



CASE STUDY: GERMANY

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1. INTRODUCTION

Terrorism became part of German history through the actions of national terrorist groups, especially the *Rote Armee Fraktion* (RAF) actions in the 1970's. Since then, Germany has not experienced terrorism understood as acts targeting the very foundation of the country, authorities, and major institutions¹. As a consequence of the September 11 2001-attacks on the United States of America, Germany had to change its policies and thinking on counter-terrorism. This case study on Germany will focus on the period following 9-11 as these attacks sent shockwaves through Germany; Germany was not directly targeted but had to confront and tackle the information that the attacks had been partly planned in Hamburg.

Following the 9-11 attacks, Germany's government acted swiftly by ratifying UN Security Council Resolutions, EU Regulations as well as two anti-terrorism packages and drafted national acts and amendments, all aimed at preventing terrorist attacks, facilitating the investigation possibilities and procedures, and prosecute terrorists. This very active position was furthered by Germany during its EU Presidency with e.g. the launching of '*Check the Web*',² an initiative aimed at monitoring and evaluating Islamist terrorist websites at EU level; and the Prüm Convention, a cooperation between seven EU-members aimed at '*stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration*'.³

According to German law there is no clear definition of what constitutes a terrorist or a terrorist act. Therefore, the quick post 9-11 adjustment by Germany to an international 'war on terror' with a strong focus on fundamentalists and radicalisation⁴ seems somewhat complicated by the absence of a clear definition of terrorism.⁵ EU Framework Decision on Terrorism (2002) includes a common definition

¹ Safferling mentions a few attacks for instance as part of a gang riot (2006, section 1).

² Council Conclusion 2007: <http://register.consilium.europa.eu/pdf/en/07/st08/st08457-re03.en07.pdf>

³ The Prüm Convention is sometimes referred to as 'Schengen III': <http://www.libertysecurity.org/article368.html>.

⁴ According to Council of Europe October (Profile 2004:4) there were 195 sets of investigation proceedings in progress with a fundamentalist terrorist background.

⁵ Safferling (2006). He also points out that the following wording is being used frequently by the government: '*...terrorism is an international threat, supported by a supra-national network*'. A suggested but not adopted definition of terrorism as acts '*...intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such act, but its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act*'. Heinz and Arend 2005: 11.

of terrorism. The Decision focuses on compliance with fundamental rights as well as the definition itself, which are subjects that are essential to the debate in Germany.⁶

The internationalisation of the campaign to prevent terror in Germany bears with it a focus on Germany's international human rights and legal obligations. While consequences of such internationalisation are far-reaching and rely on international and bilateral cooperation, the constitutional judicial review of acts and provisions and the strong focus on fundamental rights in the Basic Law tie counter-terrorism initiatives closely to the Basic Law and to the human rights conventions ratified by Germany.

Meanwhile, also important in defining the context of the debate in Germany is a fear that Germany may be targeted by terrorists in the same way as Spain or Great Britain. This is mentioned repeatedly by politicians when acts are amended and authorities have extended mandates. German authorities have increased their focus on fighting international terrorism, often as part of the focus on international crime, and issues such as Germany's international human rights responsibilities, the balance between the investigation and persecution of terrorists versus the protection of privacy of German citizens, and the constitutionality of newly adopted acts and amendments play vital roles in the discussions.

Questions related to radicalisation and Islam, to Islamists, and any potential relation to terrorism is a global current issue, in Germany no less with a focus on home-grown terrorists, '*Hausgemachte Terroristen*' and radicalisation. Following Ministry of Interior's '*German Islam Conference*' in 2006, a number of working groups continue working on the overall goal of building a national framework for dialogue between the German state and Muslims living in Germany. The Ministry underlines the importance and urgency of integration of young Muslims in Germany. As an important voice in this debate, the director of Germany's national human rights institution (NHRI) in his essay '*The Image of Islam in Germany*' presents his views on how to approach the growing anxiety towards Islam in Germany and states that the way a society treats a minority is an image of how this society perceives itself.

⁶ Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of: — seriously intimidating a population, or — unduly compelling a Government or international organisation to perform or abstain from performing any act, or — seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002F0475&model=guichett. Arend and Heinz (2005) claim this is too vague and unclear a definition to be a legal tool (2006:15).

This case-study attempts to answer how ethical questions concerning counter-terrorism measures, including issues of legality and legitimacy, have been discussed in Germany and how the balance between civil liberties and public security has been addressed. Section two gives an introduction to the basic legal structure and continues with an insight into the Criminal Code. A list of legislative acts with the fight against terror in mind will be introduced and analysed. The case study will focus on measures that are relevant to individuals. Moreover, that analysis is covering the period after 9/11 2001 as this date marks a particular change in German counter terrorism policies due to the fact that perpetrators in the attack at the World Trade Centre were based in Germany.

The question of legality will focus on criticism from the Constitutional Court as well as the discussions of compliance to Basic Law by the measure in question.

Each legal measure will then be analysed using the concept of legitimacy developed by Thomas Franck. The issue of legitimacy builds on four aspects with the overarching idea that in order for a measure to be quickly and smoothly implemented, there should be a '*pull to compliance*' of a measure, a question that can be answered through application of the following concepts.

Determinacy gives focus to clarity in wording as well as legal predictability in a provision. Franck's notion of symbolic validation relates to the authenticity of measures as well as adding a cultural dimension to the concept of legitimacy. The concept of coherency relates to the requirement that likes should in principle be treated alike and any distinction of treatment has to be justified in principled terms. Adherence points to the aspect of viewing new legal initiatives in the light of the already existing system and thereby a normative standard that here stems from Germany's obligations to international law.

2. CONSTITUTION, CONSTITUTIONAL COURT, AND BASIC RIGHTS

Before looking at the specific initiatives by Germany with regards to counter-terrorism policy, the following presents a few highly relevant points concerning the judicial foundation upon which the policy stands. This section introduces Germany's Basic Law and focuses on the main counter-terrorism initiatives with a final view on essential points of criticism.

