

## KOLIKO IN ZA KAKO DOLGO? OMEJITVE UKREPOV PROTITERORISTIČNEGA SODELOVANJA

### HOW MUCH FOR HOW LONG? LIMITS ON COUNTER-TERRORISM COOPERATION MEASURES

Professional article

**Povzetek** Vse pobude vladnih politik, vključno s sprejetimi ukrepi za boj proti terorizmu, so omejene z vrsto dejavnikov, vključno z razpoložljivimi sredstvi, pravnimi omejitvami, nacionalno varnostjo in s tem, koliko so sprejemljive za javnost. Tako so ob tem, da vlade lahko sprejmejo politiko v zvezi s protiterorizmom, dolgoročni ukrepi, vključno s pospeševanjem sodelovanja, tako v domačem okviru kot z zunanjimi agencijami, lahko moteni. Razporeditev sredstev ima prav tako vlogo pri oblikovanju vladne politike, saj finančni pogoji omejujejo programe in osredotočajo razpoložljiva sredstva na najpomembnejše javne zadeve. Dojemanje javnosti glede grožnje, ki jo predstavlja terorizem, se ponavadi zmanjšuje z oddaljenostjo od napada, s tem pa se pozornost vlade premakne na pomembnejša civilna vprašanja, kot sta zdravstveno varstvo in izobraževanje. Medtem ko so dodatne dejavnosti v zvezi s sodelovanjem v boju proti terorizmu vedno mogoče, ostaja problem za tiste, ki odločajo o politiki, ali so sedanji ukrepi zadostni, ko gre za konkretno grožnjo.

**Ključne besede** *Protiterorizem, vladna politika, oblikovanje politike, terorizem, Nemčija.*

**Abstract** All government policy initiatives, including measures undertaken to combat terrorism, are constrained by a variety of factors including available funding, legal restrictions, national security and public acceptance. Thus, while governments may initiate a counter-terrorism policy, long-term measures including fostering cooperation both domestically and with external agencies can be hampered. Resource allocation also plays a role in the development of government policy as fiscal conditions limit programmes and focus available funding on the most pressing public issues. The public's perception of the threat posed by terrorism tends to recede following the immediacy of an attack, shifting the government's attention paid to the issue to more pressing civic problems such as health care and education. While additional counter-

terrorism cooperation activities are always possible, the issue confronted by policy makers is whether existing measures are sufficient for the given threat.

**Key words** *Counter-Terrorism, Government Policy, Policy Development, Terrorism, Germany.*

**Introduction** Combating terrorism, the fight against terrorism, curbing international terrorism as well as preventing terrorists from acquiring access to weapons of mass destruction have all become very familiar headlines repeated endlessly in newscasts, journal articles and papers around the globe. Increasingly since the events of 11 September 2001, anti-government protests, attacks against governmental offices or institutions or crimes targeting foreign businesses or individuals have on many occasions been characterized by the press as well as by official sources as stemming from terrorist activities. This has led to an increased public perception that the threat from terrorism was not only growing but was in fact, in American parlance ‘a clear and present danger’. Whether this in fact is a reality depends largely on how one defines a terrorist act as well as how one defines a terrorist.

A bomb explodes in downtown Jerusalem, killing 91 and injuring 46. A car bomb detonated in Pretoria kills 17 and injures 197. Moscow suffers another attack where 12 are killed and 55 wounded. These examples are not taken from today’s headlines but rather from the pages of history. The first took place in 1946 and was planned and executed by Irgun, a Jewish group labelled as terrorists by the British authorities. Menachem Begin, a future Israeli Prime Minister and Nobel Laureate, at that point in time led the Irgun group (Haaretz, 2008).

The second attack took place in 1983 when the African National Congress (ANC) targeted a government building. An ANC leader, Nelson Mandela, future president of South Africa and another Nobel Laureate, stated immediately after the event that the attack was legitimate (BBC, 1983). The last example occurred in 1919 when the Group called Underground Anarchists opposed to what they termed Communist dictatorship, carried out an attack against the Communist Party Headquarters in downtown Moscow (The Anarchist Encyclopaedia, 2009).

The lesson that can be drawn from these examples is that acts against the established order are often defined as terrorism and are rife throughout history. The events that today so focus our attention need to be viewed in the proper context. These examples also clearly demonstrate that governments throughout history have had to face the threats posed by terrorist acts and had to develop mechanisms to deal with both the direct consequences as well as the underlying issues that gave rise to the emergence of the groups perpetuating these attacks.

