Liberty Dies by Inches: German Counter-Terrorism Measures and Human Rights

*By Verena Zöller**

"I believe there is no trade-off to be made between human rights and terrorism. Upholding human rights is not at odds with battling terrorism: on the contrary, the moral vision of human rights – the deep respect for the dignity of each person – is among our most powerful weapons against it."[1]

A. Human Rights After September 11

On February 5, 2004 Abdelghani Mzoudi walked free from court in Hamburg, Germany. The Moroccan engineering student had been suspected of aiding and abetting the planning of the heinous terrorist attacks on the World Trade Center and the Pentagon of September 11, 2001 and of being a member of a terrorist organization. Even though the court expressed discomfort with its judgement, not being entirely convinced of Mzoudi's innocence, it acquitted him due to the lack of sufficiently compelling evidence.[2] The main problem was that the crucial testimony of an alleged co-plotter, Ramzi Binalshib, had been withheld by the United States. Subsequently, *Bundesgerichtshof* (Germany's highest court of appeal) basically on the same grounds ordered a retrial for Mounir el-Mossadaq, who had been the first person to be convicted in relation to the 9/11 attacks. He had been sentenced to 15 years of prison for accessory to murder on more than 3,000 counts.[3]

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[1] UN Secretary-General Kofi Annan, Statement to conference "Fighting Terrorism for Humanity: A Conference on the Roots of Evil," 22 Sept. 2003.

[2] *German court clears student of plotting with 9/11 terrorists*, THE GUARDIAN, 6 Feb. 2004.

[3] *First and only 9/11 conviction overturned by German court*, THE GUARDIAN, 5 Mar. 2004;: *Retrial ordered in terror case*, FRANKFURTER ALLGEMEINE ZEITUNG WEEKLY, 5 Mar. 2004.

While the rulings are deplorable if Mzoudi and el-Mossadaq in fact are guilty and certainly there should be no doubt that persons involved in terrorist acts must be brought to justice, there is a positive note on the case from a human rights perspective: In spite of the gravity of the accusations and strong political pressure the court upheld rules of due process and the fundamentally important presumption of innocence. In the tensioned climate since 9/11 this attitude is not self-evident. In response to the tragic events, many States felt a need to re-evaluate their security and introduced legislative measures putting them in a stronger position to combat terrorism. While some of these measures certainly may be necessary and proportionate, others give raise to severe human rights concerns. As the UN Secretary General stated, human rights are in danger of becoming "collateral damage" in the so-called war on terrorism.[4] In evaluating counter-terrorism measures with reference to human rights, the focus of academic writing and NGOs has mainly been on the United States, where some violations of international and human rights law are most obvious, as exemplified by the Guantanamo detention camp. But little work has been done to revisit legislative and operational measures in other countries.

Soon after 9/11 Germany came into the spotlight, as it became known that the attacks had at least partly been planned and prepared in Hamburg.[5] Concern was raised about the country being a 'safe haven' for terrorists and possible 'sleepers' hiding behind an unsuspicious façade. In this climate the Government rushed through counter-terrorism legislation. On November 9, 2001, Parliament adopted the so-called "Security Package I," containing urgent measures addressing the perceived security threat. *Terrorismusbekämpfungsgesetz* ("Security Package II") promptly followed suit in December 2001. The new legislation basically amends a number of existing laws, mainly regarding the powers of the security authorities. Furthermore, changes concern the *Strafgesetzbuch* (Criminal Code), the *Asylgesetz* (Asylum Act) and the *Ausländergesetz* (Foreigners Act). The focus of this law is on prevention rather than on repression; it is supposed to ensure that terrorist activities are detected early on and that Germany does not provide a 'safe haven' for foreigners involved in terrorist activities.[6]

As in other countries around the globe, legislative and operational measures raised concern about their compatibility with national and international human rights

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[4] UN Secretary-General Kofi Annan, Statement to the 20 January Security Council ministerial meeting on terrorism.

[5] BUNDESAMT FÜR VERFASSUNGSSCHUTZ, *Verfassungsschutz gegen Ausländerextremismus* 7 (Dec. 2003).

[6] Markus Rau, *Country Report Germany*, Max Planck Society, Conference on Terrorism as a Challenge for National and International Law, 24 Jan. 2003, *available at* http://edoc.mpil.de/conference-on-terrorism/imdex.cfm, p. 7f.

obligations. Many feel that the new, security-driven laws compromise long-standing civil and political rights and freedoms. The necessity and desirability of bringing persons to justice who are involved in terrorist acts remains unquestioned. Nevertheless, counter-terrorism measures must be under strict scrutiny regarding their conformity with international human rights standards.

This essay shall evaluate measures introduced in Germany, mainly under Security Packages I & II. As they amended a variety of existing legislation, not all facets can be covered. Thus, some of the most important aspects shall be analysed with regards to the respective affected groups of persons: all persons living in Germany, foreigners living in Germany and asylum seekers. Efforts against the financing of terrorism, although important, will not be covered as they form a whole sphere on their own. Moreover, it is not within the scope of the essay to take all relevant human rights instruments into consideration. Therefore, preference shall be given to the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR) and the 1951 Refugee Convention.

Before turning to this evaluation, some general thoughts on the concepts of liberty and security are necessary to establish the context of counter-terrorism measures in democratic societies. Secondly, an overview over Germany's international obligations in combating terrorism and protecting its citizens shall be given. Thirdly, problems arising from the vague use of the term 'terrorism' will be looked at. Finally, some of the new measures shall be analysed with respect to Germany's international human rights obligations.

B. Liberty and Security in a Democratic Society

Any debate on counter-terrorism measures must be seen in the light of the correlation of liberty and security. Although these are often said to be antagonistic, the modern democratic State embraces both: while ensuring as much security to its citizens as deemed necessary, it grants as much liberty as possible. Both elements are crucial in democratic systems, as security cannot be ensured without civil liberty. This view is reflected in many human rights instruments, which protect liberty and security of the person in one single paragraph.[7] An interference with one of them will always affect the other. Hence, the State must ensure a prudent balance of the two.[8] In the tradition of post-enlightenment philosophy and French and American Revolutions, liberal democracies strongly emphasised liberty. Hobbesinian

[7] EUR. CT. HR art. 5; INT'L COVENANT ON CIV POL. RTS. art. 9.

[8] Erhard Denninger, *Zur rechtsstaatlichen Problematik des Terrorismusbekämpfungsgesetzes*, DEUTSCHES INSTITUT FÜR MENSCHENRECHTE, *at* www.institut-fuer-menschenrechte.de/seiten/doku8.htm.

thinking of the guarantee of security as the State's foremost duty has been overcome by the conviction that a good order must allow citizens to develop their lives and ideas as free as possible. When Rousseau said, "man is born free, and everywhere he is in chains", he did not advocate a lawless state of nature, but a political system built on the free will of its citizens. The concept of the State's exclusive right to resort to force to ensure security and the rule of law – illustrated in Hobbes' Leviathan – has been upheld in European constitutional history. But it must be controlled be its people; and it must not interfere with their right to freedom and personal development – as long as these don't threaten the order of the state or violate the rights of others. German philosophers Kant and Hegel both placed individual liberty at the heart of the State.[9] This idea of everyone's free development within the democratic State is reflected in art. 2(1) of the *Grundgesetz* (German Basic Law):

"Everyone has the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or against morality."

