

# *Fordham International Law Journal*

---

*Volume 3, Issue 2*

1979

*Article 3*

---

## Anti-Terrorism: The West German Approach

Kevin G. Horbatiuk\*

\*

Copyright ©1979 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

# Anti-Terrorism: The West German Approach

Kevin G. Horbatiuk

## **Abstract**

Focuses on the West German government's political response to terrorism specifically surveying the changes deemed to be necessary in the areas of law enforcement, substantive criminal law and criminal procedure. Also, it considers the reaction to these measures and compares the view of the West German government with that of various critics.

## NOTES

### ANTI-TERRORISM: THE WEST GERMAN APPROACH

#### INTRODUCTION

In the 1970's, various terrorist organizations put the fabric of the West German society to the acid test. To understand fully the German response to terrorism, it is necessary to examine the peculiarities of the West German terrorist situation. The roots of the German terrorist movement are firmly planted in the student demonstrations of the 1960's.<sup>1</sup> Dissatisfied students swelled the ranks of the various New Left organizations.<sup>2</sup> Some student leaders, joined by prominent members of Germany's radical-chic such as Ulrike Meinhof, founded the *Rote Armee Fraktion* (Baader-Meinhof group) and the *Bewegung 2. Juni*.<sup>3</sup> These groups were composed almost entirely of students and former students of impeccable middle class backgrounds.<sup>4</sup> Although they labeled their actions proletarian, many people doubted the veracity of their political motiva-

---

1. See C. DOBSON & R. PAYNE, *THE TERRORISTS* 161 (1979); Blei, *Terrorism, Domestic and International: The West German Experience*, in NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, *DISORDERS AND TERRORISM* 497 (1976); Lasky, *Ulrike and Andreas*, N.Y. Times, May 11, 1975, § 6 (Magazine), at 74-76.

The 1960's in Germany were marked by a pressing need for university reform, see Wagenlehner, *Motivation for Political Terrorism in Germany*, in INTERNATIONAL TERRORISM IN THE CONTEMPORARY WORLD 198 (M. Livingston ed. 1978), a growing dissatisfaction among students with the profit and production oriented society, see *id.* at 201, and a perceived failure of Western democracy. *Id.* As a reaction to Germany's recent anti-democratic past, parents taught their children that the only possible form of government was democracy and that the demise of the communist regimes was inevitable. Scientific and technological advancements in the east and demonstrations of strength like the construction of the Berlin Wall shook democracy's position of superiority. American involvement in Vietnam further proved to the students that they could no longer perceive the democratic west as insurance against war and inhumanity. *Id.*

2. From 1969-1974, communist and leftist organizations were the victors in student elections while they did not win more than one or two percent of the vote in the national elections. Wagenlehner, *supra* note 1, at 200.

3. W. LAQUEUR, *TERRORISM* 206 (1977).

4. *Id.* at 207.

tions.<sup>5</sup> Their protest movement was decidedly negative and offered no alternative to the democratic order.<sup>6</sup> They had no base of support among the working class.<sup>7</sup> Their ideology was, at best, abstract.<sup>8</sup> Though these groups disdained the orthodox communists and older leftist organizations,<sup>9</sup> the latter were initially protective of the New Left terrorists.<sup>10</sup>

The cataloged incidents of terrorism in West Germany indicate that the phenomenon of terrorism occurred in two distinct

5. The official organ of the German Democratic Republic (East Germany) considered the members of the Baader-Meinhof group neither revolutionary nor Marxist-Leninist, but rather a group of "disappointed middle class children without revolutionary discipline and without fundamental political knowledge." Wagenlehner, *supra* note 1, at 197. Thus it seemed incredible when Klaus Rainer Röhl admitted that he and his former wife, Ulrike Meinhof, received financial assistance for their magazine, *Konkrete*, from sources in East Berlin. See Lasky, *supra* note 1, at 75.

6. Some of the objectives of the terrorists were "to hit the Establishment in the face, to mobilize the masses . . . to maintain international solidarity," C. DOBSON & R. PAYNE, *supra* note 1, at 161, "to destroy the islands of wealth in Europe," W. LAQUEUR, *supra* note 3, at 207, and to show the feasibility of successful armed confrontation with the police as representatives of the system. F. WATSON, *POLITICAL TERRORISM* 176 (1976).

7. "[Their movement] became a very popular front, uniting practically everyone on the left—except the proletariat." Lasky, *supra* note 1, at 75. See P. WILKINSON, *TERRORISM AND THE LIBERAL STATE* 83 (1977).

8. Unlike the Palestinian Liberation Organization and the Provisional Irish Republican Army, there were no deep and grievous issues of nationalism, religion and social conflict behind the violence of the West German terrorists. Lasky, *supra* note 1, at 14.

9. The terrorists considered the orthodox communists to be *Schrieftisch Marxisten* (desk-Marxists) and *Schwützer* (chatterboxes), who were only concerned with dissertations and academic issues. Wagenlehner, *supra* note 1, at 202. According to the official philosophy of the *Rote Armee Fraktion* the difference between the Social Democrats and the Christian Democratic Union was like the difference between the plague and cholera. *Id.* at 195.

10. [M]any liberals despised the cry for "law and order" and offered nothing but kind words for the disciples of violence. . . . The old distinctions between democratic socialists and authoritarian communists, between meliorists and militants, between reform and revolution, had been blurred in the nineteen-sixties. . . .

A campaign to "save Ulrike Meinhof" before she came to harm at the hands of the police arose on the left. Nobel prize-winning novelist Heinrich Böll . . . demanded an official safe conduct pass for Ulrike to protect her . . . from the vicious hysteria of 60 million Germans now hunting witches as they once hunted Jews.

Lasky, *supra* note 1, at 79.

Böll's statements are sorely contrasted with those of author Günter Grass who in 1977 stated that describing Ulrike Meinhof as a murdered victim of fascism was an insult to those who really died in the fight against the fascists. Relay from Bonn 3 (October 20, 1977) (German Information Center, N.Y.C.).

phases.<sup>11</sup> During the first phase, starting in 1968, the Baader-Meinhof group centered attacks on property which represented either German capitalism or American militarism.<sup>12</sup> Subsequent to the arrest of the terrorist leaders,<sup>13</sup> the reign of terrorism entered its second phase with attacks against specific persons who represented established pillars of West German society.<sup>14</sup> The ancillary acceler-

---

11. See generally C. DOBSON & PAYNE, *supra* note 1, at 204-25.

12. The terrorists fire bombed department stores and lauded this "new form of demonstration" which gave Europeans the "crackling sensation of Vietnam." C.H. Neukirchen, Director of the German Information Center, *The Challenge of International Terrorism* 3 (Feb. 15, 1978) (address before the Council on Religion and International Affairs) [hereinafter cited as Neukirchen Address]. They robbed banks and the proceeds helped support their movement. See C. DOBSON & R. PAYNE, *supra* note 1, at 162; Blei, *supra* note 1, at 499; Maseberg, *The Terrorist's World and How it is Financed*, *The German Tribune*, May 29, 1975, at 14, col. 1.

The terrorists also attacked American military installations. A series of bombs exploded at the Fifth U.S. Army Corps Headquarters in Frankfurt on May 11, 1972 in retaliation for American bombing of North Vietnam. C. DOBSON & R. PAYNE, *supra* note 1, at 210.

13. Andreas Baader, Holger Meins and Ulrike Meinhof were arrested in 1972. C. DOBSON & R. PAYNE, *supra* note 1, at 210-11.

14. The terrorists initially experimented with hostage-taking in the hope that the government would capitulate to their demands and release their imprisoned comrades. See Blei, *supra* note 1, at 500. In February of 1975 terrorists kidnapped Peter Lorenz, a Berlin politician and mayoralty candidate. Here the West German Government capitulated to the demands of the terrorists by releasing five of their comrades. C. DOBSON & R. PAYNE, *supra* note 1, at 218. This indicated the high premium which the West Germans placed on individual life and safety in the early nineteen-seventies. See generally Evans, *American Policy Response to International Terrorism: Problems of Deterrence*, in *TERRORISM: INTERDISCIPLINARY PERSPECTIVES* 108 (Y. Alexander ed. 1977); STAFF OF HOUSE COMM. ON INTERNAL SECURITY, 93D CONG., 2D SESS., *STUDY ON POLITICAL KIDNAPPINGS 1968-1973* at 15, 17 (Comm. Print 1973). By the time of the Schleyer kidnapping, the government adopted a policy of noncapitulation fearing that the released terrorists would commit new crimes. Statement of the Federal Government delivered by Chancellor Helmut Schmidt to the *Bundestag* (Oct. 20, 1977) reprinted in 4 *THE BULLETIN* 2 (archive supp., Nov. 2, 1977) (Press and Information Office, Gov't of the Federal Republic of Germany).

