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Data Mining and 'Renegade' Aircrafts

The States as Agents of a Global Militant
Security Governance Network
– The German Example

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Abstract

Security governance has changed the way societies organise and control the execution of powers. This contribution will focus on the 'German' approach, and, inevitably these days, also on the EU approach towards new threats to security, especially with regard to terrorism. The main argument is that national responses to terrorism after 9/11 have to be understood in a wider context; they are embedded in a growing structure of security governance, which has evolved into a Global Militant Security Governance. This formally non-hierarchical network structure poses a threat to the rule of law/Rechtsstaat principle and lacks basic respect towards fundamental rights. The structure and its actors act first; they do not waste time on complex legal debates. Two distinct phenomena that represent the main characteristics of the Global Militant Security Governance are discussed. First, the blurring of institutional and legal boundaries between two distinct fields of governmental action: police actions and military operations. Here a 2005 decision of the German Federal Constitutional Court upon the admissibility of shooting down civilian aircrafts in order to prevent a terrorist attack is used as an illustration. Second, we can observe a de-formalisation of security governance processes. Two subtopics will be addressed here: the extension of data-mining operations and their conflict with the constitutional right to personal data protection, on the one hand, and the informal or barely regulated co-operation of information agencies in the dissemination and processing of this data, on the other. In the concluding remarks the question how to tame the Global Militant Security Governance is addressed. Crucial for a success of such an attempt are the installation of a new type of effective control institutions within transnational information networks and a new awareness about regulatory pre-cooking activities that have evolved in the shadow of the law.

Keywords

Germany – Governance – International Regimes – Internationalisation – Legitimacy – NATO – Networks – Security/External – Security/Internal – USA

Introduction

Security governance has changed the way societies organise and control the execution of powers. This contribution will focus on the ‘German’ approach, and, inevitably these days, also on the European Union (EU) approach towards new threats to security, especially with regard to terrorism. The main argument developed here is that national responses to terrorism, especially after 9/11, have to be understood in a wider context: they are embedded in a growing structure of security governance, and this structure has evolved into a Global Militant Security Governance. This formally non-hierarchical network structure poses a threat to the rule of law/*Rechtsstaat*¹ and lacks basic respect towards fundamental rights. The structure and its actors act first, they do not waste their time on complex legal debates.

I will make this point by discussing two distinct phenomena that represent the main characteristics of the Global Militant Security Governance. Firstly, I will describe and analyse the *blurring of institutional and legal boundaries between two distinct fields of governmental action* – police actions and military operations. I will use a prominent German court case in order to illustrate this aspect; in 2005 the German Federal Constitutional Court (FCC) decided upon the admissibility of shooting down civilian aircrafts in order to prevent a terrorist attack.

Secondly, we can observe a *de-formalisation* of security governance processes. I will address two subtopics in this context: the extension of data-mining operations and their conflict with what is called in the German and European contexts the constitutional right to personal data protection (a concept which is similar to, but also considerably different from, the right to privacy-approach in United States constitutional law), on the one hand, and the informal or barely regulated co-operation of information agencies in the dissemination and processing of this data, on the other. This co-operation has led in a number of cases to a chain of events that brought individuals directly to Guantanamo.

In the concluding remarks I will address the question of how to tame the Global Militant Security Governance. Crucial for the success of such an attempt are the installation of a new type of effective control institutions within transnational information networks and a new awareness about regulatory pre-cooking activities that have evolved in the shadow of the law.

Militant Security Governance and its tendency to overcome institutional and legal boundaries

The terrorist attacks of 11 September 2001 have cast a long shadow. They ignited around the globe waves of government and legislative activities that were aimed at the prevention of future attacks. In Germany, one piece of legislation concerned the permission to shoot down civil aircrafts that have been hijacked and are intended to

* Forthcoming in *Emory International Law Review*, 24, vol. 2 (March 2011).

¹ The *Rechtsstaat* principle – literally: the principle of a state bound by [the rule of] law – is one of the four fundamental constitutional principles: democracy, *Rechtsstaat*, *Sozialstaat* and federalism. See Articles 19.1-4, 20.1-4 in the German Federal constitution *Grundgesetz* (literally: basic law).

be used as weapons against persons (so-called 'renegade aircrafts'). It led to a remarkable decision of the FCC, which imposed clearly defined constitutional limits to anti-terrorist measures. The court also rejected a philosophy according to which the end justifies the means.²

Legislation on 'renegade aircrafts': The German Air Security Act

One imminent reason for the introduction of a new regulation was an incident that bore resemblance to the scenery of the New York City attacks. On 5 January 2003 an armed man hijacked a sports airplane, circulated over the financial district of Frankfurt am Main and threatened to plunge the plane into the tower of the European Central Bank unless he was allowed to make a phone call to the United States of America. A state police helicopter and two fighter planes of the Federal Air Force took off and circled around the sports plane. The state police declared a red alert, cleared the inner city district of Frankfurt and evacuated its skyscrapers. About half an hour after the hijacking it became clear that the hijacker was a confused man. After his demand for a phone call was fulfilled, he landed at Frankfurt Rhein Main Airport and was arrested by the police without showing any signs of resistance.³

This incident fuelled a political discussion about emergency responses to such dramatic events. In 2005 the Federal Government introduced a legislative proposal covering this scenario, and the Federal Parliament accordingly passed the Aviation Security Act (*Luftsicherheitsgesetz* - LuftSiG). In Article 14, the Aviation Security Act authorises the armed forces (especially the air force) to shoot down an aircraft that has been hijacked or is otherwise intended to be used as weapon for a crime against human lives:

Article 14. Deployment measures, right of command.

[...]

(3) A direct use of force is admissible only if the circumstances suggest that there is an intention to use the airplane against the life of persons, and if this is the only possible means to repel this clear and present danger.

(4) A measure pursuant to subsection 3 can only be ordered by the Minister of Defence, or, in case of absence, by the member of the Federal Government who is authorised to represent the Minister.⁴

Two novelties were introduced with this legislation: the deployment of Federal troops within the borders of Germany with a license to use military means, and the use of

² *Bundesverfassungsgericht* (the Federal Constitutional Court, FCC), judgment of 15 February 2006, case no. 1 BvR 357/05. An English translation is available on the court's website at: <http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705en.html>.

³ *Ibid.*, paragraph 3.

⁴ Translation provided by the author. The provision reads in German: '§ 14 Einsatzmaßnahmen, Anordnungsbefugnis [...] (3) Die unmittelbare Einwirkung mit Waffengewalt ist nur zulässig, wenn nach den Umständen davon auszugehen ist, dass das Luftfahrzeug gegen das Leben von Menschen eingesetzt werden soll, und sie das einzige Mittel zur Abwehr dieser gegenwärtigen Gefahr ist. (4) Die Maßnahme nach Absatz 3 kann nur der Bundesminister der Verteidigung oder im Vertretungsfall das zu seiner Vertretung berechnete Mitglied der Bundesregierung anordnen.' Available at: <<http://www.gesetze-im-internet.de/bundesrecht/luftsig/gesamt.pdf>>.

Federal troops as a kind of policing force. In the U.S. context, this may not be very controversial in itself; the U.S. air force is seen as an integral part of a security machinery that protects the 'homeland' against all kinds of attacks, and the U.S. has declared a 'war against terrorism' that may lead to a qualification of all possible terror attacks as actions *in bello*. In Germany, however, the two novelties described above were by no means uncontroversial. The *Grundgesetz*, the constitution, does not allow for the deployment of troops within the borders of Germany, policing is a competence of the Federal states, and there is no institution comparable to the U.S. National Guard.

Accordingly, the air force can only be activated in the case of an attack that has been formally defined as a war attack by an alien army force (the so-called 'defence case', or *Verteidigungsfall*), or in exceptional circumstances which are defined in the *Grundgesetz* as follows:

Article 35. Legal and administrative assistance and assistance during disasters.

