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# The Penalization of Public Provocation to Commit a Terrorist Offence

## – Evaluating Different National Implementation Strategies of the International and European Legal Framework in Light of Freedom of Expression

### *Abstract*

In the last decades, the fight against terrorism has (once again) taken centre stage, not only internationally but also on the European level. On both levels, legal counter-measures have targeted specifically terrorist speech. The national legislator, in implementing international requirements and creating terrorism incitement offences, is faced with a specific problem, as there exists an inherent tension between such measures and the right to freedom of expression. This paper, after briefly considering the relevant terminology, delineates the international obligations with respect to different forms of incitement to terrorist acts, such as direct incitement or glorification. Distinct implementation strategies in national laws are then considered, with a focus on the EU member states of Germany and the UK. These states' implementation of the European legal framework is evaluated in light of the requirements of Art. 10 ECHR. It is demonstrated that German criminal law penalises incitement through a number of different provisions. Unlike UK law, the German legislator has thereby refrained from creating a wide-scoped offence of incitement to terrorist acts. It is argued that this approach is more parsimonious and is preferable in light of the threat that such communication-based offences present to the freedom of expression safeguarded by Art. 10 ECHR. This approach not only respects the principle of proportionality but also poses less risk of a chilling effect, while the UK provisions might fulfil Art. 10 ECHR requirements only if construed narrowly.

### *I. Introduction*

The last decades have seen a rise in terrorist activities worldwide. Consequently, the fight against terrorism has (again) taken centre stage not only internationally but also

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on a European level. In this context, a special focus is laid on one prominent aspect: terrorist propaganda. The so called “new” terrorism skilfully exploits the opportunities new technologies offer for propaganda purposes, to spread their ideas and recruit supporters.<sup>1</sup> Propaganda in forms of radical texts, pamphlets or propaganda videos that are intended to radicalize susceptible recipients are widely disseminated, especially through the internet. Thus, the last few decades have seen, both on the national and international levels, a rise in legal activities targeting specifically terrorist speech. International bodies such as the UN Security Council or the Council of Europe have advocated for specific action to be taken to counter this phenomenon.

On the European level, numerous legislative measures have been adopted that focus on the challenges that the terrorist threat poses to EU-member states. One important and controversial area that was concentrated on is incitement to terrorism. Both the Council of Europe's Convention on the Prevention of Terrorism 2005<sup>2</sup> and the EU Framework Decision 2008/919/JHA of 28 November 2008, amending Framework Decision 2002/475/JHA on combating terrorism, specifically require their member states to penalize public provocation to commit terrorist offences. Most recently, in the Draft Directive on combating terrorism, that is to replace the European Framework Decision 2002/475/JHA on combating terrorism, the dangers of public provocation were again emphasized and it was stressed that strengthened action is needed.<sup>3</sup>

Domestic legislators have responded differently to these international obligations. Germany is one country among many that had to consider whether it fulfilled international requirements or was under the obligation to act. As a result, most European member states did introduce new legislation targeting specifically terrorist propaganda, among them Germany and the UK.<sup>4</sup> In considering whether its criminal law sufficiently penalised incitement to terrorism, a national legislator is faced with a specific problem. As incitement offences target acts of communication, there exists an inherent tension with the right to freedom of expression – a right widely protected by human rights law. A too extensive criminalization would risk having a chilling effect on politi-

1 EU Framework Decision 2008/919/JHA of 28 November 2008, amending Framework Decision 2002/475/JHA on combating terrorism, margin no 5.

2 CETS No. 196, adopted on 16 May 2005, in force since 1 June 2007.

3 Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, 6655/16, p. 5. After the time of writing the Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA entered into force.

4 Specifically on the implementation in Germany, the UK and Spain see A. Petzsche, *Strafrecht und Terrorismusbekämpfung – Eine vergleichende Untersuchung der Bekämpfung terroristischer Vorbereitungshandlungen in Deutschland, Großbritannien und Spanien*, 2013. On the broadening of the scope of criminal through the introduction of precursor crimes M. Cancio Meliá/A. Petzsche, *Precursor Crimes of Terrorism*, in: G. Lennon/C. Walker (eds.), *Routledge Handbook of Law and Terrorism*, 2015, p. 194 et seq.

cal speech and on media coverage of terrorism-related news.<sup>5</sup> Therefore, in dealing with incitement offences, the need to safeguard the conflicting value of free speech while intending to prevent terrorist propaganda creates a difficult context. In the following sections, the international obligations dealing with different forms of incitement to terrorist acts, such as direct incitement or glorification, and different implementation strategies in national law are considered. As examples, the EU member states of Germany and the UK will be examined, and their implementation of the European legal framework evaluated in light of the requirements of Art. 10 of the European Convention on Human Rights (ECHR). First, the terminology is briefly considered.

## II. Terminology

In line with international terminology, the broader term of “incitement” will be used as an overarching term. While the vague term of “incitement” has been attributed with various meanings, there exists no internationally binding or widely recognized definition.<sup>6</sup> For example, the UN resolution 1624 (2005) dealing with (direct) incitement to terrorists acts offers no definition or comment on its meaning. *Barnum* in his article on incitement attempts to define it with a negative approach, whereby he delineates the constraints to penalization, suggesting that “the impugned message must consist of an unambiguous, affirmative exhortation to engage in unlawful action, and, secondly, the ‘incitees’ must be exhorted to engage in unlawful action that is ‘particular’, ‘concrete’, or ‘specific’.”<sup>7</sup> The general uncertainty of this term is amplified by the usage in international and domestic legal frameworks of not only the term (direct or indirect) “incitement” but also of “provocation”<sup>8</sup>, “glorification”<sup>9</sup> or “apologie”<sup>10</sup>.

