

TERRORISM AND EVIDENCE GATHERING: CASE STUDIES FROM GERMANY

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I. INTRODUCTION

Germany knows many different forms of terrorism. These include right-wing extremist terrorism, left-wing extremist terrorism, and Islamist terrorism. First, I will briefly explain right-wing and left-wing extremist terrorism in Germany. Then, I will proceed to explain a special case of Islamist terrorism which demonstrate the difficulty of these proceedings.

II. TERRORISM CASE STUDIES

A. Right-Wing Extremist Terrorism

Right-wing extremist terrorism was underestimated for a long time.¹ Occasionally, the right-wing extremists would beat foreign people, but this was not seen as expression of organized crime.² However, since November 2011, that picture has changed.³ A group named “Nationalsozialistischer Untergrund–NSU” (National Socialist Underground) was identified.⁴ Approximately three people traveled throughout Germany for about ten years and shot down citizens with a foreign background, including merchants and police officers.⁵ A huge trial for this case has been pending in Munich since 2013.⁶ The Federal Parliament of Germany and several State Parliaments instituted commissions of inquiry related to the NSU activities.⁷

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1. Cornelia Rabitz, *Chronicle of Right-wing Terrorism in Germany*, FACTIVA, Nov. 23, 2011.

2. *Id.*

3. *Id.*

4. Matthias von Hein, *Hundreds of Neo-Nazis in Germany Have Gone Underground*, FACTIVA, Jan. 9, 2017.

5. Marcel Fürstenau, *A Neo-Nazi Murder Spree Shocks Germany*, FACTIVA, Apr. 13, 2013.

6. *NSU Neo-Nazi Murder Trial Opens in Munich*, FACTIVA, May 6, 2013.

7. Matthias Bartsch et al., *Officials Concerned by Growing Far-Right Networks*, SPIEGEL ONLINE INT'L, Sept. 2, 2015.

B. Left-Wing Extremist Terrorism

Left-wing extremist terrorism is a large part of German history.⁸ Especially in the 1970s, but also in the 1980s, left-wing extremist terrorism represented a big problem for Germany's security and democracy.⁹ Many people were killed and entire communities lived in fear.¹⁰ The most prominent group was the "Rote Armee Fraktion" (Red Army Fraction), from which several other groups have succeeded.¹¹ Since the 1990s, left-wing extremist terrorism has almost disappeared in Germany.¹² Now, the left-wing extremists mainly concentrate their actions on quarrels with the right-wing extremists.¹³

C. Islamist Terrorism

Islamist terrorism is currently the biggest problem in Germany, as it is throughout the world.¹⁴ Recently, Germany experienced a serious terrorist act, similar to an attack in France, in which a terrorist from the Islamic State drove a truck into the Christmas-Market in Berlin and killed 12 people.¹⁵ Because we fear additional terrorist acts, German politicians and lawmakers hope to catch Islamist terrorists before they can carry out a terrorist attack.¹⁶ We have identified many people traveling from Germany to regions of Islamist terror, like Afghanistan or Syria, where they receive military training.¹⁷ Some of those people are likely to return to Germany to use their new abilities to commit terrorist attacks.¹⁸ To avoid this, the German criminal laws provide some regulations enabling courts to sentence Islamists with respect to their actions abroad.¹⁹

There are two important sections to note. The first is Section 129b, which discusses criminal and terrorist organizations abroad, including

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8. Louisa Schaefer, *'68 Movement Brought Lasting Changes to German Society*, FACTIVA, Apr. 11, 2008.
 9. *Id.*
 10. *Id.*
 11. *Id.*
 12. Jefferson Chase, *After G20: A Look at Left-wing Radicalism in Europe*, FACTIVA, July 10, 2017.
 13. *Id.*
 14. Friederike Heine, *The Biggest Fears of Germans: Terrorism, Extremism, Migrants*, DPA INT'L, Sept. 7, 2017.
 15. Andrew McCathie, *Germany's Beloved Christmas Markets Face Modern Threat: Terrorism*, DPA INT'L, Dec. 20, 2016.
 16. Andrew McCathie, *Germany Set to Beef up Anti-terrorism Laws*, DPA INT'L, Jan. 10, 2017.
 17. *Islamic State Reportedly Training Terrorists to Enter Europe as Asylum Seekers*, FACTIVA, Nov. 14, 2016.
 18. *Id.*
 19. STRAFGESETZBUCH [STGB] [PENAL CODE], *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1238.

extended confiscation and deprivation.²⁰ The second is Section 89a, which discusses preparation of a serious violent offense endangering the stat.²¹ These two sections were of great importance in a case my panel adjudicated. The facts of the case involve a young German citizen named Harun living in Munich, where he was born. His parents, however, came from Afghanistan. In his early twenties, he had problems with his job and with his girlfriend. Harun became violent with his girlfriend and was sentenced to a penalty, on suspension. Seeking orientation in God, Harun searched the internet, where he found friends with radical opinions.²²