In April of 1977, terrorists shot Siegfried Buback, West Germany's Chief Public Prosecutor. C. DOBSON & R. PAYNE, *supra* note 1, at 222. In July they murdered Jürgen Ponto, an influential banker. *Id.* One of the most dramatic terrorist incidents which occurred was the kidnapping of Hanns Martin Schleyer in September of the same year. Schleyer was the president of the Confederation of the German Employers' Associations and the Federation of German Industry. He was often perceived as a spokesman for big business. *Ambush in a "Civil War,"* *TIME*, Sept. 19, 1977, at 37. The kidnapers hoped to bargain with the government to gain the release of imprisoned terrorists. Instead they triggered a chain of events: the formation of Chancellor Schmidt's Crisis Staff, the skyjacking of a Lufthansa Airliner to Somalia, a dramatic rescue by the *Bundesgrenzschutz Gruppe 9*, the deaths of the terrorists imprisoned

ation of international terrorism also affected public opinion in West Germany.<sup>15</sup>

This Note focuses on the West German government's political response to terrorism. Specifically it surveys the changes deemed to be necessary in the areas of law enforcement, substantive criminal law and criminal procedure. It then considers the reaction to these measures and compares the view of the West German government with that of various critics.

### I. LAW ENFORCEMENT

To combat terrorism successfully the West German government needed a unified national force with access to *Land*<sup>16</sup> criminal agencies and the national decision makers. The lack of such a force was due to a constitutional mandate that reserved practically all police power to the *Länder*<sup>17</sup> and a historical unwillingness to vest great power in a national police force.<sup>18</sup> The *Bundeskriminal Amt* (BKA), created in 1951, existed on a relatively small scale with limited resources and practically no executive jurisdiction.<sup>19</sup> Subsequent amendments to the law creating the BKA expanded its executive authority and made it increasingly more effective in the government's fight against terrorism.<sup>20</sup> By 1973, the BKA was

---

in Stammheim, and the murder of Schleyer. See *War Without Boundaries*, TIME, Oct. 31, 1977, at 34.

15. There was the massacre at the 1972 Olympic games in Munich, C. DOBSON & R. PAYNE, *supra* note 1, at 211, the kidnapping of the OPEC oil ministers who were meeting at Vienna in 1975, *id.* at 219, and the skyjacking of the Air France Airbus to Entebbe in 1976, *id.* at 220.

16. The territorial subdivisions of the Federal Republic of Germany are called *Land* (plural: *Länder*). R. NEUMANN, *THE GOVERNMENT OF THE GERMAN FEDERAL REPUBLIC* 89 (1966). There are ten *Länder*: Baden-Württemberg, Bavaria, Bremen, Hamburg, Hesse, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Schleswig-Holstein, and the Saarland. *Id.* at 156.

17. Article 70 of the *Grundgesetz* provides, "The *Länder* have the power to legislate insofar as the Basic Law does not confer legislative power on the Federation." *Basic Law of the Federal Republic of Germany, reprinted in THE CONSTITUTIONS OF EUROPE* 155-56 (E. Goerner ed. 1967). Practically all police business is reserved to the *Länder*. R. NEUMANN, *supra* note 16, at 90.

18. See Blei, *supra* note 1, at 505; *West Germany's Political Response to Terrorism: Hearing Before Subcomm. on Criminal Law and Procedure of the Senate Comm. on the Judiciary*, 95th Cong. 2d Sess. 9 (1978) [hereinafter cited as *Senate Hearing*]. There was nothing comparable to the F.B.I. in West Germany. *Id.*

19. Blei, *supra* note 1, at 505. The BKA, under the direction of the Minister of the Interior, had only investigative powers. This separation of state police executive and federal law enforcement investigative powers caused problems in coordination, command and control, and communications. *Senate Hearing, supra* note 18, at 9.

20. *Senate Hearing, supra* note 18, at 9; Blei, *supra* note 1, at 505.

granted authority for greater use of electronic data processing equipment which created a completely automated electronic intelligence system for all German police forces.<sup>21</sup> The West Germans move cautiously between the BKA and the *Amt für Verfassungsschutz* (Office for the Protection of the Constitution) in implementing intelligence gathering to ensure that such activities are properly coordinated and executed.<sup>22</sup> The next development is expected to be the utilization of the new draft registration law to gather more information on citizens in a central computer system.<sup>23</sup> The 1973 amendment to the law creating the BKA also dealt with certain jurisdictional aspects. It affirmed that police preventative functions would remain with the *Länder*, but assigned the BKA jurisdiction over important crimes of an international character, crimes against government officials and members of the diplomatic corps, and where requested by *Land* or competent federal authority.<sup>24</sup>

While the BKA concentrates on information gathering, analysis and dissemination, the tactical execution of West Germany's anti-terrorist measures lies with an elite group of police, the *Bundesgrenzschutz Gruppe 9* (BGS G9), which, because of its relationship with the *Bundesgrenzschutz* (Federal Border Police), is under the operational control of the Minister of the Interior.<sup>25</sup> Most of West Germany's successes against terrorists have been attributed to this special force with its thorough and varied training.<sup>26</sup> In May of 1975, two new divisions were added to the Federal Border Police, *Staatschutz* (Special Branch), and *Terrorismus*

---

21. *Senate Hearing, supra* note 18, at 9.

22. *Id.*, at 13.

23. A central computer will store 172 basic items of data on every citizen of West Germany. *Id.*, at 14.

24. Blei, *supra* note 1, at 505.

25. *Senate Hearing, supra* note 18, at 10.

[T]he structure of the federal government and its relation with the several German states required the creation of a special border guard unit . . . in order to cope with German internal terrorist problems. It is a highly unique para-military commando unit designed to walk the delicate line between a national force and state jurisdiction—required because of civil liberties and the remembrance of a Nazi Past. A nervous German *Bundestag* would permit no risk of the perception of a supernational secret service.

Delaney, *World Terrorism Today*, 9 CAL. W. INT'L L.J. 450, 451 (1979).

26. See P. WILKINSON, *supra* note 7, at 140; Corve, *Terrorism and Criminal Justice Operations in the Federal Republic of Germany*, in *TERRORISM AND CRIMINAL JUSTICE* 95 (R. Crelinsten ed. 1978); *New Breed of Commando*, *TIME*, Oct. 31, 1977, at 44.

(Suppression of Terrorism).<sup>27</sup> The purpose of the latter is to prevent further acts of terrorism via a careful investigation of terrorist activity, and to apprehend terrorists wanted under warrant and bring them to trial.<sup>28</sup> *Terrorismus* works with its counterpart in Bonn's Office for Protection of the Constitution, and maintains direct access to the West German national decision makers.<sup>29</sup>

In 1977, following the kidnapping of Hanns Martin Schleyer, Chancellor Helmut Schmidt took this coordination at the national level one step further when he formed his "crisis staff."<sup>30</sup> This bifurcated staff consisted of the *Kleine Lage* (Small group) and a Higher Level group. The latter consisted of representatives from diverse political groups.<sup>31</sup> The real decision making power, however, rested with the *Kleine Lage* which met every day chaired by Chancellor Schmidt.<sup>32</sup> Schmidt's "crisis staff" is an example of law enforcement agencies having access to decision makers without having to go through red tape.<sup>33</sup> Such improvements in coordination and centralization greatly increased the preciseness and speed of the law enforcement response to terrorism.<sup>34</sup>

## II. SUBSTANTIVE CRIMINAL LAW

Prior to the enactment of anti-terrorist measures, the West German Penal Code required extreme specificity concerning offenses and persons who might be charged with them.<sup>35</sup> It was not possible to begin proceedings for a specific offense on generalities of evidence.<sup>36</sup> The authorities had to identify and appropriately

---

27. *Senate Hearing, supra* note 18, at 10.