How we define something proscribes how we will deal with it. Terrorism can be loosely defined as attacks against civilians, government or the established order. Since we are examining the phenomena from the perspective of a liberal democracy,

is terrorism an ideological threat to western nations as was the case for the clash that occurred between western capitalism and Soviet Marxist-Leninism? Or is terrorism simply a tactic used to support the advancement of a particular political objective? Is there truly a global dimension to international terrorism? And finally do our western democratic societies make it easier for terrorists to exert influence and achieve their goals? Additionally how governments and the media portray events helps to mould the public's perception of terrorism. Are acts of terrorism in and of themselves different from any other type of criminal activity?

Whether it be bombings, kidnappings or assassinations, Germany has a long history of individuals and groups using acts of terror to achieve their political goals. Attempts to assassinate Kaiser Wilhelm I in 1878, the attacks launched by the Freikorps following the end of the First World War, the actions of the Red Army Faction from 1978 to 1998 as well as the attack executed by the Black September cell during the Munich Olympic Games in 1972 have provided Germans with a multitude of examples of acts of terror. More recent events including the attacks in New York in 2001 as well as domestic occurrences such as the attempted bombing of regional trains in July 2006 near Hamm and Köln have created an environment where the general public has demanded greater transparency of government actions to counter such threats.

However, while “terrorist acts have, for a long time, constituted a major concern for the international community [...] the definition of terrorism has represented an area of international law where the divergence of views between States was significant” (Dimitriu, 2004). Germany, as is the case for most nations, has developed and instituted its own vision and response to the perceived threat posed by individuals and groups who employed terrorism as a tactic to obtain their objectives.

Defining what in fact constitutes terrorism is indeed the first step in establishing how a government will deal with this issue. While there have been numerous definitions formulated by various entities, it is important to recognize that what is today characterized as international terrorism is a relatively recent phenomenon, only gaining prominence in the mid 1980's, according to Chomsky (George, 1991).

One of the first modern definitions of terrorism was issued by the League of Nations in 1937 as a response to the increased unrest and violence then present in the world. That definition stated: “All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public” (League of Nations, 1937). This is a very useful definition as it provides the legal framework to characterize terrorism as a criminal act against the established political order. Other definitions have expanded upon this rationale in characterizing the act of terrorism itself rather than attempting to proscribe who a terrorist is. This is clearly demonstrated in the formulation of definitions of terrorism employed by a number of nations including the US where it is defined as premeditated, politically motivated violence (US Code Title 22), Canada which characterizes it as acts committed for political, religious or ideological

purposes with the intention of intimidating the public (Criminal Code of Canada Paragraph 83.01), and France which defines it as a violence committed by an organization in order to create a climate of insecurity or in order to overthrow the established government (Tiefenbrun, 2003).

## 1 GERMAN APPROACH

The German definition of terrorism and terrorist acts follows this same logic by establishing offences in its Criminal Code for such actions. Article 129a of that code states that “[w]hoever forms an organization, the objectives or activity of which are directed towards the commission of (1) murder, manslaughter or genocide or (2) crimes against personal liberty” is guilty of the formation of a terrorist organization (Germany Strafgesetzbuch, 2009). Interestingly, in Germany there is no legal definition of who a terrorist is. Under current law, a terrorist is defined by what he or she does or whom they associate with. No one in Germany has ever been charged with the crime of being a terrorist but rather with the more mundane crimes of murder or forming a terrorist organization.

The German federal government’s response to terrorism has been implemented on both the domestic as well as internationally fronts within the constitutional constraints imposed upon it. Domestically, acts of terrorism are viewed as being legally within the purview of the various Länder (states) or federal Ministries of Interior. In order to coordinate intelligence activities as well as counteractions, a national Joint Terrorism Defence Centre (Gemeinsames Terrorismusabwehrzentrum - GTAZ) was established in December 2004 in Treptow, located just outside of Berlin. This Centre is staffed with personnel from the Federal Office of Criminal Investigation, the Federal Office for the Protection of the Constitution, the Federal Intelligence Service, state-level branches of the Office of Criminal Investigation, and Office for the Protection of the Constitution, the Federal Police, the Customs Office of Criminal Investigation and the Military Security Service. Additional powers were assigned to the Federal Criminal Police Office (Bundeskriminalamt - BKA) in 2008 to deal specifically with the issue of international terrorism. Various legal caveats were placed on these powers to ensure that the constitutionally mandated division of responsibilities between the state governments (Länder) and the federal level were respected. BKA responsibilities are exclusively restricted to cases of terrorist threats. These threats must involve several federal Länder when an individual state police authority is not competent to deal with the case concerned, or when the supreme state authority asks the BKA to take over the case. The powers of the Länder remain unaffected by the tasks fulfilled by the BKA. In order to coordinate the measures to be taken, the BKA must inform the competent Länder and federal authorities immediately and fulfil its tasks in consultation with all parties involved (Germany, 2009).