- (1) All Federal and Land authorities shall render legal and administrative assistance to one another.
- (2) In order to maintain or restore public security or order, a Land in particularly serious cases may call upon personnel and facilities of the Federal Border Police to assist its police when without such assistance the police could not fulfill their responsibilities, or could do so only with great difficulty. In order to respond to a grave accident or a natural disaster, a Land may call for the assistance of police forces of other Länder or of personnel and facilities of other administrative authorities, of the Armed Forces, or of the Federal Border Police.
- (3) If the natural disaster or accident endangers the territory of more than one Land, the Federal Government, insofar as is necessary to combat the danger, may instruct the Land governments to place police forces at the disposal of other Länder, and may deploy units of the Federal Border Police or the Armed Forces to support the police. Measures taken by the Federal Government pursuant to the first sentence of this paragraph shall be rescinded at any time at the demand of the Bundesrat, and in any event as soon as the danger is removed.⁵

It is far from clear whether these provisions apply at all in the case of a hijacked airplane. A 'renegade aircraft' may produce a grave accident, but do the provisions also cover intentional 'accidents'? But even if we assume this, what exactly does Article 35 allow? Police forces in Germany do not have fighter jets or any other typical military equipment. Can the federal army complement the police equipment, or can it only use the limited means that the police has at its disposal? And if the army can use military means, would this still amount to assistance to the police (as Article 35, paragraphs two and three define), or would this rather be a different case, of an army operation authorised by state police? In any case, Article 14.3 of the Air Security Act clearly states that only the federal government, and not the state government, is

⁵ The Federal Ministry of Justice of Germany. Available at: <http://www.gesetze-im-internet.de/englisch_gg/index.html> (according to the website of the Ministry of Justice, this translation was provided by Professors Christian Tomuschat and David P. Currie).

authorised to order the use of force against a 'renegade' aircraft . Thus the conditions laid out in Article 35 are not met; if the command lies with the federal government, it does not 'assist' the states, but acts on its own.

Another emergency provision, Article 87a, chapter 4 in the *Grundgesetz*, allows for the deployment of the armed forces only if the 'democratic order' of the Federal Republic is in danger.⁶ Therefore, in cases where there is neither a massive attack nor a war-like emergency situation, it is rather questionable whether the *Grundgesetz* allows for the deployment of the armed forces or not. An attempt by the major opposition party at that time, the Christian Democrats, to amend Article 35 of the *Grundgesetz* remained unsuccessful.⁷ There was no political will to extend the emergency powers of the Federal government and the armed forces; the existing emergency provisions in the *Grundgesetz* were already a result of a difficult political compromise reached in the 1960s, and none of the other major parties in the *Bundestag* (including the Social Democrats) were willing to open up another round of political discussions about this issue.

The rationale behind this clear distinction between a case of war (which needs to be clearly stated by parliamentary decision) and the internal deployment of troops (which is forbidden except for natural disaster scenarios such as a flood or an earthquake, and there only for rescue operations and not for the use of force) is, of course, a consequence of the Nazi past of Germany. During the Third Reich, many legal and institutional boundaries that had been erected under the Weimar Republic as guarantees for the effectiveness of the rule of law/*Rechtsstaat* principle were overthrown. Step by step legally defined divisions between the state and the Nazi party, between the police and intelligence agencies, and between the military sector and the police were dissolved or systematically blurred.⁸ The involvement of the German Army in atrocities against civilians and the Holocaust during the Second World War; torture and terror executed by the Gestapo, or by the SS, formally a Nazi party organisation but practically a parallel army with military, secret police and police functions – these are but some examples of the dissolution of institutional balances. Many provisions in the *Grundgesetz* can be traced back to the idea that the

⁶ Article 87a, paragraph 4 reads: 'In order to avert an imminent danger to the existence or free democratic basic order of the Federation or of a Land, the Federal Government [...] may employ the Armed Forces to support the police and the Federal Border Police in protecting civilian property and in combating organized armed insurgents'. As a single attack with an airplane can hardly pose an imminent danger to the 'democratic basic order' of the Federal Republic, this provision is an insufficient basis for the transfer of emergency powers to the armed forces in the Air Safety Act.'

⁷ Deutscher Bundestag, Drucksache 15/2649, 9 March 2004 (Federal Parliament, Printing Matter 15/2649).

⁸ The Third Reich established a parallel system of legality and de-facto legality, and its institutions were also characterised by a parallel structure of party and state institutions, with overlapping functions and powers. For an early account of this structure, see Ernst Fraenkel (1941) *The Dual State: A Contribution to the Theory of Dictatorship*. New York and Oxford: Oxford University Press; Franz L. Neumann (1966) *The structure and practice of National Socialism 1933–1944*, New York: Harper & Row. Carl Schmitt, the (in)famous Weimar constitutional law scholar and legal theorist who enthusiastically embraced the Third Reich, brought this to a point when he affirmatively stated in 1934: "Der Führer schützt das Recht" (The Führer protects the law"), *Deutsche Juristen-Zeitung*, columns 945-950. In this article Schmitt justifies the extralegal killings of about 200 leading SA members in June and July 1934, following false allegations that the SA was planning a coup d'état. The executions had been ordered directly by Hitler. Although these killings were formally illegal, no criminal procedure was ever opened.

erection of legal and institutional boundaries is fundamental for the functioning of the *Rechtsstaat*. Once these principles are hollowed out it is just a small step to a perpetual state of emergency.⁹

Despite numerous legal concerns that were publicly voiced against a deployment of the army in ‘renegade’ cases,¹⁰ the German parliament accepted the government’s legislative proposal and passed the Aviation Security Act. Immediately after its enactment, several constitutional complaints¹¹ were lodged against the provision in the Aviation Security Act, which gave the Minister of Defence the power to order the shooting-down of a civilian aircraft. The complaints were successful. In February 2006 the Federal Constitutional Court declared Article 14, paragraph 3 of the Aviation Security Act unconstitutional on the grounds that the federal government lacks the competence to introduce legislation covering acts of public authorities that are situated in the field of policing and the execution of police power for the prevention of harmful acts. This regulatory competence lies solely in the hands of the States.¹²

In a second line of reasoning, the Court held in a lengthy passage (which is longer than the reasoning on the competence issue) that even if there was a competence of the federal government, created, for example, by constitutional amendment, such a legislative act would still be unconstitutional. This part of the judgment is heavily based on Article 1 of the constitution, which guarantees that ‘human dignity is inviolable’. The court refers to a Kantian notion of the person in order to justify its position. Here is a quote from the judgment:

The passengers and crew members who are exposed to such a mission are in a desperate situation. They can no longer influence the circumstances of their lives independently from others in a self-determined manner. This makes them objects not only of the perpetrators of the crime. Also the state which in such a situation resorts to the measure provided by § 14.3 of the Aviation Security Act treats them as mere objects of its rescue operation for the protection of others. Such a treatment ignores the status of the persons affected as subjects endowed with dignity and inalienable rights. By their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the

⁹ For an impressive, but sometimes over-dramatic and empirically weak, account of Guantanamo as a symbol for a modern reality where the state of exception is the rule, see Giorgio Agamben (2005) *State of Exception*, Chicago: University of Chicago Press.

¹⁰ See the references in Domenico Siciliano (2010) ‘Governance nello spazio giuridicamente vuoto. Il caso della disciplina giuridica per la sicurezza dello spazio aereo: un confronto tra Germania, Italia e Spagna’, in *Turis Quidditas – Liber Amicorum per Bernardo Santalucia*, Naples: Editoriale Scientifica.

¹¹ Article 93, paragraph 4a of the *Grundgesetz* grants the right of individuals to lodge a constitutional complaint, under certain conditions, directly against federal legislation. Unlike in the U.S., where all federal courts can declare legislation unconstitutional, only the FCC has the power to declare federal legislation unconstitutional. For more details, see Donald P. Kommers (1997) *The Constitutional Jurisprudence of the Federal Republic of Germany*, Durham, N.C.: Duke University Press, 2nd edition; Rainer Nickel (2004) ‘The German Federal Constitutional Court: Present State, Future Challenges’, in Andrew Le Sueur (ed.), *Building the UK’s New Supreme Court*, Oxford: Oxford University Press.

¹² Accordingly, there is no federal police other than the Federal Border Police (*Bundespolizei*) whose actions are geographically limited to the borders, airports and train stations. Any other acts of policing are within the exclusive competence of the Federal states. The state police forces, however, do not possess any heavy arms (such as surface-to-air missiles), or fighter jets.

state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake. [...] It is absolutely inconceivable to intentionally kill persons who are in such a helpless situation on the basis of a statutory authorisation. The assumption that someone boarding an aircraft as a crew member or as a passenger will presumably consent to its being shot down, and thus in his or her own killing, in the case of the aircraft becoming involved in an aerial incident is an unrealistic fiction. Also the assessment that the persons affected are doomed anyway cannot remove from the killing of innocent people in the situation described its nature of an infringement of these people's right to dignity. Human life and human dignity enjoy the same constitutional protection regardless of the duration of the physical existence of the individual human being.