28. *Id.*

29. *Id.*

30. *Id.*

31. It contained representatives from the ruling party (Social Democrats), the opposition (Christian Democrats), other parliamentary parties (*i.e.*, Free Democratic Party), the heads of the four *Länder* holding prisoners, the release of whom the terrorists were seeking, the highest level representatives from the Cabinet, the BKA, and the Office for the Protection of the Constitution. *Id.* at 17.

32. It encompassed the BKA, the Attorney General, representatives of the Chancellor's office, and when required, the Ministers of Defense and Transportation. *Id.* Necessary specialists such as linguists, semanticists, psychiatrists and psychologists were provided at the Ministries of Justice and Interior. *Id.*

33. *The Events and Decisions Connected With The Kidnapping of Hanns Martin Schleyer and The Hijacking of the Lufthansa Jet "Landshut,"* in 3 NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, INT'L SUMMARIES 6 (April, 1979).

34. *Senate Hearing, supra* note 18, at 9.

35. Blei, *supra* note 1, at 501.

36. *Id.*



charge the principal actor, instigators and accessories before and after the fact.<sup>37</sup> There was no general obligation to report crime to the police, and participants in certain crimes were not obliged to furnish information to authorities.<sup>38</sup> The definition of offenses against the state was extremely narrow.<sup>39</sup>

#### A. 1971 Amendments

The first series of amendments to the Penal Code represented an attempt by the West German government to prevent the commission of specific terrorist acts, rather than the adoption of broad anti-terrorist measures. The amended laws faced the problems of attacks on civil aviation, hostage taking, and the attendant jurisdictional problems. The Eleventh Law of December 16, 1971 introduced Article 316c, dealing with attacks on aviation.<sup>40</sup> It also provided for imprisonment of those engaged in any preparatory act necessary for the commission of these offenses.<sup>41</sup> Article 6.3 made such acts subject to West German jurisdiction regardless of where they may have occurred.<sup>42</sup> The Twelfth Law of December 16, 1971, introducing Articles 239a and 239b, concerned the taking of hostages for ransom and coercion, respectively.<sup>43</sup> Both imposed sen-

37. *Id.*

38. *Id.*

39. *Id.*

40. (I) He who uses force, or attacks the freedom to make decisions of a person, or who undertakes further machinations in order to obtain control of an aircraft, which is employed in civil air traffic and is in flight, or to influence the command of the aircraft, or who uses firearms or undertakes to cause a fire or explosion in order to destroy or damage the aircraft or its cargo, will be imprisoned for not less than five years; in the case of less severe instances, with imprisonment of not less than a year.

An aircraft is considered in flight when the members of the crew or passengers have previously boarded, when the cargo has been previously loaded onto the aircraft, when the members of the crew or passengers have not yet left the aircraft according to plan, or when the cargo has not yet been unloaded according to plan.

(II) Where the death of a person is wantonly caused, the term of imprisonment shall be from 10 years to life.

*Strafgesetzbuch* [STGB] art. 316c (W. Ger.) (1976) [unofficial translation].

41. "(III) He who places, procures for someone else, secures or leaves for the preparation of one of the offenses in (I) or (II), weapons, explosives or other devices for the commission of an explosion or fire will be subject to imprisonment for a term of six months to five years." *Id.*

42. "The German Penal Code applies, independently of the law of the place where the act occurred, for the following acts, which were committed abroad: . . . attacks on air traffic . . ." STGB art. 6.3 (1976) [unofficial translation].

43. "(I) He who abducts another, or makes himself the master of another, in

tences ranging from ten years to life imprisonment where death was caused by wantonness.<sup>44</sup>

### B. 1976 Amendments

A second series of far-reaching changes occurred in 1976 with the creation of new articles and the modification of existing articles in response to accelerating terrorist activities. The bulk of the legislation again dealt with specific problems of terrorism: threats,<sup>45</sup> the dissemination of information<sup>46</sup> and propaganda.<sup>47</sup> Only one article was an anti-terrorist measure in the broad sense.<sup>48</sup>

The old Article 126 punished offenders who threatened to commit a crime that would create a generally dangerous situation and disturb public peace.<sup>49</sup> The new article is more specific in that the threat posed must be one of the enumerated offenses, and the threats must have a direct relation to the killing of another person, *e.g.*, hostage taking, robbery, extortion, arson and crimes committed by the use of explosives.<sup>50</sup> Also, the offense need only involve the

order to exploit the worries of a third person about the well being of the victim to commit extortion, will be imprisoned for not less than three years." STGB art. 239a (1976) [unofficial translation].

(I) He who either abducts another, or makes himself the master of another in order to coerce a third party through the threats of death or severe bodily injury to the victim, to commit an act of performance, forbearance, or omission, or who takes advantage of such a situation brought about by another to commit coercion will be imprisoned for not less than 3 years.

STGB art. 239b (1976) [unofficial translation].

44. "(II) Where the death of a person is wantonly caused, the term of imprisonment shall be from ten years to life." STGB art. 239a (1976) [unofficial translation]. Art. 239b expressly incorporates this provision.

45. STGB arts. 126, 145d, 241 (1976).

46. STGB arts. 130a, 138a (1976).

47. STGB arts. 88a, 131, and 140 (1976).

48. STGB art. 129a (1977).

49. "He who disturbs the public peace by threatening to commit a crime which is dangerous to the public, will be punished with imprisonment up to a year or a fine." STGB art. 126 (1975) [unofficial translation].

50. (I) He who in a manner which is likely to create a disturbance of the public peace by intending to commit crimes of severe bodily injury; by committing the crimes of kidnapping, obstruction, murder, homicide, robbery, extortion, or arson of various degrees; bringing about an explosion either via conventional explosives or nuclear energy; misusing ionized rays, bringing about a deluge which is either dangerous to life or objects; interfering with rail, maritime, or airtraffic, or traffic in the street; attacking motorists; disturbing public utilities or transmission sites; taking hostages for ransom or coercion; bearing arms; using force to bring a person into threat of death or severe bodily harm; possessing dangerous poison; or plundering or

possibility of a disturbance of the public peace and not an actual disturbance.<sup>51</sup> The redrafted article is considered sufficiently comprehensive, embracing both the person who made the threat and the person who indicated that another would commit the threatened act.<sup>52</sup>

Article 145d in the pre-1976 Penal Code punished offenders who gave false information to the authorities about an offense that had not taken place.<sup>53</sup> It did not cover prospective offenses, for example, bomb threats. The legislature redrafted 145d to prohibit false threats made to the authorities about such prospective crimes.<sup>54</sup> Such offenses carry a penalty of up to three years imprisonment or a fine.<sup>55</sup> The legislature also included a new article specifically dealing with the problem of threats against individuals.<sup>56</sup>

In addition to the dissemination of information relating to the specific conduct of terrorist activities, terrorism includes a propa-

causing damage on other peoples' property, will be punished with imprisonment of up to three years or a fine.

(II) He, who in a manner which is likely to create a disturbance of the public peace, intentionally feigns that the commission of one of the offenses enumerated in (I) is imminent will also be punished.

STGB art. 126 (1976) [unofficial translation].

51. *Id.*

52. Blei, *supra* note 1, at 502.

53. He who intentionally deceives either the authorities, or a person in a position competent for the acceptance of such a report, that an illegal act has been committed, or who tries to deceive someone in one of the aforementioned positions about the persons involved in the illegal act, will be punished with imprisonment up to one year or a fine.

STGB art. 145d (1975) [unofficial translation].

54. (I) He who intentionally deceives either the authorities or someone in a position competent to receive such a report, either that an illegal act has been committed, or that the commission of one of the offenses in article 126 (I) is imminent, will be punished with imprisonment up to three years or a fine.

(II) One who tries to deceive a figure of authority about the parties involved in the commission of the illegal deed, or in one of the offenses which are enumerated in article 126 (I) and which is alleged to be imminent, will also be punished.

STGB art. 145d (1976) [unofficial translation].

55. *Id.*

56. (I) One who threatens another with the commission of an offense which is directed against him or a person who is closely connected with him, will be punished with imprisonment up to one year or a fine.

(II) One who intentionally deceives another about the imminence of the commission of an offense directed either against him or a person closely connected with him, will also be punished.