In this article, I distinguish between direct incitement as defined by Barnum and indirect incitement that encompasses glorification and justification of terrorist acts and is also described as an *apologie* of terrorism. A focus will be laid on the question of which form of incitement international obligations encompass, and if and how it is penalized in the German and UK criminal law.

- 5 *S. Sottiaux*, *Leroy v France: apology of terrorism and the malaise of the European Court of Human Rights' free speech jurisprudence*, *European Human Rights Law Review* (E.H.R.L.R.) 2009, p. 415 et seq.
- 6 *E. De Brabandère*, *The Regulation of Incitement to Terrorism in International Law*, in: L. Hennebel/H. Tigroudja (eds.), *Balancing Liberty and Security: The Human Rights Pendulum*, 2011, p. 219 et seq.
- 7 *D. Barnum*, *Indirect incitement and freedom of speech in Anglo-American law*, *European Human Rights Law Review* (E.H.R.L.R.) 2006, p. 258 et seq.
- 8 See Art 5 Council of Europe's Convention on the Prevention of Terrorism 2005; Art. 3 (1) a) EU Framework Decision 2008/919/JHA of 28 November 2008.
- 9 See e.g. Sec. 1 (3) Terrorism Act 2006.
- 10 See e.g. Art. 579 Código Penal.

### III. *The Prohibition of Incitement to Terrorism in International and European Legal Instruments*

There exist several international obligations dealing with incitement to terrorism that are relevant to EU member states' domestic law: the UN Security Council Resolution 1624 (2005), the Council of Europe's Convention on the Prevention of Terrorism 2005 (Convention 2005) and the EU Framework Decision 2008/919/JHA of 28 November 2008, amending Framework Decision 2002/475/JHA on combating terrorism (Framework Decision 2008).

The farthest reaching, in the scope of countries affected, if not in content, is UN Security Council Resolution 1624 (2005).<sup>11</sup> The resolution was adopted in September 2005 to counter incitement to terrorist acts.<sup>12</sup> It calls upon all member states to adopt legislation that prohibits "incitement to commit a terrorist act or acts".<sup>13</sup> The resolution itself does not offer any definition of "incitement" but a non-binding definition was suggested by the Secretary-General, describing incitement as "a direct call to engage in terrorism, with the intention that this will promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring."<sup>14</sup> This definition thereby expresses what the resolution itself also clarifies: it only refers to direct, not to indirect incitement. While indirect incitement is also mentioned, the resolution "merely" "repudiate[s] attempts at the justification or glorification of terrorist acts (*apologie*) that may incite further terrorist acts" but does not require penalization.<sup>15</sup>

On the European level, there are two relevant legal instruments in force dealing with incitement to terrorist acts, and one additional measure pending adoption (which has entered into force after the completion of this writing). The Council of Europe's Convention on the Prevention of Terrorism 2005<sup>16</sup> obliges parties to criminalize "public provocation to commit terrorist offences" which it defines as all forms of "incitement" to terrorism "*whether or not directly advocating terrorist offences*" so long as they "cause a danger that one or more such offences may be committed", and the maker of the statement "intends to incite the commission of the offence." It therefore expressly encompasses both forms of incitement. It does not specifically name glorification but covers it as part of indirect incitement.<sup>17</sup> Though indirect incitement is included, the

11 UNSC Res 1624 (14 September 2005) UN Doc S/RES/1624.

12 The German government implicitly recognized its binding nature by answering the Council's questions regarding implementation in Germany in 2006, UN Doc S/2006/527.

13 UNSC Res 1624 (14 September 2005) UN Doc S/RES/1624, margin no 1.

14 Report of the Secretary General, The protection of human rights and fundamental freedoms while countering terrorism, UN Doc A/63/337, margin no 61.

15 UNSC Res 1624 (14 September 2005) UN Doc S/RES/1624.

16 CETS No. 196, adopted on 16 May 2005, in force since 1 June 2007.

17 *De Brabandère* (fn. 6), p. 229.

requirement of a specific intent to incite and causing a credible danger serves to narrow its scope.<sup>18</sup>

In 2008, the Convention 2005 was incorporated into EU law through an amended Framework Decision on combating terrorism (Framework Decision 2008).<sup>19</sup> Though the measures are not identical, there is a large overlap. The Framework Decision 2008 also explicitly includes public provocation to commit terrorist offences, which it defines as “the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 1(1)(a) to (h), where such conduct, *whether or not directly advocating terrorist offences*, causes a danger that one or more such offences may be committed”. Even though its former 2002 version had already included the penalization of inciting, aiding or abetting terrorist offences, it was viewed as necessary to explicitly regulate public provocation because the former version did “not explicitly cover the dissemination of terrorist propaganda and terrorist expertise”.<sup>20</sup>