This decision erects an absolute barrier against any kind of legislation that allows for the shooting down of a hijacked airplane; such a sacrifice cannot be justified, it is taboo. Moreover, the judgment also marks a turning point in the constitutional discourse about anti-terrorist measures. The FCC clearly rejects any kind of instrumentalist approach; to allow the state to sacrifice the lives of some persons in order to save the lives of more persons is not only unjustifiable, it is also *unthinkable*. Some politicians, however, disagree with this view. The former Minister of the Interior, Wolfgang Schäuble, and his party, the Christian Democrats, raised the issue of 'renegade' aircrafts on several occasions after the FCC's decision and pleaded for a constitutional amendment that would allow the deployment of the air force against 'renegade' aircrafts,¹³ but as the Social Democrats rejected such a move, the two-thirds parliamentary majority necessary for an amendment was never within reach. Nonetheless there is still considerable unease about the situation among those who rather prefer a Hobbesian approach towards security, and some legal scholars expressed fear that the decision would leave the German state 'defenceless' against terrorist threats.¹⁴

The evolution of a German militant security state: Hobbesianism constitutionally reloaded

Historically, Thomas Hobbes' Leviathan may be to blame for the idea that we need a strong state whose primary goal is to defend the safety and security of its citizens at all costs. In the Federal Republic of Germany, a renaissance of Hobbesian concepts of the State began in the early 1970s. After a wave of politically motivated bank robberies, kidnappings and assassinations (committed by the Baader-Meinhof Terrorist Group and its followers, the Red Army Fraction, RAF) had shaken the Federal Republic, and resulted in sometimes hysterical responses by state institutions,¹⁵ a new constitutional discourse about security began in Germany. Some

¹³ Thomas Darnstädt (2007) 'Finger am Abzug', *Der Spiegel*, 19 September 2007. Available at: <<http://www.spiegel.de/politik/deutschland/0,1518,506680,00.html>>.

¹⁴ Ulrich Palm (2007) 'Der wehrlose Staat? Der Einsatz der Streitkräfte im Innern nach der Entscheidung des Bundesverfassungsgerichts zum Luftsicherheitsgesetz', *Archiv des öffentlichen Rechts*, 132: 95-113.

¹⁵ In a wave of anti-terrorism legislation, the government restricted criminal defence rights, facilitated wire-tapping, and introduced a special procedure in anti-terrorism trials, among other measures. Additionally, there are reports that claim that during a meeting of the 'security cabinet' (an ad-hoc meeting of Federal and state government leaders) the former prime minister of Bavaria, Franz-Josef

scholars took up the idea that security is not just a public good among others, such as social security or a functioning infrastructure, but they claimed that it is of constitutional value, embodied in various provisions within the *Grundgesetz*, the constitution itself.¹⁶ This idea was finally brought to the point in 1983 when Josef Isensee claimed that there is a fundamental right to security, the *Grundrecht auf Sicherheit*.¹⁷ Isensee argued that Article 2.2 of the *Grundgesetz*, which guarantees the 'right to life'¹⁸, contains an individual right that can be activated against state institutions if they do not provide for the necessary level of protection, and he also claimed that this right can justify certain restrictions on individual liberties. In other words: The 'right to security' can be used to justify extensive police powers vis-à-vis the citizens. Additionally, this construct of a kind of individual-collective right to security would open up an arena for balancing individual rights to liberty against the individual right to effective security.

Attempts to persuade the German FCC about the existence of such a right, however, have failed so far – the FCC has not taken up this terminology of a general 'right to security' in its decisions. It did, however, confirm that there is a certain duty to protect the individual when dramatic events compelled the court to take a stance. In autumn of 1977, famously coined 'Der Deutsche Herbst', when terrorist activities of the Red Army Fraction culminated in the kidnapping of Hans-Joachim Schleyer, then chairman of the German Employers Association and a very influential public figure of corporate Germany, the court had to make a tragic choice.¹⁹ The kidnapers demanded the release of eleven RAF prisoners. When the government decided not to give in, Schleyer's wife and sons turned to the FCC and asked the court to order the release of the prisoners in exchange for Schleyer's life. The court rejected the application. It argued that the government institutions indeed have a general duty to protect the life of its citizens, as stated in Article 2.2 of the *Grundgesetz*, but that only the government can decide in which way to fulfill this duty.²⁰

Strauß, suggested to shoot and kill the leading members of the Red Army Fraction who were serving their sentences or awaiting trial in a jail in Stuttgart-Stammheim. The 'security cabinet' meeting was held in autumn of 1977 when a group of terrorists hijacked a German passenger plane and threatened to blow it up if the RAF leaders were not released immediately. A German police commando later freed the hostages; in the same night, the RAF leaders allegedly committed suicide. For a detailed account of these incidents, see Stefan Aust (1985) *Der Bader-Meinhof-Komplex*, Hamburg: Hoffmann und Campe.

¹⁶ For a critique of this terminological shift from a constitutional order that is protecting *rights* to a constitutional order that is protecting the *safety of citizens* by imposing limitations on their fundamental rights, see Erhard Denninger (1994) *Menschenrechte und Grundgesetz*, Weinheim: Belz Athenäum.

¹⁷ Josef Isensee (1983) *Das Grundrecht auf Sicherheit. Zu den Schutzpflichten des freiheitlichen Staates*, Berlin: de Gruyter.

¹⁸ Art. 2.2 sentence one reads: '*Jeder hat das Recht auf Leben und körperliche Unversehrtheit*' ('Every person shall have the right to life and physical integrity').

¹⁹ For the RAF, Hans-Joachim Schleyer represented perfectly the capitalist system of the Federal Republic and its repressive character. Schleyer had been a Nazi functionary until 1945. After the war he started working at the Daimler-Benz AG and finally rose to the board of the company. In addition, he became president and spokesperson of the Federal Employers Association, thus representing the whole German industry, and he wielded massive influence on the Christian Democratic Party, CDU. See Lutz Hachmeister (2004), *Schleyer. Eine deutsche Geschichte*, Munich: Beck.

²⁰ Case no. 1 BvQ 5/77 of 16 October 1977, BVerfGE 46, 160-165. Three days later, on 19 October 1977, the kidnapers declared that they had executed Schleyer. His body was found dead in the trunk of an abandoned car.

Despite this lack of support by the FCC, the idea of a general 'right to security' penetrated the legal and political discourses on public safety and security. Perennial discussions about declining public safety, accompanied by accounts on a new dimension of crime in the form of organised crime and terrorism, kept this security discourse alive throughout the 1980s and 1990s. In 1994, Erhard Denninger rightly stated that a paradigmatic transformation – from liberty to security – had been firmly established.²¹ An instrumentalist thinking had spread within contemporary constitutional thought and practice²². It has challenged traditional notions of liberal rights and influenced the discourse about public law in all its facets. The security paradigm supports an erosion of fundamental achievements of the rule of law/Rechtsstaat principle. Under its banner, policing becomes pre-emptive instead of being bound to factual indicators of a danger to public safety,²³ and criminal law, once coined as the 'magna charta of the criminal'²⁴, turns into *Feindstrafrecht*.²⁵ Echoing Hobbes' concept of crime and punishment, according to which 'harm inflicted upon one that is a declared enemy falls not under the name of punishment'²⁶, those who are under suspicion to fundamentally challenge the authority of the state cannot be treated as fellow citizen any more, but have to be treated differently, as an enemy. Against this enemy a different kind of criminal law is needed: a criminal law that allows for special tribunals and special interrogation measures, such as sleep deprivation, waterboarding, threat of violence, in short: torture. Even though domestic and international law clearly defines torture as unlawful²⁷, some German legal scholars debated justifications for police torture²⁸, for example, in case of a

²¹ Denninger, *supra* note 16. Denninger argues that this turn from liberty to security is part of a greater conceptual transformation from the French Revolution trias *Freiheit, Gleichheit, Brüderlichkeit* to *Sicherheit, Vielfalt, Solidarität* (from *Liberty, Equality, Fraternity* to *Security, Diversity, Solidarity*), a transformation that fundamentally challenges the legal construction of classical liberal rights.

²² For a similar account in the context of the UK, see Ian Loader and Neil Walker (2007) *Civilizing Security*, Cambridge: Cambridge University Press.

²³ Günter Frankenberg (2005) 'Kritik des Bekämpfungsrechts', *Kritische Justiz*, 38: 370.

²⁴ Franz von Liszt (1893) Deterministische Gegner der Zweckstrafe, *Zeitschrift für die gesamte Strafrechtswissenschaft*, 13: 325, at 358.

²⁵ This term literally means 'criminal law for the enemy'. It denotes special criminal law provisions directed against individuals who do not count as fellow citizens, but as, for example, 'unlawful combatants'. What was once coined as a critique, however, is now more and more often used in an affirmative sense, for example by Günter Jacobs (2003) 'Bürgerstrafrecht und Feindstrafrecht' in Yu-hsiu Hsu (ed.) *Foundations and Limits of Criminal Law and Criminal Procedure* 41, Taipei. Available at: <<http://www.hrr-strafrecht.de/hrr/archiv/04-03/index.php3?seite=6>>.

²⁶ Thomas Hobbes (1651) *Leviathan*, chapter 28 (rules inferred from the definition of punishment, eleventh and last rule).

²⁷ See e.g. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/RES/39/61 (Dec. 10, 1984), and Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (often referred to as the European Convention on Human Rights), CETS no. 005 of 03 September 1953.