STGB art. 241 (1976) [unofficial translation].

ganda function.<sup>57</sup> In response to this problem, the government suggested the drafting of a new Article 130a, making it a criminal offense to give instructions relating to the commission of the offenses enumerated in Article 126 and to publish approval of such activities. However, the *Bundestag* refused to draft such an unwarranted restriction on the right of free speech<sup>58</sup> and created instead a new Article 88a, which prohibits constitutionally hostile support of crimes.<sup>59</sup> The remainder of the suggested draft became Article 130a, which punishes those who gave instructions in terrorist activities and specifically refers to unlawful acts under Article 126.<sup>60</sup> Article 130a applies to instructions given, whether in public or at any private assembly, which purposefully promote the proscribed unlawful activity.<sup>61</sup>

Article 140, also a new amendment, punishes individuals who either offer a reward for the commission of a punishable act or express their satisfaction at its commission.<sup>62</sup> A violation requires

---

57. See Blei, *supra* note 1, at 502.

58. *Id.*

59. (I) One who disseminates, publicly displays, posts, presents, or otherwise renders accessible, or sets up, refers to, furnishes, holds in possession, offers, advertises, commends, exports or imports in order to use or make possible the utilization of, a writing which contains support of one of the offenses enumerated in article 126 (I) 1-6, and which is determined to encourage the preparation of another to set up attempts against either the existence or security of the Federal Republic or against constitutional principles, will be punished with imprisonment up to three years or fined.

(II) He who publicly or in assembly supports the commission of one of the offenses enumerated in article 126 (I) 1-6, in order to encourage the preparation of another to set up attempts against either the existence or security of the Federal Republic or against constitutional principles will also be punished.

STGB art. 88a (1976) [unofficial translation].

60. (I) He who disseminates, publicly displays, posts, presents, or otherwise renders accessible, or sets up, refers to, furnishes, holds in possession, offers, advertises, commends, exports or imports in order to use or to make possible the utilization of a writing which contains instructions for the commission of offenses enumerated in article 126 (I) 1-6, and which is determined to encourage the preparedness of another to commit such crime, will be punished with imprisonment up to three years or a fine.

(II) He who gives instructions publicly or at an assembly pertaining to offenses enumerated in article 126 (I) 1-6, in order to encourage the preparedness of another to commit such offenses will also be punished.

STGB art. 130a (1976) [unofficial translation].

61. *Id.*

62. He who, publicly or in an assembly or through the dissemination of a writing, in such a manner which is appropriate to disturb the public peace, rewards or approves of the commission of one of the offenses enumerated ei-

only the giving of a reward itself or approving acts in such a way as to disturb the public peace.<sup>63</sup> Such approval must be manifested publicly, either before an assembly or via the dissemination of a written instrument.<sup>64</sup>

In 1976, the West German legislature supplemented Article 129,<sup>65</sup> which dealt with criminal association, with Article 129a, en-

ther in article 138 (I) 1-5 or article 126 (I) 1-6, after it has been committed or attempted in a culpable manner, will be punished with imprisonment up to three years or fined.

STGB art. 140 (1976) [unofficial translation].

Art. 138 delineates the instances when there is a positive duty to report crime to the authorities. The specified offenses to which Art. 140 refers include "preparation for a war of aggression, high treason, state treason or endangerment of the external security, crimes relating to counterfeit money or bonds, or human slavery." STGB art. 138 (1976) [unofficial translation].

63. *Id.*

64. *Id.* The glorification of violence is also punished:

(I) He who disseminates, publicly displays, posts, presents, or otherwise renders accessible to a person under eighteen years of age, or sets up, refers to, furnishes, holds in possession, offers, advertises, commends, exports or imports in order to use or make possible the utilization of writings which depict violence against people in a cruel or inhuman manner, and in doing so express a glorification of violence, or loss of offensiveness of such violence, or which incites racism, will be punished with imprisonment up to a year or fined.

(II) He who prepares materials which are covered by (I) for presentation over the radio will also be punished.

(III) (I) and (II) do not apply when the actions aid in the reporting of either current events or history.

STGB art. 131 (1976) [unofficial translation].

65. (I) He who founds an association, the purpose or activities of which are to commit crimes, or who participates in such an association as a member, or who makes propaganda for or who supports such an association, will be punished with imprisonment up to five years or fined.

(II) (I) does not apply when the association is a political party which the Federal Constitutional Court has not declared to be hostile to the constitution, when the commission of crimes is only a purpose or activity of secondary significance, or when the purposes or the activity of the association concern offenses covered by articles 84-87.

(III) The attempt to found such an association will be punished.

(IV) If the actor is one of the ringleaders or background members, or in an especially severe case, the term of imprisonment shall be from six months to 5 years.

(V) In the case of participants whose guilt is slight and whose cooperation is of secondary significance, the court can waive a punishment prescribed by (I) or (III).

(VI) The court can, in its discretion, mitigate or waive a punishment which is prescribed if the actor voluntarily and earnestly endeavors to prevent the continuation of the association or the commission of the crime which was the goal of the association, or voluntarily and timely reveals to

titled "Founding a Terrorist Association."<sup>66</sup> Members who support, participate in, or recruit for such an association are guilty of offenses under the article.<sup>67</sup> Increased sentences are applicable to ringleaders as well as directors of the activities in the background.<sup>68</sup> Even the attempt to form a terrorist association is an offense.<sup>69</sup> Mitigation of sentences is permitted for cooperation with the authorities or the prevention of a crime that might have taken place in consequence of such an association.<sup>70</sup>

### III. CRIMINAL PROCEDURE

Some of the most drastic and controversial anti-terrorist measures are incorporated in several amendments to the West German Code of Criminal Procedure. Prior to 1974, the code was relatively benign and favored defendants and their counsel.<sup>71</sup> These rules were framed in the liberal postwar era when the West Germans anticipated neither the phenomenon of terrorism nor the disruptive tactics which the terrorists would use at trial.<sup>72</sup>

---

the authorities his knowledge that crimes, the planning of which he knows, can still be prevented. If the actor accomplishes his goal to prevent the continuation of the association, or if it is accomplished without the actor's endeavors, he will not be punished.

STGB art. 129 (1976) [unofficial translation].

66. (I) He who founds an association whose purposes or whose activities are directed at the commission of murder, homicide, genocide, offenses against personal freedom as listed in articles 239a or 239b, or offenses constituting a public danger in the cases of articles 306-308, 310b (I), 311a (I), 312, 316c (I), or 324, or who participates in such an association as a member, or recruits for or supports such association, will be imprisoned for a term of six months to five years.

....  
(VI) In addition to imprisonment of at least 6 months, the court can deprive the accused of the ability to hold public office and the ability to acquire rights from public elections.

STGB art. 129a (1977) [unofficial translation].

67. *Id.*

68. "(II) If the actor belongs to one of the ringleaders or background members, the term of imprisonment is from one to ten years." *Id.*

69. "(III) The attempt to form such an association is punished." *Id.*

70. The statute expressly incorporates art. 129 (VI), *supra* note 65, and also provides: "(IV) In the case of an accused whose guilt is slight and whose participation is of secondary significance, the court can, in the case of offenses under (III) waive the punishment, and in the case of offenses under (I) mitigate the punishment." STGB art. 129a (1977) [unofficial translation].

71. Blei, *supra* note 1, at 503. It was "premised on an acceptance by the legal profession and defendants of certain minimal standards of conduct that would have permitted a fair and expeditious trial of causes before the court." *Id.* at 504.

72. *Id.* See Neukirchen Address, *supra* note 12, at 6.

### A. *Proceedings in the Absence of the Accused*

Since 1975, courts in West Germany are empowered to proceed against a defendant in his absence. Article 231a of the Criminal Procedure Code permits such a measure where the defendant has "intentionally and through his own fault placed himself in a condition which suspends his ability to participate in the trial,"<sup>73</sup> as in the case of a hunger strike.<sup>74</sup> Article 231b provides for the exclusion of the defendant where his "violative comportment" threatens to impede the main proceeding.<sup>75</sup> Where the defendant is physically removed he will nevertheless be given the opportunity of being heard in some form on those matters material to the pro-

73. (I) Where the accused has intentionally, and through his own fault, placed himself in a condition which suspends his ability to participate in the trial, and which prevents the regular execution or continuation of the main proceeding at the present time, the main proceeding will be continued in his absence, even if he had not yet become aware of the charge, as long as the court does not consider his presence indispensable. The first sentence outlines the procedure only to be used when the accused has had the opportunity, after commencement of the main proceedings, to answer the charge before the court or an authorized judge.

