criminally relevant,[21] but independent from any already existing criminally relevant endangering process by means of group-dynamic-developments.[22] Revealingly, none of the provisions establishes punishment for committing a terrorist attack, but otherwise expands criminal responsibility in two directions: (1) for forming terrorist associations and action coherent to that *and* (2) for planning and preparing acts endangering the state, *predating* (*vorverlagern*) the criminal responsibility to a stage before committing a crime. Especially the second phenomenon (2) has been critically discussed as a new concept predating criminal responsibility (*Vorverlagerung*) by timely expanding criminal responsibility to the stages of planning and preparing the commission of crimes.[23] Namely, through such provisions the function of criminal law as *ultima-ratio*-punishment for infringements of the law tends to change into a function of criminal law as *preventing the commission of crimes as such*.[24]

Hence, both kinds of provisions were introduced against the background of actual terrorist threats. In the 1970's the attacks by the German Red Army Faction (RAF) terrorist group

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[20] Bohlander, *supra* note 9, at §§ 89a, 89b, 91. The provisions were introduced by the Gesetz zur Verfolgung der Vorbereitung von schweren staatsgefährdenden Gewalttaten [Act to Prosecute Preparation of Serious Criminal Offenses], 30 July 2009, BGBl. I at 2437, effective 4 August 2009.

[21] Through the introduction of sections 89a, 89b, and 91 of the dStGB.

[22] As solely in the past, section 129a of the dStGB.

[23] *Cf.* GRENZENLOSE VORVERLAGERUNG DES STRAFRECHTS? [UNLIMITED PREDATING OF CRIMINAL LAW] (Roland Hefendehl ed., 2010); GRENZEN DER VORVERLAGERUNG IN EINEM TATSTRAFRECHT – EINE RECHTSVERGLEICHENDE ANALYSE AM BEISPIEL DES DEUTSCHEN UND UNGARISCHEN STRAFRECHTS [LIMITS OF PREDATING CRIMES – A COMPARISON BETWEEN THE GERMAN AND THE HUNGARIAN CRIMINAL LAW] (Arndt Sinn, Walter Gropp & Ferenc Nagy eds., 2011).

[24] *Cf.* Sinn, *supra* note 1, at 14. *See also* Henning Radtke & Mark Steinsiek, *Bekämpfung des internationalen Terrorismus durch Kriminalisierung von Vorbereitungshandlungen? – Zum Entwurf eines Gesetzes zur Verfolgung der Vorbereitung von schweren Gewalttaten*, 3 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK (ZIS) 383, 387 (2008), concluding that the introduction of section 89a in the dStGB by the Ministry draft of 21 April 2008 would still be constitutional and even though predating, it would not yet be "thought crime". But this argumentation is confined to section 89a. Radtke and Steinsiek's argument has to be read against the background that the Ministry draft of 21 April 2008 did not yet include further predating elements including the preparation of the preparatory crime, now introduced in section 89b of the dStGB.

induced the amendment of section 129a in the dStGB.[25] While the RAF itself was detected quickly as a result of its publicly announced terror threats and attacks, its structure and organization remained the target for law enforcement in order to prevent further attacks. As result, German legislators enacted section 129a of the dStGB, a law establishing punishment solely for forming a terrorist group.[26] The aim of the provision is to protect the community from terrorist groups and to hold anyone who forms, participates in, or supports a terrorist organization criminally responsible.[27] Such laws enable investigators to arrest founders, members, and supporters of terror groups, and to hold them criminally responsible for *being part of the organization*. Investigators need not to produce evidence of a committed crime in order to arrest a "RAF" terrorist, but evidence exposing the suspect as *being part of the group* and *endangering public safety* was sufficient (and still is). To that extent, the law has been effective to shatter the structure of specifically known terrorist groups.

Almost 40 years later, terrorist groups have learned their lessons. Their answer to such law is decentralization rendering organizations, members and supporters more difficult to detect.[28] Moreover, arresting detected members or supporters of such groups does not shatter such organizations given their pose and *non hierarchical structure*.[29] Arrested founders, members or supporters are easily replaced. Thus, while the German law of 1976 is often ineffective against modern terror,[30] the German 2009 laws of sections 89a, 89b,

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[25] Gesetz zur Umsetzung des Rahmenbeschlusses des Rates vom 13. Juni 2002 zur Terrorismusbekämpfung und zur Änderung anderer Gesetze [Act to implement the Council Framework Decision of 13 June 2002 on combating terrorism and to amend related Acts), 22 December, BGBI. I at 2386, art. 1(Ger.). It has been effective since 28 December 2003, in order to transform requirements of the European Council Framework Decision: *see* Council Framework Decision 2002/475/JHA, of 13 June 2002 on Combating Terrorism, 2002 O.J. (L164) 3, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:164:0003:0003:EN:PDF (last accessed: 31 August 2012). This framework decision has been seen as providing a legal EU-terrorism definition, *see* Eugenia Dumitriu, *The E.U.'s Definition of Terrorism: The Council Frame-work Decision on Combating Terrorism*, 5 GERM. L.J. 585, 590, 595, 602 (2004).

[26] *See* Shawn Boyne, *Law, Terrorism & Social Movements: How Politics has Shaped Germany's Anti-Terrorism Legislation*, 12 CARDOZO J. INT'L & COMP. L. J. 41 (2004) (for a American and comparative perspective); KARSTEN FELSKE, KRIMINELLE UND TERRORISTISCHE VEREINIGUNGEN - §§ 129, 129A STGB: REFORMDISKUSSION UND GESETZGEBUNG SEIT DEM 19. JAHRHUNDERT [CRIMINAL AND TERRORIST GROUPS—129, 129A OF THE CRIMINAL CODE: REFORM DEBATE AND LEGISLATION SINCE THE 19TH CENTURY] 349 (2002) (for an historical perspective).