In September 2013, in fear of being prosecuted again, Harun booked a flight to Turkey and traveled to Syria to fight in the Syrian Civil War.²³ In Syria, Harun contacted a Chechen terrorist organization and learned to use a gun.²⁴ He was involved in a battle around a prison in Aleppo, though the court could not prove whether Harun ever actually shot any enemies.²⁵ Nevertheless, Harun was a part of the supply troops close to the battle.²⁶ In March 2014, Harun returned to Europe, where he was arrested in Prague and extradited to Germany.²⁷ He was indicted in our panel, and we sentenced him in July 2015.²⁸

Legally, the gun training represented an offense under Section 89a of the Penal Code.²⁹ Pursuant to this section, it is a crime to plan a serious offense against the State by receiving instruction in the use of firearms.³⁰ The provision applies to acts committed both domestically and abroad, including instances in which the offender leaves Germany to receive the training necessary to commit a serious violent offense against the State.³¹ Additionally, under sections 129a and 129b of the Penal Code, Harun's connection to the Chechen group constitutes membership in a terrorist organization abroad.³² However, a precondition of prosecution is authorization from the German Federal Ministry of Justice.³³ Here, such authorization was given.

20. STRAFGESETZBUCH [STGB] [PENAL CODE], § 129b.

21. § 89a.

22. International Crimes Database, *Prosecutor v. Harun P*, www.internationalcrimesdatabase.org/Case/3283/Harun-P/.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. STRAFGESETZBUCH [STGB] [PENAL CODE], § 89a, translation at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1238.

30. § 89a, para. 2.

31. § 89a, para. 3.

32. § 129a, para. 2; § 129b, para. 1.

33. § 129b, para. 1, sentence 3.

One legal problem our panel faced was the fact that one could characterize the Syrian Regime as a terrorist system.³⁴ Because it was a fight of evil against evil, Harun could justify himself by saying that he only wanted to free the regime's prisoners who were captured illegitimately.³⁵ However, legally speaking, one can only invoke grounds of emergency assistance if he, himself, had the will to do so. In reality, Harun had no such a will, as his real goal was to help install an Islamist state by killing their enemies. Therefore, his actions were not for the purpose of humanitarian aid, but rather for the killing of disbelievers.

Harun also could not invoke the privilege of combatants, pursuant to Article 43 of the First Supplement to the Protocol of the Geneva Conventions from 1949, because the Chechen terrorist group was not subject to the international law of nations.³⁶ Therefore, the Geneva Conventions could not be invoked.

The purpose of the Chechen and other groups involved was to fight against the Syrian Regime and conquer the Aleppo prison.³⁷ This goal included the killing of at least 400 Syrian soldiers and police officers.³⁸ Thus, assisting in the battle around the Aleppo Prison constituted an act of murder.³⁹

Finally, we sentenced Harun because of his membership in a terrorist organization abroad, and for assisting in the attempted murder of at least 400 people. Harun was sentenced to eleven years of imprisonment,⁴⁰ which he accepted without applying for legal review before the Supreme Court. However, if he shows good behavior while in custody, Harun is likely to be released after seven or eight years, with the remainder of his penalty suspended to probation.⁴¹

Harun received a light sentence because he pleaded guilty and because he testified against other offenders.⁴² Section 46b of the German Penal Code allows for a reduction in penalty if the offender has substantially contributed to the discovery of a serious offense which is related to his own offense by voluntarily disclosing information.⁴³

34. U.S. Dep't of State, Bureau of Counterterrorism, Country Reports on Terrorism (2013).

35. § 34.

36. Additional Protocol I to the Geneva Conventions of August 12, 1949 art. 43, June 8, 1977.

37. International Crimes Database, *Prosecutor v. Harun P.*, www.internationalcrimesdatabase.org/Case/3283/Harun-P/.

38. *Id.*

39. § 211, para. 2.

40. Hans Pfeifer, *German Jihadi Gets 11-year Prison Sentence*, DEUTSCHE WELLE, July 15, 2015.

41. § 57, para. 1.

42. International Crimes Database, *Prosecutor v. Harun P.*, www.internationalcrimesdatabase.org/Case/3283/Harun-P/.

43. § 46b, para. 1, cl. 1.

III. EVIDENCE GATHERING CASE STUDY (THE *HARUN* CASE)

A. Evidence Gathering in Terrorism Cases

Normally, evidence gathering in terrorism cases occurs in several steps. The first step is the surveillance and taping of telephone calls between the offender and his friends and relatives. Often, offenders speak in clear terms regarding their actions abroad and enjoy boasting about their adventures. The second step is to uncover evidence from the offender's own use of the internet, such as postings on Facebook and chat conversations. The next step is to acquire the offender's mobile phone, as mobile phones contain vast amounts of information. For example, one can see the offender's contacts and the pictures saved to the device, each of which can show the offender's prior activity. The fourth step is to examine information available from the offender's home, such as documents and IT-equipment. Sometimes, however, it is very hard to analyze IT-equipment. The final step is to search the internet for information directly from the terrorist organization. Terrorist organizations often display their actions publicly by broadcasting videos and messages. Many of the organizations have official spokesmen who glorify the actions of the organizations. Although references to actual people typically are not made in these messages, one can learn something about concrete attacks.