The Federal Republic of Germany, as it emerged out of the Third Reich dictatorship, was conscious about the importance to control state power and guarantee personal freedom. Fundamental civil rights and liberties, such as the right to privacy and the rights to freedom of expression, association and assembly are core elements of freedom and *conditio sine qua non* for the healthy functioning of democracy. Throughout the terrorist threat posed by violent left-wing groups during the seventies and eighties, most prominently the Red Army Faction (RAF), this conviction was not severely compromised. The logic of RAF terrorist action was to force the State to make intensive use of its powers in order to ensure the rule of law and suppress terrorist opposition, thereby debunking itself as illiberal and loosing legitimacy.[10] This logic eventually did not gain momentum. While some civil rights were restricted by the widely protested against *Notstandsgesetzgebung* (emergency law), three so-called anti-terrorism acts[11] and the *Kontaksperrengesetz*[12] (contact ban

[9] DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 38 (Durham and London 1989).

[10] Berthold Meyer, *Im Spannungsfeld von Sicherheit und Freiheit. Staatliche Reaktionen auf den Terrorismus*, 1 HSKF STANDPUNKTE, PEACE RESEARCH INSTITUTE FRANKFURT, No. 1/2002 at 2.

[11] Gesetz zur Ergänzung des Ersten Gesetzes zur Reform des Strafrechts, 20 Dec. 1974; Gesetz zur Änderung des Strafgesetzbuches der Strafprozessordnung, des Gerichtsverfassungsgesetzes, der Bundesrechtsanwaltsordnung und des Strafvollzugsgesetzes, 18 Aug. 1976; Gesetz zur Änderung der Strafprozessordnung, 14. Mar. 1978.

[12] Gesetz zur Änderung des Einführungsgesetzes zum Gerichtsverfassungsgesetz, 30. Sep. 1977. This law until today is controversial but was upheld by the *Bundesverfassungsgericht*. JOHN E. FINN, CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW, 215 (Oxford 1991).

law) allowing for solitary confinement, overall the primacy of civil rights persisted. The impossibility to guarantee absolute security within the democratic order was accepted. Nevertheless, during this period Germany laid the legal foundations for combating terrorist action.[13]

This sense of proportionality seems to have faded away during the 1990s. In 1998, the Government introduced a law on widely extended eavesdropping in private homes with the purpose of combating organized crime and terrorism – the latter explanation being particularly interesting, because at the time Germany did not face any particular terrorist threat. This law is so far-reaching that it led to the resignation of the Minister of Justice, who subsequently challenged it before courts.[14] After a long judicial fight, only recently the Supreme Court declared the law in wide parts unconstitutional.[15] This example shows that already in the 1990s an increasing emphasis was placed on security – probably in response to the loss of stability in the international order and the spread of organized crime from the former Soviet countries. Still, this development is surprising in the light of the young history of public surveillance through the STASI in the Democratic Republic of Germany.

After the heinous attacks of September 11, the fragile balance between liberty and security was tipped even more towards the latter. The new counter-terrorism legislation is clearly security-driven. While in many respects it builds upon the legislation introduced in the 1970s, the official justifications do not refer back to the history of terrorism in Germany but only to a new dimension of 'international terrorism'.[16] However, it remained unclear what characterized this 'new dimension' – all the more because European societies have had to live – and actually managed – with terrorist activities for a long time. The mere scale of the 9/11 attacks can hardly serve as a satisfactory explanation. Rather, as Lepsius points out, the perception derives from the fact that this time it was not identifiable individuals but a globally operating 'obscure' network who was responsible for the attacks. [17] This perceived new quality of a threat to security seemed to justify a new quality of measures with a focus on preventive action. But the equation that a restriction of

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[13] Oliver Lepsius, *Freiheit, Sicherheit und Terror. Die Rechtslage in Deutschland,* LEVIATHAN, Mar. 2004, 1/2004, at 64-88.

[14] Lepsius, *Court overturns much of eavesdropping law*, FRANKFURTER ALLGEMEINE ZEITUNG WEEKLY, 5. Mar. 2004.

[15] BverfGE, 1 BvR 2378/98, 03 Mar. 2004.

[16] Terrorismusbekämpfungsgesetz, Begründung, Erster Teil.

[17] Lepsius, *supra* note 14, 66ff.

civil liberties will provide for a higher level of security is highly problematic. As was submitted, during the 1980s in German public law the concept of a basic right to security equal to the other constitutional civil rights and liberties emerged.[18] This concept entails two problems: First, as Lepsius showed, contrary to the constitutional basic rights, security is not defined on a normative level. It can only be defined on a factual basis, that is in connection with specific threats and thereby specific criminal activities – which is difficult when operating with categories of diffuse networks instead of individual perpetrators. Thus, the factual character of security can't be balanced against the normative character of the basic rights, as it should be done within the German constitutional system. But security seems to have become a value as such that prevails over other basic rights.[19] Secondly, even the factual level of security is questionable: It basically is defined negatively through the absence of a specific threat. But as the threat remains obscure as long as it does not translate into activities, it is mainly a question of perception. The assumption that the State can guarantee absolute positive security, i.e. no criminal or terrorist actions actually occur, is a pure fiction – not only in open societies but also in autocratic States, as the bombings in Saudi Arabia and Morocco showed. While certainly a high level of security is desirable, societies have to accept that they have to live with a certain extent of threat and danger. Moreover, this conception of security is rather one-dimensional, focused on threats to life and limb. It neglects the dimension of security of individuals within the legal system, i.e. from arbitrary actions of the State, which is on the utmost important foundations of the democratic State. If this dimension of legal certainty is neglected, citizens loose both freedom and security.

Critics complained that there was no sufficient time for parliamentary and public debate and that the Government used the opportunity to adopt legislation, which had already been planned before 9/11 September but had lacked politic support.[20] This 'opportunity' is rooted in the inherent logic of terrorist attacks: the indefinite risk of further attacks forces governments to react – primarily to prevent more attacks, but also to appear strong and active in a situation of crisis. The security of its citizens momentarily becomes the utmost function of the State, while the citizens are more willing to accept restrictions of their liberty. This situation may not be problematic as long as the measures taken are proportionate to the security threat. Proportionality may include a strict focus on the legitimate aim of the measures – the prevention of further attacks – and a temporary factor, i.e. it may be necessary

[18] *Id*. at 65.

[19] *Id.* at 86ff.

[20] Cordelia Koch, *Freiheitsbeschränkung in Raten? Biometrische Merkmale und das Terrorismusbekämpfungsgesetz*, HSFK-REPORT, PEACE RESEARCH INSTITUTE FRANKFURT, 5/2002 at 2 ; Meyer *supra* note 10, 8.

to revisit the measures when the perceived security threat has lowered. Otherwise, there may be a clash with fundamental human rights norms. And if societies allow human rights to be impaired in the name of the fight against terrorism, they threaten exactly what they claim to fight for: the democratic order on the basis of the freedom of its citizens.