[27] For a detailed discussion on the elements of the offense, *cf*. Bernhard Kretschmer, *Criminal Involvement in Terrorist Associations – Classification and Fundamental Principles of the German Criminal Code Section 129a dStGB*, 13 (9) GERM. L.J. 1016-1036 (2012); MARK ZÖLLER, *supra* note 7, at 510.

[28] As also argued by Oliver Lepsius, *Liberty, Security, and Terrorism: The Legal Position in Germany*, 5 GERM. L.J. 435, 438, 439 (2004).

[29] Again, the Al-Qaida group may serve as a well known example.

[30] This does not mean that such laws are no longer necessary. Traditional groups still exist (even though they may internationalize) and their conduct still may be effectively addressed by older laws. Hereto section 129b of the

and 91 of the dStGB,[31] by establishing punishment *for planning and preparing* acts endangering the public, attempts to address the dangers presented by modern, decentralized terrorist groups. The sections 89a to 91 amendments of the dStGB resulted from the European Terrorism Convention.[32] Germany, as well as other member states of the European Union, covenanted to transpose the requirements of the convention into the legal framework of German criminal law. The purpose of the European Terrorism Convention was "to enhance the efforts of parties in preventing terrorism and its negative effects on the full enjoyment of human rights".[33] Implementing the convention in Germany, legislators argued that it would be almost adverse to the investigative goal if investigative officers would *have to delay* arresting the actor until he/she actually starts to attempt to commit a terrorist attack.[34] The "root of all evil" is that it is not obvious, whosoever is connected to a terrorist group and is planning an attack. Today's sleeper can be tomorrow's terrorist.

The need for early investigation is clear: In view of the unclear threat *from whom to whom*, nothing seemed more urgent than to investigate the planning, founding and supporting of terrorist associations in order to forestall further terrorist actions, most importantly the

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dStGB allows investigation also in European and International terror cells, critically discussed by MARK ZÖLLER, *supra* note 7, at 331.

[31] Section 89a of the dStGB punishes *preparing a serious offense* (against life or personal freedom) endangering the state. Preparatory action can be instructing another person or receiving instruction in the production or the use of firearms, etc.; producing, obtaining for himself or another, storing or supplying to another weapons, etc.; obtaining or storing objects or substances essential for the production of weapons, etc.; or collecting, accepting or providing not unsubstantial assets for the purpose of its commission.

Section 89b of the dStGB provides punishment even for *establishing contacts for the purpose of committing* a serious violent offense endangering the state. As such, section 89b serves as the preparatory crime to "forming a terroristic group" according to section 129a of the dStGB, which punishes any person who establishes or maintains contacts to an organization within the meaning of section 129a (i.e., if he/she acts with the intention of receiving instruction for the purpose of the commission of a serious violent offense endangering the government and/or democratic state under section 89a(2)(1) of the dStGB). Neither the elements of section 129a nor section 89a of the dStGB have to be fulfilled, if only the offender intends to commit a crime according to section 89a dStGB by establishing or maintaining contact to a terroristic group according to section 129a dStGB. Thereby criminal law is extended in predating *and* in expanding its subject matter. The aim is to catch the so called "sleeper terrorists." *Cf*. in detail MARK ZÖLLER, *supra* note 7, at 581.

Section 91 of the dStGB establishes punishment for encouraging the commission of a serious violent offense endangering the state by displaying or supplying to another written material. For text of German provisions in English, *cf.* Bohlander, *supra* note 9.

[32] Council of Europe Convention on the Prevention of Terrorism [CECPT] art. 5-10, 1 June 2007, C.E.T.S. No. 196. But Germany went beyond the demands of the convention; even the factual need for the new laws was ever issued; see Lepsius, *supra* note 28, at 435-437.

[33] CECPT, *supra* note 32, *preamble*.

[34] BT 16/12428.

planning and preparation of violent attacks against the public. Legislators bypassed the need for a concrete effect of action and instead just aimed at *endangering* the legally protected interest.[35] In fact, legislators very effectively ensure the function of criminal law to protect basic values and ensure full enjoyment of human rights and peaceful coexistence, if determining that German law need not wait until someone actually harms the society by damaging something or injuring someone.[36] Within such "safe society", anyone is punished, who *endangers* any legally protected interest. In simple terms, whether the actor harmed someone or something is of no account. Only harmless action obeys the law. But critically spoken, we need to reconsider: We can fine-tune our "personal firewalls" and create legal systems preventing from any endangering signals, even those sent out accidently. Accordingly, sleeper terrorists will then upgrade their personal systems to "firewall+". One can only forewarn that these current developments into "safe societies"[37] highly run the risk to interfere individual rights at highest price by selling the liberal basic order of democracy.[38]

E. Predating Criminal Responsibility

Taking a closer look at the new structure of such crimes of endangerment, be it either concrete in relation to a certain object of protection (*konkretes Gefährdungsdelikt*) or abstract in relation to endangering the public (*abstraktes Gefährdungsdelikt*),[39] one would have to express some doubts. Terrorism offenses cannot be seen as isolated, but rather, as links of a criminal chain, a chain consisting of all crimes.