B. The *Harun* Case

In the *Harun* case, we were lucky, not only because we had monitored numerous telephone calls and pictures, but also because Harun pleaded guilty. Harun spoke a lot about his activities in Syria and explained some of the evidence to the court. There were pictures and videos in his mobile phone that showed Harun handling guns and weapons, including a video that showed Harun learning to fire off a mortar. We could see this was not in correlation to the battle around the Aleppo prison, but we decided the action was done to fire against the Syrian troops. Under the court's view, firing off the mortar qualified as an additional crime.⁴⁴

With respect to the battle around the Aleppo prison, Harun was rather reserved. We still do not know whether he really knew too little because he was not within the supply troops, or whether he actually did fight, and simply did not want to reveal these activities. Therefore, we had to uncover more information about the battle through special evidence. We found a video of the battle on the internet, which was published by the offending

44. International Crimes Database, *Prosecutor v. Harun P.*, www.internationalcrimesdatabase.org/Case/3283/Harun-P/.

organizations. There, we could see a steel-plated truck and the suicide offender, who drove the truck to the prison. The truck exploded and the battle began. The video showed men with guns and a gunfight, but we did not see Harun, nor did we see any dead Syrian defenders.

The main problem in determining the facts was whether we could prove enemies actually died because of the battle around the Aleppo prison. Unfortunately, we did not get any information from the Syrian government. Mutual legal assistance between Germany and Syria does not happen due to a lack of mutual arrangements.⁴⁵ We then tried to bring some eye-witnesses to the court. We got in touch with the non-governmental organization, Commission for International Justice and Accountability (CIJA), which still investigates war crimes in Syria.⁴⁶ This Commission named three witnesses who were former prisoners in Aleppo who could report on the battle and the victims. That organization delivered personal data from those witnesses.

The court attempted to ensure two especially important witnesses would receive visas to travel to Germany. However, German security authorities were not amused that some former prisoners would travel to Germany and potentially seek political asylum here. Despite this, the court finally received the support of the German security authorities and the German Foreign Ministry. As the rapporteur judge in the case, I phoned around to numerous individuals in order to manage the issue. Finally, one witness traveled from Syria to Turkey where he tried to get a visa. We were then informed this witness could not travel from Turkey to Germany because he lacked a valid passport. Without valid personal documents, no airline would transport him to Germany.

Although we did everything we could do, including informal cooperation with non-governmental organizations, we did not succeed in hearing eye-witness testimony on the battle's course. Furthermore, internet articles were insufficient and contradictory.

As a result, the court was not able to find evidence regarding the death of any victim. Though we could not prove murder, attempted murder charges remained.⁴⁷ As a result, the court punished Harun for assisting in the attempted murder of at least 400 people.⁴⁸ The court reached the number 400 from the written statements of several witnesses. They described seeing around 500 Syrian defenders, soldiers, and police officers, who were in or around the prison. These written statements seemed to be reliable, however

45. MUTUAL LEGAL ASSISTANCE TREATIES, *Country Profile: Germany*, <https://mlat.info/country-profile/germany>.

46. Nick Robins-Early, *Inside One Group's Mission to Bring Assad's Regime to Justice*, HUFFINGTON POST (Apr. 26, 2016, 2:05 PM), http://www.huffingtonpost.com/entry/assad-war-crimes-cija_us_571ed6e6e4b0f309baee63e0.

47. STRAFGESETZBUCH [StGB] [PENAL CODE], § 22.

48. § 23.

under the principle of “in dubio pro reo,” the court reduced those 500 cases by 100.

There is another remarkable, difficult aspect that happened during the hearing. One female witness appeared in court fully veiled from a niqab, or burka, due to her religious beliefs. Such behavior represents a general problem in court, and our panel did not allow for an exception. Bearing that in mind, the court tried to convince the female witness to show her face, yet she refused for quite a long time. Finally, the court told the witness that a female constable would violently tear off her veil if she did not lift it by herself. In our opinion, this was the correct legal procedure because no court in Germany can allow religious beliefs to hinder fact-finding or the quality of evidence. Threatened in that very way, she finally gave in and tore off her veil. One year later, a court in Munich did accept the refusal of a witness and did not unveil her.⁴⁹ That decision caused a massive negative media echo, and law makers have since initiated an amendment to the German Courts Constitution Act to clarify the point.⁵⁰

IV. CONCLUSION

Proceedings against suspected terrorists are difficult because of their foreign, political and religious implications. This is true despite the fact the proceedings shall be done in strict accordance with the rule of law.

49. *Bavaria Initiates Push to Ban Veil in German Courts*, DEUTSCHE PRESSE-AGENTUR, June 21, 2016.

50. *Id.*