(II) As soon as the accused is once again able to participate in the trial, and as long as the pronouncement of sentence has not begun, the president has to instruct him about the substance of what has transpired in his absence.

(III) The court decides whether to proceed with trial in the absence of the accused after hearing the expert testimony of a medical doctor. The decision can be formed prior to the beginning of the main proceeding. Complaints against the decision are immediately permissible. The decision has a postponing effect. A previously begun main proceeding is interrupted until there is a decision concerning the complaint. The period of interruption may last up to thirty days.

(IV) Counsel is appointed for the accused who is without defense counsel when the decision to proceed in his absence pursuant to (I) comes into question.

*Strafprozeßordnung* [StPO] art. 231a (1977) (W. Ger.) [unofficial translation].

74. A Comparative Survey of the Anti-Terrorist Legislation in the Federal Republic of Germany, France, England and Sweden and an Overview of the Legal Situation in the United States 5 (German Information Center, N.Y.C.) (1978) [hereinafter cited as Comparative Survey].

75. (I) The accused will be separated from the court room or removed and confined, because of violative comportment, if the court does not consider his presence indispensable, and fears that the presence of the accused would impair the completion of the main proceeding in a troublesome manner. In each case the accused is to be given the opportunity to answer the charge.

(II) As soon as the accused is readmitted, the procedure outlined in article 231a (II) is followed.

StPO art. 231b (1977) [unofficial translation].

ceeding.<sup>76</sup> The court has discretion to allow the defendant to return when it deems his behavior satisfactory and believes that the likelihood of further disruptions is minimal.<sup>77</sup>

### B. *Increases in Prosecutory Power*

In August of 1976, the Criminal Procedure Code was amended to facilitate arresting members of terrorist associations.<sup>78</sup> Under prior law, detention could be ordered only when both urgent suspicion and grounds for arrest existed, such as the danger of flight or obstruction of justice.<sup>79</sup> The new law, in contrast, requires only urgent suspicion<sup>80</sup> where members of terrorist organizations are concerned.<sup>81</sup>

The 1978 amendments dealt with search warrants,<sup>82</sup> police checkpoints, and the conduct of defense attorneys. Current law<sup>83</sup> permits the issuance of a warrant for an entire building<sup>84</sup> rather

76. Blei, *supra* note 1, at 504.

77. *Id.*

78. Minister Vogel, A Reply to Terrorism from a Country that Lives by Law and Justice (Sept. 22, 1976) statement at a press conference in Bonn (German Information Center, N.Y.C.) [hereinafter cited as Vogel Statement].

79. See Comparative Survey, *supra* note 74, at 4. The Code of Criminal Procedure provides:

There are grounds for arrest, if facts are presented, that the accused is in flight or is concealing himself, or if in an estimation of the circumstances of the particular case there is a danger that the accused will evade the process of criminal justice, or if the conduct of the accused supports the suspicion that he will destroy, alter, remove, falsify or suppress evidence, or influence other criminal participants, witnesses, or experts in a self-serving manner, or will induce others to such conduct, and if therefore the danger threatens that the inquiry of truth will be impeded.

STPO art. 112 (II) (1977) [unofficial translation].

80. "Urgent suspicion exists when, because of the present state of the inquiry, the probability is great that the one under investigation is the guilty actor or participant." STPO art. 112 [Kommentar N.6] (1977) [unofficial translation].

81. Detention pending investigation may be ordered against the accused who is suspected of having committed an offense proscribed by articles 129a, 211, 212, or 220a of the Penal Code, or in the case of an offense under article 311 which endangers life and limb, even if grounds for arrest do not exist.

STPO art. 112 (III) (1977) [unofficial translation].

Articles 211, 212, 220a and 311 refer to murder, homicide, genocide and attempts to bring about an explosion, respectively.

82. See *Senate Hearing, supra* note 18, at 10; New Laws Facilitating the Hunt for Terrorists in the Federal Republic of Germany—A Necessary Consequence (April 1978 Press Release) (German Information Center, N.Y.C.) [hereinafter cited as Terrorist Hunt Laws].

83. STPO art. 103 (I) (1978).

84. Prior to 1978, warrants could only be issued for a single apartment or for



than a single dwelling when the police have reason to believe that a person suspected of committing an offense, as defined by Article 129, is inside.<sup>85</sup> The police may search for the wanted person, but may not disturb personal effects, open drawers, or look through files.<sup>86</sup>

Prior to 1978, police and prosecutors had no legal authority, after the commission of serious crimes, to establish road blocks and conduct identity checks.<sup>87</sup> Under present law,<sup>88</sup> a judge<sup>89</sup> may authorize the establishment of such checkpoints when the police have reason to believe that a terrorist act or other serious offense has been committed.<sup>90</sup> Also, such measures must be necessary either to apprehend criminals or obtain evidence.<sup>91</sup> If an individual can not identify himself,<sup>92</sup> the police may detain him either until he satisfactorily does so,<sup>93</sup> or for a maximum of twelve hours,<sup>94</sup> after

several individually specified apartments believed to contain suspected persons or evidence. *See* Terrorist Hunt Laws, *supra* note 82, at 1. During the nationwide search for Hanns Martin Schleyer in 1977, police officers in Cologne found a cufflink belonging to Schleyer in the underground garage of a large apartment complex. Under the existing law, the police officers could not conduct a search of the whole building. *Id.*

85. M. RADVANYI, ANTI-TERRORIST LEGISLATION IN THE FEDERAL REPUBLIC OF GERMANY 86 (1979).

86. Terrorist Hunt Laws, *supra* note 82, at 2.

87. *Id.*

88. STPO art. 111 (1978).

89. Whether the necessary preconditions have been met is a decision for a judge. M. RADVANYI, *supra* note 85, at 87. If judicial authorization would cause serious delay, the police may set up the checkpoints without such authorization. *Senate Hearing, supra* note 18, at 5.

90. M. RADVANYI, *supra* note 85, at 86; Terrorist Hunt Laws, *supra* note 82, at 2.

91. M. RADVANYI, *supra* note 85, at 87; Terrorist Hunt Laws, *supra* note 82, at 2.

92. Prior to the adoption of arts. 163b and 163c of the Code of Criminal Procedure, the laws of the *Länder* regulated the procedure for determining a person's identity. M. RADVANYI, *supra* note 85, at 87. Article 163b distinguishes between determining the identity of persons suspected of having committed an offense and those not suspected. *Id.* at 88. West German police have no authority to demand to see a person's identity card unless they suspect the person of having committed a criminal offense. Terrorist Hunt Laws, *supra* note 82, at 2. The identity of persons who are not suspected of having committed an offense may not be searched against their will, and the police must accept their statements about the facts and circumstances of the case in question. M. RADVANYI, *supra* note 85, at 88. When whole areas are cordoned off, however, identity checks, even of people who are not suspects, are permissible, if they are necessary for the solution of a criminal offense. Terrorist Hunt Laws, *supra* note 82, at 2.

93. In general, a judicial order is required in order to deprive a person of his liberty. M. RADVANYI, *supra* note 85, at 88.

which time, even if his identity is still unknown, he must be released.<sup>95</sup>

### C. Attorney-Client Relationship

Chancellor Helmut Schmidt has repeatedly maintained that the German terrorist problem is unique because of the active collaboration between defense attorneys and their terrorist clients.<sup>96</sup> In West Germany, defendants have an unrestricted right to choose their defense counsel.<sup>97</sup> In principle, the communication between defense counsel and client in custody is not subject to any restrictions.<sup>98</sup> However at a trial for founding a terrorist organization, all communication in writing will be monitored.<sup>99</sup> In September of 1977, as a reaction to the kidnapping of Schleyer, the *Bundestag* passed the Contact Ban.<sup>100</sup> This legislation permits the government to temporarily isolate imprisoned terrorists and to prevent all contact with the outside world, including written and oral communica-

94. Deprivation of liberty pending identification is subject to one further condition. No one may be detained for a period longer than absolutely necessary to determine his identity. *Id.*

95. Terrorist Hunt Laws, *supra* note 82, at 3.

96. See *Schmidt on Terrorism*, NEWSWEEK, Nov. 28, 1977, at 77. In an interview broadcast by French National television on November 9, 1977, Chancellor Schmidt commented, "I do not think that terrorism in Germany should be analyzed as a completely unique phenomenon. But of course, it has some specific characteristics. Among these I would number the participation of attorneys to an extent of which I am not aware anywhere else in the world." Remarks on Terrorism in a Democratic Society (excerpts from an interview with Chancellor Schmidt) (November 10, 1977) (German Information Center, N.Y.C.) [hereinafter cited as Schmidt Interview]. See also *Masters of Disruption*, TIME, Sept. 19, 1977, at 38; *War without Boundaries*, *id.*, Oct. 31, 1977, at 34.