C. International Obligations to Combat Terrorism and Related Human Rights Obligations

When analysing the compatibility of counter-terrorism measures with human rights it is important to bear in mind that Germany has not only obligations under human rights instruments which may collude with anti-terrorism legislation. Also, it undertook a variety of international obligations to combat terrorism. Among the most important are:

Eleven out of twelve UN Conventions covering several specific terrorist offences; the 1977 European Convention on the Suppression of Terrorism and the 1957 European Convention on Extradition; several Security Council resolutions, most prominently resolution 1373 of 28.09.2001; the EU Council Framework Decision on Combating Terrorism of 19.09.2001 and the Council Framework Decision on an European Arrest Warrant of 07.08.2002; numerous bilateral agreements related to terrorism.[21]

Furthermore, it is important to mention Germany's obligations under human rights treaties to protect citizens from terrorist acts, e.g. bombings or hostage taking. Especially relevant are the right to life under art. 6 ICCPR and art. 2 ECHR, the right to liberty and security of the person (art 5 ECHR, art. 9 ICCPR) as well as the protection from torture and inhuman and degrading treatment (art. 3 ECHR, art. 7 ICCPR). Also, the protection of property under art. 1 of the first Protocol to the European Convention is of some importance. These provisions not only put the State under a negative obligation not to arbitrarily interfere with those rights, but also under a positive duty to protect its citizens from interference of third parties.[22] Thus, Germany has an obligation under international human rights law to secure

[21] A full list of relevant bilateral and multilateral treaties is contained in Germany's first report to the Counter Terrorism Commission (CTC) of 02 Jan. 2002, S/2002/11, Appendix.

[22] Delgado v Paez, Report of the Human Rights Committee, Communication No. 195/1985, U.N. GAOR, 45th Sess., Supp. No. 40, Vol. II, at 43, U.N. Doc. A/45/40 (1990).; Kiliç v. Turkey, 33 Eur. H.R. Rep. 58, ¶ 62 (2000).

life, liberty and property of the people within its territory as well as to protect them from ill-treatment.[23]

These obligations have to be borne in mind in order to avoid rash judgements on counter-terrorism legislation. In this context, it shall be sufficient to observe that the Counter Terrorism Committee (CTC), established by the Security Council after 9/11, did not criticise Germany of not satisfactorily fulfilling any core obligations. Germany reported to the CTC fist in December 2001 and pursuant in October 2002 and June 2003.[24] The additional information requested by the Committee related to quite detailed questions, indicating that there are no major deficiencies. Therefore it shall be assumed that no crucial additional measures are necessary.

D. Lack of Clarity in the Legal Concept Of Terrorism

I. International level: no agreed definition of terrorism

The major problem surrounding the issue of terrorism on the international level is the failure to agree on a definition of the term.[25] The central disagreements arise from key questions such as the actors involved, the precise nature of the acts, and the issue of State terrorism.[26] With the increasing international tensions after the events of 11 September a solution to the problem is even less likely to be found. Moreover, the term is increasingly used within simplistic and polarized rhetoric making certain groups of people, such as minorities, migrants and prisoners, even more vulnerable to marginalisation of their human rights.[27] Some scholars expressed doubt about the legal significance of "terrorism", but in fact it is used as a

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[23] For a comprehensive compilation of case law on Human Rights and terrorism *see* UN HIGH COMM. H.R.: *Digest of the UN and of Regional Organizations on the Protection of Human Rights While Countering Terrorism*, July 2003.

[24] First, Second and Third German Reports to the Counter Terrorism Commission (CTC), S/2002/11, S/2002/1193, and S/2003/671.

[25] SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS: TERRORISM AND HUMAN RIGHTS, *Progress Report*, prepared by Kalliopi K. Koufa, Special Rapporteur, 27 Jun. 2001, E/CN.4/Sub.2/2001/31, ¶ 25.

[26] *Id.* at ¶ 25ff.; INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, *Human Rights after September 11*, Versoix 2002, 11ff.

[27] Id, at 3. The same concern was raised by Kofi Annan, UN Secretary-General Kofi Annan, Statement of the Secretary-General to the 58th Commission on Human Rights, 12 Mar. 2002.

legal concept on the domestic and international level and thus, the need of a definition can hardly be called into question.[28]

II. Domestic level: terrorist offences in the Criminal Code

This lack of an internationally agreed upon definition is mirrored on the national level. Neither the 1970s acts nor the new legislation provide for a clear definition of the term.[29] The most relevant provision is article 129a of the German Criminal Code, introduced in 1976. It penalizes the formation of terrorist organizations as well the support of or recruitment for it.

1. Terrorist organizations

Article 129a specifies the notion of terrorist organizations through listing a number of crimes as their objectives or activities, *inter alia* murder, manslaughter and kidnapping/hostage taking, causing of explosion and interference in public operations. Not all these crimes are typically considered to be terrorist offences in terms of a certain scale:[30] Terrorist offences should reach a certain degree of severity because they justify extraordinary investigational measures and harsh punishment. More restrictive concepts of terrorism only include the use of serious violence against persons. Thus, the notion of terrorist organisations is very broad in comparison to the national definitions of other States.[31] As regards the formal question what constitutes an organization – terrorist or of other nature – jurisprudence has clarified that it should have at least three members and should be intended to exist over a certain duration of time. Moreover, the fact that the individual members subordinate their wills under the common objective of the organization is critical.[32]

2. Objective Element

Also, the objective elements of the criminalized acts are problematic. Article 129a criminalizes the formation of a terrorist organization as well as being a ringleader

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[28] Christian Walter, *Defining Terrorism in National and International Law,* Max Planck Society, Conference on Terrorism as a Challenge for National and International Law, 24 Jan. 2003 *at* http://edoc.mpil.de/conference-on-terrorism/imdex.cfm, p. 2.

[29] *Supra* note 5, at 12.

[30] *Id*.

[31] *Supra* note 24, at 5. Nevertheless, some recent concepts are similarly broad, such as the United Kingdom Terrorism Act and the Canadian Bill.

[32] BGH 1992, 518.

or supporting or recruiting for it. Especially critical is the notion of 'support' as it may entail a wide range of actions (or their omission) but is not further specified in the criminal code.[33] Basically, it may manifest itself in financial, practical/logistical or written and oral support. Thus, the courts are left with the interpretation and jurisprudence provided for some degree of clarification. Accordingly, financial and logistical support largely come within the scope of the provision. Less clarity exists with regard to support through words, but it may be considered that many respective acts, such as solidarity manifestations or printing documentaries with statements of terrorist organizations are protected as freedom of expression under art. 5 *Grundgesetz*.[34] Nevertheless, a coherent clarification would be strongly desirable. It should be added that under article 138 Criminal Code there exists a duty to inform if a person has knowledge the planning or execution of certain specified crimes, including the crimes under article 129a.