While the aforementioned coordination and activities deal principally with the direct consequences of threats or acts of terrorism, the governmental response to issues such as financing and radicalization are equally important to understand. “In seeking

to dry up the sources of terrorist financing, new laws were aimed at strengthening Germany's own capabilities, as well as German cooperation with the broader international effort. Under the oversight of the German Federal Banking Supervisory Office, banks, financial service providers and others must monitor all financial flows for illegal activity. Within the BKA, a Financial Intelligence Unit (FIU) was established in 2002 to serve as Germany's central registration office for money laundering as well as a main contact point for foreign authorities. Germany was the first country to implement an EU guideline against money laundering as well as the recommendations of the Financial Action Task Force on Money Laundering (FATF). The FATF has characterized Germany's anti-money laundering regulations as comprehensive and effective" (CRS Report to Congress, 2004).

Radicalization poses a different set of problems and requires a more comprehensive approach to resolve. Most western nations include provisions within their respective constitutions granting citizens the right of religious freedom. Within Germany, this principle is firmly established in Article 4 of the Basic Law. Today's form of radical Islamism, which permits the use of violence to impose an Islamic order presents police and courts with challenges in regards to respecting the constitutional provisions regarding religious freedom and the necessity for effectively preventing and countering possible terrorist acts. In the 2009 Report of the Federal Office for the Protection of the Constitution, Interior Minister Wolfgang Schäuble reported that an internal study into the issue concluded that the lack of integration of immigrants into German society is leading to a "fundamental religious orientation". That same study indicated the "worrying conclusion that a serious potential for Islamist radicalization has developed in Germany". Additionally, increasing numbers of Islamic fundamentalists – mostly second generation immigrants and radical converts – were observed travelling from Germany to Pakistan to visit terror camps run by al-Qaeda and other similar groups (Germany, 2008). Government responses to integration problems, such as those described in the German study are constrained by national constitutional protections as well as EU laws permitting freedom of expression, religious orientation as well as freedom of movement. Any measures implemented by governments that monitor or restrict those freedoms face significant legal hurdles.

It is important to note that the German Armed Forces have no role in combating domestic terrorism. There are severe legal constraints for the employment of the military in domestic counter-terrorist activities, including hijacked aircraft. A 2006 ruling by the Constitutional Court specifically prohibited the shooting down of any hijacked aircraft by the German Armed Force over national territory as incompatible with the constitutional rights to life and human dignity (Spiegel, 2006). Thus a severe legal impediment exists in Germany to deal with the same type of situation that occurred in the United States in 2001 when aircraft were specifically used to target civilians.

While the foregoing has described the methods used by German authorities to deal with terrorist organizations and acts of terror that occur domestically, how Germany acts internationally is constrained by a different set of factors.

Western military activities in Afghanistan have often been described, particularly in the US press, as part of the war on terror. This terminology has also been used by other allied nations in describing their engagement in that theatre of operations. However, within Germany that description is much less prevalent. German involvement is officially characterized by the Federal Foreign Office as a stability and reconstruction effort following the removal of the Taliban and the subsequent establishment of a new government in 2001. The Ministry of Defence similarly describes the mission as having the goal of supporting the Afghan government, as well as establishing and safeguarding internal security (German Federal Foreign Office, 2009).

This however is not the case for two other Bundeswehr missions, Operations ENDURING FREEDOM and ACTIVE ENDEAVOUR. The German Parliament specifically mandated the Bundeswehr to participate in combined coalition efforts to combat international terrorism in both of these operations (German Ministry of Defence, 2009).

There is also direct German involvement in other non-military activities that directly target the terrorist threat. Led by the German Ministry of the Interior, exchanges of intelligence and information with INTERPOL and EUROPOL occur on a regular basis. The Federal Intelligence Service as well as the military intelligence branch both provide and receive information from international sources such as the NATO Terrorist Threat Intelligence Unit as well as their peers in other countries.

However, the issue under discussion is how we can improve cooperation and coordination in combating terrorism. At the domestic level, interdepartmental cooperation and coordination is already facilitated by the close integration of involved ministries in the Joint Terrorism Defence Centre. Combined with a robust national counter-terrorism strategy approved by Parliament and implemented by Cabinet, internal cohesion of Germany's domestic anti-terrorism efforts remains high. While there is always room for improvement, the domestic campaign can be considered well in hand.