However, the Framework Decision 2008 might soon be repealed and replaced by a new Directive, as on March 3<sup>rd</sup> 2016, the Council of the European Union agreed on a draft of a new Directive on combating terrorism that is to replace the European Framework Decision 2002/475/JHA on combating terrorism (Draft Directive 2016).<sup>21</sup> The proposal explicitly refers to the dangers of public provocation to commit a terrorist offence and stresses that strengthened action is needed.<sup>22</sup> The Draft Directive clarifies and explicitly states that indirect incitement means in particular the glorification of terrorist acts.<sup>23</sup> Additionally, the member states are called upon to take measures to remove or to block access to webpages publicly inciting to commit terrorist offences.<sup>24</sup> Whereas the Directive has not yet entered into force, on February 16<sup>th</sup> 2017, the European Parliament, at the first reading, adopted the Directive<sup>25</sup> with some amendments and is now awaiting the Council’s position. While the amended Draft Directive 2016 maintains the obligation of member states to penalize “Public provocation to commit a

18 Explanatory Report on Council of Europe Convention on the Prevention of Terrorism, CM (2005) 34, margin no 99 et seq.

19 EU Framework Decision 2008/919/JHA of 28 November 2008, amending Framework Decision 2002/475/JHA on combating terrorism.

20 Proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism, COM (2007) 650 final, p. 4.

21 However, the UK has not yet decided whether it will take part in the adoption of this Directive.

22 Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, 6655/16, p. 5.

23 Ibid, p. 15.

24 Ibid, p. 5.

25 European Parliament legislative resolution of 16 February 2017 on the proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism (COM(2015)0625 – C8-0386/2015 – 2015/0281(COD)).

terrorist offence”, the European parliament proposed a slightly different wording<sup>26</sup> thereby clarifying that public provocation encompasses conduct that “[...] directly or indirectly, such as by glorification of terrorist acts, advocates the commission of terrorist offences”.<sup>27</sup>

Thus, whereas the UN Resolution 1624 (2005) only covers direct incitement, the Convention 2005 and the Framework Decision 2008 (and presumably the new Directive) include both direct and indirect incitement. These obligations have a wide scope. The prohibited conduct is a communicative act per se, such that any offence threatens to come in conflict with the freedom of expression. This freedom is enshrined in international human rights law, such as Art. 19 of the Universal Declaration of Human Rights or Art. 10 European Convention on Human Rights (ECHR). It can also be found in many European constitutions, such as Art. 5 of the German Basic Law. While it is afforded a central place in liberal democracies, it is not an absolute right, but is subject to restrictions provided for in the same instruments protecting the right, e.g. Art. 10 (2) ECHR.

The international bodies recognize this tension: for example the UN Resolution 1624 (2005) explicitly stresses that any measures taken to implement the obligations must comply with international human rights law;<sup>28</sup> the European measures contain similar clauses.<sup>29</sup> On the European level, the measures are governed by the requirements of the ECHR and domestic constitutions.<sup>30</sup> Whereas the right to freedom of expression is not absolute, any measure infringing upon it still has to be proportionate or, in the language of the ECHR, “necessary in a democratic society” and carried out for certain enumerated aims, of which in the context of terrorism “the interests of national security”, “public safety” and “the prevention of disorder and crime” are relevant. It is, therefore, important that the member states implementing those international requirements take this tension into account. One limit on the restriction is the presence of potential harm. As an incitement does not need to lead to the actual commitment of

26 “Member States shall take the necessary measures to ensure that the distribution, or otherwise making available *by any means, whether online or offline*, of a message to the public, with the intent to incite the commission of one of the offences listed in points (a) to (i) of Article 3(1), where such conduct, *directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of* terrorist offences, *thereby causing* a danger that one or more such offences may be committed, is punishable as a criminal offence when committed intentionally.”, which corresponds with the final version in Art. 5 of the Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism.

27 Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, 6655/16, p. 15.

28 UNSC Res 1624 (14 September 2005) UN Doc S/RES/1624, margin no 4.

29 EU Framework Decision 2008/919/JHA of 28 November 2008, margin no 15; Council of Europe’s Convention on the Prevention of Terrorism 2005, p. 2.

30 In the implementation of the Convention 2005 as part of the legal framework of the Council of Europe the members are bound directly by the ECHR whereas for the implementation of European Framework Decision the influence is indirect as all EU members are also members of the Council of Europe and therefore bound by the ECHR.

a terrorist act, the element of potential harm or the likelihood of the effective commission are central to preserving freedom of expression.<sup>31</sup>

#### IV. Implementing the European framework: Incitement offences in the UK

Several countries have grappled with the challenge of implementing these international obligations. As a result, many EU member states created specific new offences covering not only direct incitement but also indirect incitement or glorifications, such as the UK that penalizes the encouragement of terrorism and the dissemination of terrorist publications in Sec. 1, 2 Terrorism Act 2006 (TA2006)<sup>32</sup> and Spain that penalizes the *apologie* of terrorism (“apología de terrorismo”) in Art. 578, 579 Código Penal. In both countries, these provisions have been criticized.<sup>33</sup> In the present section, the UK provisions are examined more closely as an example of a wide approach to implementation.