2.1 German Basic Law and German Federal Constitutional Court⁷

The Basic Law, *Grundgesetz* (GG) for the Federal Republic of Germany was proclaimed on May 23, 1949. The founding of GG was based on the Universal Declaration of Human Rights and former constitutions such as the Weimar Constitution of 1919. With the reunification of East and West Germany (October 3, 1990) the People's Chamber in Berlin declared that now, both belonged to the area of application of the Basic Law.⁸ The German state is based on the principles of rule of law, binding the *Bundestag* to the GG stipulating how no state act may contradict the Basic Law. The State may interfere with a citizen's rights only on the basis of a statute and such interference needs to comply with the principle of proportionality of means and ends.⁹

The German Federal Constitutional Court, *Verfassungsgericht* exercises constitutional jurisdiction at federal level while the Land Constitutional Courts do so equally at Länder level. The Federal Constitutional Court is active when called upon and it supervises Parliament to see whether laws are in accordance with GG both in form and substance (review takes place when one third of the MP's, the government of a Bundesland, or the Federal Government asks for it). Anybody who claims his / her basic rights have been infringed upon can file a complaint with the Court. Instead of a special state body with competences in human rights issues, the German legal system contains special procedures and institutions, assisting individuals who wish to file a complaint. Petition committees exist at both federal and state level and the right to complain is secured in the Basic Law, art. 17. A specialised committee, G 10

⁷ Main source of information here is Core Document for Germany to the UN *HRI/CORE/1/Add.75/Rev.1*

⁸ Following the reunification, a number of amendments to the Basic Law have been accepted by the Bundestag and the Bundesrat, including a strengthening of the legislative powers of the Länder.

⁹ Core Document 2003: section 66.

Commission¹⁰ has been appointed to examine and adjudicate on complaints from individuals claiming violation of Basic Law article 10, which protects the Privacy of Correspondence, Posts and Telecommunications.¹¹

Not clear whether the list of organs that follows also have the right to assist individuals to complain on human rights violations. Or do they form a different category, or are they all different. Make an announcement on what follows next in this paragraph and how it relates to the heading of this paragraph.

The Federal Office of the Protection of the Constitution, *Bundesamt für Verfassungsschutz* (BfV¹²) works with offices at Länder level with the mandate of collecting and analysing information and intelligence concerning acts that with the use of violence are directed against the democratic basic order or the existence and the security of the Federation, against foreign concerns of Germany, or acts directed against the idea of international understanding,¹³ including peaceful coexistence of peoples. BfV works with counterintelligence and contributes to protective security and counter sabotage. Two BfV departments monitors Islamic extremism and terrorism.¹⁴

The Federal Committee on Human Rights and Humanitarian Aid, *Ausschuss für Menschenrechte und humanitäre Hilfe* (1998) in the Federal Foreign Office has a Commissioner, observing developments in the field of human rights worldwide and participates in the bilateral and multilateral human rights dialogue. The responsibility for monitoring international missions lies with this Committee together with the Armed Services Committee and Committee on Foreign Affairs.

With regards to national issues, the Commissioner for Human Rights Issues in the Federal Ministry of Justice, *Die Beauftragte für Menschenrechtsfragen im BMJ* is the representative of the Government to the European Court of Human Rights, and the Commission acts as observer to the UN Commission on Human Rights focusing on economic and social rights and similar obligations.¹⁵

¹⁰ The G-10 Monitoring Committee is a subcommittee to the Parliament <http://www.bundestag.de/parlament/gremien/kontrollgremien/g10/index.html>

¹¹ Law Limiting the Secrecy regarding Letters, Posts and Telecommunications (http://bundesrecht.juris.de/bundesrecht/g10_2001/gesamt.pdf) was amended in 2001 to give intelligence agencies the means to monitor data and voice lines, an access that service providers are required to give (Privacy and Human Rights 2007: 481).

¹² The BfV was founded in 1990: <http://www.verfassungsschutz.de/>

¹³ CF. art. 9, par 2 of German Basic Law.

¹⁴ The Department on Activities posing a threat to security and extremist efforts of foreign nationals and from abroad (including Islamists) and the Department on Islamist Extremism and Islamist Terrorism. See: http://www.verfassungsschutz.de/en/index_en.html.

¹⁵ The Human Rights Issues Commissioner, Federal Ministry of Justice: http://www.bmj.bund.de/enid/8e9c023445759fbf4a0e9a0a7dcfa8df,5cecef6e6575657375636865092d0931/Menschenrechte/Beauftragte_fuer_Menschenrechtsfragen_sw.html

Institut für Menschenrechte, Germany's national human rights institution was founded in 2001 and builds on a mandate of information, documentation, training, public information, and research. The German Institute presents itself as a bridge between national and international levels, where the Institute amongst other issues follows up on the recommendations from treaty bodies. The Institute also offers policy advice on how to integrate human rights into provisions and acts.¹⁶ The Institute has raised a number of issues, pertinent to counter-terrorism in various reports, for instance the complicated relationship with Germany's Muslim minority. In 2005, the German Institute hosted a conference that took up the essential topics when discussing public security and fundamental rights, such as the constitutional importance of new legislation adopted in order to improve national security.¹⁷

Forum Menschenrechte is a forum for human rights NGO's, comprising some 50 German NGO's with the aim of improving the human rights situation in general and monitoring the Government and the Parliament's work in this area. Amongst many activities and publications, the working group of the Forum on the UN Human Rights Council focuses on making sure that members are heard at council meetings.¹⁸

2.2 FUNDAMENTAL RIGHTS LAID DOWN IN THE CONSTITUTION

The German Basic Law, *Grundgesetz* (GG) stipulates in art. 1 to 19 citizens' fundamental rights, including art.1 that describes human dignity as inviolable. The German Official Core Document (2003) to the UN Office of the High Commissioner for Human Rights explains GG and the following is relevant in light of the question of legality:

- Articles 1-19 constitute the basic rights, *Grundrechte* of the German constitution.
- Articles 1 and 20 are inalienable, as stated in article 79 – securing protection of human dignity (1) and of the basic institutional principles of the Federal Republic of Germany (20).