3. Subjective Element

Furthermore, article 129a does not set out any subjective requirement, i.e. terrorist intention. Most national definitions entail an intention to create a climate of terror and fear within the population and the advancement of political, religious or other ideological goals.[35] The silence on any subjective element obscures the distinction to the offence of forming a criminal organization.[36] This is critical because of the more extensive investigation powers, such as solitary confinement and widespread phone tapping,[37] as well as more severe punishment coming along with 129a. The newly introduced article 129b extends the provisions of 129a to terrorist organisations abroad but does not add to its clarity.

The annual reports of the Federal Office for the Protection of the Constitution describe terrorism as "the persistent struggle for political goals, which are to be attained with the help of attacks against the physical integrity, life, and property of other persons, in particular through serious criminal offences as defined in article 129a para. 1 of the Criminal Code, or through other offences, which serve as prepa-

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[33] Reinhard Marx, *Terrorismusbekämpfungsgesetz*, UN HIGH COMM. ON REFUGEES, Berliner Symposium 21f (2002).

[34] Heinz-Jürgen Schneider, *Der neue Paragraf 129b*, 30 Nov. 2001, *at* http://www.cilip.de/terror/schneider.htm.

[35] *Supra* note 24, at 6f. With respect to the latter, the Eur. Ct. H.R. case Jersild v Denmark, 19 Eur. Ct. H.R. 1 (1995), is relevant.

[36] Art.129 Criminal Code.

[37] Criminal Procedure Code art.100a, 100c, 103, 111, 112; Contact Ban Law art.31.

ration for such crimes."[38] While this definition is more comprehensive, including the subjective element, it certainly has no legal status and is thus not applicable in criminal proceedings.

III. Requirement of clarity of law in international human rights law

From the perspective of human rights law this vagueness poses a problem because international norms require domestic law to be precise and foreseeable. This principle should be upheld even more so in the case of a provision of criminal law, which entails severe punishment, grants the State wide investigating powers and requires a low threshold of suspicion. The importance of certainty of national law was pointed out by the European Court. It uses the question whether the law is precise and foreseeable as part of the test whether an interference of the State was "prescribed by law" in relation to the claw back clauses in articles 8-11. In the Sunday Times case, the Court stated:

[A] norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if needed with appropriate advice – to foresee to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[39]

The Court upheld this approach in a number of cases. Furthermore, the requirement of clarity in criminal legislation follows from the prohibition of retrospective legislation under art. 7 of the Convention.[40] According to *Kokkinakis v Greece*, an individual must know from the wording of the relevant provision what acts and omissions will make him liable.[41] Nevertheless, the Court accepted that criminal law cannot be absolutely precise in order to avoid excessive rigidity and to keep pace with changing circumstances. Moreover, it recognized "the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resulting development is consistent with the essence of the offence and could reasonably be foreseen."[42] Thus, while establishing a general rule

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[38] *Supra* note 5, at 12f.

[39] Sunday Times v United Kingdom, 2 Eur. Ct. H.R. 245 (1979).

[40] CLARE OVEY & ROBIN C.A. WHITE, JAKOBS & WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 191f (Oxford 2002).

[41] Kokkinakis v Greece, 260 Eur. Ct. H.R. (Ser. A) at ¶ 52 (1993).

[42] CR v United Kingdom, Eur. Ct. H.R. (Ser. A) at ¶ 34 (2 Nov. 1995).

of precision and foreseeability, the Court gives States considerable leeway and accepts a certain degree of vagueness.

The Human Rights Committee (HRC) addressed the question of clarity of law in relation to State interference with the art. 17 protection of privacy. In General Comment 16 the Committee stated: "[R]elevant legislation must specify in detail the precise circumstances in which such interferences may be permitted."[43] Several States were asked to adopt more precise legislation regulating these matters.[44]

The question if article 129a would withstand scrutiny of the European Court or the Human Rights Committee is rather speculative. Given the wide margin of appreciation States are granted in questions of national security, these bodies might find sufficient clarity in the provision. Nevertheless, as German jurisprudence only clarifies the matter to a certain degree, more precision would be strongly desirable – especially for the element of 'support' and with regards to an inclusion of an element of intention, in order to strengthen the distinction to criminal organizations. This appears even more important in the light of new article 129b, which extends the criminal act to organizations abroad, as the new provision may mainly have implications for non-nationals who are less familiar with the German legal system. The same holds true for certain newly introduced provisions of the Associations Act, the Aliens Act and the Asylum Procedure Act, which exclusively apply to foreigners and are interpreted in the light of article 129a.

E. Counter-Terrorism Measures

The principal international body monitoring the measures taken by all States is the Counter Terrorism Committee (CTC) established by Security Council resolution 1373. The Committee's mandate is to monitor the implementation of resolution 1373 and to increase the capability of States to fight terrorism.[45] All States are obliged to report to the CTC. Germany first did so in December 2001 and, judging from the follow-up questions of the Committee, the report was carefully analysed.[46] However, the scrutiny of the CTC only extends to whether it regards the measures taken sufficient and appropriate to combat terrorism. It does not consider their

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[43] U.N. HRC, General Comment 16 ¶ 8 (1988).

[44] JOSEPH, SARAH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 353 (New York 2000).

[45] S/RES/1373 ¶ 6 (2001).

[46] *Supra* note 20.

conformity with human rights law. Thus, the reports provide an overview of the measures in place but are silent about their compatibility with human rights standards.

As can be seen from the Germany's report, counter-terrorism measures are wide-ranging. Security Packages I and II amended 19 different statutes and six statutory orders. In the following some of the most important measures shall be reviewed regarding their accordance with Germany's human rights obligations. The selection was made with a view to cover all different groups of affected persons. Also included are the eavesdropping law and grid search, both introduced before 9/11, firstly because of their importance and secondly to illustrate a certain continuity.

I. Measures potentially affecting all persons present in Germany

1. The right to privacy: surveillance and data protection in human rights instruments

The most wide-ranging measures in that they potentially affect all persons on German territory mainly concern issues of surveillance and therefore pose a problem with the right to privacy as guaranteed in art. 17 ICCPR and art. 8 ECHR. International jurisprudence left no doubt that measures of surveillance and data collection/processing fall within the scope of the right to privacy.

Art. 8 of the European Convention guarantees the right to respect for private and family life, home and correspondence. Paragraph 2 sets out the circumstances when an interference by the State with these rights is legitimate. European case law on surveillance and data protection is extensive. The leading case *Klass v Germany* [47] concerned a 1960s law on surveillance of mail and telecommunications. The Court pointed out that the restriction of free communication constituted a direct interference with art. 8.[48] Also in terms of data collection the Court repeatedly affirmed the applicability of art 8, stating that the storing of information relating to a person's private life as well as the release of such information falls within the scope of the right to privacy.[49] Moreover, in *Niemitz v Germany* the Court pointed out that the private life includes the ability to establish relationships with others, [50] and in *Hal-*

[47] Klass and others v Germany, 06 Sep 1978.

[48] *Id*.