Sec. 1 TA2006, on the encouragement of terrorism, contains as the *actus reus* the publication of a statement “that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences<sup>34</sup>”. In Sec. 1 (3) TA2006 it is clarified that such statements include the glorification of the commission or preparation of such acts or offences, thereby clearly signifying a wide approach. The *mens rea* requirement demands that the publisher of the statement “intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences; or is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offence.” Additionally, Sec. 2 TA2006, on the dissemination of terrorist publications, penalizes the (secondary) dis-

31 *De Brabandère* (fn. 6), p. 219 et seq.

32 Though the Framework Decision 2002/475/JHA is not applicable to the United Kingdom, which in accordance with Article 10(4) of Protocol number 36 annexed to the TEU and to the TFEU, exercised its right to opt out of this legal framework with effect from 1 December 2014, it is still bound by the Council of Europe’s Convention on the Prevention of Terrorism 2005.

33 Regarding UK law see *E. Barendt*, Threats to freedom of speech in the United Kingdom?, UNSW Law Journal 2005, p. 895 et seq.; *A. Hunt*, Criminal prohibitions on direct and indirect encouragement of terrorism, Criminal Law Review (Crim.L.R.) 2007, p. 441 et seq.; *C. Walker*, Blackstone’s Guide to the Anti-Terrorism Legislation, 3<sup>rd</sup> ed. 2014, p. 66 et seq.; *Petzsche* (fn. 4), p. 252 et seq.; on Spanish Law see *M. A. Cano Paños*, La reforma penal de los delitos de terrorismo en el año 2015: cinco cuestiones fundamentales, Revista General de Derecho Penal 23 (2015), p. 1 et seq.; *M. Cancio Meliá*, Delitos de organización: criminalidad organizada común y delitos de terrorismo, in: J. Díaz-Maroto y Villarejo (ed.), Estudios sobre las reformas del código penal, 2011, p. 643 et seq. (on the law prior to the latest reform). Furthermore, for a critical view on Australian law see *B. Saul*, Speaking of Terror: Criminalising incitement to violence, UNSW Law Journal 2005, p. 868 et seq.

34 These specified offences are listed in Schedule 1 of the Terrorism Act 2006.

semination of terrorist publications with intent or with recklessness as to direct or indirect encouragement of acts of terrorism. Consequently, both sections cover, in this wide implementation approach, direct and indirect incitement.

Noteworthy in this context are two elements of the provisions that highlight their wide scope: the offences can be committed not only intentionally but also recklessly<sup>35</sup> and there is no express requirement – unlike in the European framework<sup>36</sup> – that there be any danger that anyone will actually be encouraged by the publication or dissemination. Thus, both provisions have been criticised.<sup>37</sup> Sec. 1 TA2006, which inter alia describes glorification as including “any form of praise or celebration”<sup>38</sup>, has received notable objections on the grounds of uncertainty and vagueness.<sup>39</sup> Concern has also been raised as to the chilling effect that such offences can have on free speech.<sup>40</sup> Additionally, such offences might create tension with the proportionality principle, as a glorification offence with its wide scope and interpretative difficulties could be seen as an interference that goes beyond the extent strictly required to meet its purpose.

As a justification for creating such wide-scoped offences, not only is the international framework referred to, but also the fact that the severity of the terrorist threat necessitates an early intervention and that propaganda has a particular qualitative contribution to the materialization of the terrorist acts.<sup>41</sup> A specific incitement offence is not only meant to prevent terrorist acts, but also contains a symbolic message that the state will not accept such conduct.

Germany, to the contrary, has chosen a different path. The legislator did not create a specific incitement or glorification offence. However, this does not mean that such conduct is not penalized. Several different provisions are relevant and applicable in this context. In providing for various offences, rather than one wide-scoped incitement offence, the German approach tries to capture any behaviour meriting punishment without unduly infringing on free speech. In the following section, this German approach will be explored and the different relevant offences examined.

35 See Sec. 1 (2) (b) (ii) and 2 (1) (c) Terrorism Act 2006.

36 Art. 5 (1) of the Council of Europe Convention on the Prevention of Terrorism 2005 explicitly states as a requisite that “such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.”

37 *Hunt*, *Crim.L.R.* 2007, p. 441 et seq.; *T. Choudhury*, *The Terrorism Act 2006: Discouraging Terrorism*, in: I. Hare/J. Weinstein (eds.), *Extreme Speech and Democracy*, 2009, p. 463 et seq.; *Walker* (fn. 33), p. 76 et seq.; *Petzsche* (fn. 4), p. 259 et seq.

38 Sec. 20 (2) TA2006.

39 *Hunt*, *Crim.L.R.* 2007, p. 441 et seq.

40 *Hunt*, *Crim.L.R.* 2007, p. 441 et seq.; *Choudhury* (fn. 37), p. 463 et seq.; *Walker* (fn. 33), p. 76 et seq.

41 *Y. Ronen*, *Incitement to terrorist acts and international law*, *Leiden Journal of International Law* (L.J.I.L.) 2010, p. 645 et seq.

V. *Implementing the European framework: The penalization of incitement in the German Criminal Code*

German criminal law does not contain a definition of terrorism<sup>42</sup> or an offence penalising a “terrorist act”.<sup>43</sup> Consequently, neither does there exist an offence of “incitement” or “public provocation to terrorism”. Several forms of conduct that are considered incitement are still penalised under the following general norms and specific offences.