97. FEDERAL MINISTER OF JUSTICE, THE LEGAL POSITION OF DEFENSE COUNSEL IN CRIMINAL PROCEEDINGS 4 (Feb. 1978). In the event that the defendant does not exercise this right, the court will appoint counsel ex-officio, *Id.* The number of counsel of the defendants own choosing may not exceed three, *id.* at 7, while an attorney may not jointly and simultaneously defend more than one defendant to avoid a possible conflict of interests. *Id.*

98. *Id.* at 27.

99. (I) The accused, even if he is not at liberty, is permitted to have written and oral communication with defense counsel.

(II) If the accused is not at liberty and is the subject of an investigation of an offense prescribed by article 129a of the Penal Code, pieces of writing are to be rejected insofar as the sender or the one who wants to immediately hand them over to the accused, does not make it understood in doing so, that the pieces of writing will be immediately presented before a magistrate. STPO art. 148 (1977) [unofficial translation].

100. *Senate Hearing*, *supra* note 18, at 10; Neukirchen Address, *supra* note 12, at 9; Comparative Survey, *supra* note 74, at 6.

tion with counsel, for a specified period of time if, due to terrorism, "there is a present danger to life, limb or liberty."<sup>101</sup> A *Land* government or the Minister of Justice may order the prevention of outside contact<sup>102</sup> which, in the absence of judicial confirmation, lapses after two weeks.<sup>103</sup> This period of temporary isolation, however, may last for thirty days, after which time, judicial confirmation is again required.<sup>104</sup> A recent amendment precludes any physical contact between defense counsel and client: a glass partition will separate them when they meet.<sup>105</sup>

---

101. If there exists a present danger to life, limb or liberty of persons, and well-founded facts establish the suspicion that the danger emanates from a terrorist association, and to ward off this danger, it is necessary to interrupt connections between the prisoners themselves and the outside world, including the written and oral communication with defense counsel, then such precautions will be taken. Such precautions may only affect prisoners who have been sentenced by force of law because of an offense proscribed by article 129a of the Penal Code, or because of one of the offenses enumerated in this provision, or those prisoners against whom an arrest order exists because of suspicion of such an offense. The same applies to persons who have been sentenced because of another offense or because they have been arrested on suspicion of another offense and urgent suspicion exists, that they have committed this act in conjunction with an act proscribed by article 129a of the Penal Code. This precaution is restricted to definite prisoners or groups of prisoners, if this is sufficient to ward off the danger . . . .

BGB1 I., para. 31, at 1877 [unofficial translation].

102. "The *Land* government, or the highest competent *Land* authorities, may establish the measures delineated in paragraph 31. The Federal Minister of Justice can establish these measures to interrupt the connection in more than one *Land*, if it is necessary to ward off the danger." BGB1 I., para. 32, at 1877 [unofficial translation].

103. The precaution delineated in paragraph 31 loses its effectiveness if it is not authorized within two weeks after it is decreed. The criminal division of the Senate of the *Oberlandesgericht* [Highest Federal Court] in whose jurisdiction the *Land* government is situated is competent for the authorization of precaution which a *Land* authority has taken. The criminal division of the Senate of the *Bundesgerichtshof* [Higher Regional Court] is competent for the authorization of measures established by the Federal Minister of Justice.

BGB1 I., para. 35, at 1877 [unofficial translation].

104. The establishment of measures pursuant to paragraph 31 are revoked as soon as the conditions which necessitated their establishment are no longer present. Such measures lose their effectiveness, at the latest, after the termination of thirty days. This interval begins at the termination of the day on which the measures were established. If the measures are authorized then they can be renewed after their termination if the requisite conditions are still present; for the renewed establishment of these measures, paragraph 35 delineates the requirements. If the initial establishment was not authorized, then renewed precautions may only be taken if new facts so demand . . . .

BGB1 I., para. 36, at 1877 [unofficial translation].

105. *Senate Hearing, supra* note 18, at 10. This measure is meant to prevent

The rights of defense counsel may be further restricted in investigative proceedings. Counsel has no right to be present at the police interrogation of defendant, witnesses or experts, or at the interrogation of witnesses and experts by the prosecuting authorities.<sup>106</sup> In theory counsel may inspect files compiled as a result of investigation.<sup>107</sup> Generally, counsel may be present when prosecuting authorities or a judge interrogates the defendant, or when the judge interrogates witnesses and experts.<sup>108</sup> The court, in its discretion, may exclude counsel.<sup>109</sup>

Counsel may be excluded at any stage of the proceeding if he is suspected of participating in the commission of the offense, or of

the transfer of weapons, explosives and documents from attorney to client. Neukirchen Address, *supra* note 12, at 8.

106. FEDERAL MINISTER OF JUSTICE, *supra* note 97, at 32.

107. *Id.* However, he may be refused the right of inspection if, prior to the conclusion of the investigation, the object of the investigation is in jeopardy. *Id.*

108. *Id.*

109. Previously, courts assumed an inherent power to exclude a defense counsel if the court feared a conflict of interest, suspected counsel of being an accessory, or thought that he might be a witness in the proceeding. Blei, *supra* note 1, at 504. The exclusion of Gudrun Ensslin's attorney pursuant to this inherent judicial power was held unconstitutional by the *Bundesverfassungsgericht* (Federal Constitutional Court) because of the absence of either legislation or preconstitutional law to that effect. BVerf GE 34, at 293(26). In 1974 the Code of Criminal Procedure, for the first time, provided for exclusion of counsel:

(I) Defense counsel is excluded from participation in the trial if he is urgently suspected, or suspected to a degree which justified the commencement of the main proceeding, of the act which forms the object of the investigation, or of participation in, or having committed an act, which in the case of the trial of the accused would be aiding and abetting the accused, frustrating the sentence, or receiving stolen property.

(II) Defense counsel is excluded from participating in the trial if he is urgently suspected of misusing communication with the accused in custody for the purpose of committing offenses which are punished by a maximum of one year imprisonment or, misusing the communication with the accused in custody for the purpose of endangering considerably the security of a prison.

(III) The exclusion is rescinded as soon as the prerequisite conditions are no longer at hand.

(IV) As long as counsel is excluded pursuant to (I) or (II) he can not defend the accused who is in custody, or at another judicial proceeding.

(V) Counsel who is excluded pursuant to (I) also can not defend the accused in the same trial; the same applies to counsel who is excluded pursuant to (II) with regard to the accused who is in custody. Counsel excluded pursuant to (II) can not defend an accused in custody at other trials, the subject matter of which are offenses proscribed by article 129a of the Penal Code, and which have been instituted prior to the time of exclusion.

STPO art. 138a (1977) [unofficial translation].

aiding and abetting it.<sup>110</sup> Further grounds for exclusion include any abuse of communication with defendant which results in an endangerment of security.<sup>111</sup> Counsel and client may appeal the exclusion.<sup>112</sup> The criminal division of the *Oberlandesgericht* (Higher Regional Court), not the court before which the case is pending, decides whether counsel should be excluded.<sup>113</sup> If counsel is excluded, the court must either assign new defense counsel or permit the defendant to brief new defense counsel of his own choosing.<sup>114</sup>

#### IV. REACTION TO WEST GERMANY'S ANTI-TERRORIST MEASURES

##### A. *The West German View*

In response to the threat of terrorism, the West Germans amended their Penal Code to fill every imaginable gap.<sup>115</sup> However, the opposition parties in the *Bundestag* criticized these measures as not going far enough.<sup>116</sup> West German politicians and experts on the phenomenon of terrorism laud the effectiveness of West Germany's anti-terrorist measures.<sup>117</sup> While some suggest

110. FEDERAL MINISTER OF JUSTICE, *supra* note 97, at 32.

111. Defense counsel is also excluded from participation in proceedings which have as their subject matter, offenses enumerated in article 138 of the Penal Code concerning the offenses of state treason, or offenses enumerated in articles 94-96, 97a, and 100 of the Penal Code concerning the endangerment of the external security, when it is proven through determined facts that counsel's participation would cause danger to the security of the Federal Republic.