## 2 INTERNATIONAL COOPERATION POSSIBILITIES

Efforts on the international front present other challenges. While in the wake of the 9/11 attacks, public support for military and domestic operations against the perceived threat was high, that support has generally waned in Germany and other countries over the following years as the immediacy of the threat receded. It is always more difficult to marshal domestic support. When the events recede into the past, they are replaced by new concerns. Public approval of foreign anti-terrorism operations, particularly for those led by the military, continues to fall in the face of increasing casualties as well as doubts over the effectiveness of those operations. What then is the solution?

There is a requirement for governments to re-engage their citizens by continuously and proactively ensuring that the threat posed by terrorism is communicated to them.



This has to be done in a manner that does not promote undue and needless fear or despondency but rather ensures that an accurate portrayal of the threat is provided as well as the measures that the government is undertaking to counter those threats. This implies a requirement for a comprehensive public information campaign that addresses all aspects of terrorism including not only the direct acts of terror but also the radicalization and financing aspects that support it.

An internationally agreed definition of terrorism would of course make it much easier for nations to initiate joint action. While there are significant obstacles to achieving this goal due to national constitutional constraints, the value in accomplishing this would be in having a standard to which all nations could apply to their anti-terrorist campaigns.

Within democratic societies, acceptance, as opposed to approval, by the voters of anti-terrorist programmes is required for governments to act. Public support can provide governments with the necessary plurality needed to enact what would otherwise be very difficult legislation. The attacks on the twin towers, the subway bombings in London, the Beslan school attacks in Russia and the attempted train bombings in Germany in 2006 all resulted in increased public acceptance for governmental anti-terrorist actions. Thus the implementation of the Patriot Act in the United States immediately following the 2001 attacks, the 2001 Canadian Anti-Terrorism Act as well as the German anti-terrorism laws passed in 2001 and 2002 and supplemented in 2007 all initially had wide support due to the public's perception of an imminent threat.

National reactions, however, vary as was demonstrated following the 2004 train bombings in Madrid. This event catalysed Spanish public opinion against continued military participation in Iraqi coalition efforts, ultimately leading to the withdrawal of the Spanish military from that theatre. While hailed as a victory for Islamic terrorism, it in reality demonstrated the failure of the Spanish government to maintain popular public support and acceptance for its participation in the Iraqi campaign. It is interesting to note that the Spanish government does not suffer the same problem in maintaining its public support against the local Basque separatists who have waged a domestic terror campaign for decades.

However, within western liberal democracies, as the immediacy of the international terrorist threat recedes, a more critical review of a state's actions by its citizens normally occurs. Restrictions on civil liberties and travel come under greater scrutiny, as governments are forced to provide greater justification for increased curtailment of normal personal freedoms. Being able to demonstrate that other nations are undertaking similar actions can provide governments with additional political cover in curtailing the established rights of the members of its society. Thus, domestic audiences can more easily accept anti-terrorist actions taken under the aegis of the United Nations or other supranational organization such as NATO as the appearance of burden and threat sharing is provided. There is also the perception that if agreement to act has been reached at the international level, then domestic audiences

can be more certain that the threat is real. While this may in reality not be the case, it does provide governments with additional ammunition in retaining popular support.

Germany, as a member of both the North Atlantic Treaty Organization (NATO) as well as the European Union (EU), has been actively engaged in both these forums in developing the necessary tools to combat international terrorism. It has also deployed military and civil forces under the control of both organizations to actively do so. However, working with both these international organizations poses its own set of challenges.

The difficulties that the EU faces in implementing a cohesive counter-terrorism programme as described by Daniel Koehane in his 2005 article remain. Reluctance of national intelligence agencies to share information, inability of national police forces to cross borders and sharing of individual financial information that is constrained by national privacy laws are but some examples of the problems that exist in this regard. As Koehane states rather succinctly, “On the one hand, the governments agree in principle that co-operation at the EU level is a good thing because of the cross-border nature of the terrorist threat. On the other, they are slow to give the Union the powers (such as investigation and prosecution) and resources (such as spies and money) it would need to be truly effective. This is because security policy – especially when it concerns protecting citizens – goes to the core of national sovereignty, and governments are reluctant to give the EU powers that could interfere with their existing laws and national security practices” (Keohane, 2005).

**Conclusion** All government policy making is achieving the art of the possible. What is possible always has legal, financial, social, diplomatic and other factors that impact on policy creation and implementation. This applies equally to the development and evolution of government’s terrorism policy. Are attempts to disrupt acts of terrorism more productive than cultural integration programmes designed to counter the radicalization process? How does the government balance its efforts to monitor Internet chatter prior to an attack with its responsibility to protect every citizen’s basic civil liberties such as the freedom of association and expression? When should a government undertake military or police action outside of its national borders in order to execute a counter terrorist operation and what does that government do with any prisoners it captures during such an operation? How much money should be spent on combating international terrorism and how do governments justify the expenditure against other pressing national social needs?