¹⁶ Deutsches Institut für Menschenrechte: http://www.institut-fuer-menschenrechte.de/webcom/show_article.php/c-419/i.html

¹⁷ See Deutsches Institut 2005.

¹⁸ Forum Menschenrechte: http://forum-menschenrechte.de/cms/front_content.php?idart=245

- Article 19 states that in no case may the essence of a basic right be affected. Parliament is prohibited from encroaching on the essence of a basic right.
- Article 25 states that international law takes precedence over national law in relation to the human rights protected in the international conventions that Germany has ratified '*...to the extent that they can be interpreted as general rules of international law*' (section 100).
- Article 93 secures the right to constitutional complaint – which exclusively serves to protect basic rights and the constitutional rights which have the same status. This adheres to basic rights, to rights under article 20, par. 4 or articles 33, 38, 101, 103, 104

2.3 International obligations

Germany's international obligations entail various consequences relevant to German engagement in missions, including counter-terrorism missions internationally; and there are implications regarding collaboration with foreign intelligence services including the exchange of personal information, and court cases making use of information and evidence from non-German agencies.

Germany's responsibility to contribute to the protection of human rights as determined by international law is stipulated in Basic Law art 25: '*The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory*'. To underline this, there is a relevant point made by Heinz and Arend. They refer to decisions made by the European Court of Human Rights stating that even when Germany transfers certain sovereign rights and powers to international organisations (UN or EU), Germany maintains its obligations to the European convention for the Protection of Human Rights¹⁹.

¹⁹ Heinz and Arend 2005:19 (footnote 50).

3. LEGALITY AND LEGITIMACY

The German Cabinet responded to 9-11 by adopting Security Package I and II quickly after.²⁰ The strong focus on money laundering and financing of international terrorism and crime is often linked closely to terrorism and this is also a central part of Germany's state party report to UN Counter Terrorism Committee (2004).

This section discusses the most important counter-terrorism legal measures drafted and adopted in Germany. The five aspects of analysis mentioned in the introduction will provide the basis for the concluding remarks on whether any serious ethical bottlenecks can be described or detected in relation to the German counter-terrorism measures.

The following sections introduce the German Criminal Code and how it is applied in the pursuance of terrorist offences. Following legal measures will be analysed:

- Criminal Code
- Act on Joint Databases
- Fourth Financial Market Act and the Money Laundering Prevention Act
- Act on Suppression of Terrorism
- Aviation Security Act
- Draft Act on Preventing International Terrorist Threats

This section ends with a reference to the debate concerning the Muslim minority in Germany, a topic closely related to Security Package I and II.

3.1 Criminal Code – Strafgesetzbuch

This section focuses first on the lack of definition of terrorism in German Criminal Law and subsequently on the specific acts relevant in relation to terrorist activities which are punishable under the German criminal code. Such relevant acts are public incitements to crime, formation of groups intending to commit crime, and rewarding and approving crimes.

In the 2006 state party report to the UN Counter-Terrorism Committee (CTC), Germany refers to the absence of a general definition in the German Criminal Code

²⁰ First package was adopted on December 8, 2001, allowing the authorities to prohibit also religious associations, should they advocate violence. Second Package was adopted on January 1, 2002, with a number of changes in acts such as the Federal Act on the Protection of the Constitution (Council of Europe 2004: 5).

Strafgesetzbuch (StGB²¹) 'as to what is to be understood as a terrorist, criminal offence'.²²

The state party report to the CTC describes the provisions in the Criminal Code which relate to terrorist offences. The Criminal Code contains provisions to prohibit by law incitements to commit a terrorist act. Thus the 2006 report to the CTC explains that various provisions are relevant in pursuing terrorists and terror acts, although these provisions do not contain a reference to terrorism but rather to a serious, criminal offence punishable by at least one year.

StGB section 26 stipulates punishment for inciting others to commit serious criminal offences and section 30 defines that this person, accepting to act on an incitement is also liable. Conviction for inciting others to commit criminal offences stems from StGB section 111. It is pertinent to underline that it is irrelevant whether the incitement is successful or not, i.e. whether it results in a criminal act or not²³.

As regards recruitment and formation of terrorist groups, Section 129 (1), (2) refers to the formation of terrorist groups and stipulates that whoever forms groups that are directed at seriously intimidating the population, to unlawfully coerce a public authority or an international organisation through the use of coercion, or to *'...significantly impair or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation'* is to be considered a criminal offender.²⁴ Supporters of such groups as well as members are liable to conviction according to StGB, as well as are acts of recruitment for such groups (section 129a (5)).

Section 129b, a new amendment to the German criminal law, refers to international groupings, stating that the law applies when the victim or the perpetrator is in Germany or has German nationality.

Thus, the newly amended acts against international terrorists and organisations are aimed at people living in Germany as well as outside its borders as well as at both criminal and terrorist organisations (paragraph 129, 129a, 129b) – a clear reference to the 9-11 shock mentioned earlier.

Rewarding and approving crimes (StGB section 140 (2) as well as disseminating instructions for crimes (StGB section 130a) are also mentioned in the

²¹ StGB accessed via <http://dejure.org/gesetze/StGB> on July 31, 2008.

²² S/2006/527, report from Germany to Counter-Terrorism Committee, 2006.

²³ Quote: (S72006/27) paragraph 1: *'...irrelevant whether the incitement actually results in criminal conduct or not... The provision does not require the perpetrator to explicitly incite an unlawful act.'*

²⁴ State Party Report 2006: section 1 with reference to StGB art 129.a

<http://bundesrecht.juris.de/stgb/> . The wording resembles the definition by the EU, see note 2.