StPO art. 138b (1977) [unofficial translation].

Strangely enough, violating the dignity of the court is not a ground for exclusion.

FEDERAL MINISTER OF JUSTICE, *supra* note 97, at 18.

During the Baader-Meinhof trial . . . constant disputes took place between the attorneys and the court. The attorneys patently accused the presiding justice of violations of law, for example, "This is a free ticket for any judicial arbitrariness, for violation of law, for violation of the procedural rights of the accused, thus a kind of judicial free-for-all which rules this trial instead of legislation and law."

The presiding justice had (and has) in accordance with the pertinent Judicial Organization Law no possibility of countering such accusations. Only the ethical court of the Bar can deal with such a case . . .

Comparative Survey, *supra* note 74, at 9.

112. M. RADVANYI, *supra* note 85, at 80.

113. FEDERAL MINISTER OF JUSTICE, *supra* note 85, at 19.

114. *Id.*

115. Corve, *supra* note 26, at 94.

116. *Senate Hearing*, *supra* note 18, at 5, 9.

117. See Moons, *Political and Judicial Approach to Terrorism and Anarchistic*

that other Western societies use Germany's response as a model to shape their own anti-terrorist programs,<sup>118</sup> others question whether such measures may lead to an erosion of civil liberties.<sup>119</sup> The German public welcomed these anti-terrorist measures and did not acknowledge that even criminals have constitutional rights.<sup>120</sup> The extraordinarily violent reaction of the German people caused Chancellor Schmidt to wonder whether a "mania for order" may be part of the German national character.<sup>121</sup> The hostility directed against the "so-called sympathizers," a term applied as indiscriminately as the terrorist epithet "fascist,"<sup>122</sup> is evidenced by the statement of Federal President Walter Scheel at the state funeral of Hanns Martin Schleyer.<sup>123</sup> The West Germans have a historical sensitivity re-

---

*Criminality in the Federal Republic of Germany*, in 3 NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, INT'L SUMMARIES 123-29 (April, 1979); Vogel Statement, *supra* note 78. See generally *Senate Hearing*, *supra* note 18.

118. See generally *Senate Hearing*, *supra* note 18.

119. See 1978 AMNESTY INT'L REP. 214-17; 1977 AMNESTY INT'L REP. 249-53; Carbonneau, *Extradition and Transnational Terrorism: A Comment on the Extradition of Klaus Croissant from France to West Germany*, 12 INT'L LAW. 813, 822-23 (1978); Fletscher, *Terrorism and Reaction*, in 3 NATIONAL CRIMINAL JUSTICE SERVICE, INT'L SUMMARIES 48 (April, 1979). See generally Horowitz, *Can Democracy Cope With Terrorism?* CIVIL LIBERTIES REV. 29 (1979).

120. Fletscher, *supra* note 119, at 48; *Senate Hearing*, *supra* note 18, at 15.

121. Fletscher, *supra* note 119, at 48.

122. *Id.* at 51.

123. There are first of all those who directly abet the terrorists, provide accommodations for them, motor cars, false passports and so forth. It is possible that the terrorists do not let their helpers in on all details of their plans, indeed, that frequently the helpers do not even know to what end the one or the other requested help will be used. But it should meanwhile have become clear to all citizens to what they could be contributing by giving such help. The excuse, "I didn't know anything about that—I didn't want that" no longer goes.

Anyone giving such help—is guilty.

Then there is the group of those who are again now, after the occurrences in Stammheim, in this country and abroad, becoming active by, for example, smearing slogans supporting the terrorists on walls. They help prepare the soil on which the evil seed can grow.

They, too, are therefore also guilty.

....

Then there are the people whose blind repugnance to democracy leads to their supporting the aims of the terrorists . . . in word and writing, although they themselves reject the use of terrorist violence in regard to their own person . . .

This group, too, I believe, is also guilty.

The Exhortation and Obligation of Hanns Martin Schleyer's Death. Speech by the Federal President at the State Funeral in Stuttgart, (Oct. 25, 1977), *reprinted in* 4 THE BULLETIN 7-8 (archive supp., Nov. 2, 1977) (Press and Information Office, Gov't of the Federal Republic of Germany).

garding civil liberties, but are also sensitive about terrorism.<sup>124</sup>

Minister of Justice Vogel labeled his government's response to terrorism a course in moderation which ensured the safeguarding of rights, and the vitality of dissent<sup>125</sup> and citizens-action groups in Germany.<sup>126</sup> Chancellor Schmidt repeatedly affirmed that all actions taken were within the rule of law and the parameters set down by the *Grundgesetz* (Basic Law).<sup>127</sup>

### B. *Criticism of the West German Measures*

Following the arrest of Andreas Baader, Ulrike Meinhof, and Holger Meins in 1972, the West German authorities ordered a curtailment of their visitation rights and correspondence with the outside world.<sup>128</sup> The Baader-Meinhof leaders appealed to the Fed-

124. The question of civil liberties is very basic in Germany because of the country's Nazi past. So is the question of terrorists very basic. They want Germany to look Nazi before the eyes of the world. The Federal German Republic has thus had to walk a very delicate legal line in its efforts to control its own insurgents.

Delaney, *supra* note 25, at 458. See Neukirchen Address, *supra* note 12 at 7. The lesson of Weimar has taught the West Germans that they can not give "the enemies of liberty the same freedom as the defenders of liberty." Schmidt Interview, *supra* note 96, at 2. It is also asserted that no suppression of civil liberties can occur within the present West German democracy as it is the strongest in Europe and there is no real anti-democratic threat to Bonn. *Senate Hearing, supra* note 18, at 6.

125. On Jan. 30, 1980, the West German government banned a Neo-Nazi group and confiscated its equipment, because the group's paramilitary activities were unconstitutional and "gave West Germany a bad name abroad." N.Y. Times, Jan. 31, 1980, at A9, col. 1.

126. Vogel Statement, *supra* note 78.

127. Statement of the Federal Government, *supra* note 14, at 2. During the Schleyer incident, the government had a two-fold obligation as mandated by the Federal Constitutional Court: to protect and promote life, and to protect the whole body of citizens. *Id.* at 1. Chancellor Schmidt stated in one interview, "Freedom and liberalism on one side and internal security and safe-guarding of the democratic state [on the other] are not in opposition." *Schmidt on Terrorism*, NEWSWEEK, Nov. 28, 1977, at 77. Terrorism was perceived as a great social harm, and the government's duty was to prevent the infringement of civil liberties by such criminal organizations.

There is a persistent kind of liberalism in Western Europe that is sensitive exclusively to the dangers of an erosion of civil liberties, but is peculiarly phlegmatic about threats to liberty by enemies of the state. It is blind to the sufferings of fear and oppression, if the fear and oppression are caused by organizations other than the state. It does not acknowledge that there are cases in which the state must be given sufficient powers to protect citizens from infringements upon *their* civil liberties by criminal organizations.

Neukirchen Address, *supra* note 12, at 7-8. (emphasis in original).

128. Andreas Baader, Holger Meins, Ulrike Marie Meinhof and Wolfgang

eral Constitutional Court which held that the measures were not unconstitutional.<sup>129</sup> Subsequently they submitted an application for review by the European Commission on Human Rights in Strasbourg.<sup>130</sup> The West German government submitted an exhaustive report on the need for such measures in light of the danger which the incarcerated terrorists posed.<sup>131</sup> As the applicants' attorneys did not refute the facts in the government report, the

---

Grundmann *against* the Federal Republic of Germany. 1975 Y.B. EUR. CONV. ON HUMAN RIGHTS 132 (Eur. Comm. on Human Rights).

129. *Id.* at 134.