²⁸ See Winfried Brugger (1996) 'Darf der Staat ausnahmsweise foltern?', *Der Staat*, 35: 67-97. In his article Brugger revives a scholarly discussion about torture in a 'ticking bomb situation' that has been around since Jeremy Bentham used this example in his writings about utilitarianism in the 1770s. See W.L. Twining & P.E. Twining (1973), Bentham on Torture, 24 *N. Ir. L. Q.* 305, 347. In the U.S., this type of utilitarianism came into the academic spotlight again when Alan Dershowitz (2002) called for the use of judicially sanctioned torture to force a terrorist suspect to reveal information that would prevent an imminent terrorist attack. See Alan Dershowitz (2002) *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, New Haven: Yale University Press .

kidnapping where the kidnapper is caught and the hostage is believed to be in a life-threatening situation, as early as the mid-1990s.²⁹

The 9/11 attacks have accelerated this transformation from traditional policing to a compound of 'combat law'. Moreover, the idea of a new, more aggressive concept of policing not only gained momentum in domestic arenas. It assumed a global dimension, propelled especially by coordinated policies of the European Union and its Member States,³⁰ the U.S. as victim of a major terrorist attack, and the United Nations, which had already established in 1999 its own measures against global terrorism, such as the 'terror list' of the Security Council.³¹ The most important characteristic of the new waves of security legislation, enacted after 9/11, after the Madrid train bombings (2004) and the London attacks (2005) is that they originate in strategies that were established transnationally, and not domestically. The 'global security architecture' that has since emerged is increasingly detached from its anchoring in (popular) sovereignty and the territorial nation state, and it becomes subject to 'security-technical rationalisation', while the institutions of the nation state are transformed step by step into a *security agency*,³² situated within a network of militant security states.

Militant security governance is based upon an intrinsic logic of a Hobbesian nature, and it can claim a high degree of legitimacy for its actions - especially if it can be justified by a constitutional order whose primary goal is to protect the citizens against all kinds of threats. As a consequence, the security governance philosophy turns the idea of individual rights on its head. Indeed, if the government's role is to create an effective and protective shield because it has a legal duty to do so – a duty which is the other side of the coin of an individual 'right to security' – then we can safely claim that restrictions on security governance need an additional justification, and not those restrictions that further limit individual liberties.

Additionally, security governance actions appear to be backed both by private autonomy and public autonomy, by fundamental rights and popular sovereignty

²⁹ Unfortunately this is not a fabricated case from a legal philosophy textbook, but an actual case involving a law student from the University of Frankfurt who kidnapped an eight year old boy and asked the family for ransom. After the kidnapper was caught during the ransom delivery the Frankfurt vice police commissioner threatened him with torture, and the student confessed. The boy was not saved; the kidnapper had killed the boy shortly after the abduction. A Frankfurt criminal court sentenced the police commissioner for his actions, but the sentence was rather mild. The European Court of Human Rights held that Germany had violated the Convention, see ECHR, case of *Gäfgen v Germany*, application no. 22978/05, judgment of 01 June 2010. Available at: <<http://www.echr.coe.int>>.

³⁰ Numerous 'security packages' (or similar legislative projects; 'security package' is the German terminology) have been enacted in all member states of the EU. For an overview over the co-ordinated strategies of the member states in the framework of Article 29 et seq TEU (co-operation in criminal and judicial matters), see Neil Walker (2004) 'In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey' in Neil Walker (ed.), *Europe's Area of Freedom, Security and Justice*, Oxford: Oxford University Press. For an analysis of the first two German 'security packages' enacted after September 11, see Verena Zöller (2004) 'Liberty Dies by Inches: German Counter-Terrorism Measures and Human Rights', *German Law Journal*, 5(5): 469-494. Available at: <<http://www.germanlawjournal.com>>.

³¹ The UN 'Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities' provides a list of 454 persons and entities. Available at: <<http://www.un.org/sc/committees/1267/pdf/consolidatedlist.pdf>>.

³² Klaus Günther (2005) 'World Citizens between Freedom and Security', *Constellations*, 12(3): 379-391, esp. at p. 382.

alike.³³ If the citizens can claim a high degree of security from the state because they have a right to be protected, and if the same citizens decide upon legal measures safeguarding an effective protection via their parliamentary representatives, there seems to be *no a priori* legal limit for militant security governance. Global governance, then, turns the 'right to security' into a ubiquitous tool for justification: from indefinite detainment over extensive (bio)data collections on an unprecedented scale to torture networks, and from pre-emptive shootings of suspects and hijacked or suspect passenger planes to pre-emptive wars, the security paradigm seems to trump the traditional notion of inalienable individual rights and replaces them with the rule that the end justifies the means.

The FCC's decision in the Aviation Security Act case marks a turning point in this regard. It declares that whatever the threat may be, below the threshold of a full-fledged, traditional war situation, all constitutional boundaries and guarantees have to be respected. This principled attitude considerably limits those who attempt to justify any means with their good intention to provide security. If organised state cruelties like torture³⁴, or a sacrifice of innocent civilians by way of shooting down 'renegade' aircrafts, do not remain a taboo that can never be regulated by statute, the idea of law is downgraded to a mere instrument of the state, a *dispositivum* within the security paradigm.

The role of the Global Militant Security Governance in the making of the Aviation Security Act

The Air Security Act emanates from the new influence the Global Militant Security Governance structure has on national legal orders. This new influence does not stem from a hierarchy of norms, where international law trumps national law, but from a new regulatory technique – an informal security governance regime that is less visible but more effective than traditional, treaty-based international law.³⁵ Informal security governance acts 'in the shadow of the law', especially by means of regulatory pre-cooking.³⁶ Its main characteristics are: (a) a horizontal transnational co-operation between governments or government agencies; (b) this co-operation produces regulations and directives instead of clearly defined legal rules; and (c) these regulations and directives are implemented at the national level as if it was an inescapable necessity to do so.

³³ Rainer Nickel (2007) 'Private and Public Autonomy Revisited: Jürgen Habermas' Concept of Co-Originality in Times of Globalisation and the Militant Security State', in Martin Loughlin and Neil Walker (eds) *The Paradox of Constitutionalism*, Oxford: Oxford University Press, pp. 147-167.

³⁴ See Günter Frankenberg (2008) 'Torture and Taboo: An Essay Comparing Paradigms of Organized Cruelty', *American Journal of Comparative Law*, 56: 403-422, for a thorough reconstruction of recent strategies to justify torture for 'good' ends.

³⁵ For critical accounts of the global governance discourse, see Martti Koskeniemi (2007) 'The Fate of Public International Law: Between Technique and Politics', *Modern Law Review*, 70(1): 1-30; Martti Koskeniemi (2004) 'Global Governance and Public International Law', *Kritische Justiz*, 37: 241-254; David Kennedy (2008) 'The Mystery of Global Governance', *Ohio Northern University Law Review*, 34: 827-860.

³⁶ For a more detailed account and critique of transnational governance structures, see Rainer Nickel (2010) 'Participatory Transnational Governance' in Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance, and Social Regulation*, Oxford: Hart Publishing, 2nd ed.

Often the influence of transnational regulatory governance is barely visible. In the ‘renegade aircraft’ case, for example, the attempt of the German government to blur the division between military and police operations within the borders of Germany appears to be a purely national issue. This is, however, not true. The initiative to launch new legal rules was taken outside of the national arena, in the NATO governance structure called the NATO Military Committee, composed of the Chiefs of Defence of North Atlantic Treaty Organization (NATO) member countries. During the NATO summit in Prague in May 2002, the North Atlantic Military Committee adopted document number MCM 062-02, a document that apparently binds the NATO member states to introduce new regulations for the so-called ‘renegade aircraft’ cases.³⁷ The official NATO summit press release is silent about this decision, and the document can neither be found on the NATO website, nor anywhere else on the Internet. In other words, it seems to be a secret (‘classified’) document. Legal research on this topic undertaken by Domenico Siciliano, an Italian legal scholar, has revealed that not only Germany, but also Italy and Spain introduced new regulations concerning ‘renegade aircrafts’ after the adoption of document MCM 062-02, but neither the government of Germany nor the governments of Italy or Spain have publicly made clear that they execute a NATO governance document.³⁸ In Italy, the existence of such a document came to light only because a member of the Italian Parliament, Tana de Zulueta of the Green Party, asked the government to respond to rumors that the Italian Prime Minister Berlusconi had issued a ‘Special Decree’ in which he authorised the minister of defence to order the Italian air force to strike down a ‘renegade aircraft’. In its response to Zulueta’s question the Italian government referred to the ‘NATO directive MCM 062-02’ and stated that NATO had delegated the responsibility to shoot down an aircraft to the national authorities, and therefore an Italian regulation was needed.³⁹

Traces of the ‘renegade aircraft’ concept can also be found in the German discussion surrounding the Air Security Act. During the debates about the Act, a member of parliament repeatedly (and vaguely) referred to the ‘renegade’ concept and stated that the regulations in the act were ‘basically nothing new’ because they were already part of a ‘NATO regulation’. Finally, similar remarks are also reported from Spain. In 2004, the Spanish government under prime minister Aznar publicly declared that the state secretary for security was the ‘national authority’ in renegade cases (entrusted with the decision to take measures), and that this nomination was necessary because of a demand from NATO. In its National Defence Law (*Ley Organica de la Defensa*

³⁷ A report by Lord Jopling (United Kingdom) to the NATO parliamentary assembly mentions that ‘[i]n the aftermath of 9/11, the Prague Summit in 2002 adopted the “RENEGADE concept” in the event of use of an aircraft as a weapon to perpetrate terrorist attacks.’ Lord Jopling, Special Rapporteur, *The Protection of Critical Infrastructures*, 162 CDS 07 E rev 1. Available at: <<http://www.nato-pa.int/default.asp?SHORTCUT=1165>>.