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[35] *See* WALTER GROPP, STRAFRECHT ALLGEMEINER TEIL, para 3, at 90 (3rd ed. 2005) who argues that substantive criminal law defines, in which the circumstances in which legal norms are indispensible and require public disapprobation and that normally, this requires a certain action resulting in a certain violation of a legally protected interest or it requires a certain action as such. But Gropp also argues that today's criminal laws in majority provide for both. *See also*, Uta Baroke, *Grenzenlose Vorverlagerung des Strafrechtsschutzes durch Gefährdungsdelikte*, *in* GRENZEN DER VORVERLAGERUNG IN EINEM TATSTRAFRECHT 247 (Arndt Sinn, Walter Gropp & Ferenc Nagy eds., 2011) who argues that criminal law is predated, if only *endangering* the interest is sufficient.

[36] *Cf.* also Sinn, *supra* note 1, at 13,14.

[37] The term "safety" shall be especially stressed herein for discussion more and more is about feeling safe than socially secure.

[38] *Cf.* with a critical discussion of a criminal law of averting of dangers *see* Winfried Hassemer, *Kennzeichen und Krisen des modernen Strafrechts,* 25 ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 378 (1992); ERIC HILGENDORF, STRAFRECHTLICHE PRODUZENTENHAFTUNG IN DER RISIKOGESELLSCHAFT (1993); Verena Zöller, *Liberty Dies by Inches: German Counter-Terrorism Measures and Human Rights*, 5 GERM. L.J. 469, 472, 473 (2004); Thomas Mertens, *Criminal Justice after 9-11: ICC or Military Tribunals*, 5 GERM. L.J. 545, 568 (2004); Cancio Meliá, *supra* note 2, at 108.

[39] Crimes of concrete *or* abstract endangerment are sometimes termed *strict liability crimes* (*Gefährdungsdelikte*). The terminology, however, is misleading and not used herein as in some criminal codes including those in the United States where "strict liability has a meaning that is significantly different in both criminal and civil contexts.

I. Briefly – Status of the Criminal Justice System

In Germany, the criminal justice system – including substantive and procedural criminal law – is increasingly influenced by the public demand for safety and the public desire for penalization.[40] Criminal law shifts from sanctioning bad behavior to averting danger. Examples include terrorism offenses (§§ 89a, 89b, 91, 129a, and 129b of the dStGB), cybercrime offenses (§ 202c of the dStGB), environmental crimes (§§ 324 *et seq*. of the dStGB), and money laundering (§ 261 of the dStGB).[41] Instead of functioning as *ultima ratio*-law responding to *the committed wrong*, the criminal law turns into a *soft law*[42] reflecting actual social needs by preventing *a future wrong*. As such criminal law addresses the challenges of prospective disorder.[43] In fact, this was the origin of police law.[44]

II. Briefly – the Means

The question remains *how* criminal law can become part of a society's strategy for averting danger. The answer is by simply waiving "damage." The offender does not need to *cause* an effect, but simply increase the risk of its occurrence. This can be done by either *expanding* criminal law *over a bigger base of facts* (*sachliche Ausdehnung*) or in *predating* (*Vorverlagerung*) criminal law to stages of planning and preparation.[45]

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[40] *Cf.* MARK ZÖLLER, *supra* note 7, at 502. For discussions on recent projects researching the predating of criminal responsibility (*Vorverlagerung*) by means of substantive criminal law *see* UNLIMITED PREDATING OF CRIMINAL LAW (HEFENDEHL) , *supra* note 23; LIMITS OF PREDATING CRIMES (SINN), *supra* note 23.

[41] *Cf.* LIMITS OF PREDATING CRIMES (SINN), *supra* note 23.

[42] MARK ZÖLLER, *supra* note 7, at 502.

[43] MARK ZÖLLER, *supra* note 7, at 502.

[44] *See also* Manuel Cancio Meliá, *Zum strafrechtlichen Begriff des Terrorismus*,159 GOLTDAMMER'S ARCHIV FÜR STRAFRECHT (GA) 1 at 5 (2012). Criminal law which includes some aspects of police law is problematic especially within the German legal system because Articles 70-74 of the German Basic Law (GG) allow both the German Federation and the German *Länder* (the states of Germany) to enact such laws, *see*: GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [Basic Law for the Federal Republic of Germany], May 23, 1949, in the revised version published in the Federal Law Gazette [BUNDESGESETZBLATT] [BGBL.] Part III, classification number 100-1, as last amended by the Act of 21 July 2010 (Federal Law Gazette I p. 944). Article 74(1)(1) of the GG gives exclusive jurisdiction to enact *criminal law* to the federal legislator, because substantive criminal law and criminal procedural law are been seen as an intrinsic task of the German Federation. In contrast, the Federal *Länder* are competent to enact police law, because preventing danger from the public is been seen as one major task of each of the *Länder* within their areas. New enactments of laws to prevent danger originating in police law but "dressed up" as substantive criminal law therefore interfere with the *Länders'* competence to legislate: *cf*. Susanne Beck, *Rechtsstaatlichkeit – Bauernopfer im Krieg gegen den Terror?*, *in* FESTGABE FÜR RAINER PAULUS ZUM 70. GEBURSTAG 15, 27 (Klaus Laubenthal ed., 2009).