1. The General Part

In the general part of the German Criminal Code (Strafgesetzbuch – StGB), there exist two relevant sections: Sec. 26 StGB, on abetting, clarifies that whoever “intentionally induces another to intentionally commit an unlawful act”<sup>44</sup> is punished the same as a perpetrator of the crime. Whereas this norm can be potentially relevant in the context of terrorist propaganda, in order to be fulfilled it would have to be shown in court that a specific terrorist act was actually committed or at least attempted by another person. In addition, the specific offence would need to be covered by the intent of the perpetrator. To prove in court such a connection of “mere” propaganda to a specific act will often be impossible. In cases where the commitment of an actual act causally linked to the “inciter” can actually be proven, the element of incitement would be covered by the conviction as an abettor under sec. 26 StGB.

The relevant German conspiracy offence contains two parts: It provides that a person who attempts to induce or abet another to commit a serious offence is punishable, sec. 30 (1) StGB, and that whoever declares his willingness, accepts the offer of another or agrees with another to commit or abet the commission of a serious offence is equally punishable, sec. 30 (2) StGB. Unlike sec. 26 StGB, sec. 30 StGB does not require for the serious offence to actually have been committed, which makes it more relevant to the context of incitement to terrorist acts. However, one requirement is that the details of the planned offence have to be specified to a certain degree. The jurisprudence requires that although the perpetrator need not have planned all the details,<sup>45</sup> his or her intent must at least encompass most of the characteristic aspects of the planned offence so that it is recognizable as a specific and individualizable event.<sup>46</sup> Showing this degree

42 Even though the definition included in the European Framework Decision 2002/475/JHA is binding in the interpretation of any relevant provision of domestic law.

43 Only three provisions expressly mention terrorism in their title: sec. 89c – the financing of terrorism and section 129a, b – forming terrorist organisations and terrorist organisations abroad.

44 Official translation by Prof. Bohlander, [http://www.gesetze-im-internet.de/englisch\\_stgb/](http://www.gesetze-im-internet.de/englisch_stgb/) (last accessed 7 March 2017).

45 BGHSt 40, 218, 231.

46 G. Heine/B. Weißer, in: A. Schönke/H. Schröder (eds.), *Strafgesetzbuch Kommentar*, 29<sup>th</sup> ed., 2014, § 30, margin no 5; U. Murmann, in: H. Satzger/W. Schluckebier/G. Widmaier (eds.), *StGB – Strafgesetzbuch*, 2<sup>nd</sup> ed., 2014, § 30, margin no 9.

of specificity can prove difficult in the context of incitement, as propaganda messages for example might include a general call to fight against or to kill non-believers without laying out a specific plan including whom, when and where.

## 2. The Special Part

In addition, several provisions of the Special Part (which stipulates and defines specific crimes) are of interest in penalizing incitement to terrorist acts: Section 91 (1), on encouraging the commission of a serious violent offence endangering the state, Section 111, on the public incitement to crime, Section 129a Subsection 5 that penalises support of a terrorist group and the recruitment of members or supporters for a terrorist group, Section 130a, on attempting to cause the commission of offences by means of publication, Section 131, on the dissemination of depictions of violence and Section 140, on the rewarding and approving of offences.

### a) Section 91 (1) – Encouraging the commission of a serious violent offence endangering the state

Instead of discussing these norms in the listed numerical order, I examine them with regard to their relevance. Consequently, I first consider the “youngest” norm, sec. 91 (1) StGB, as it was part of a law amending the German Criminal Code<sup>47</sup> that was specifically designed to implement the requirements of the Convention 2005 and the Framework Decision 2008.<sup>48</sup> The norm penalizes the encouragement of the commission of a serious violent offence endangering the state. Whereas its wording does not explicitly focus on encouraging *terrorist* acts, the legislator clarified that the norm is meant to target in particular Islamic terrorism and the use of modern technologies to disseminate propaganda and instructions for terrorist purposes.<sup>49</sup>

With regard to incitement, sec. 91 (1) no. 1 StGB is of importance. It penalizes a person who displays or supplies written material which by its content is capable of serving as an instruction to the commission of a serious violent offence endangering the state, if the circumstances of its dissemination are conducive to awakening or encouraging the preparedness of others to commit such an offence. The written material can also include any virtual data like links to a document or videos, because the main objective of the German legislator is to target instructions disseminated through the Internet on how to plan a terrorist attack, build explosive devices etc. As such, the norm clarifies that it only covers material that is suited to serve as instruction for the commission of serious offences. General messages glorifying or justifying terrorist acts do not suffice. Additionally (unlike the UK provisions), the dissemination must be con-

47 Gesetz zur Verfolgung der Vorbereitung von schweren staatsgefährdenden Gewalttaten (GVVG), BGBl I 2437.

48 See the explanatory memorandum BT-Drucks. 16/12428, p. 2, 13.

49 BT-Drucks. 16/12428, p. 1, 17.

ductive to awakening or encouraging the preparedness of others to commit such an offence. Therefore, even though a different wording was chosen in the norm, this prerequisite corresponds with the “likelihood of harm” requirement contained in the international framework.