Each of these questions illustrates the three principles of policy making. Any counter terrorism policy undertaken by a nation has to be practical, achievable and necessary. Practical measures have to be adopted that have measurable and achievable results. Any actions undertaken must also be absolutely necessary if the government hopes to convince its citizens of the value of the programme. This is essential as it is only with the citizen’s consent that governments in western democracies are over the long



term able to impose the measures needed to institute a counter-terrorism programme. Once that consent is gone, public support for counter-terrorism actions will evaporate leading to policy reversals such as was the case in Spain in 2004.

The question thus remains – What actions should be undertaken to effectively cooperate to deal with the threat posed by international terrorism? Measures to increase cooperation, both domestically as well as internationally, are of course possible. Additional contacts amongst national intelligence services, creation or expansion of terrorist intelligence units, expansion of police cooperation beyond national borders or the establishment of a supranational policing agency are all possible measures that could be implemented.

From the German perspective, it is very unlikely that the hurdles posed by national legislation will ever be successfully negotiated to overcome the existing legal constraints imposed on intelligence sharing and policing. This would require significant revision to current constitutional law and require the consent of all political stakeholders at the local, state and national levels. Achieving such a consensus is simply unrealistic. If improvement in cooperation in these areas is not possible, then perhaps we need to revisit the initial question. Rather than seeking to find new methods to cooperate, does the issue instead revolve around the question ‘Are the current cooperation levels and methods achieving the goal of hindering international terrorism?’ Or perhaps the question should be: ‘Are states prepared to accept the current level of anti-terrorism cooperation as acceptable given the risk?’

It could be argued that the last question has the most validity at this present point in time. The German government views terrorism, both domestic and international, as a continuing phenomenon that will always have to be dealt with. As such, it is not different from any other form of criminal act, and surrendering aspects of national sovereignty (domestic control of policing, intelligence sources and methods, judicial oversight, etc.) to deal with this type of activity are not considered either politically or operationally necessary.

It can also be argued that the current level of international cooperation is acceptable given the level of risk. The threat posed by international terrorism simply is not great enough to pose a danger to the existence of the German state. Thus combating this threat has to be considered in relation to all other social, financial, diplomatic and other problems that Germany is presently dealing with. Governments only have a finite set of resources and capabilities to deal with the multitude of problems that arise. Countering the threat posed by terrorism has to be balanced against the need for health care services, pensions, power generation and the other mundane minutia of a citizen’s daily life. As the experience with the Red Army Faction terror campaign of the 1970s demonstrated, once the immediate publicity and shock value of the attacks receded from public memory, both the government and the citizens focused their attention on other issues. Funding, legislative efforts and priorities shifted to deal with these new issues.

There are practical limits to what any government can achieve in implementing policy initiatives, including ones dealing with terrorism. Public interest and concern, available funding, legal restrictions, protection of national intelligence sources and methods are but some of the political factors that must be calculated and weighed against the likely success of a government-sponsored anti-terrorism campaign. Above all, time plays a decisive role. The passage of time following a terrorist attack shifts the attention of both governments and their publics to other, normally more mundane, concerns. Implementing a comprehensive plan to coordinate anti-terrorist actions both domestically as well as internationally is constrained by each of these factors.

Governments will always suffer from the accusation following a terrorist attack that they did not do enough beforehand to prevent it. While such an accusation is undoubtedly true, sometimes the risk of a potential threat is simply not worth the effort to counter it. While difficult to explain to the families of the victims of a terrorist attack, it is ultimately a question of priorities and funding but above all the public's willingness to accept restrictions on their personal liberties that result from government initiatives to counter-terrorist actions.

Finding the appropriate balance between respecting the essential values of individual civil liberties that is a defining feature of western liberal democracies and the need for security from all threats, of which international terrorism is but one, is the unenviable task that governments must face. Tipping the balance in favour of security will in the long term change the very nature of society, reducing civil liberties and endangering democracy. Failure to provide sufficient security safeguards will result in more casualties. The final equation is an evaluation of the cost, both in human as well as financial terms, to the society of the level of security to be imposed versus respect for human rights and social liberties that are the defining characteristics of western liberal democracies. Imposition of security requires infringement on liberties. Ultimately, civil society has to achieve a consensus on how far it is prepared to act or accede in either direction.

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