[45] For a discussion of *structure* and *terms* see especially Sinn, *supra* note 1, at 13, 15. Both are discussed as expansion (*Ausdehnung*) of criminal law. However, both need to be differentiated into an expansion of facts

1. Expanding Criminal Laws over a Bigger Base of Facts (sachliche Ausdehnung)

In expanding criminal law over a bigger base of facts (*sachliche Ausdehnung*) concrete "damage" is replaced by *concretely* endangering the legally protected interest (*konkretes Gefährdungsdelikt*) or even by only *probably (abstractly)* endangering the legally protected interest (*abstraktes Gefährdungsdelikt*).[46] As such, the concept of crimes of endangerment is old,[47] traditionally applied to violations of road and traffic.[48] But lately, prosecutions of crimes involving only an *abstract endangerment* have increased and have been critically discussed.[49] Reactions range from non-acceptance[50] to redefining the elements of crimes of abstract endangerment by specific additional elements.[51] The full discussion cannot be reproduced here, but to summarize, the construction of behavior of mere *abstract endangerment* as criminal offenses drives substantive criminal law into the delicate realm of preventing the commission of crimes and punishing the offender for causing *abstract danger*. Criminal law as such does not function retrospectively but prospectively. In order to ring-fence developments, substantive criminal laws need to contain a specific material substance.[52] As suggested by Bernd Schünemann such substance is derived from (1) determining the actual circumstance requiring protection of the legal interest; (2) determining that protection will not interfere with entitled rights of the actor; (3) respecting constitutional principles, above all the principle of clarity and definiteness (*Bestimmtheitsgrundsatz*), in defining the offense of *abstract endangerment* clearly and with certainty; and (4) considering whether the prescribed wrong (*Unrecht*) is proportional

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(*sachliche Ausdehnung*) and an expansion of time by predating criminal responsibility (*Vorverlagerung*). In fact, both will occur.

[46] For a detailed discussion on crimes of endangerment and their lawfulness (*Zulässigkeit*) in German criminal law *see* Frank Zieschang, DIE GEFÄHRDUNGSDELIKTE, (1998); Wolfgang Wohlers, DELIKTSTYPEN DES PRÄVENTIONSSTRAFRECHTS: ZUR DOGMATIK "MODERNER" GEFÄHRDUNGSDELIKTE, (2000). In eliminating the element of *concrete damage* and replacing it with *danger*, criminal responsibility is also (already) *predated* to the point where the legally protected interest is endangered. The offender does not have to intend on damaging, but must endanger the interest: *see* Sinn *supra* note 1, at 13, 31, 32.

[47] Baroke*, supra* note 35, at 247.

[48] KARL LACKNER, DAS KONKRETE GEFÄHRDUNGSDELIKT IM VERKEHRSSTRAFRECHT (1967).

[49] Baroke, *supra* note 35, at 247.

[50] *See* lately Baroke*, supra* note 35, at 247, 257, 275.

[51] *See e.g.,* Bernd Schünemann, *Kritische Anmerkungen zur geistigen Situation der deutschen Strafrechtswissenschaft*, 142 GA 201, 213 (1995).

[52] Hence, crimes of endangerment exist and continue to exist. Some interests are not to be protected else, like roadworthiness or public safety in special circumstances (e.g., protecting from terror attacks); *see* sources cited *Baroke, supra* note 35, at 247, 260.

to the prescribed punishment.[53] Herewith Schünemann's concept allows to ring-fence lawfulness of crimes of *abstract endangerment*. In order to clearly and with certainty define the elements of an offense of endangerment, determining circumstances of protection as well as entitled rights of the actor, just any abstract endangerment will not suffice to requirements of criminal law. The endangerment needs to *qualify* in the very situation to actually protect a legal interest.[54] In other words, the abstractness of endangerment is to be substantiated.[55]

2. Predating Criminal Responsibility in the Stricter Sense

Looking at the expansion of criminal law by *predating* criminal responsibility (*Vorverlagerung*), the "time-controller" of criminal responsibility has been moved towards planning and preparation of crimes. While the increasing demand for safety is cited as one main cause of such development,[56] the increase of hazards by organized crime and terrorism intensifies the sense of menace, thus calling for means, including substantive criminal law, to *prevent* dangers.[57] In this context, the debate on the so-called *Feindstrafrecht* (criminal law for enemies) – critically discussed in German criminal law – is instructive to unmask alarming developments of such criminal law. When first bringing it up, Günter Jakobs pointed to developments in the predating of criminal responsibility on the basis of a perceived threat by *enemies*.[58] While legislators tend to criminalize any

[53] *See* Schünemann, *supra* note 51, at 142; Baroke, *supra* note 35, at 264.

[54] *See* Sieber, *supra* note 10, at 357; Schünemann, *supra* note 51, at 142. Already Schünemann's first and second criteria concede that the *actual circumstances* require protection of the *legal interest* (first criterion) while not interfering with *entitled rights of the actor* (second criterion). The academic discussion in Germany meanwhile discusses a so-called crime of *qualified endangerment* (*Eignungsdelikt*). The term seems to have come to the forefront in the discussion. The term well describes that not any endangerment is sufficient, but only such which *qualifies* to intervene with the legally protected interest; with further references Baroke, *supra* note 35, at 275 who explicitly argues for a conversion.

[55] Also named *abstrakt-konkretes Gefährdungsdelikt* (crime of substantiated abstract endangerment). The term is to be criticized. Not only is translation almost impossible, the German terminology herein brings together, what is actually oppositional: Something is either *concrete* and substantiated or it is *abstract*, not both.

[56] Sinn, *supra* note 1, at 13, 19.

[57] *Cf.* Roland Hefendehl, *Über die Pönalsierung des Neutralen - zur Sicherheit*, *in* GRENZENLOSE VORVERLAGERUNG DES STRAFRECHTS? 89, 94 (Roland Hefendehl ed., 2010).