Sec. 91 StGB is applicable to different forms of direct incitement as long as the communication act contains an instruction. It therefore covers a specific form of incitement, incitement through providing instructions on how to commit a serious crime. An example would be a manual on how to construct a home-made bomb if placed in a specific context such as a radical Islamic forum. However, in general, it does not encompass forms of indirect incitement as it is difficult to imagine a message of “mere” justification or praise of terrorism containing specific instructions.

b) Section 129a (5) – The support of a terrorist group and the recruitment of members or supporters for a terrorist group

Sec. 129a (5) penalises the support of a terrorist group and the recruitment of members or supporters for a terrorist group. In the first alternative, contained in this provision, support encompasses certain forms of aiding and abetting by non-members. Such acts need to be effective to promote, enhance or secure the specific potential threat the terrorist organisation poses, and to benefit the organisation. There are some propaganda activities imaginable that would fulfil these criteria.

The recruitment, contained within the second alternative of the provision, encompasses propaganda activities that are beneficial for the organisation and are directed at individuals or the public. The recruitment needs to be directed towards the group’s organisational preservation or enhancement through recruiting new members or third-party supporters. The recruitment must be undertaken in favour of a specific terrorist organisation: a general call to participate in terrorist acts or in the “Jihad” does not suffice.<sup>50</sup>

This norm consequently encompasses some forms of direct incitement. However, a small change of the wording of the provision in 2002 had served to clarify that the mere lobbying for sympathy or approval (the so called *Sympathiewerbung*) was to be excluded from the norm. Rather than cover any endorsement that promotes the ideology and goals of a terrorist organisation, it is now confined to soliciting new members or supporters.<sup>51</sup> Endorsements of organisations like Al-Qaeda, the justification of their aims, or glorification of their criminal acts alone do not constitute the offence of supporting terrorism,<sup>52</sup> so that it is not applicable to such general acts of indirect incitement.

50 *B. von Heintschel-Heinegg*, in: B. v. Heintschel-Heinegg (ed.), *Beck'scher Online Kommentar StGB*, 33th ed., 2016, § 129a, margin no 15a.

51 *K. Lobse*, in: H. Satzger/W. Schluckebier/G. Widmaier (eds.), *StGB – Strafgesetzbuch*, 2nd ed., 2014, § 129a, margin no 29; *von Heintschel-Heinegg* (fn. 51), § 129a, margin no 15a.

52 *von Heintschel-Heinegg* (fn. 51), § 129a, margin no 17; BGH 3 StR 314/12 = NStZ-RR 2013, 171 (Ls.).

A case dealing with this offence illustrates its scope. The defendant was a member of different internet platforms the goal of which was to translate into western languages and spread jihadist propaganda.<sup>53</sup> In 2007, the defendant had provided in such a platform a link to a video of “al-Qaida in the Land of the Two Rivers” which showed the beheading of an American hostage by the leader of the group Abu Musab Al Zarkawi in 2004. The execution was preceded by a message in which Al Zarkawi referred to the events in Abu Ghuraib and called on all Muslims to fight and take revenge on America. In his speech, that was translated in subtitles, the leader said inter alia: “Kill the polytheists, wherever you find them!” The Federal Criminal Court did not uphold the conviction of the lower court for sec. 129a (5) StGB.<sup>54</sup> It found that posting the link did not provide a tangible benefit for the terrorist organisation. Therefore, the act was limited to a mere endorsement of the organisation, the justification of its aims and glorification of criminal acts which did not fulfil the requirements of the offence.<sup>55</sup> However, this did not mean that the defendant was acquitted. Even though the court had quashed the conviction for sec. 129a (5) StGB, it stressed that other criminal offences were indeed applicable, as will be examined below.

c) Section 130a – Attempting to cause the commission of offences by means of publication

Sec. 130a StGB penalizes the provision of instructions for the commission of certain crimes. According to subsection 1, the disseminated material must be capable of serving as an instruction for specific unlawful acts and must be intended by its content to encourage or cause others to commit such an act. Only specific forms of dissemination are covered. Subsection 2 additionally requires the subjective element that the perpetrator intends to encourage or cause others to commit such an act.

Similar to sec. 91 StGB, this section in particular covers instructions for the commission of certain offences. It thereby penalises specific forms of direct incitement whereas it is difficult to imagine examples of merely glorifying or justifying material fulfilling the requirements of this offence.

d) Section 111 – The public incitement to crime

Sec. 111 (1) StGB provides that a person who publicly, in a meeting or through the dissemination of written materials incites the commission of an unlawful act is punishable, whereby it is irrelevant whether the incitement actually results in any criminal conduct of another or not. The communicative act can be in the form of direct and indirect incitement, as it does not require an explicit incitement. However, the unlawful act needs to have a certain degree of specification, so that the mere identification of the

53 BGH 3 StR 314/12.

54 Ibid, margin no 11.

55 Ibid, margin no 11.

type of act without indicating time, place and victims is not sufficient.<sup>56</sup> Thus, whereas sec. 111 StGB generally contains both direct and indirect incitement, often, the specific inciting nature of the act and the necessary specification of the intended criminal act will be missing in general propaganda messages.

e) Section 140 – Rewarding and approving of offences

Sec. 140 StGB provides that whoever approves publicly of one of the unlawful acts enumerated in the provision, in a meeting or through dissemination of written materials, and in a manner that is capable of disturbing the public peace, is punishable. The approval must refer to a concrete act but must not be expressed explicitly; it can be inferable from the circumstances. A glorifying portrayal of a terrorist crime as necessary and justified may fulfil the norm.<sup>57</sup> This norm is therefore one of the few offences of the German criminal code clearly targeting indirect incitement in form of glorification and justification.

f) Section 131 – Dissemination of depictions of violence

Lastly, sec. 131 StGB is of relevance in penalizing whoever disseminates depictions of violence against persons. One alternative of fulfilling the elements of the crime is to depict cruel or otherwise inhumane acts of violence “in a manner expressing glorification” which indicates that sec. 131 StGB is also applicable to forms of indirect incitement. Unlike in sec. 91 or 111 StGB, it is not necessary for the dissemination to be conducive to encouraging others to commit violent crimes. A central aspect of the norm is the quality of the depictions of violence as it needs to be in a manner violating human dignity.