³⁸ Domenico Siciliano (2009) ‘Governance im luftleeren Raum’, *Kritische Justiz*, 42: 40-48 (in German); see also Domenico Siciliano (2010) ‘Governance nello spazio giuridicamente vuoto. Il caso della disciplina giuridica per la sicurezza dello spazio aereo: un confronto tra Germania, Italia e Spagna’, in *Iuris Quidditas’ – Liber Amicorum per Bernardo Santalucia*, Naples: Editoriale Scientifica, with a detailed description and analysis of the legal responses in Germany, Italy and Spain.

³⁹ Camera dei Deputati, Atti parlamentari, Allegato B ai resoconti, seduta del 13 novembre 2007, p. 9325 ss. The documents are available at:

<<http://www.tanadezulueta.it/html/modules/wfsection/article.php?articleid=186>>.

National) the Spanish parliament approved in 2005 a 'military response' in case renegade airplanes pose a threat to 'the life and the interests of the population'⁴⁰.

The history of the NATO 'renegade' concept shows that Global Militant Security Governance serves government interests in two respects: it, on the one hand, enables government actors to 'pre-cook' solutions for legal problems and, on the other hand, to sell these solutions to their parliaments as binding rules that have to be enacted. The interplay of government actors within global governance networks has the additional advantage that neither the pre-cooking process nor its results are subject to public scrutiny. Established means of accountability, such as effective parliamentary oversight, or civil society involvement, fail or can be avoided. Especially in Westminster-type democracies, where the government is backed by a parliamentary majority, it is rather unlikely that the parliament decides not to support the policy of its government as this can ultimately lead to a political crisis and, ultimately, to a loss of power. Only the courts, and especially constitutional courts, may be independent enough to interrupt this machinery. In this regard, the FCC's strong wording in its decision about the Air Security Act represents a rare glitch in the world of a smoothly operating Global Militant Security Governance.

'We have information about you...' The effects of Global Information Governance

Data protection in the information age

Data protection is a constitutional right in Germany⁴¹ and in the European Union.⁴² In its census decision (*Volkszählungsurteil*) in the wake of the Orwellian year 1984⁴³ the Federal Constitutional Court affirmed that the *Grundgesetz* contains a 'basic right to informational self-determination' and held that this 'basic right warrants [...] the right

⁴⁰ See Siciliano, *supra* note 38, pp. 371-72 for further references; see also the report of Manuel Gonzalez (2005) 'El Congreso regula por la ley la respuesta ante ataques suicidas como los del 11-S', *El Pais*, 28 June 2005.

⁴¹ FCC, decision of 15 December 1983, case no. 1 BvR 209/83, BVerfGE 65, 1. This right particularly differs from a more vague and general concept of privacy in two respects: (1) limitations on the right have to be based upon statutory law enacted by parliament, and (2) the right itself has a political and societal function: Unregulated or under-regulated data mining activities of public authorities do not only touch upon citizen's privacy, they inherently convey also a potential to undermine democratic processes (as they can have a chilling effect on public discourses). For a detailed comparison between the U.S. concept of 'privacy' and European concepts of data protection, see Francesca Bignami (2007) 'European Versus American Liberty: A Comparative Privacy Analysis of Antiterrorism Data Mining', *Boston College Law Review*, 48: 609-698.

⁴² The EU Charter of Fundamental Rights, in force since 1 December 2009, contains in its Article 8 the following right:

Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

⁴³ George Orwell (1949) *Nineteen Eighty-Four. A novel*, London: Secker & Warburg. Orwell depicts a world of perpetual war with pervasive government surveillance.

and capacity of the individual to determine in principle the disclosure and use of his/her personal data'. This right, however, is constantly under siege, and after September 11 the German parliament enacted several waves of legislation, often based upon European Union framework directives or common positions of the EU member states, which especially covered data mining activities. All these statutory measures extended the legal basis for governmental data mining operations, and inevitably, some of these provisions were challenged in front of the Federal Constitutional Court.

Three court decisions are particularly noteworthy in this context. In 2008 the court held that the *Grundgesetz* contains in its Articles 2.1 (personal liberty) and 1.1 (human dignity) a 'fundamental right that guarantees the confidentiality and integrity of information technology systems'⁴⁴ and struck down a state law that authorised state intelligence agencies to carry out so-called online searches. This technique consist of a secret infiltration of computers (especially personal computers) by the police or security agencies. It enables the intruder to, for example, search the hard disk and copy files from it, or to supervise and register which websites an Internet user visits. The court found that the statutory basis for online searches was too vague, and that interventions in the fundamental right are admissible only if they meet strict criteria, such as an imminent danger for a person's life. Additionally, an online search has to be ordered by a judge.⁴⁵

A second decision concerns data retention of communication data. A federal statute, enacted in 2007, forced telecommunications companies to store all connection data of their clients for a period of up to six months after the communication took place. This included telephone and mobile phone communications as well as data from online communication, Internet use and email traffic. The statute was based on a European Union directive that had to be implemented by Germany.⁴⁶ Based on the principle of proportionality the FCC declared major parts of the legislation unconstitutional and set very detailed conditions for future legislation on this topic.⁴⁷

Additionally, in 2006 the FCC declared a data mining operation that took place immediately after September 11 unconstitutional.⁴⁸ In the weeks after the attacks, when it became apparent that a number of the attackers had studied at German universities, the state police authorities ordered and coordinated a complete scan of student data. The goal was to single out possible 'sleepers' by using the following search terms: male, age between 18 and 40, student or former student, Islamic religious denomination, country of birth, or national of certain specified countries with predominantly Islamic population. The results were stored in a separate file,

⁴⁴ FCC, decision of 27 February 2008, case no. 1 BvR 370/07, head note 1. The decision is available at: <http://www.bverfg.de/entscheidungen/rs20080227_1bvr037007.html>.

⁴⁵ FCC, *supra* note 44, head notes 2 and 3.

⁴⁶ Directive 2006/24/EC of the European Parliament and the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, Official Journal (OJ) L 105/54, 13 April 2006.

⁴⁷ FCC, decision of 2 March 2010, case no. 1 BvR 256/08. Available at: <http://www.bverfg.de/entscheidungen/rs20100302_1bvr025608.html>.

⁴⁸ FCC, decision of 4 April 2006, case no. 1 BvR 518/02. Available at: <http://www.bverfg.de/entscheidungen/rs20060404_1bvr051802.html>.

accessible and shared by all sixteen state police authorities, under the file name 'sleeper file'.⁴⁹ The FCC held that this measure was unconstitutional:

A general threat to security, as it existed with regard to the terrorist attacks since September 11, 2001, or political tensions in the external relations, cannot sufficiently justify a computer-based, systematical data mining operation [*Rasterfahndung*], grid search]. Additional facts are necessary that add up to a concrete danger, for example the preparation or execution of terrorist attacks.⁵⁰

These three examples of effective judicial oversight suggest that if parliament cannot resist calls for militant security measures, at least the FCC upholds minimum restrictions on data mining operations of governmental agencies. There are, however, a number of reasons for concern; governmental agencies do not necessarily wait for the legislator to introduce a statutory basis for the gathering, retention, processing or sharing of information. Moreover, many examples from the recent past show that legislators are quite often willing to pass legislation that is overly vague and unclear in order to facilitate the work of police authorities and information agencies. And finally, it is sometimes not even possible to find out who exactly gathered, stored, processed or shared information with whom, and which authorities were connected to the information network. This indeterminacy can produce serious and harmful results, especially if the information is incomplete or incorrect.