CTC report. Organisations found guilty in the above-mentioned paragraph can be prohibited following Article 9, section 2 of the Basic Law under which the assets of the organisation can also be confiscated.

Section 47 (2) no 2 of the Residency Act prohibits political activities by foreigners *'...if they are designed or apt to publically support, advocate or induce the use of violence as a means to advocate political, religious or other concerns.'* Also organisations whose purpose or activities are directed against the principle of international understanding can be prohibited. Section 54 no 5a of the Residency Act justifies expulsion of foreigners from Germany if a person has publically called for the use of violence, an offence barring people from getting residence permit in Germany through Residency Act section 5 (4).²⁵

Legality

In his assessment of the new amendment 129b of which Law? on prosecution of international organizations both criminal and terrorist, Safferling stresses that 129B opens the way for government influencing the Public Prosecutor because it is the Minister of Justice who has to decided whether prosecution is to go ahead. This is in conflict with the ordinary rules on the applicability of the Criminal Code, where the discretion of prosecution is left with the office of Public Prosecutor, i.e. an administrative decision rather than a political one. Would you thus qualify this as a point of criticism that undermines the legality of this regulation? In addition, according to Safferling, German scholars have also criticised the new provisions for being too vague.²⁶ Elaborate and explain how this undermines the determinacy of the regulation.

Question on symbolic validation: is this a new trend to have so much influence by the Ministry of Justice? Or is there a tradition in German Law with regard to these kind of regulations?

Turning to the question of legal proceedings against suspects of terrorism or allegiance to a terrorist group, there is no separate procedure in Germany; however a few provisions are directed at serious crimes, including that of terrorism. For

²⁵ Council of Europe 2004: 5.

²⁶ Safferling 2006: 5-8.

instance, surveillance of mobile phone and emails may be authorised for up to three months by judicial order²⁷ with extensions only on renewed order.

As regards the legal criminal provisions defined after 2001 as a result of counter-terrorism measures, the main problem is one of coherency. There are no principled reasons given by the authorities why the new legal measures of combating international crime and terrorist threats should not be undertaken according to the same procedures as national terrorist threats (explain more elaborate how the procedure for national terrorist threats work, or did I miss that?). The amendment to the Criminal Code tend to politicise prosecution of international crime in contrast with practices earlier pursued as regards domestic crime.

The criticism raised against the Straffgesetzbuch is therefore one of clarity and determinacy and one of coherency.

3.2 The Act on Joint Databases

The Act on Joint Databases, *Anti-Terror-Datei Gesetz* came into effect on December 31 2006, allowing the federal and state police and intelligence agencies to set up joint databases.²⁸ Can you give more information on what this Act entails? What does it do? What information of individuals is joint and what can happen with that information? Who has access to this information, and when?

Federal Minister of Interior, Wolfgang Schäuble underlined the importance of creating efficient tools to fight terrorism while at the same time stressing the compliance with existing regulations to protect sources, confidentiality, and the privacy of personal data.²⁹ The law was discussed in a Hearing of the Federal Parliament during November 2006. Critical voices were raised from among others the Chairperson of the "Deutschen Vereinigung für Datenschutz". Also individual researchers raised critical questions. Who were they? And what was their critique?

²⁷ Germany – profiles on Counter-Terrorist Capacity, Committee of Experts on Terrorism, Council of Europe, October 2004.

²⁸ Gesetz zur Errichtung gemeinsamer Dateien von Polizeibehörden und Nachrichtendiensten des Bundes und der Länder
http://www.bmi.bund.de/nn_1016300/Internet/Content/Common/Anlagen/Gesetze/Antiterrordatei_gesetz_en,templateId=raw,property=publicationFile.pdf/Antiterrordatei_gesetz_en.pdf

²⁹ Federal Minister of the Interior Schäuble: *Counterterrorism is essential to the fight against terror*, October 2, 2006
(http://www.bmi.bund.de/cln_012/nn_122730/sid_C2A8A670D1A0D4649539C7E88C010AE7/Internet/Content/Nachrichten/Pressemitteilungen/2006/09/Antiterrordatei_en.html)

The concerns related to the protection of privacy, i.e. it was argued that the widened access to personal data was not justified by the perceived gains in security. The proportionality argument, i.e. the negative consequences of the intervention in terms of less personal privacy assessed against the actual threats was also raised as regards the fact that the joint data based could also be used when disseminating information outside Germany.³⁰ How did one respond to this criticism? Relate these arguments to the legality discussion, or otherwise to the adherency discussion.

In relation to the question of determinacy, general critique and comments³¹ aiming at both the automatic gathering of information and the lack of clarity as to the use of the information has been put forward.³² As a wider perspective on this issue, Heinz and Arend underline the seriousness of the problems related to the exchange of information, both amongst EU-member countries and beyond. They argue that such an exchange is problematic due to the lack of Parliamentary control and clarified purpose as well as the sudden access amongst EU states to personal information from EU-citizens across the EU. Adherence to principles of rule of law is therefore a problem, according to these observers. This is amongst other things a constitutional issue in Germany, related to the right to informational self-determination, thus issues of legality are at stake in this regard.

As regards coherence, the overall question of privacy ties a number of aspects together, such as the right to have insight into who has access to one's personal information, and in this case, what kind of information is kept. Other relevant question is whether there are any for instance religiously biased buzz-words that trigger such gathering of information. In terms of coherence, the legislation on joint data-bases represents one threat of German principles of upholding privacy protection as elements of rights safe-guarded in the Constitution may be violated through measures of surveillance. However, the debate on the

30 See Deutscher Bundestag, Öffentliche Anhörung 6. November 2006: „Anti-Terror-Datei und Terrorismusbekämpfungsergänzungsgesetz“.