[49] Heike Krieger, *Limitations on Privacy, Freedom of Press, Opinion and Assembly as a Means of Fighting Terrorism*, Max Planck Society, Conference on Terrorism as a Challenge for National and International Law, 24 Jan. 2003, *at* http://edoc.mpil.de/conference-on-terrorism/imdex.cfm, p. 3; Leander v Sweden, 116 Eur. Ct. H.R. (Ser. A) at ¶ 48 (1987); Rotaru v Romania, Eur. Ct. H.R. at ¶ 43, (4 May 2000).

[50] Niemitz v Germany, 251-B Eur. Ct. H.R. (Ser. A) at ¶ 29 (1992).

ford v UK it concluded that professional and business activities may fall within the notion of private life.[51]

Thus, the right to privacy under the European Convention protects citizens from arbitrary gathering, storage and release of personal data. However, as art. 8 is no absolute right this cannot mean that the State is prohibited from performing such activities at all. In *Klass* the necessity of some degree of surveillance was explicitly accepted: "Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order to effectively counter such threats, to undertake secret surveillance of subversive elements operating within its jurisdiction."[52] Thus, the State enjoys a certain but not unlimited discretion, subject to art. 8(2): The measures have to be prescribed by law, have a legitimate aim, such as national security, be necessary in a democratic society and strictly proportionate. As laid out in *Klass*, a crucial factor for proportionality are sufficient safeguards to ensure that the measures are not carried out in an excessive or arbitrary manner.

The ICCPR protects from "arbitrary or unlawful interference with privacy, family, home or correspondence." Unlike the ECHR, the Covenant does not contain a claw back clause. But still art. 17 is no absolute right –there may be interference as long as it is not arbitrary or unlawful. Case law provides for an inclusion of data protection.[53] As the European Court, the HRC includes the ability of individuals to develop relationships with others.[54] The issue of surveillance measures is addressed in General Comment 16, para 8: "Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited." Despite this strict language, the concluding comments to various State reports make it clear that surveillance measures are permissible when strictly controlled and overseen by independent, preferably judicial, bodies.[55]

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[51] Halford v United Kingdom, Eur. Ct. H.R. at ¶¶ 42-46 (25 Jun. 1997).

[52] *Supra* note 43, at ¶ 48.

[53] *Supra* note 40, at 370.

[54] Coeriel and Aurik v Netherlands, ¶ 10 Feb. 1994.

[55] *Supra* note 40, at 263f; *Concluding Comments on Poland*, UN doc. CCPR/C/79/Add. 110 (1999); *Concluding Comments on Zimbabwe*, UN doc. CCPR/C/79/Add. 89 (1998); *Concluding Comments on Lesotho*, UN doc. CCPR/C/79/Add. 106, ¶ 24 (1999).

The Comment also elaborates on the necessity of data protection guarantees.[56] It clarifies that "the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society."[57] The Committee demands some safeguards, e.g., personal data must not get into the hands of persons not authorised by law and individuals must have the possibility to inquire about stored information and to rectify incorrect data. However, these seem to be less far-reaching than under the European Convention. For example, they don't address the manner of information gathering or the issue of non-excessive use.[58] Thus, while the HRC addressed the issue with greater clarity through a General Comment, one may argue that the actual protection is less far-reaching than under the ECHR. Nevertheless, it must be ascertained that both treaties provide for clear protection against unlawful or arbitrary surveillance as well as personal data collection and use.

2. Eavesdropping and phone-tapping

Telecommunications surveillance for investigational purposes and crime prevention is not a recent phenomenon but plays a major role in combating terrorism. In Europe, today only Italy, the Netherlands and Switzerland make more use of phone interception than Germany. Recent records show a considerable increase by 80% between 1996 and 2001.[59] The biggest leap by 75% in 1996 is hard to explain. A ministerial statement,[60] linking it to the increased use of mobile phones is questionable, as the big rise in mobile phone users occurred only from 1999 on.[61]

In the *Klass* case, the European Court found that German legislation did not violate art. 8 of the Convention and showed itself largely satisfied with the safeguards in place.[62] *Inter alia*, surveillance is only permissible if "the establishment of the facts by any other method is without prospects of success or considerably more diffi-

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[56] *Supra* note 39, at ¶ 10.

[57] *Id*. at ¶ 7.

[58] Lee Bygrave, *Data Protection Pursuant to the Right to Privacy in Human Rights Treaties*, 6 Int'l J.L. & Info. Tech. 247, 247 (1998).

[59] Konferenz der Datenschutzbeauftragten September 2003, *Konsequenzen aus der Untersuchung des MPI über Überwachung der Telekommunikation*, *at* http//www.datenschutz-berlin.de.

[60] Zypries, *Telefonüberwachung wirksam und maßvoll*, *at* www.beck.de .

[61] MAX-PLANCK-INSTITUTE, *Rechtswirklichkeit und Effizienz der Überwachung der Telekommunikation nach den §§ 100a, 100b StPO und anderer verdeckter Ermittlungsmaßnahmen* 54 (2003).

[62] *Supra* note 43, at ¶¶ 50-60.

cult."[63] The application for a surveillance order must be in written form and give reasons for their necessity and measures must be reported to a parliamentary supervisory body. After discontinuation the intercepted person is to be notified unless notification would impair the long-term goals of surveillance. Thus, after cessation legal remedy becomes available.[64]

However, as a recent report by the Max-Planck-Institute revealed, these safeguards are not satisfactorily respected.[65] First of all, the unexplained increase in phone-tapping since mid-1990s suggests that the measure is being used excessively, i.e. not as last resort. The fact that only 25% of all cases lead to an investigational success calls proportionality into question. 66,5% of convicted persons were sentenced to less than five years of detention, indicating that the measure often relates to less serious crimes, mostly drug-related. Moreover, 73% of persons subjected to phone-tapping were not notified after discontinuation and thus had no access to legal remedy.[66] While the reasons for this lax practice are not entirely clear, there is a strong suggestion that it may be due to a lack of resources.[67] Hence, while the law as such is accordance with human rights standards, its implementation is to be criticized. Largely, the safeguards set out by the European Court and the HRC are not sufficiently respected. In conclusion, the compatibility of surveillance practice in Germany with the right to privacy and – with regards to notification – the right to al legal remedy as guaranteed by art. 13 ECHR and art. 2(3a) ICCPR is highly questionable.

If the same holds true for the above-mentioned 1998 *Großer Lauschangriff*[68] (eavesdropping law) has to be awaited until a similar report becomes available in summer 2004. However, the findings may not be of major relevance anymore: The law was in large parts declared unconstitutional in March 2004.[69] It had amended art. 13 *Grundgesetz* (inviolability of the home) and the Criminal Procedure Act, allowing for 'acoustic surveillance' of private homes in cases of explicitly listed grave

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[63] *Id*, ¶ 17.

[64] *Id*, ¶¶ 18-25.

[65] *Supra* note 57.

[66] *Supra* note 55.

[67] *Supra* note 57, at 310.

[68] Gesetz zur Änderung des Grundgesetzes, 26 Mar. 1998; Gesetz zur Verbesserung der Bekämpfung der organisierten Kriminalität, 4 May 1998.