[58] Günter Jakobs, Kriminalisierung im Vorfeld einer Rechtsgutverletzung, 97 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT (ZStW) 751 (1985) who critically pointed on the beginning of developments. For a provoked discussion see only FRANCISCO MUÑOZ CONDE, ÜBER DAS "FEINDSTRAFRECHT" (2007); MICHAEL PAWLIK, DER TERRORIST UND SEIN RECHT. ZUR RECHTSTHEORETISCHEN EINORDNUNG DES MODERNEN TERRORISMUS (2008); Arndt Sinn, *Moderne Verbrechensverfolgung – Auf dem Weg zu einem Feindstrafrecht?*, 1 ZIS 107 (2006); Manuel Cancio Meliá, *Feind "strafrecht"*?, 117 ZStW 267 (2005).

"enemy-action", criminal law needs limitation, especially if criminal responsibility is predated to earliest stages of planning and preparation. Lately Arndt Sinn differentiates between types of 'predating' according to whether an existing criminal offense is predated or a new offense, including predating criminal responsibility, is established.[59] Discussing the "enemy criminal law", suggestions to limit criminalization rank from a control of proportionality to a delimitation of the offender's *internum* to his/her *externum*;[60] interference with the offender's *internum* would not be lawful.[61] This, along with Bernd Schünemann's concept of limiting the lawfulness of crimes of endangerment[62] is beneficial to consider lawfulness of predating criminal responsibility. The benefit lies in combining both: to prove the substance of a criminal law to its proportionality[63] but also to whether it interferes with the core area of privacy (*internum*).[64] This means that the law must be proportionate to the actual security threat and (as well) accept borderlines of individual fundamental rights and freedom rights.[65] Such criminal law can develop as the back bone of democracies in the modern form of pluralistic societies, in which part wise values seem to be arbitrary.[66]

III. German Laws Against Terrorism as a Question of Predating Criminal Liability

The question remains whether the current German substantive criminal law on "fighting against" terrorism overextends appropriate borders in order to effectively prevent terror attacks. Especially in "fighting against" terrorism, criminal law pursues preventive

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[59] Sinn, *supra* note 1, at 13, 25.

[60] Jakobs, *supra* note 58, at 756. *See also* Sinn, *supra* note 1, at 33; Jens Puschke, *Grund und Grenzen des Gefährdungsstrafrechts am Beispiel der Vorbereitungsdelikte*, *in* GRENZENLOSE VORVERLAGERUNG DES STRAFRECHTS? 24 (Roland Hefendehl ed., 2010).

[61] Likewise see Sieber, *supra* note 10, at 359 for a discussion on the *forum internum*.

[62] *See supra* discussion Part E.II.1 Expanding Criminal Laws over a Bigger Base of Facts (sachliche Ausdehnung) together with Schünemann, *supra* note 51.

[63] Argued also by Sinn, *supra* note 1, at 13, 33.

[64] While such core area is basically acknowledged, the German Federal High Court of the Constitution (BVerfG) decides restrained. Unclear is, whether and to what extent such core area of the individual has to be respected in cases of criminalizing the planning and preparing of the commission of crimes, *see* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 80, 367 (375), 14 Sept. 1989, 43 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 563, 1990 (Ger.).

[65] *Cf.* also Verena Zöller, *supra* note 38, at 469, 474, 475.

[66] As also argued by Christoph Safferling, *Can Criminal Prosecution be the Answer to massive Human Rights Violations?* 5 GERM. L.J. 1469, 1488 (2004) on behalf of human rights violations and International criminal law.

interests.[67] The aim is to prevent concrete terror acts in order to protect citizens and the basic values of the democratic order.[68] Retrospective criminal laws cannot meet that goal.[69] The only recourse is to criminalize behavior that otherwise result in actual terror attacks.

1. §§ 129a, b dStGB

Thus, German criminal offenses of "forming a terrorist association", according to sections 129a and 129b of the dStGB, are considered crimes of *abstract endangerment* (*abstrakte Gefährdungsdelikte*).[70] Punishment is established for forming, participating or supporting a group that is aimed at the commission of violent acts with *terrorist motivation*. To be criminally responsible, a suspect does not need to participate in the actual commission of such acts, nor does the suspect even need to be a member of a terrorist group. In fact, the targeted object of the intended act does not need to be concretely endangered at all.[71] Instead, punishment is established for intrinsic areas of crime preparation.[72] Criminal responsibility is predated. Doing so, the crime of "forming a terrorist association" takes into account that the process of organizing in order to commit specified serious crimes contains inherent dynamism and carries endangerment to persons and property requiring protection.[73] With the help of section 129a of the dStGB, the commission of the specified crimes shall be prevented. Mark Zöller rightly calls the offense of "forming a terrorist association" the creation of a "criminal outpost" (*strafrechtlichen Vorposten*).[74] While the exact "shape" of the offense and its elements may be discussed,[75] clearly the potential for endangerment is caused by "forming," "participating in," or "supporting" a group in order to commit a terror attack, thus calling for intervention of

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[67] *See* Winfried Hassemer, *Kennzeichen und Krisen des modernen Strafrechts*, 25 ZRP 378, 380 (1992). *But see* Bettina Weißer, *"Der Kampf gegen den Terrorismus" – Prävention durch Strafrecht?*, 63 JURISTENZEITUNG (JZ) 388, 393 (2008); Bettina Weißer, *Über den Umgang des Strafrechts mit terroristischen Bedrohungslagen*, 121 ZSTW 131, 153 (2009).