³¹ See Oliver Lepsius, 2004. Liberty, Security and Terrorism. The Legal Position in Germany, Part 1 and 2. German Law Journal, 5, 1 (2004). US observers point to the fact that the German implementation of terrorism legislation contains more bureaucratic hurdles and a higher level of protection of privacy than other Western governments. See Francis T. Miko and Christian Froehlich, 2004: Germany's Role in Fighting Terrorism. Implications for US Policy. Congressional Research Service, the Library of Congress.

³² Heinz and Arend 2005:16 (footnote 34;36) where they introduce the debate about the relationship between the requirements of clarity and legitimate purposes when personal data is collected on one side and on the other the obligation to pursue criminals.

legislation has not been a key issue in Germany among the critics of the counter-terrorism measures.

3.3 Fourth Financial Market Act and the Money Laundering Prevention Act

Soon after 9-11, the German Cabinet implemented a number of Financial Action Task Force (FATF) Special Recommendations on terrorist financing through the Fourth Financial Market Act and the Money Laundering Prevention Act.³³ Banks are now obliged to cooperate with the Federal Financial Supervisory Authority on personal information regarding bank accounts³⁴. Following, a number of amendments to the Banking Act and what others have been adopted in order to make it possible to freeze the assets of a terrorist organisation and be able to save and thereby also track personal information on bank transactions (Council of Europe 2004: 6). This was amended in 2003 in to include suspected terrorists residing inside the EU (ibid: 7). The issue at stake here is the automatic, electronic access to all key account data held by banks by the Federal Financial Supervisory Authority, with reference to Banking Act section 24c. Finally, according to the Money Laundering Prevention Act, banks, financial institutions, estate agents, attorneys and others are required to submit to the Financial Intelligence Unit reports on suspicious transactions possible involving the funding of terrorism (ibid).

The mandate to freeze assets on the basis of suspicion of non-normal behaviour seems also to touch upon the Right to Property, Basic Law art.14 in so far as the limits of the rights are not stipulated clearly. A lack of clear procedures for being removed from the terror list is manifest according to Heinz and Arend (2005: 17-19). This means that the rules and procedures around freezing of assets are unclear and thus hardly according to rule of law principles.

With regard to the determinacy of the Act on Financial Activities, especially the aspect of automatic information gathering is relevant. Heinz and Arend (2005: 16-19) question the lack of clarity of the purpose of the collection of information as well as lack of clarity when and for how long private information can be shared and stored with other intelligence services.

³³ Council of Europe 2004: 6.

³⁴ Cf. Council of Europe – Germany profile, October 2004.

With regard to the authenticity of the measure, its symbolic validation, it is interesting that while American sources (Miko and Froelich 2004, Summary) question the effectiveness of German monitoring as "German intelligence forces face more bureaucratic hurdles, stricter constraints, and closer oversight than those in many other countries", Safferling points to the fact that anti-terrorist legislation gives priority to the highest possible level of control also as regards how financial institutions are obliged to provide information to security institutions that the citizens are barely aware of (2006: 8-9). This debate on the undermining of privacy and the risk of eroding rule of law principles of clarity and predictability resonates through all comments made by German critics of the measures introduced including those of financial controls.

Related to the validation concern is the question of adherence to principles that are fundamental in German legislation. The debate around the Financial Market and Money Laundering Act as well as the one around Joint Database legislation revolves around the same issues, i.e. the question of how to balance respect for privacy with control.

The question of the right to privacy of correspondence, posts and telecommunications (Basic Law art.10) and the inviolability of the home, (Basic Law art. 13) and the right to property (Basic Law art.14) are rights that are pertinent to the acts and provisions mentioned above. The automatic gathering of key account information and the requirement from various financial and other institutions to inform on suspicious behaviour, as well as the extended mandate of the intelligence services to carry out surveillance are control mechanisms that challenge the privacy of the individual.

In the debate, Minister of Interior Schäuble has repeatedly referred to the balance between ensuring protection of personal data, even when shared between police and intelligence services, while simultaneously pursuing the greater goal, protecting society against threats from terrorists efficiently.³⁵ Schäuble believes that electronic surveillance (including non-information of the individual in question afterwards) and searches of computers is a necessary compromise on the right to privacy and necessary in order to prevent terrorism although he admits that it is a

³⁵ Here it is relevant to mention the Federal Commissioner for Data Protection and Freedom of Information, *Bundesbeauftragte für den Datenschutz and die Informationsfreiheit*, a body that monitors adherence by federal public agencies to the protection of the individual from detriment to rights of privacy caused by the use of personal data (http://www.bfdi.bund.de/EN/Home/homepage_node.html). Equivalentents are found in Länder.

heavy price to pay.³⁶ This argument has been presented by government representatives, at times in relation to situations where terror plans have been foiled by German authorities³⁷, which underlines the point made. This is countered by arguments of how it is possible and necessary to maintain a high level of protection of the individual while complying with human rights standards and the Basic Law as well as protecting the general public.³⁸ The debate therefore revolves around the adherence to basic principles of freedom of German legislation and rule of law. Relevant in this regard is also the strong critique by Safferling on the Federal Constitutional Court. He claims that the Court attempts to stand firm on protection of privacy and informational self-determination but he argues that slowly, courts and the judiciary are giving in to a more widespread use of electronic surveillance equipment, thereby risking infringement of fundamental rights.

A related example is the question of acoustic and visual surveillance where constitutional reservations have been expressed. In a decision from 2005, the Constitutional Court expressed its concern that all surveillance technologies working together would pose a risk to privacy and to an individual's informational self-determination to a far larger degree than each technology by itself.³⁹ This means that serious concerns about the legality of the measure have been raised.

3.4 The Act on Suppression of Terrorism

The Act on Suppression of Terrorism⁴⁰ was amended and extended in 2007. The amendment is based on an evaluation of the first Act from 2002 and extends the mandate of the Federal Office for the Protection of the Constitution, BfV which is now entitled to use its right of information to investigate anti-constitutional activities,

³⁶ 'Elektronische Überwachung in eng begrenzten Ausnahmefällen', Interview with Minister of Interior Dr. Wolfgang Schäuble, ZDF-Morgenmagazin, September 11, 2007, published at website of Ministry of Interior.