[69] BverfG, 1BvR 2378/98, 3 Mar. 2004. *Also*, *Court overturns much of eavesdropping law*, FRANKFURTER ALLGEMEINE ZEITUNG WEEKLY, 5 Mar. 2004.

crimes.[70] It provided for similar safeguards as mail and telecommunications surveillance. The Constitutional Court did not challenge the amendment of art. 13 *Grundgesetz*, as it does not interfere with human dignity (Art. 1) and the basic principles of the State order (art. 20).[71] However, it found parts the implementation as laid down in the Criminal Procedure Act disproportionate with a view to the guarantees of human dignity and the inviolability of the home, i.e. eavesdropping must be conducted in such a way not endangering the protection of human dignity. Hence, it is not allowed when the suspect is around persons of his confidence, such as close friends, family, lawyers, doctors and clergy, and when the rights of third parties would be violated. Respective evidence may not be used before the courts.[72] Moreover, the Court declared the list of crimes as too extensive, as more than twenty offences do not entail a sentence of at least five years of detention and thus do not reach the threshold of severity.[73] Finally, it regarded the regulations regarding notification as insufficient.[74] Although the law must be rectified until June 2005, it is safe to say that German surveillance practice at least since the mid-1990s was in violation with the internationally guaranteed right to privacy.

3. Extension of powers of the security authorities

While the above-described surveillance partly could be analysed in relation to the actual practice, this is not the case for the newly introduced measures as there is no data available yet. Thus, the view on the legislation as such must suffice. In respect of the right to privacy, one of the most important features of the second Security Package is the extension of the powers of the two intelligence services, namely the *Bundesverfassungsschutz* (Office for the Protection of the Constitution) and the *Bundesnachrichtendienst* (Federal Intelligence Service). Before 2001 the Office for the Protection of the Constitution could gather and evaluate information on endeavours directed against the free democratic order, national security, an impairment of the administration as well as activities of an intelligence nature and activities which, by the use of force, endanger the external interests of Germany.[75] Security Package II extended this list to include "endeavours that are directed against the idea of international understanding (art. 9(2) *Grundgesetz*), especially against the

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[70] Art.13(3)-(6) Grundgesetz and art.100-101 Criminal Procedure Act (Annex).

[71] BverfG, 1BvR 2378/98, ¶¶ 103-124.

[72] *Id.* ¶¶ 167-197.

[73] *Id.* ¶¶ 227-241.

[74] *Id.* ¶¶ 228-307.

[75] Federal Constitution Protection Act ¶ 3.

peaceful co-existence of people (art.26(1) *Grundgesetz*)."[76] While based in the Constitution, these principles are relatively vague for legitimating intelligence action. However, the actual measures allowed for are even more concerning. Both intelligence services are given the authority to request information about individuals suspected to engage in the above-mentioned activities from various financial service institutions, postal service providers, telecommunications services and aviation companies.[77] Moreover, the possibilities of data exchange between all major institutions involved in crime prevention and investigation have been extended, i.e. apart from the intelligence services mainly the *Bundeskriminalamt* (Federal Office of Criminal Investigation) and the *Bundesgrenzschutz* (Federal Border Guard).

Again, the question is if these amendments are compatible with data protection under privacy rights. Basically, the same safeguards as for other surveillance measures apply. Nevertheless, the law greatly extends the list of institutions private information can be requested from, and thereby the type of information that may be gathered. Furthermore, the grounds for request do not seem to be sufficiently precise. In the *Malone* case, the European Court has reiterated the need for clarity in legislation in relation to surveillance measures.[78] Thus, while there are safeguards in place, the new powers may amount to a violation of privacy rights because of their mere scope. Moreover, the enhancement of data exchange obscures the separation between intelligence and police, rooted in the historical experiences from the Third Reich and the GDR.[79] Also, this exchange may endanger the principle that collected data may only be used for the purpose it was collected for – this requirement may be difficult to control when data come from a variety of sources. Thus, strict scrutiny must be maintained supervising the application of the new measures. On a positive note, the provisions contain a sunset clause, requiring them to be reviewed after five years.[80]

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[76] Counter-Terrorism Act art.1(1).

[77] Counter-Terrorism Act, articles 1(3) and 3.

[78] Malone v UK, 02 Aug. 1984, ¶ 79.

[79] Till Müller-Heidelberg, *Das Terrorismusbekämpfungsgesetz. Ein Erfolg der Terroristen*, ZEITSCHRIFT FÜR BÜRGERRECHTE UND GESELLSCHAFTSPOLITIK, No. 21 (2002).

[80] INTERNATIONAL HELSINKI FEDERATION FOR HUMAN RIGHTS, *Anti-terrorism Measures, Security and Human Rights. Developments in Europe, Central Asia and North America in the Aftermath of September 11* 196 (April 2003).

II. Measures affecting foreigners living in Germany

In the aftermath of September 11 many NGOs reported on increasing xenophobia in Germany, especially against Muslims or persons with an Arab appearance. Complaints ranged from vandalism and bomb threats against mosques, to verbal abuse, discrimination and violent attacks. While German politicians condemned intolerance and hostility towards Muslims, critics made counter-terrorism measures partly responsible for creating prejudice.[81] Indeed, a great part targets foreigners, either wishing to enter or living in Germany. Regarding the latter, there are problems with various human rights: again, the right to privacy, but also freedom of religion and the prohibition of discrimination. In the following, two measures shall be evaluated: the so-called grid search and the ban of extremist religious foreigner's associations.

1. Rasterfahndung (Grid search)

Rasterfahndung is a method of systematic screening of personal data which initially was used rather unsuccessfully to search members of the RAF. It was taken up again after it became known that three of the 9/11 terrorists had been living in Germany. Practically, the data of individuals are systematically compared and screened for certain criteria presumed to be characteristics of criminals. The purpose is to identify 'sleepers' of Islamist terror organizations. While basically the criteria are not publicly known, they seem to include affiliation with Islam, male, between 18 and 40 years old and university studies in natural science and technical subjects. As a result, allegedly thousands of Muslims have had their data screened and many subsequently had their houses searched, sometimes in the middle of the night, have been arrested and interrogated. Some individuals reported on police brutality.[82] Supposedly only within the first four months in Hamburg data of more than 30.000 male students had been screened and 140 persons were interrogated at police stations.[83] Relatively new is the use for preventive purposes, i.e. independent of a concrete suspicion of persons having committed a crime.[84] Universities, health and social insurance agencies, employers and other institutions were asked to provide information on individuals, which clearly poses a problem to data protection and the right to privacy as it requires no degree of suspicion in relation to a concrete offence but just a very abstract danger and involves no safeguards. *Raster-*

[81] *Id.* at 117f.

[82] *Supra* note 76, at 118.

[83] Kleine Anfrage der PDS zur Rasterfahndung, 18 Feb. 2002 Bundestagsdrucksache 14/8257.

[84] *Supra* note 5, at 33.

fahndung puts a considerable number of persons under a general suspicion, denying the fundamental presumption of innocence as laid out in and art. 14(2) of the ICCPR. Thus, the inference with the right to privacy can hardly be called proportionate[85] - even more so in the light of the poor investigational success rate.