Tales of collateral damage

The effects of new Global Militant Security Governance techniques can be positive – they can prevent future attacks and help find and stop possible perpetrators before they act.⁵¹ Some citizens, however, pay a high price for this fundamental change from criminal prosecution to preventive measures and pre-emptive actions. For example, there are numerous reports about incomplete or inaccurate information about persons whose names ended up on the infamous US 'no fly list'⁵² or the extended 'watch list'⁵³.

⁴⁹ FCC, *supra* note 48, paragraph 7 and 8.

⁵⁰ FCC, *supra* note 48, headnote 2 (translation by the author). The court could – and should – have mentioned a number of other possible grounds for its decision. In view of the fundamental right to equality and non-discrimination (Articles 3.1 and 3.3 *Grundgesetz*) it should have called the data mining operation a plain and obvious case of an unconstitutional discrimination on the grounds of gender, age, religion and national or ethnic origin.

⁵¹ There are, however, also serious concerns about the effectiveness of militant security measures such as extensive data collections and unlimited communication surveillance measures. In some of its decisions on those measures the FCC has expressly raised doubts whether the government's claim about the necessity of far-reaching measures hold closer scrutiny, see FCC, *supra* note 37, paragraph 10, where the court reports that Internet users can take technical measures in order to prevent governmental online searches, and FCC, *supra* note 41, paragraphs 33 and 120, where the court states that although in the course of the post-9/11 grid search personal data of 5.2 million persons were transferred to a security agency, and the 'sleeper' file contained data of 32.000 persons, not a single criminal procedure resulted from the operation.

⁵² For accounts on how difficult it is to be deleted from this list, see Mike MacIntire (2010) 'Ensnared by Error on Growing U.S. Watch List', *New York Times*, 6 April 2010; Scott Shane (2010) 'American Man in Limbo on No-Fly List', *New York Times*, 15 June 2010.

⁵³ After an attempt to blow up a jetliner bound for Detroit on Christmas 2009, President Obama ordered a review of security at international airports in the U.S. According to a report in the *New York Times*, the intelligence based security system is devised to raise flags about travelers whose names do not appear on

The technique of setting up lists has become very popular after September 11, and from the United Nations to domestic security agencies, institutions around the world set up collections of personal data and share this information with other security agencies and institutions. Transnational intelligence exchange was barely regulated when the attacks occurred, and this enabled security agencies to simply act and exchange data on a large scale. Only slice by slice has this practice come under legal scrutiny.⁵⁴

From Bremen to Guantanamo: The odyssey of Murat Kurnaz and his personal data

A ban from flying to the U.S. can have very negative effects on the life of those affected by this measure.⁵⁵ An even more serious example of the far-reaching influence of the new global security governance has to do with Guantanamo. The story begins in Bremen, where Murat Kurnaz was born as a Turkish citizen in 1982. Kurnaz, a legal resident of Germany, was in the process of becoming a German citizen when he was arrested in Pakistan in late 2001. He was held in extrajudicial detention and had been tortured at the U.S. military base in Kandahar, Afghanistan and in the U.S. military prison at Guantanamo Bay Naval Base, Cuba for four years. His Internment Serial Number was 53.⁵⁶ After being imprisoned for a total of almost five years he was released and arrived in Germany 24 August 2006. On 20 May 2008, Kurnaz became the first former Guantanamo detainee to testify before the U.S. Congress, which he did from Germany via videolink.⁵⁷

How did Murat Kurnaz end up in Guantanamo? When he was 19 years old he became interested in Islam, started to visit Mosques in Bremen on a regular basis, and finally decided to visit Pakistan, where he wanted to explore the madrasas together with a friend. Kurnaz' family was concerned about his development because he wanted to go to Pakistan in November 2001, shortly after September 11 and at a time when a U.S. invasion of neighboring Afghanistan was imminent. This sounded suspicious to them. Kurnaz' family contacted the Bremen police, and the public prosecutor opened up an investigation because family members had uttered fears that Kurnaz may join the Taliban in their fight against the U.S. Although Kurnaz' trip was delayed because of the investigation he finally boarded a plane and took off.

Kurnaz went to Pakistan, where he was arrested by Pakistani police during a routine control in a bus. There was no arrest warrant, no procedure, no trial. At the U.S. end

no-fly watch lists, but whose travel patterns or personal traits create suspicions: Jeff Zeleny (2010) 'Security Checks on Flights to U.S. to Be Revamped', *New York Times*, 1 April 2010.

⁵⁴ See, for example, the long legal battle of persons and institutions to be deleted from the 'UN terror list' in the cases of Yusuf Kadi and the Al Barakaat foundation. After they were added to the list in October and November 2001 it took the EU Court system almost seven years to rule that there need to be legal remedies against this measure, see European Court of Justice, joint decision of 03 September 2008, cases of *Kadi and Al Barakaat v European Council and European Commission*, cases no. C-402/05 and C-415/05.

⁵⁵ See the numerous case studies mentioned in the New York Times articles quoted above, *supra* note 52.

⁵⁶ See United States State Department of Defense, 'List of Individuals Detained by the Department of Defense at Guantanamo Bay, Cuba from January 2002 through May 15, 2006'. Available at: <<http://www.defense.gov/news/May2006/d20060515%20List.pdf>>.

⁵⁷ Jason Ryan (2008) 'Former Detainee Describes "Water Treatment"', *ABC news*, 20 May 2008. Available at: <<http://abcnews.go.com/TheLaw/LawPolitics/story?id=4896217&page=1>>.

of this case there are questions about the constitutional legitimacy of detention and torture, but at the German end of this case there is especially one question that needs to be asked (and answered): how did the 'intelligence' concerning Kurnaz end up in the hands of the Pakistani police?

International co-operation in criminal matters usually follows formalised procedures. The main instrument is the arrest warrant, issued by the domestic judge. This is followed by extradition procedures between the countries involved if the suspect has been arrested. None of this applies here, where the Bremen authorities, via the Federal Government, obviously disseminated information about Kurnaz, in a clear violation of his constitutional rights, namely the right to an efficient protection of his personal data. This right demands that there needs to be a statutory basis for the exchange of data with foreign countries, and that there are preconditions and limits to this process that have to be effectively controlled. No such effective legislation existed in 2001, no control was installed, no precise preconditions for a data transfer were set.

The Federal Data Protection Act (*Bundesdatenschutz-Gesetz, BDSG*) contains in its chapter 4a on 'Transfer of Personal Data to Foreign Countries or to Supra- and Transnational Authorities' provisions that regulate preconditions and limits of cross border data exchange.⁵⁸ These provisions, however, are only vaguely formulated and contain a number of equally vague exceptions. Additionally, they ask for an 'adequate level of data protection' in the receiving state. It is widely held that the U.S.⁵⁹ does not fulfill this condition⁶⁰, and it is beyond any reasonable doubt that Pakistan does not provide for any adequate level of effective data protection. Nonetheless the U.S. somehow learned about Kurnaz, informed Pakistan (or vice versa, nobody knows), and Kurnaz ended up in Guantanamo.

This case illustrates a new quality in transnational security co-operation. It is, firstly, a new quality of a de-formalisation of security governance processes. Facilitated by email and the Internet, security agencies and police authorities can exchange information much faster and easier than ever before, and without leaving a paper trace. Until this day it is unclear how Kurnaz' data ended up in the hands of Pakistani police. There are unconfirmed reports according to which, after September 11, the U.S. demanded from its allies (including Germany) to be immediately informed about any suspicious activities, and German authorities willingly complied.⁶¹

⁵⁸ The BDSG is available (in German) at: http://www.gesetze-im-internet.de/bundesrecht/bdsg_1990/gesamt.pdf.

⁵⁹ For a detailed analysis of major differences between the U.S. and the European concept of data protection, see Bignami, *supra* note 41.

⁶⁰ During the debates about the 2008 agreement between the U.S. and Germany on cooperation in criminal matters the State chamber (*Bundesrat*) criticised that the U.S. does not meet German or European standards of data protection, see *Bundesrats-Drucksache* (Federal Länder Chamber printing matter) no. 331/1/09 of 04 May 2009, Report on the 858th session of the Federal Länder chamber. Nonetheless, on 11 September 2009 (sic!) the Federal parliament ratified the 'Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America on enhancing cooperation in preventing and combating serious crime'. This agreement contains far-reaching powers for cross-border data transfer, see <http://npl.ly.gov.tw/pdf/7043.pdf> (with the official English text of the agreement).