[68] Weißer, *"Der Kampf gegen den Terrorismus" – Prävention durch Strafrecht?*, *supra* note 67, at 393.

[69] MARK ZÖLLER, *supra* note 7, at 503.

[70] *Cf.* MARK ZÖLLER, *supra* note 7, at 503; Bernd Heinrich, *Die Grenzen des Strafrechts bei der Gefahrprävention, Brauchen oder haben wir ein "Feindstrafrecht"?,* 121 ZSTW 94,116, 121 (2009).

[71] Hereto and discussing the elements of section 129a of the dStGB: Kretschmer, *supra* note 27, at 1026- 1028. *Cf.* also MARK ZÖLLER, *supra* note 7, at 510.

[72] Also MARK ZÖLLER, *supra* note 7, at 503; Weißer, *Über den Umgang des Strafrechts mit terroristischen Bedrohungslagen*, *supra* note 67, at 140.

[73] MARK ZÖLLER, *supra* note 7, at 503.

[74] MARK ZÖLLER, *supra* note 7, at 504.

[75] For full discussion see MARK ZÖLLER, *supra* note 7, at 505.

criminal law. The formed group is self-directed, which can cause all kinds of risks to safety and order, especially since individuals may further participate in forming, joining or supporting group-goals in what may be termed a *group-dynamic process*.

In a limited sense, endangerment carried out by such terrorist groups is comparable to endangerment carried out by cars on public streets: in both cases, a multitude of risks endangers the public and causes a common danger while the chain of cause often remains unclear. In both cases, intervention by criminal law is justified in order to *prevent future damage to the society*.[76] Therefore endangering road traffic (§ 315c of the dStGB) by, e.g., wrongly overtaking and concretely endangering other road users and their belongings, driving while under the influence of drink or drugs (§ 316 of the dStGB) or the dangerous disruption of road traffic (§ 315b of the dStGB) are punishable. Compared with, in case of terrorism already forming a terrorist association is punishable (§ 129a of the dStGB). The interference with the individual's entitled right of "free assembly"[77] (*criteria No. 2*) is justified, prohibiting association beyond the borders of constitutional order that interferes with the rights of others. Yet, the transitions are floating. Full concurrence is to be given to Zöller's suggestion to rename section 129a of the dStGB into "participating in a terrorist group" and to concentrate on its subjective elements (*mens rea*).[78] The elements of *association* and *terrorist motivation* need clarification and concrete definition.[79] Yet, as long as laws interfere only with the offender's *externum* their application is lawful in order to prevent from terror attacks. If someone actually participates in a group and is showing terrorist motivation, this will normally be the case.

2. §§ 89a, b, 91 dStGB

The 2009 introduced laws of sections 89a and 89b do not require a group-dynamic-element,[80] but criminalize planning and preparing terror attacks also by single offenders. The endangerment to the public is self-determined: the offender *determines* effective time and place to convert any abstract endangerment (stage of *planning a terror attack*) into a

[76] For cases of terrorism, *see also* MARK ZÖLLER, *supra* note 7, at 508; Weißer, *Über den Umgang des Strafrechts mit terroristischen Bedrohungslagen*, *supra* note 67, at 393, 395.

[77] According to German constitutional law, the right of "free assembly" is a personal right deriving from Art. 8 of the German Basic Law (GG): GG, *supra* note 44, at Art. 8.

[78] MARK ZÖLLER, *supra* note 7, at 560, but also at 505.

[79] MARK ZÖLLER, *supra* note 7, at 560, 561.

[80] Intention was to punish the single offender: BT. 16/12428, 9. *Cf*. Kretschmer, *supra* note 27, at 1030 with further references.

concrete breach of law (*infringing the objects of protection*).[81] The provisions respond to emerging terror groups, which do not show strong hierarchical structures but consist of loose connections and floating memberships.[82] Criminal responsibility is *predated* to the stages of training, or taking part in training, in order to craft or to train use of weapons (§ 89a (2)(1) of the dStGB), to the stages of crafting, producing, providing or lodging such weapons to others (§ 89a (2)(2)), to the stage of obtaining or lodging such materials in order to craft or produce weapons (§ 89a (2)(3)), and to the stage of collecting or receiving significant financial interests in order to prepare a terror attack (§ 89a (2)(4)).[83] Anyone who produces or provides written materials, which can be used as instructions or manual to commit a terror attack (§ 91 of the dStGB), also, violates the law. Section 89b of the dStGB adds even more predating. Hereto, whoever *establishes* or *maintains* contacts to a terror group, as defined in section 129a of the dStGB, with the intention to take part in any training for a terror attack, as defined in section 89a of the dStGB, is punishable.[84] Hence section 89b criminalizes the *preparation* of crimes defined by sections 89a and 129a, which already predate criminal responsibility; in other words, herein a *chain of preparations* is criminalized.[85]

To justify such legislation, one needs to examine the *wrong* (*Unrecht*). Not every new law is unconstitutional just because it predates criminal responsibility. But, in the new anti-terrorism laws, criminal behavior only *abstractly* endangers the public. Especially in section 89b of the dStGB legislators have not provided any other rationale substantive element adding to the *just abstract* endangerment. The elements of forming/participating in terror groups are not required; nor must any other element be met.[86] Further critics have questioned whether the elements of the new laws satisfy the constitutional principle of clarity and definiteness.[87] Because the laws do not explicitly define specific elements of

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[81] *See also* Katrin Gierhake, *Zur geplanten Einführung neuer Straftatbestände wegen der Vorbereitung terroristischer Straftaten,* 3 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK (ZIS) 397, 402 (2008); Weißer, *Über den Umgang des Strafrechts mit terroristischen Bedrohungslagen*, *supra* note 67, at 149 .