Furthermore, it gives rise to an issue of discrimination under art. 14 ECHR and articles 2(1) and 26 ICCPR on the basis of race or national origin and religion. The protection from discrimination under the European Convention is the weakest one: Article 14 is not considered a freestanding right, i.e. it can only be violated in conjunction with another Convention right – in this case privacy. According to such reasoning, not only the right to privacy was violated, but also it was done so in a discriminatory way. The affected persons were singled out, *inter alia*, on the grounds of race or national origin and religion. The Court often has been reluctant to address article 14 even if it had found a violation of another provision. However, in recent years it seems to have taken the question of discrimination somewhat more serious if it is considered to be "a fundamental aspect of the case."[86] The protection against discrimination in art. 26 ICCPR thus is much stronger, as the Covenant considers it a right on its own. The protection under art 2(1) is limited to the rights set forth in the Covenant. Hence, just as for the ECHR, it has to be seen in connection with the right to privacy. However, as the Committee pointed out, not all distinction on one of the grounds constitutes discrimination. If the differentiation is based on objective and reasonable criteria it is not prohibited.[87] Nevertheless, it is questionable if the distinction for the purpose of *Rasterfahndung*, mainly on the basis of personal characteristics of a few persons who committed terrorist crimes, can be justified.

The practice of *Rasterfahndung* has widely been criticised on all these grounds on the national level, but apart from the highest court in the Federal State Hessen judiciary upheld it. It has not come under review of the Constitutional Court.

2. Ban of extremist religious associations

One of the first measures in September 2001 within Security Package I was the abolition of the so-called "religious privilege," under which religious or ideological associations were not subject to the *Vereinsgesetz* (Act Governing Private Associations) and thus could not be prohibited accordingly. Hence, now religious associa-

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[85] *Id.* at 35.

[86] Chassangnou and others v France, Eur. Ct. H.R. at ¶ 89 (29 Mar. 1999).

[87] *Supra* note 40, at 523.

tions may be banned – in accordance with art. 9(2) *Grundgesetz* – under art. 3(1) of the law when their endeavours are directed against the Criminal Code, the constitutional order or against the idea of international understanding. Associations of foreigners, i.e. when the majority of members or executive members are non-nationals (excluding EU nationals), additionally may be prohibited on grounds listed in art. 14(2). These include activities directed against peaceful co-existence of Germans and foreigners or foreigners among each other, or against Germany's obligations under international law, incitement to violence or support of organisations abroad which plan or support attacks against persons or property. The aim of this more restrictive approach towards foreigner's associations is the prevention of extremist activities. It has to be emphasised that the abolition of the religious privilege applies not only to foreigner's associations, but certainly these are subjected to more extensive prohibition grounds. Among scholars it had been debated if the abolition violated freedom of thought, conscience and religion, on the international level protected under art. 9 ECHR and art. 18 ICCPR. But religious associations are not prohibited as such; they are just subjected to the same rules as other private associations.[88] While it may be argued that religious groups need somewhat greater protection than is guaranteed under freedom of associations, it is hard to see why they should be able to engage in activities related to the prohibitions grounds of articles 3 and 14(2). The activities indicated there are by no means necessary for the exercise of religious freedom.

Thus, the question would rather be if there were an issue of discrimination in that more prohibition grounds apply to foreigner's associations and thus their right to freedom of association is more restricted. There appears to be an underlying assumption that foreigner's associations are more likely to engage in organized crime and terrorism,[89] as such are the justifications for art. 14(2). Freedom of association is one of the core principles in a democratic society.[90] It helps to guarantee the healthy functioning of democracy and is especially important for groups which don't constitute a majority. However, in art. 16 the European Convention limits freedom of association under art. 11: It grants State Parties the right to restrict political activities of aliens. It is not very clear why the limitations laid out in art. 11(2) should not be sufficient to control political activities by non-nationals and accordingly, the Court has never considered the provision. As early as 1977 the Parliamentary Assembly has recommended its removal.[91] Hence, while art. 16 certainly can't be ig-

[88] *Supra* note 5, at. 18f.

[89] *Supra* note 76, at 74.

[90] As for example reiterated by the European Court, *see* United Communist Party v Turkey, 62 Eur. Ct. H.R. 1 at ¶ 44 (1998).

[91] *Supra* note 36, at 216.

nored, it does not have a very strong standing and runs counter developments in international law.[92] Accordingly, the ICCPR does not know such a restriction of political activities of foreigners. Freedom of association under art. 22 as all rights equally applies to nationals and non-nationals – subject to the restrictions set forth in para 2.[93] Thus, the distinction regarding prohibition grounds under German law on the basis of nationality, while justifiable under the ECHR, is clearly questionable in terms of universal human rights standards and may well be called discriminatory.

In practice, since the abolition of the religious privilege the Ministry of Interior prohibited several Muslim associations: the Turkish Islamic group *Kalifstaat* (Caliphate State) along with 19 connected associations. The objective of the *Kalifstaat* was said to be the overthrow of the Turkish secular State and its replacement by a system based on the Shari'a. The ban was confirmed by the Federal Administrative Court on the ground that the group contravened the principles of democracy, the rule of law and human dignity.[94] The leader of *Kalifstaat*, Metin Caplan, was sentenced to four years imprisonment because of incitement to murder. Furthermore, the association *Al-Aqsa* was prohibited because of financial support of *Hamas* and *Hizb ut-Thahir al-Islami* (Islamic Liberation Party) was banned for propagating violence and anti-Semitism.[95] On the basis of the facts, these bans appear to be justified and by no means disproportionate. All these organizations fall within the scope of art. 3 of the Associations Act.

III. Measures affecting asylum seekers

The concern about foreigners engaging in terrorist activities is also illustrated by the numerous changes in aliens and asylum law through Security Package II. The amendments are to ensure that data about foreigners who wish to enter are available to all relevant institutions, including the Federal Criminal Office and that potential terrorists are not granted stay permit or can be expelled. These measures involve some critical aspects, especially the extension of expulsion grounds and the restriction of the right to non-refoulement.

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[92] *E.g.*, U.N. GAOR, *Declaration of Human Rights of Individuals who are not Nationals of the Country in which They Live*, A/RES/40/144 (1985); IHF 2003, at 74f.

[93] U.N. HRC, General Comment 15.

[94] *Supra* note 5, at 19.

[95] Annual Report of the Office for the Protection of the Constitution 2002, at 148, 165, 168f.