130. The applicants' complaint alleged that the measures adopted by the West Germans exceeded the purposes of detention on remand, that by isolating the applicants from other detainees the authorities created the status of a political prisoner whose rights were reduced in comparison to others, their defense counsel had been globally defamed by the Attorney General who called them accomplices to criminal organizations, and that decisions by the German courts violated Articles 3, 6, 8, and 10 of the Convention. *Id.* Article 3 prohibits the use of torture, or inhuman or degrading treatment or punishment. Article 6 outlines the procedural due process requirements. Article 8 states that respect is to be accorded to a person's home, correspondence, private and family life. Article 10 protects the basic freedom of expression. *See, Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, BGBl II (W. Ger.) 685, 953; 213 U.N.T.S. 221.

131. The West German government argued that the dangerous character of the applicants and the fact that they continued their activities during their imprisonment justified the restrictions. 1975 Y.B. EUR. CONV. ON HUMAN RIGHTS, at 138. They also noted that the measures had been modified since the original decree. *Id.* In the case of Baader, Meinhof and Meins visits and correspondence had been authorized. *Id.* The visits and correspondence of Grundmann were still restricted but that did not mean that a request to see other persons would not be granted. *Id.* at 140. In the West German government's estimation, "[The applicants] were not treated more harshly than any other dangerous prisoner suspected of crimes of equal gravity." *Id.*

In a subsequent application, Gudrun Ensslin, Andreas Baader and Jan-Carl Raspe alleged that the conditions of their detention were tantamount to torture and that they had not been accorded due process. Gudrun Ensslin, Andreas Baader and Jan-Carl Raspe *against* the Federal Republic of Germany, 1978 Y.B. EUR. CONV. ON HUMAN RIGHTS 418, at 442, 444 (Eur. Comm. on Human Rights). The Commission held that the exceptional detention arrangements to which the applicants were subjected, were justified by the security problems which they posed, *id.* at 454, that the government's actions did not rise to a level of sensory deprivation which would have destroyed their personalities, *id.* 456, and that the social limitations were not comparable to solitary confinement. *Id.* at 458. The subsequent deaths of the applicants at Stammheim did not cast any doubts on these conclusions. *Id.* at 460. The Commission also dismissed the alleged due process violations. *Id.* at 462-66. It held that the anti-terrorist campaign in the press which the government abetted did not affect the applicants' presumed innocence, *id.* at 462, that the government's limitations on the number of defense counsel did not violate Article 6(3) of the Convention, *id.* at 466, and that the right to counsel of one's choosing is not an absolute right but is subject to the State's right to regulate the conduct of attorneys. *Id.*



Commission found the facts uncontradicted and thus held the application "manifestly ill-founded."<sup>132</sup>

Opposition started to grow after the passage of more stringent measures.<sup>133</sup> Amnesty International considered the human rights implications of the 1976 anti-terrorist measures, fearing infringements on the freedom of expression.<sup>134</sup> In its opinion, Articles 131<sup>135</sup> and 140<sup>136</sup> of the Penal Code, require "a subjective interpretation of motive and opinion by the courts."<sup>137</sup> Authors or publishers could be punished for merely exercising their freedom of expression without advocating violence.<sup>138</sup> Amnesty also noted that Article 88a,<sup>139</sup> provided the support for a series of raids on leftist bookshops and printers.<sup>140</sup>

Opposition increased steadily after 1977, a year marked by the raid at Mogadishu, the deaths at Stammheim and the passage of the Contact Ban.<sup>141</sup> Hans Heinrich Sautman, a student and member of the Communist Federation of West Germany was arrested and found guilty of defamation of the state and incitement of the people.<sup>142</sup> Theodore L. Bellekom<sup>143</sup> reported that Sautman was on trial not for advocating violence but for voicing his political criticisms.<sup>144</sup> The French Bar expressed their misgivings about the Contact Ban when the West Germans sought to extradite Klaus Croissant, a former Baader-Meinhof defense counsel.<sup>145</sup> Amnesty

132. 1975 Y.B. EUR. CONV. ON HUMAN RIGHTS, at 446.

133. See 1977 AMNESTY INT'L REP. 249-53; Ledeen, *Visions of Hobnails*, THE NEW REPUBLIC, Nov. 19, 1977, at 17.

134. 1977 AMNESTY INT'L REP. 249.

135. See note 64 *supra*.

136. See note 62 *supra*.

137. 1977 AMNESTY INT'L REP. 249.

138. *Id.*

139. See note 59 *supra*.

140. 1977 AMNESTY INT'L REP. 250.

141. Leftist European journalists and intellectuals were quick to note that the action at Mogadishu was the first foreign operation of the *Wehrmacht* since the second World War, Ledeen, *supra* note 133, at 17, and they attributed the death of Andreas Baader, Gudrun Ensslin and Jan-Carl Raspe to "state terrorism." *Id.* at 18.

142. Sautman displayed a placard at a demonstration calling the German anti-terrorist squad (BCS G9) the killers of the bourgeoisie and accusing the authorities of killing the terrorists imprisoned at Stammheim. 1978 AMNESTY INT'L REP. 215.

143. Amnesty International sent Bellekom, a Dutch Lawyer to observe the January 1978 trial. *Id.*

144. *Id.*

145. See Carbonneau, *supra* note 119, at 822. A representative of the bar declared before the *Cour d'appel* that the right of legal counsel itself was on trial in the Croissant proceeding. *Id.*

International feared that, in the wake of the Contact Ban, the "respect for the human rights of some suspects and defendants [would become] excessively dependent upon the good will of the government in power and upon the discretion of the judiciary and the prosecution."<sup>146</sup>

### CONCLUSION

Acts of violence are reprehensible and the perpetrators of such acts should be punished according to the provisions of the penal law. Lawyers who commit culpable violations of their professional duties should be punished according to the laws governing the legal profession.<sup>147</sup> Where legislation is specifically tailored to the threat of terrorism there should first be a careful and objective consideration of the magnitude of that threat.<sup>148</sup> Legislators should balance the burdens imposed upon freedom with the benefits of eradicating terrorism.<sup>149</sup> It is certainly possible to create a society

---

146. 1978 AMNESTY INT'L REP. 215. According to Amnesty the Contact Ban affected seventy prisoners during the month of October, 1977. *Id.*

147. The West German professional law provides that violations of professional duties in connection with an attorney's activities may lead to a gamut of punitive measures from warnings to disbarment. See FEDERAL MINISTER OF JUSTICE, *supra* note 97, at 41. The need for certain amendments to the Code of Criminal Procedure is thus questionable.

Most of West Germany's current anti-terrorist efforts center on punishing defense attorneys who created information networks between their clients and the outside world. See generally C. DOBSON & R. PAYNE, *supra* note 1, at 163; Carbonneau, *supra* note 119, *Masters of Deception*, TIME, Sept. 19, 1977, at 38. Such communication networks helped the imprisoned terrorists coordinate hunger strikes and ensured that they acted in conformity with each other. See Information and Documents concerning the Deaths of Andreas Baader, Gudrun Ensslin and Jan-Carl Raspe, 4 THE BULLETIN 1 (archive supp., Nov. 30, 1977) (Press and Information Office, Gov't of the Federal Republic of Germany).

148. "Ultimately though it is easier to stretch the notion of what civil society can tolerate than to establish inflexible legislation that would probably escalate levels of terrorism without leading to international tranquility. The idea of prohibitory legislation as a cure-all, or even a limiting element against terrorist actions, is itself dubious." Horowitz, *supra* note 119, at 31.

It would seem that "inflexible legislation" would be especially problematic in West Germany. The West German attitude toward the function of law is quite rigid. It is marked by a legalistic conformity to detailed texts which prescribe remedies for practically all problems. The basic attitude of the judges, who utilize these codes to solve all problems that come before them, is marked by a "neutrality toward social values and political realities." R. NEUMANN, *supra* note 16, at 143.

149. "Whether put forward by political leaders or social science experts, programs to forestall terrorism should be examined closely to see what their costs are for individual privacy, group protest, political competition, and social change. There are

free of terrorism by utilizing various devices which militarist and fascist dictatorships employ to ensure conformity. However, no free society should ever pervert its own political integrity by responding to criminality with repression. Manifestations of dissent should be permitted to stand "undisturbed as a monument to that society where error of opinion may be tolerated if the force of reason is left to combat it."<sup>150</sup>

*Kevin G. Horbatiuk*

---

more than a few wolves among those offering to help guard the lambs from the tigers." Horowitz, *supra* note 119, at 37.

150. Jefferson's First Inaugural Address (March 4, 1801) *reprinted in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 14 (1969).