The recent importance of this rather specific offence is due to the fact that many Islamic terrorist organisations use the internet to disseminate photos and videos of their deeds such as the beheading of hostages for propaganda purposes. Consequently, in the criminal case involving an execution video, outlined above, the court that had quashed the conviction for sec. 129a (5) StGB – the support of a terrorist group – held that the facts of the case presented a violation of sec. 131 StGB.

This examination of the criminal code shows that German criminal law does indeed penalize incitement of terrorist acts in its direct and to a lesser extend in its indirect form. For example, only sec. 131 and 140 StGB cover specific forms of glorification. The legislator, rather than creating an all-encompassing offence, decided that different offences that penalize specific forms of incitement would suffice in order to fulfil its European obligations. This approach is recommendable considering the problems faced by other countries in formulating such offences. As *Hunt*, who has examined the

56 BGHSt 31, 16, 22; *T. Fischer*, in: Fischer (ed), *Strafgesetzbuch mit Nebengesetzen*, 64<sup>th</sup> ed., 2017, § 111, margin no 4a; *Petzsche* (fn. 4), p. 202.

57 UN Doc S/2006/527.

British approach stresses, such “offences must be narrowly construed in order to ensure that they do not constitute a disproportionate interference with the Convention right to freedom of expression”.<sup>58</sup> The German approach is an attempt to narrowly draft and construe the relevant criminal law.

## VI. *Evaluating UK and German Offences in light of the European Convention on Human Rights*

Incitement offences create an inherent tension with the right to freedom of expression because they target acts of communication and thus risk having a chilling effect on political speech. Therefore, in what follows, both the German and UK approach to implementing the European framework are considered in light of the freedom of expression protected by the ECHR, in which both countries are member states. First, the requirements of Art. 10 ECHR are examined, in order to evaluate, secondly, the aforementioned UK and German provisions in this context.

### 1. Art. 10 ECHR-requirements

Article 10 ECHR – providing for freedom of expression – protects primarily the expression of opinion.<sup>59</sup> The content of a statement is not relevant in determining the scope of protection, such that it applies “not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population”.<sup>60</sup> Even statements that are directed against the principles of a democratic state are in principle protected by Art. 10 ECHR.<sup>61</sup> Thus, even terrorist speech and propaganda potentially fall into the ambit of Art. 10 ECHR. However, Art. 10 (2) ECHR clearly states that member states are allowed to interfere with this freedom if they comply with the requirements set out in Art. 10 ECHR, namely, if the interference is ‘necessary in a democratic society’. The following steps apply in evaluating whether this proportionality-requirement has been fulfilled: the interference has to be prescribed by law, must follow a legitimate aim (in this context the maintenance of public safety and the prevention of disorder and crime<sup>62</sup>) and be necessary in a democratic society.<sup>63</sup> However, the European Court of Human Rights (ECtHR) has stressed that a margin of appreciation is left to the member states.<sup>64</sup> A central element often invoked in assessing the

58 *Hunt*, Crim.L.R. 2007, p. 441 et seq.

59 C. Grabenwarter, European Convention on Human Rights Commentary, 2014, Art. 10, margin no 4.

60 *Handyside v. UK*, Application no. 5493/72, Judgement 7 December 1976, margin no 49.

61 Grabenwarter (fn. 59), Art. 10, margin no 6.

62 C. Mensching, in: U. Karpenstein/F. Meyer (eds.), EMRK Konvention zum Schutz der Menschenrechte und Grundfreiheiten Kommentar, 2012, Art. 10, margin no 49.

63 Grabenwarter (fn. 59), Art. 10, margin no 21.

64 ECtHR, *Handyside v. UK* (fn. 60), margin no 48.

necessity of the interference, that was introduced by ECtHR case law, is the requirement that an expression “incites to violence against an individual, a public official or a sector of the population”<sup>65</sup> which is particularly relevant to terrorist propaganda cases.

One of the central cases dealing with the actual prohibition of (indirect) incitement to terrorism is the *Leroy v. France*<sup>66</sup> case, in which the applicant was convicted and fined by the *cour d’appel de Pau* for an *apologie* of terrorism, namely for having published a cartoon in a newspaper in the Basque Country shortly after the 9/11 New York terrorist attack. This cartoon depicted four tall buildings that collapse in a cloud of dust after being hit by two planes, with the caption “We have all dreamt of it... Hamas did it.”, parodying a well-known commercial slogan. In its judgement, the ECtHR found that the conviction was well founded under the French law, which pursued several legitimate aims, namely the maintenance of public safety and the prevention of disorder and crime. It also concluded that the conviction did not represent an unjust infringement of the freedom of expression, because the cartoon amounted to supporting and glorifying the destruction of the USA, in which the author, by using the word “we”, had identified himself with terrorism,<sup>67</sup> thus ultimately finding the interference with Art. 10 ECHR to be justified. However, it needs to be stressed that the ECtHR did not make a judgement on the (French) criminal provisions criminalizing incitement themselves. Rather, the Court considers on a case-by-case basis the compatibility of convictions, such as those for an *apologie* of terrorism, with the ECHR and especially with Art. 10.