1. Extension of expulsion grounds

According to Security Package II, persons now can be expelled when they threaten the democratic order or national security, pursue political aims by violent means or publicly incite violence, are member of an organisation which supports international terrorism or support such an organisation, make false or incomplete statements regarding their contacts to persons or organisations who are suspected of supporting international terrorism.[96]

It can be argued that these new grounds fall within the scope of art. 32 of the 1951 Refugee Convention, allowing for expulsion on grounds of national security and public order. Accordingly, the provision was not criticised as such. The basic problem arises out of the vague language of the new text.[97] As elaborated above, the term 'terrorism' lacks precise definition in German law and so does the concept of 'support'. Thus, the competent authorities are left with the decision which organisations can be called terrorist. But this decision is especially critical for asylum-seekers, as they are frequently engaged in opposition movements against repressive governments. The issue leads back to the bonmot "one person's terrorist is another person's freedom fighter": It often is a question of digression where legitimate opposition ends and terrorism begins, especially in cases of internal conflict.[98] Furthermore, information about alleged terrorist activity will often come from the country of origin. This results in a conflict of interest between the asylum seeker and his home country and may put him at risk in case of return.[99]

2. Restriction of non-refoulement

Under art. 33 of the 1951 Convention refugees are guaranteed not to be sent back to territories where their life would be threatened. Thus, even if a refugee falls under the art. 32 grounds of expulsion, the State is not allowed to send him or her to an unsafe country (including third countries). However, the protection is not absolute: it does not apply where there are reasonable grounds to believe the person to be a threat to national security or when he has been convicted for a particularly serious crime (art. 33(2)). Art. 51 of the German Aliens Act reflects this provision. Moreover, Germany is bound by the prohibition to sent someone back when he is in

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[96] Aliens Act art.47(2); Counter-terrorism Law art.11(8).

[97] U.N. HCR, *Stellungnahme zur Anhörung des Terrorismusbekämpfungsgesetzes*, 30 Nov. 2001.

[98] *Supra* note 29, at 19-23.

[99] INTERNATIONAL HELSINKI FEDERATION, Statements at the OSCE Human Dimension Implementation Meeting, 9, at 44, 19 Sep. 2002.

danger to be tortured under the art. 3 jurisprudence of the ECHR and art. 3 of the Convention against Torture (CAT). The leading case of the European Convention is *Soering*, who could not be extradited to the United States because there he faced death row.[100] The principle was re-affirmed in several other cases.[101] In *Chahal*, the Court indicated that national security had no application in art. 3 cases as the prohibition of torture is an absolute, non-derogable right. Hence, the prohibition of non-refoulement under the ECHR is even stronger than under the 1951 Convention. A prominent example of non-refoulement is the case of *Kalifstaat* leader Kaplan: An extradition request by Turkey so far has been refused, as Turkey has not guaranteed that Kaplan will not face the death penalty.

Nevertheless, Security Package II restricted non-refoulement by inserting the exclusion grounds of art. 1(F) 1951 Convention into art. 51 of the Aliens Act. This runs counter the system of the Refugee Convention, as both articles apply to different groups of people: the art.33(2) exception from non-refoulement concerns persons already recognized as refugees, while art. 1(F) applies to persons who are in the process of having their refugee claim considered. Thus, German law obscures the distinction between these groups, which is of high importance for a fair asylum procedure. The principle of 'inclusion before exclusion',[102] providing that before a person is excluded from refugee status his well-founded fear of prosecution under art. 1(A) must be considered, may not be respected.[103] The inclusion of art. 1(F) in the grounds for expulsion extends this category because it uses the exclusion grounds without the context of art. 1(A). Thus, it may be possible to deport an asylum seeker before first assessing his claim for refugee status.[104] Moreover, both articles require different standards of proof. Thus, by integrating both articles in one provision, the higher standard of art. 33 may be applied to art. 1(F). This leads to an unfair procedure not in line with the Convention. However, even if a refugee qualifies for expulsion under art. 51 of the Aliens Act, he still should be protected from refoulement under the ECHR and CAT.

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[100] Soering v UK, 11 Eur. Ct. H.R. 439 (1989).

[101] Chahal v UK, 23 Eur. Ct. H.R. 412 (1996); Ahmed v Austria, 24 Eur. Ct. H.R. 278 (1996), Jabari v Turkey, Eur. Ct. H.R. (11 July 2000).

[102] ERIKA FELLER, ET AL. ED., REFUGEE PROTECTION IN INTERNATIONAL LAW: U.N. HCR GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, *Summary Conclusions: The Principle of non-refoulement* 178 (Cambridge 2003).

[103] *Supra* note 76, at 170f.

[104] *Supra* note 93.

In conclusion, German refugee law – much criticised for not respecting international standards for a long time – was made even more restrictive through counter-terrorism legislation. It remains to be noted that much of the law governing aliens and refugees will be changed with the new Immigration Act, currently discussed between government and opposition in the Federal Council. Presumably a good deal of the envisaged improvements for refugees will not survive these negotiations – even more so as now they take place under the shadow of the recent terrorist attacks in Madrid.

F. Conclusion

Since the introduction of the emergency law in 1967 Germany has had a long history of countering terrorist threats, from inside and outside the country. The two Security Packages of 2001 built on a considerable body of legislation. After left-wing terrorism had faded by the late 1980s, the mid-1990s witnessed a new wave in security driven State activity. Hence, the measures after 9/11 were not an isolated reaction to the attacks in the United States, which seem to have been more the trigger than the actual reason. This is in any event true for measures which were taken up again, as the *Rasterfahndung*, and the provisions of Security Package I, which was put together rather speedily. The rush in which legislation was pushed through did not allow for thorough discussion and fortifies the assumption that 9/11 provided the opportunity to get things approved which previously had lacked political support. In contrast to measures already in place, the focus of the Security Packages is rather on prevention than on repression.

As exemplified by the analysed measures, the main concerns for human rights are:

(1) The vagueness of many provisions, which opens the door to broad interpretations and leaves individuals in uncertainty of which conduct is actually prohibited. This imprecision poses a problem mainly wherever a definition of terrorism, terrorist organisation or support of the latter is involved, but also where powers of security authorities are extended through the broad language of constitutional principles. The legislator should consider clarifying the respective provisions.

(2) Interferences with the right to privacy, which used to enjoy an unprecedented strong protection under German law due to the history of the Third Reich and the GDR. The awareness of the fundamental importance of privacy rights seems to be fading away. As exemplified by the practice of the eavesdropping law, scrutiny must be given to the law as such and its actual implementation.

(3) The measures disproportionately aim at foreigners, who are restricted in their civil rights and freedoms and their rights as refugees. This gives not only rise to

concern about discrimination, but also fosters a climate of xenophobia. By further undermining the principles of the 1951 Convention, the rights of a group needing special protection are endangered.

On a positive note, despite increasing 'islamophobia' in the Western world, freedom of religion has not been considerably restricted, although the ongoing debate about female teachers wearing the Islamic headscarf should be noted. However, this debate has not the dimension it currently takes in France. Another positive aspect is that an independent judiciary reviews legislation and does not give in to political pressure, as shown in the Hamburg trials and the refusal to extradite Metin Kaplan.

But it also has to be noted that Germany not only introduced far-reaching national legislation, but also pushes for additional measures within the European Union – for good or for worse. For example, the introduction of *Rasterfahndung* on the European level was suggested. Furthermore, Germany advocated the European Arrest Warrant. After the tragic bombings in Madrid one week ago, the Minister of Interior was one of the first calling for an emergency meeting to discuss further measures.

In conclusion, while surely not all measures pose problems with respect to human rights obligations, there is an ongoing effort to introduce security driven legislation, on the national and European level without thoroughly considering human rights implications. As in many countries, human rights seem to be regarded as hampering the fight against terrorism – which is not only a misperception but also a serious mistake in the strategy against terrorism.