³⁷ See for instance: International Herald Tribune, September 6, 2007: <http://www.ihf.com/articles/2007/09/06/europe/webgermany.php>

³⁸ See the comments made by Lepsius 2004, Safferling 2006 and by Heinz and Arend from the German Institute for Human Rights (2005).

³⁹ Verfassungsbeschwerde gegen polizeiliche Überwachung mittels GPS erfolglos, 2 BvR581//01 http://www.bverfg.de/entscheidungen/rs20050412_2bvr058101.html. See also Ross 2005 who argues that the decision brings no solutions to the problems of having prosecutors involved only in cases where an operation is about to lead to an arrest, however they are not involved in preventive police investigations where for instance extensive surveillance is being applied.

⁴⁰ Gesetz zur Bekämpfung des internationalen Terrorismus, TBG was adopted in January 2002 and extended with five years and amended on January 11, 2007 (TBEG) http://www.bmi.bund.de/Internet/Content/Common/Anlagen/Gesetze/Terrorismusbekeampfungsgesetz_pdf,templateId=raw,property=publicationFile.pdf/Terrorismusbekeampfungsgesetz_pdf.pdf

which have so far not been recorded and which include incitement to the use of violence. Furthermore, the BfV gained access to airline information. The law does not alter the responsibilities of the Federal Intelligence Service, BND.

In relation to determinacy, the discussion about the lack of clarity of the definition of terrorism in the EU Decision is relevant here and equally so, the absence of a legally apt concept of terrorism in German law plays a role. As mentioned earlier, whenever personal information is collected, there should be a consideration of the right to privacy as well as clear explanation of the purpose of the information and the criteria by which it is collected – all aspects that are related to determinacy and coherence. Furthermore, the requirement of a transparent monitoring process in order for Parliament to have access to information here is also vital.

3.5 The Aviation Security Act

The Aviation Security Act, *Luftsicherheitsgesetz* was adopted by the German Parliament on January 11, 2005⁴¹ with a direct reference to 9-11. Parts of the Act were later rejected by the German Federal Constitutional Court as unconstitutional in two areas.⁴² The Act has been debated heavily due to paragraph 14.3, which stipulates how under specific circumstances the Minister of Defence may authorize the armed forces to engage a civilian aircraft about to be used as a weapon. The Act initiated a debate about Germany's Nazi past, a period that time and again is underlined as a part of history that the German legal structure has to learn from in order to avoid repetition.

An important legal issue is a decision by the Constitutional Court, when rejecting The Act of Aviation Security, in which it referred to the Basic Law and stated that Parliament is not competent to issue an Act allowing German armed forces to be used in such a way as described in the Act, article 14.3.⁴³ The Court refers to the right to life and to dignity of the innocent passengers on the plane, basic

⁴¹ The Law implements into federal law the EU regulation for the security in civil aviation (EU (VO) 2320/2002 and addendum). <http://bundesrecht.juris.de/luftsig/index.html>

⁴² The Court made reference to art. 87a(1) in the Constitution, stating that the '*The Federation shall establish Armed Forces for purposes of defense*'; and second, that the shooting down of a plane with innocent passengers would be a violation of their right to life and dignity. Verdict was issued by the Constitutional court on February 15, 2006) http://www.bundesverfassungsgericht.de/entscheidungen/rs20060215_1bvr035705.html

⁴³ Art. 14.3 reads: 'The immediate use of weapon-force is only allowed if the circumstances show that the airplane will be used against human lives and that this is the only means by which to avoid this danger (our translation)'.

rights which according to Art 79(3) of the Constitution are inalienable. This decision is a strong statement in favour of the protection of essential human rights, even when the life of other (equally innocent) people on the ground, are at stake.

The right to life and protection of human dignity are fundamental international standards and therefore, the issue of adherence is relevant in pointing out Germany's international obligations.

Art 14.3 of the Aviation Act sparked a debate, which seems relevant to both the issue of symbolic validation and adherence with focus on the individual soldier. The discussion of the Act brought back the image of German soldiers at risk of committing atrocities or being ordered to commit illegal acts and there were references to WWII. In a statement by Germany's Defence Minister, Franz Josef Jung, he stated that as a last resort, he would order the shooting down of a passenger's plane if it were being used as a weapon, because in order to protect *'...the fundamental liberal democratic order, other rules apply'*.⁴⁴ Jung's statement appeared more than a year after the Constitutional Court declared void the article in the Aviation Security Act allowing for exactly this. In a counter argument by MP, Social Democrat Kurt Beck refers to Germany's Nazi past saying that *'...And after all we've been taught since the Nazi dictatorship... a German soldier would have to say No, this command isn't compatible with the constitution'*.⁴⁵ An answer to that came from a Defence Ministry spokesman, stating that it was possible that the government could call out a state of emergency, which would leave the pilots in a situation where they could not refuse the order. Interior Minister Schäuble backs his minister-colleague by stating that without the government being able to deploy the German army at home, a situation like 9-11 would fall in a legal void following the court ruling.⁴⁶

The debate in Germany as regards this Act has neither related to determinacy not to coherence.

3.6 Draft Act on Preventing International Terrorist Threats

The most recent draft law from the German Cabinet is the Act on Preventing International Terrorist Threats through the intervention of the Federal Criminal Police

⁴⁴ <http://www.spiegel.de/international/germany/0,1518,506225,00.html>

⁴⁵ Ibid.