## 2. Evaluating the German and UK approach

While the *Leroy v. France* case did not find a violation of Art. 10 ECHR,<sup>68</sup> it also cannot be read as a general assessment (and approval) of all incitement offences. Consequently, the provisions for specific offences have to be considered individually. With this in mind, the wide scope of the UK law penalizing direct and indirect incitement and glorification appears problematic in light of the outlined proportionality requirements. Sec. 1 and 2 TA2006 clearly lack the element of inciting violence, an element which is often required by the ECtHR, because they lack the express requirement of an actual danger occurring. However, this requirement is only a frequent, but not a consistently employed standard:<sup>69</sup> therefore a specific conclusion cannot be drawn solely from the lack of a present danger. Nevertheless, considering that offences under this provision can be committed recklessly<sup>70</sup> and furthermore that there is no express requirement that there be any danger that anyone will actually be encouraged, it seems

65 See e.g. *Sürek v Turkey (No.1)*, Application no. 26682/95, Judgement 8 July 1999, margin no 61. On this standard see also p. *Sottiaux*, E.H.R.L.R. 2009, p. 415 et seq.

66 *Leroy v. France*, Application no. 36109/03, Judgement 2 October 2008.

67 ECtHR, *Leroy v. France* (fn. 66), margin no 43.

68 ECtHR, *Leroy v. France* (fn. 66), margin no. 48.

69 S. *Sottiaux*, E.H.R.L.R. 2009, p. 415 et seq.

70 See Sec. 1 (2) (b) (ii) and 2 (1) (c) Terrorism Act 2006.

questionable whether such wide provisions are actually ‘necessary in a democratic society’. It seems nonetheless possible that the courts adopt an interpretation of the offences that narrows and restricts their scope enough in order to address Art. 10-concerns.<sup>71</sup> *Hunt* offers a restrictive proposition in arguing that “unless indirect encouragement to engage in terrorism creates a danger that persons will be encouraged to engage in terrorism, the imposition of criminal liability would not be compatible with Art. 10.”<sup>72</sup> Consequently, the UK provisions need to be narrowly construed and applied by courts. In contrast, the German approach which uses different offences that penalize specific forms of incitement, rather than creating an all-encompassing offence, seems to be far better equipped to address Art. 10 ECHR-concerns and fulfil the proportionality requirements.

### *VII. Conclusion*

Several current legal measures on a European and international level have focused on fighting terrorist propaganda. As they target acts of communication, national legislators in the implementation are faced with the difficulty of safeguarding the freedom of expression while fighting terrorist propaganda. Different legislators have responded differently to this challenge. An example of one approach is the German criminal law, in which incitement is penalised in various provisions. These provisions encompass many forms of direct incitement (e.g. in sec. 129a (5) – support of a terrorist group and the recruitment of members or supporters for a terrorist group or sec. 111 – the public incitement to crime) and some specific forms of indirect incitement such as glorification and justification (e.g. in sec. 140 – approving of offences and in sec. 131 – dissemination of depictions of violence). Unlike UK law, however, the German legislator, while respecting and fulfilling its European obligations, has refrained from creating a wide-scoped offence of incitement to terrorist acts. This approach is more parsimonious and is preferable in light of the threat such communication-based offences present to the freedom of expression safeguarded by Art. 10 ECHR. This approach not only respects the principle of proportionality but also poses less risk of a chilling effect, while the UK provisions might fulfil Art. 10 ECHR requirements only if construed narrowly.

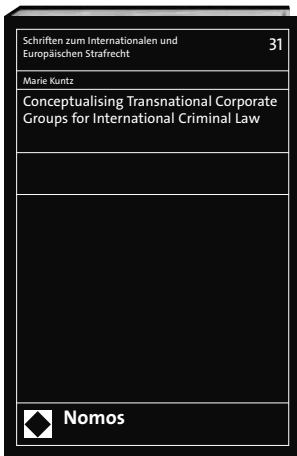
A conviction for “incitement to a terrorist act” might have a stronger symbolic meaning than a “mere” conviction for an offence such as the “dissemination of depictions of violence”. However, this presents a positive aspect of the German approach, as it is exactly such symbolism that increases the risk of a chilling effect and self-censorship. Consequently, even though the German criminal law might not be able to convict perpetrators for all the behaviour that would be punishable in the UK, this solution is recommendable. Indeed, the German legislator should refrain from broadening the

<sup>71</sup> *Hunt*, *Crim.L.R.* 2007, p. 452.

<sup>72</sup> *Hunt*, *Crim.L.R.* 2007, p. 457.

scope of the criminal law in this context, in order to strike a fair balance between the need to prevent terrorist acts and the obligation to protect the freedom of expression.

# Conceptualising Transnational Corporate Groups



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