[82] For the discussion of the law see *supra* Part D. Provisions: What is punishable according to the German Criminal Code?.

[83] Referring to section 89a of the dStGB: *see supra* note 31.

[84] *Supra* note 31.

[85] *Cf.* Volker Bützler, *Die Vorverlagerung der Strafbarkeit am Beispiel der Terrorismusverfolgung aus deutscher Perspektive*, *in* GRENZEN DER VORVERLAGERUNG IN EINEM TATSTRAFRECHT 375, 394 (Arndt Sinn, Walter Gropp & Ferenc Nagy eds., 2011).

[86] This is also criticized by Gierhake, *supra* note 81, at 398; MARK ZÖLLER, *supra* note 7, at 586.

[87] The principle of *clarity* and *definiteness* (*Bestimmtheitsgrundsatz*) is incorporated within Art. 103(2) of the German GG: *see supra* note 44 at Art. 103(2). It is one of the main principles, especially within criminal law. Laws need to clearly define the grounds and the extent of the crime with all its elements and provide punishment. Also criminal law provisions that only function prospectively by averting danger to public need to contain specific material substance, at least in order to ring-fence developments. This specific material substance is derived from

offenses, like *other skills* or *significant financial interest* in section 89a of the dStGB, at least in part, the law remains unclear.[88]

However, if criminal responsibility is predated, it has to based on behavior, which can be understood as disorder *outside* the offender's interim sphere (outside his/her *internum*) in order to qualify as *criminal wrong* (*Unrecht*).[89] Otherwise, the offender is punished for his/her (probable) plans, which still are an anticipated chain of thoughts. This means that planning or preparing the commission of a (serious) criminal offense can indeed qualify as a *criminally relevant wrong*, if concerning the *externum.* In German criminal law, these crimes are typically known as "conspiracy" to "induce another to commit a felony or abet another to commit a felony."[90] Seen from this perspective, legal justification can be based on the seriousness of group-dynamic-behavior that endangers the public. Then, planning and preparation are part of the *externum*, because the offender joins his "chain of thoughts" plotting and scheming with others. Criminalized actions punishable under sections 89a and 91 of the dStGB can be compared with conspiracy, if linked to "providing" or "lodging" certain weapons and/or production of such weapons and/or manuals to *either* produce them *or* to realize a terror attack. If clearly defined by the law, such actions are part of the offender's *externum*, because they exceed his/her entitled self-determination and interfere with rights of the community.[91] Plans and manuals to produce weapons or prepare terror attacks, especially since it is unknown who is going to make use of them, endanger the public. Thus, planning or preparing a terror attack can constitute a *criminal wrong*, *but only if* predated criminal responsibility is directed at behavior that exceeds the individual's *internum* and endangers the public (most often through self-dynamic grouping).

But lawfulness is less persuasive, when looking at section 89b of the dStGB: "Establishing contacts for the purpose of committing a serious violent offense endangering the state."[92]

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respecting constitutional principles, above all the principle of *Bestimmtheitsgrundsatz*, in defining the offense of abstract endangerment clearly and with certainty: *see* Schünemann, *supra* note 51, at 142 (This is Schünemann's third criterion).

[88] See also MARK ZÖLLER, *supra* note 7, at 586.

[89] Jakobs, *supra* note 58, at 761.

[90] *See* dStGB, *supra* note 9, at § 30; for a translation *see* Bohlander, *supra* note 9. According to section 30(2) of the dStGB, criminal responsibility also attaches to one who "declares his willingness or who accepts the offer of another or who agrees with another to commit or abet the commission of a felony".

[91] This is also seen as a necessary requirement by MICHAEL KÖHLER, STRAFRECHT ALLGEMEINER TEIL 22 (1997). For a critical summary of the discussion *see* Gierhake, *supra* note 81, at 400, 401; Sieber, *supra* note 10, at 362.

[92] Title of the German offense as translated by Bohlander, *supra* note 9. *See supra* Part D. Provisions: What is punishable according to the German Criminal Code?; *supra* note 31 and accompanying text for a discussion on German 2009 laws of sections 89a, 89b, and 91 of the dStGB.

The provision obviously aims at the *sleeper terrorist*. The element "establishing of contacts" *in German language* meets the actor at the point, where he/she starts to find another person to contact.[93] It is not yet necessary to have a concrete goal and plan, nor does the offender yet intend to commit an attack.[94] The crime to be committed is at the stage of *pre*planning; neither the crime itself, nor victim, nor time or places are specified. The crime is constructed as a preparatory crime (*Vorbereitungsdelikt*) to the preparatory crimes defined in sections 89a and 129a of the dStGB.[95] The actor is caught by his/her chain of thoughts; unclear whether ever a crime is been committed. Such criminal law interferes with the individual's interim sphere *without justification*.[96] If accepted by law, it runs the risk of justifying going after probable terrorists even before they started to concretely plan an attack in order to prevent an attack and secure public safety. It is inconceivable that government action as such would be justified against other kinds of probable criminality. It would result in "thought crimes" and "thought police".[97] Otto Backes warns that the new German anti-terrorism crimes defined in sections 89a, 89b and 91 of the dStGB are the "key" for police to open investigation against anyone who is suspected of planning or preparing a serious criminal offense.[98] But when somebody might start "thinking" about "establishing" contacts is neither predictable nor determinable.