⁴⁶ World Socialist Web Site February 2006: <http://www.wsws.org/articles/2006/feb2006/germf28.shtml>

Office.⁴⁷ The draft law enhances the mandate of *Bundeskriminalamt*, BKA the Federal Office of Criminal Investigation to gather information, however only in situations of international terrorist threats. This is part of a reform of the federal structure, leaving the Federal Government with exclusive legislative competences with regards to the tasks of the Federal Criminal Police Office when it comes to preventing international terrorist threats.⁴⁸ The new provisions allow the possibility to carry out remote searches of computer hard drives and telecommunications interception at the source. In the presentation of the draft law by the Ministry of the Interior in June 2008, it was underlined that the new provision of remote searches of computer hard drives is legitimised by an earlier ruling of the Federal Constitutional Court.⁴⁹ The Court Ruling underlines that remote research of computers is legitimate when a specific threat against the security of the State or threatening the life of individuals takes place. A general, not a specific, threat of terrorism is not sufficient to justify remote research.⁵⁰

The concern voiced by some civil society actors in Germany relates to how well the Federal Court Ruling will be respected: the formulations of the Court do not define exactly when remote research can be authorized.⁵¹

The concerns raised are therefore that the Federal Court ruling was held in quite general terms and that it is unclear when a specific threat may authorize the undertaking of a remote research of computers. The main issues raised in this regard are therefore legality and determinacy.

3.7 Summary of Legality and Legitimacy Dimensions

⁴⁷ Gesetz über das Bundeskriminalamt und die Zusammenarbeit des Bundes und der Länder in kriminalpolizeilichen Angelegenheiten http://www.bmi.bund.de/nn_769658/Internet/Content/Nachrichten/Pressemitteilungen/2008/06/BKAG_engl.html . (http://www.eu2007.bmi.bund.de/cln_028/nn_1016300/Internet/Content/Themen/Terrorism/DataAndFacts/Cabinet_20adopts_20amendment_20to_20BKA_20Act.html; http://www.eu2007.bmi.bund.de/cln_028/nn_1016300/Internet/Content/Themen/Terrorism/Einzelseiten/Draft_Law_Preventing_International_Terroris_Threats_28BKAG_E_29.html). This builds on a draft by Minister of Interior Schäuble, May 2007.

⁴⁸ Reference to Foreign Ministry's report – the police is under the jurisdiction of the Länder, which means that this draft law would be furthering a centralisation.

⁴⁹ Bundesministerium des Innern, 2008: Kurzfassung: Der Entwurf eines Gesetzes zur Abwehr von Gefahren des Internationalen Terrorismus durch das Bundeskriminalamt (BKAG-E). http://www.bmi.bund.de/nn_175818/Internet/Content/Themen/Terrorismus/Einzelseiten/Informationen_Ergaenzung_BKA_Gesetz.html.

⁵⁰ See BVerfG, 1 BvR 518/02 vom 4.4.2006, Absatz-Nr. (1 - 184), http://www.bverfg.de/entscheidungen/rs20060404_1bvr051802.html.

⁵¹ See Owl Content, 2008. Online-Durchsuchung des BKA-Gesetz (BKA-E).

<http://blog.kairaven.de/archives/1544-Online-Durchsuchung-des-BKA-Gesetzes-BKAG-E.html>

Table 1. Counter-Terrorism Measures in Germany and their Legality and Legitimacy according to the Assessment Made X Indicates problems encountered in the analysis with respect to criterion					
	Legality	Determinability	Symbolic Validation	Coherence	Adherence
Criminal Code		X		X	
Act on Joint Databases	X		X	X	X
Fourth Financial Markets Act	X	X	X		X
Act on Suppression of Terrorism		X			X
Aviation Security Act	X		X		X
Draft on Prevention of International Crime	X	X			

Table 1 summarizes the analysis made in Chapter 3 with respect to the criteria of legality and legitimacy. Four out of six criteria are questioned by actors and observers on the basis of arguments of legality. These questions are raised either with the background in Federal Court Rulings or with departure in Germany's Basic Law and in the international commitments under the human rights conventions.

Almost every measure is criticised for its lack of clarity and predictability. Four out of six measures are questioned on the grounds that it does not adhere to fundamental rule of law principles in Germany. Half of the measures are questioned for lacking authenticity according to German legal culture.

4 . CONCLUSIONS: ETHICAL BOTTLENECKS

The issues relating to legality and legitimacy in Germany have been discussed in an atmosphere that is strongly supporting the overall goal of facing up to the challenge of international terrorism. The objective of reinforcing the legislation with a view to ensuring an improved protection against terrorist threats has been generally accepted in the German debate, not least after the realization that Germany had

harboured some of the terrorists directly connected to the 9/11 attack in the US. The EU as well as the United States of America agreed that new and stricter measures were necessary following 9/11. In Germany, it seems that people's solid trust of the German authorities, combined with the sense of urgency, made way for a quick pursuance of the larger goal of public security, which has included amendments and adoptions of legislation with consequences for constitutional rights. However, despite the acceptance of new measures and of more strenuous policies, there are legal objections to the strategies of counter-terrorism. Concerns are also raised from scholars, human rights institutions, and from civil society generally concerning the legitimacy of the measures introduced. It is hard to see the debate in Germany as drawing towards "a pull to compliance" as regards the strategy of counter-terrorism, to use Franck's terminology. On the contrary, the debate may as well point away from a general compliance with the counter-terrorism strategies pursued by different governments since 2001. Thus, the previous analysis has revealed a number of ethical bottlenecks as regards counter-terrorism measures.

The ethical bottlenecks relate to compliance with legal measures in relation to both the Basic Law in Germany and to the international human rights obligations of Germany. Issues of legality have been raised by representatives of parliament, by human rights institutions, by legal scholars, and by civil society groups. Especially, The Act on Joint Data Bases, the Fourth financial Market Act⁶, the Aviation Security Act, and the Act of Preventing International Crime have been questioned on legal grounds.

However, as summarized in chapter 3, the counter-terrorism measures introduced have also been criticised for not being legally based. These questions have been raised primarily from an interpretation that the majority of measures lack clarity in terms of consequences for citizens and inhabitants. This is a critique raised against all the measures introduced. Applying the concept of determinacy highlights the principle of legal predictability and clarity as essential questions to raise when it comes to exchange and automatic collection of personal data and information, thereby focusing on amongst other issues exactly who has access to such information, for how long, and will the individual in question be notified.