⁶¹ In 2006, Radio Bremen (a local radio and television station) aired a documentary about the Kurnaz case. In an interview with the public prosecutor who was in charge of Kurnaz' case, the prosecutor said

Secondly, this exchange culture promotes the dissolution of institutional and legal boundaries between criminal investigators (police and prosecutors) and those ‘secret’ government agencies whose sole task is to gather information, again for limited purposes. To keep up this separation between police forces and information-gathering agencies is another demand from German history, where the institution of the Gestapo (*Geheime Staatspolizei*, literally: Secret State Police) symbolises the consequence of a combination of both unlimited investigation powers and unlimited arrest powers.⁶²

The legal task of information-gathering agencies in the Federal Republic of Germany is to collect information (and not rumors!). These agencies do not possess any police powers; they cannot arrest people, they cannot use force, etc. In short: they observe, but they do not act. However, if the limits of police activities are shifted towards ‘pre-emptive prevention’, and if the threshold is lowered piece by piece until rumors and hearsay replace the concept of reasonable cause based on facts, there is no more limitation between intelligence agencies and police authorities left to speak of.⁶³ They become undistinguishable from each other, they melt into a pre-emptive prevention compound of governmental activities. The likely result is that legal limits for police actions, developed over centuries⁶⁴ and guaranteed in the *Grundgesetz* and statutory law, are rendered toothless.

From Bavaria to the ‘Salt Pit’: The ordeal of Khaled el-Masri

Informal transnational mutual co-operation has also facilitated various forms of outsourcing: in a number of cases, interrogation and torture networks have effectively replaced criminal procedures and the rule of law.⁶⁵ A considerable number of European countries have supported the establishment of – plainly illegal – torture networks and enabled ‘extraordinary rendition’ flights used for the distribution of

that ‘the Americans wanted to know everything’ and that he was ‘ordered to report any suspicious activities to the U.S. authorities’. There was no mentioning of the Federal Data Protection Act.

⁶² For an analysis, see the accounts of Ernst Fraenkel and Franz L. Neumann, *supra* note 8.

⁶³ The Bremen *Verfassungsschutz* (a state information agency whose task is to observe radical groups, but does not have any police authority) apparently delivered detrimental reports based on hearsay and rumors, and this may have led to the effect that Kurnaz was not released in 2002 (when the U.S. first came to the conclusion that he is probably harmless), but remained in Guantanamo until 2006. See the report by Florian Güzgen, Uli Rauss and Oliver Schröm in the news magazine Stern, 22 February 2007. Available at: <http://www.stern.de/politik/deutschland/fall-kurnaz-verbannt-aufgrund-hoerensagens-583228.html>.

⁶⁴ In Prussia, the *Preussische Allgemeine Landrecht* (PrALR) from 1794 represents the first attempt to regulate all aspects of public life, including police actions. In 1882, the *Preussische Obergerverwaltungsgericht* (Prussian Superior Administrative Court, PrOVG), in its Kreuzberg decision, defined the limits of policing and defined the threshold for police actions: It can act only if there is a ‘danger to public safety’, and a decision to take police action has to be based on facts that establish a probable cause; PrOVG, decision of 14 June 1882, reprinted in *Deutsches Verwaltungsblatt*, 1985: 219-221. For an account of the history of German public law (including its darker legacies), see Michael Stolleis (1988) *Geschichte des Öffentlichen Rechts in Deutschland*, vol. 1, München: Beck; Michael Stolleis (1992) *Geschichte des Öffentlichen Rechts in Deutschland*, vol. 2, München: Beck; Michael Stolleis (1999) *Geschichte des Öffentlichen Rechts in Deutschland*, vol. 3, München: Beck.

⁶⁵ Francesca Bignami (2007) ‘Towards a Right to Privacy in Transnational Intelligence Networks’, *Michigan Journal of International Law*, 28: 663-686, reports about a similar case from Canada: On the basis of ‘inaccurate and misleading intelligence provided by the Canadian government’, the Canadian national Maher Arar was wrongfully deported from the U.S. to Syria, where he was tortured and held captive for nearly one year. Cf. Bignami, pp. 664 and 674-680.

prisoners who were secretly detained and tortured somewhere in the world.⁶⁶ Many more European and non-European countries have benefitted (if that is the correct expression) from intelligence gathered this way, allegedly also including Germany.

One of these prisoners was Khaled el-Masri, a German citizen of Lebanese origin. He was kidnapped and apparently later tortured by the Central Intelligence Agency (CIA) in the framework of the so-called extraordinary rendition procedure.⁶⁷ In what reads like a tale out of a Hollywood movie, the Washington Post describes the plot as follows:

Khaled al-Masri was supposed to have been disappeared by black-hooded CIA paramilitaries in the dead of night. One minute he was riding a bus in Macedonia, the next – poof – gone. Grabbed by Macedonian agents, handed off to junior CIA operatives in Skopje and then secretly flown to a prison in Afghanistan that didn't officially exist, to be interrogated with rough measures that weren't officially on the books. And then never to be heard from again -- one fewer terrorist in the post-9/11 world.⁶⁸

El-Masri was detained by the police in Skopje, Macedonia, on 31 December 2003. The CIA flew him first to Bagdad and then to Afghanistan, where he was held and allegedly tortured in the 'Salt Pit', an infamous detainment site. On 28 May 2004 el-Masri was released; the CIA flew him back to Europe and left him at night on a desolate road somewhere in Albania, without an apology or funds to return home. He was eventually intercepted by Albanian guards, who first believed him to be a terrorist due to his haggard and unkempt appearance, but then enabled his transfer back to his Bavarian home.⁶⁹

After his return to Germany el-Masri took up a legal battle against the United States government, but his many attempts to hold it and its helpers legally accountable all failed. The district court of the Eastern District of Virginia, where he filed his civil action against former Director of Central Intelligence George Tenet, three corporate defendants, ten unnamed employees of the CIA, and ten unnamed employees of private security corporations that were allegedly involved in the kidnapping, rejected his claims for compensation due to reasons of national security. The Court of Appeals

⁶⁶ The Parliamentary Assembly of the Council of Europe has documented the extent of these extraordinary rendition flights in a special report by rapporteur Dick Marty (Switzerland). The report mentions a global "spider's web" of CIA detentions and transfers and alleged collusion in this system by 14 Council of Europe member states, see <<http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf>>. Additionally, in resolutions from 6 July 2006 and 19 February 2009, the European Parliament criticized 'that several EU Member states had been involved in, or had cooperated actively or passively with the U.S. authorities' and that 'EU Member states bear a particular share of political, moral and legal responsibility for the transportation and detention of those imprisoned in Guantánamo and in secret detention facilities'.

⁶⁷ Dana Priest (2005) 'Wrongful Imprisonment: Anatomy of a CIA Mistake', *Washington Post*, 4 December 2005.

⁶⁸ Excerpt from Dana Priest (2006) 'The Wronged Man', *Washington Post*, 29 November 2006. Available at: <<http://www.washingtonpost.com/wp-dyn/content/article/2006/11/28/AR2006112801810.html>>. Ironically, the article misspells his name as al-Masri instead of el-Masri. This confusion with the suspected Al-Quaida operative Khaled al-Masri may have caused el-Masri's detainment in the first place.

⁶⁹ See the reports of the Washington Post, *supra* notes 68 and 69.

upheld this decision⁷⁰, and the Supreme Court refused to hear the appeal, without giving reasons for its decision.⁷¹

El-Masri also tried to activate German courts, with rather limited success. Although a court in Munich issued warrants for 13 people who were suspected to have been involved in el-Masri's rendition, among them CIA agents, pilots and employees of private companies whose planes the CIA had leased, none of these persons was ever brought to court. The German government decided to pass the warrants to Interpol despite interventions by U.S. officials and concerns about political fallout, but the U.S. government immediately signaled that it will not extradite the agents, and the German government decided not to ask for extradition as an unofficial request had met a negative reply.⁷² According to a BBC report, a new suit was launched in 2008 by German and U.S. civil rights lawyers representing el-Masri seeking to force the German government to reconsider the extradition requests it issued in January 2007.⁷³ The fate of this suit is unknown; it is probably still pending. In the end, until today nobody was ever held accountable (legally or politically⁷⁴) for the massive human rights violations el-Masri had suffered.

The rule of law/*Rechtsstaat* principle, data protection and transnational security governance: Strategies against the global Leviathan

In the movie 'Brazil', filmed in 1984 (sic!), a fly causes a fatal error – it gets jammed in a printer, which causes the printer to misprint a file, which results in the incarceration, torture and death during interrogation of Archibald Buttle instead of the suspected terrorist, a man named Archibald 'Harry' Tuttle.⁷⁵ In real life, such errors may have a whole of additional causes: mistaken identities, unchecked rumors

⁷⁰ United States Court of Appeals, Fourth Circuit, Khaled el-Masri v. United States of America, No. 06-1667, decision of 02 March 2007. Available at: <<http://caselaw.findlaw.com/us-4th-circuit/1301276.html>>.

⁷¹ U.S. Supreme Court, El-Masri v. United States, No. 06-1613, decision of 09 October 2007; see Linda Greenhouse (2007) 'Supreme Court Refuses to Hear Torture Appeal', *New York Times*, 10 October 2007. Available at: <<http://www.nytimes.com/2007/10/10/washington/10scotus.html>>.