F. Conclusions: "Fighting against" *Terrorism* by Means of Criminal Law - Identifying the Unknown

Concluding, terrorism nowadays causes new kinds of complex risks to the modern risk society (*Risikogesellschaft*)[99]; "fighting against" terrorism challenges the society's very foundations. There is nothing really new in the "new" terrorism, except that the actual

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[93] The German wording does not require the "strong" establishment of relations to a terror group, but simply punishes for "contacting a terror group" under section 129a and section 129b of the dStGB or for "keeping contact to such a terror group" in order to be advised according to a crime under section 89a of the dStGB. A simple phone call would be sufficient.

[94] Also rightly argued by Sieber, *supra* note 10, at 362.

[95] Sieber, *supra* note 10, at 362.

[96] See the arguments by Jakobs, *supra* note 58, at 756 on *conspiracy*—if close friends develop criminal plans. For a discussion which links *conspiracy* to the new German terrorist offenses *see* Gierhake, *supra* note 81, at 400; Detlev Sternberg-Lieben, *§ 89b*, *in* SCHÖNKE/SCHRÖDER-KOMMENTAR ZUM STGB (Albin Eser et al eds., 28. ed., 2010), margin number 1.

[97] GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949). This discussion is not farfetched, but part of the U.S. discussion on the U.S. Patriot Act: see only Viet D. Dinh, *USA Patriot Act*, 5 GERM. L.J. 461, 463 (2004).

[98] Otto Backes, *Der Kampf des Strafrechts gegen nicht-organisierte Terroristen*, 28 STRAFVERTEIDIGER (StV) 654, 660 (2008).

[99] Sieber, *supra* note 10, at 353.

source of endangerment has become more and more unclear. Due to the non-hierarchical loose structures of terrorist groups and their almost arbitrary choice of whom to victimize, "fighting against" terrorism means fighting against the *unknown*. So far, the government's response seems to convert substantive criminal law principles into those that would aim to avert dangers. While predating criminal responsibility to its earliest stages of planning and preparing *or* even of *pre*planning the commission of crimes may be very effective in preventing terror attacks, one needs to take into account the inevitable impact on the criminal justice system. If not limited, such criminal law seems to enter the realm of police investigation. The interest of safety conflicts with the right to privacy. Still, the *unknown* is not identified. Suggestions to identify the *unknown* are (1) determining the actual circumstance requiring protection of the legally interest *by criminal law* while respecting constitutional principles, above all the principle of clarity and definiteness *in the process of legislation*, (2) determining that protection will not interfere with entitled rights of the actor, and finally (3) determining whether the prescribed wrong (*Unrecht*) is proportionate to the prescribed punishment. In order to obtain that goal, we need to research the social phenomenon of "terrorism" in its changing faces[100] but be mindful by distinguish occurring "terrorist danger" from "terrorist action".[101] There will be always a public interest to prevent the public from terrorist danger to be guaranteed by carrying out proportionate social rules and, for example, good police work. Borderlines hereto are to be discussed at another place.[102] Hence, it is not the main function of substantive criminal law to prevent terrorist *danger*, but to prevent terrorist *action*. Preventing terrorist danger can only be excepted, if the terrorist *danger* is at least concrete enough to *qualify* for *endangering a legally protected interest* and can be manifested in the suspect's *externum*. This applies to suspected terrorists and also to all other suspects of crime without labeling any of them as an "enemy". Otherwise punishment is carried out for "thinking differently" by way of *precrime*.

In the end sleeping is allowed also for suspected terrorists. Going after them still originates with the police in their efforts to prevent danger to the public. Predating criminal responsibility has to be limited. The use of criminal law may be justified in order to "fight against" terrorism, if the endangerment qualifies to risk fundamental rights of the community through an actual terror attack. That is the case if planning and preparation include a self-dynamic-grouping *external* of the suspect's interim sphere. Despite critics of

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[100] Because the "social phenomenon" terrorism changes its faces, one concrete and clear international definition is almost inconceivable. On the other hand, this failure to agree on a definition of terrorism is been seen as the major problem: *see* Verena Zöller, *supra* note 38, at 469, 476. For the social approach *see also* Saul Newman, *Terror, Sovereignty and Law: On the Politics of Violence*, 5 GERM. L.J. 569 (2004).

[101] For concrete suggestions on a legal definition see now Cancio Meliá, *supra* note 44, at 8.

[102] This does not mean that constitutional borderlines are to be drawn differently for installing legal measures to prevent danger from the public and to ensure public security by police work, clearly: *see* Heinrich, *supra* note 70, at 129, 130. But, whether criminal law can be applied is yet to be seen different.

the wording, criminal law establishing punishment for *participating in a terrorist group* (§ 129a and b of the dStGB) or for *providing or lodging weapons/production plans for weapons or manuals to produce weapons or to commit terrorist attacks* (§§ 89a and 91 of the dStGB) can be lawful with certain limitation. But punishing the *establishment of plans* in the *pre*plan-period (§ 89b of the dStGB) and preparing for further preparatory actions according to section 89a of the dStGB violates constitutional principles. It just *symbolizes a wrong* instead of containing substance. Not only the suspected terrorists but German criminal law needs to be driven back within the constitutional border. Only then can the individual's personal freedom be guaranteed towards peaceful coexistence and to the full enjoyment of human rights.