The majority of measures are also criticised for lacking adherence to basic principles of law in Germany, the rule of law, but also fundamental principles relating to the protection of the individual. Half of the measures, i.e. the Act on Joint Databases, the Fourth Financial Market Act, and the Aviation Security Act are

questioned because they are perceived to lack validity based on the legal culture which evolved in Germany after World War II.

The conflict between strengthened state control and surveillance and protection of privacy stands out as the major ethical dilemma lying at the core of the debate about legality and legitimacy with regards to counter-terrorism measures in Germany. Safferling argues that basic rights are sacrificed in a process where technical surveillance equipment is used to control crime, allowing the limit for when surveillance, including acoustic, can be used to be extended in favour of the authorities and for crime control and terrorism prevention. The courts are only slowing down the process, not stopping it and thereby protecting constitutional rights.⁵² The limitation of the right to privacy was the target of heated debates in Parliament just after 9-11 with arguments against such intervention in fundamental rights of the citizens. But government representatives such as Minister of Interior Schäuble are commending the highly efficient German authorities and maintain that a professional and quickly-operational system aimed at protecting society is a necessity. Schäuble admits that the price is high but underlines that such interference is being controlled.⁵³

The issue of parliamentary control of governmental initiatives is closely related to the issue of symbolic validation. In a German context, Parliamentary control has a strong, historical connotation back to the time leading up to the 2ndWW, which is the background for the strong focus on the role of Parliament. *Institut für Menschenrechte* has questioned whether the Parliamentary control panel (PKGr) of the German intelligence service *Bundesnachrichtendienst*, BND is efficient enough and asks what happened to the announced reform of PKGr.⁵⁴ These issues are related to a process initiated in April 2006, where the Government presented a report to the PKGr on the war in Iraq as well as counter-terrorism initiatives – a report deemed unsatisfactory by the opposition, which following decided on a continued investigation. The main argument from NHRI is that the control committee should be based on a sufficient mandate, allowing it to investigate the actions of intelligence

⁵² Safferling 2006: 7.

⁵³ Bundesinnenminister Schäuble zur Einbringung des Gesetzentwurfs zur Abwehr von Gefahren des internationalen Terrorismus durch das Bundeskriminalamt, June 20, 2008:

http://www.bmi.bund.de/cln_028/nn_165104/Internet/Content/Nachrichten/Reden/2008/06/BM_BT_BKAG2.html

⁵⁴ June 2008: *The Human Rights Institute encourage a strengthening of the Parliamentary control authority of intelligence service*, http://www.institut-fuer-menschenrechte.de/webcom/show_article.php/ c-419/ nr-208/ p-1/i.html

services and thereby ensure a timely, efficient control by Parliament of the intelligence services as well as the protection of human rights.

Half of the measures are questioned for not being in tune with inherent notions of legal culture in Germany. When the Defence Minister offers to legitimise the shooting down of a passenger plane being used by terrorists in an attack, this statement is not only out of tune with concerns of legality because the Constitutional Court had declared such particular action illegal, but it was also out of tune with the basic tenets of German legislative culture that grew out of the Nazi past, as pointed out by Parliamentarians.

Finally, the concept of coherence, that likes should be treated alike, resonates in the discussions of two of the measures, i.e. the Criminal Code and the Act on Joint Databases. Different principles and procedures are being applied to terrorist crimes dependent on their status as national or international acts. In the case of the latter, political authorities and the minister will decide whether to prosecute or not, while in cases of domestic terrorist suspects, the decision to prosecute is administrative. For observers in Germany, it is difficult to find an explanation for these differences in policies.

The challenges in Germany are underlined by the context in which the debate on counter-terrorism takes place. The question of Islam, radicalisation, German converts, and the situation of the Muslim minority in Germany has been analysed by Heiner Bielefeldt. The Director of the German National Human Rights Institution underlines the importance of how a state treats one of its minorities – and he shows how oversimplifying the image of Muslims in Germany will not render useful or correct information if the root causes of radicalisation are to be analysed and described. Furthermore, there is the more ethical side to the issue when Bielefeldt states that the way a state treats its minorities gives a profound impression of the society in question.

Involved in the ethical discussion is therefore also a minority dimension relating especially to how social contracts and trust can be established with minorities.

However, another aspect of the context in which the debate on counter-terrorism in Germany is taking place is also the arrest by German police on September 4, 2007 of three men on suspicion of planning a bomb attack that was categorised at the same level or even bigger than the bombings in Madrid and London, had the authorities not foiled such plans. Two of the detainees were German

converts to Islam. This added to the discussion of 'home-grown' terrorists and the role of Islam and converts. The arrests came about due to close cooperation with American intelligence services who carried out surveillance of German citizens travelling in Pakistan – and the reality of the debate in Germany suddenly stood closer to the ongoing discussion in Europe about how terrorism – especially when connected to Islamist fundamentalism – now is an integral part of European life with reference to the bombings in London and Madrid.⁵⁵

Arguments by the German government focus on securing access for intelligence services to adequate information in order for them to fulfil their tasks and protect the population and provide information for the legal pursuance of terrorists. In opposition are arguments from the German Institute for Human Rights, human rights NGO's and academics who stress the fundamental importance of approaching counter-terrorism, whether nationally or on international missions, without violating the core fundamental rights and values of an open and free democratic society. The ethical debate in Germany therefore remains one between security and rights protection and this analysis has shown that the settlement of the ethical dilemmas has not been established yet.

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⁵⁵ See for instance, focusing on security and terrorism in EU: http://www.eu2007.bmi.bund.de/cln_028/EU2007/DE/Home/Home_node.html_nnn=true a website set up as part of Germany's presidency during Spring of 2007.

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