⁷² 'Bundesregierung verhindert Auslieferungsantrag für CIA-Agenten', *Der Spiegel*, 22 September 2007. Available at: <<http://www.spiegel.de/spiegel/vorab/0,1518,507227,00.html>>.

⁷³ 'German sues for CIA extradition', *BBC*, 9 June 2008. Available at: <<http://news.bbc.co.uk/2/hi/europe/7444406.stm>>.

⁷⁴ In 2005 a parliamentary ad-hoc committee was set up in order to investigate whether German government members were responsible for the fact that Murat Kurnaz had remained detained in Guantanamo for another three years after the U.S. expressed doubts in 2002 about Kurnaz' alleged role as 'enemy combatant'. The committee report does not come to any clear conclusion. In the case of Khalid el-Masri, another parliamentary committee set up in 2006 investigated accusations over the role the German Federal Intelligence Service (*Bundesnachrichtendienst*) played in el-Masri's abduction and interrogation. Allegedly, some of its agents had been present when el-Masri was tortured, and directly questioned him about his alleged contacts to radical fundamentalists. In the course of the public discussion about the two cases it was revealed that the government had founded a 'commando special forces' (*Kommando Spezialkräfte*, KSK) which operated in Afghanistan and other places in order to 'gather intelligence'. Again, the parliamentary committee report remained inconclusive. No government minister stepped back and no member of intelligence agencies or 'special force' were held accountable.

⁷⁵ The movie, directed by Terry Gilliam, was shot in 1984 and released in 1985.

that are treated like facts, misspellings, you name it. Political realists and fatalists may suggest that this is part of the *condition humaine*: mistakes are made, this is the reality of every human institution. Indeed, it may appear inevitable that the police sometimes arrests innocent persons and that the criminal system sometimes sends innocent persons to prison. The rule of law/*Rechtsstaat* principle provides for institutions and procedures of self-correction; wrongful convictions can be challenged in court, and they can be reversed. Compensations are due if convictions were wrong. In the world of Global Militant Security Governance, however, these rules do not apply, as the cases of Murat Kurnaz and Khalid el-Masri show; they were never indicted or convicted of any crime and the circumstances of their arrests remain unclear until this day. They were not given the chance to challenge their arrests and subsequent detention and torture, and their attempt to get compensation ended in a legal limbo. Moreover, Kurnaz and el-Masri are but two examples of persons who suffered 'collateral damage' caused by Global Militant Security Governance.⁷⁶ The interplay between lowered thresholds for police actions, free-floating personal data, and substantial limits on effective legal protection against governmental actions has seriously eroded the fundamentals of the rule of law/*Rechtsstaat* principle.

Transnational intelligence networks are an important element of Global Militant Security Governance. Germany and the European Union are agents of this governance compound. Highly formalised procedures within Germany and the EU may safeguard the protection of fundamental rights such as the 'right to informational self-determination' (Germany) and the 'right to protection of personal data' (EU) to a certain degree, but they did not effectively prevent a free flow of - sometimes incorrect or misleading - information to third countries such as the U.S. and Pakistan.

Informal ways of information exchange, or vague and underdetermined rules for information pooling, processing and distribution, are dominant features of transnational intelligence networks that have emerged since September 11. There are, however, small steps towards a stricter oversight over shady operations. In July 2010, the European Parliament finally ratified an agreement between the U.S. and the EU about bank data exchange (the EU-U.S. Terrorist Finance Tracking Program agreement, better known as the SWIFT agreement)⁷⁷ after having managed to force the EU Commission and the U.S. to include tougher data protection safeguards into the agreement.⁷⁸ The fact that the U.S. had access to data covering every single financial transaction between Europe and the U.S. became public only after the Belgian company SWIFT, which manages these data for all banks active in Europe, publicly admitted in 2005 that it had allowed the U.S. to do so after September 11, in a clear breach of EU data protection standards. Even though the European Parliament and the European Commission applauded themselves for their tough stand vis-à-vis the U.S., serious doubts remain whether the agreement holds closer scrutiny. The EU's data protection watchdog commissions, the Article 29 Data Protection Working Party, and the Working Party on Police and Justice correctly expressed concerns that the right to non-discriminatory judicial redress in the U.S. for individuals whose

⁷⁶ See, for example, Francesca Bignami's account of the fate of Maher Arar, *supra* note 65.

⁷⁷ Valentina Pop (2010) 'Sighs of relief as EU parliament approves "Swift" deal', *EU Observer*, 8 July 2010.

⁷⁸ Cecilia Malmström (2010) 'Comment: Tough demands from European Parliament included in bank data deal with U.S.', *EU Observer*, 7 July 2010. Cecilia Malmström is the EU Commissioner for Home Affairs.

personal data are processed in the EU is not guaranteed in full: 'The agreement does state it will respect this right, while at the same time setting out that it shall not create or confer any new right or benefit on any person. Since U.S. law does not provide any redress rights to non-U.S. citizens, the EU Data Protection Authorities seriously question if judicial redress will indeed be available to non-U.S. citizens.'⁷⁹ As another round of EU-U.S. is due because data exchange on Passenger Name Records, or PNR, will have to be re-regulated soon, there are good reasons for serious concerns. If the SWIFT agreement becomes a precedent, future bilateral and multi-lateral cooperation agreements with the U.S. will finally undermine the level of data protection prescribed by EU law, especially if the EU and its member states decide to sacrifice data protection rights on the altar of good transatlantic relations.

Re-formalisation of previously informal data exchange is an important task for the future. In November 2008 the EU took another important step and formalised data exchange between the EU member states in police and justice matters.⁸⁰ Besides statutory or treaty-based new material regulation, the institutional side of data protection has to be addressed as well. If material barriers against an unconditional flow of data are erected while nobody is entitled or capable to oversee data-mining operations and effectively control whether the rules are kept, pompous declarations and agreements only amount to window-dressing exercises. Germany has set a bad example in this regard when it ratified on 11 September 2009 the 'Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America on enhancing cooperation in preventing and combating serious crime'. This agreement does not fulfill a number of preconditions set by domestic constitutional and statutory data protection law.⁸¹ Additionally, it will set a (negative) precedent for the other EU member states who are also bound by the Framework Decision 2008/977/JHA. The Decision states in its Article 13 paragraph 1 d) that personal data can be forwarded to authorities of third countries only if these countries 'provide for an adequate level of protection', a safe harbor. With its cooperation agreement Germany signals that it views the U.S. level of data protection as being 'adequate' in the sense of the Framework Decision - and other EU member states, lead by their governments, most certainly will follow suit.

This is a critical step. Besides the fact that there are doubts whether the agreement contains sufficient material levels of protection, serious doubts have also been raised

⁷⁹ Article 29 Data Protection Working Party and the Working Party on Police and Justice, press release, Brussels, 28 June 2010. The statement addresses a number of other critical issues, for example, insufficient conditions for onward transfer of financial information to law enforcement agencies in both the U.S. and the EU.

⁸⁰ Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, *Official Journal L 350*, 30 December 2008: 60 -71. A Framework decision is an instrument of the so-called third pillar of the EU as laid down in the (former) EU treaty of Maastricht as amended by the treaties of Nice and Amsterdam. The new Treaty of Lisbon, in force since 1 December 2009, has removed the pillar structure. It has integrated its elements into a single European Union legal entity.

⁸¹ See *supra* note 60. Europe-wide data protection standards can be traced back to the 1981 Council of Europe 'Convention for the protection of individuals with regard to automatic processing of personal data', European Treaty Series (ETS), no. 108, complemented by the 2001 Additional Protocol to the Convention, ETS, no. 181, that provides a special requirement to protect personal data with regard to cross-border data exchange and sets up the standard of an 'adequate level of protection' in the receiving country.

with regard to insufficient institutional oversight over the execution of the agreement. When it commented upon the agreement, the German *Bundesrat* (the Länder chamber) found a number of major flaws, but instead of rejecting the ratification of the agreement as a whole, it only asked the government to 'make sure that a high standard of protection is provided for in the application phase of the agreement'. It did not, however, explain how the government is supposed to do this. Once the data has been transferred to the U.S., German authorities do not have any effective means of controlling what the U.S. does with this data – whether it handles them with extra care, or whether the U.S. distributes the data among its allies in the fight against terrorism, including Pakistan, Syria, Libya, and so forth.

In domestic and European data protection law, institutional oversight is a crucial element of an effective control. Individuals are often unable to defend their data protection rights vis-à-vis police and intelligence structures, if only because they do not even know that their data is being processed and forwarded to some node institution within the European and Global Militant Security Governance network. The relatively new phenomenon of extensive transnational data transfer on a massive scale⁸² calls for completely new forms and ways of such institutional oversight. National and EU data protection legislation foresees institutional oversight by independent organs or authorities, but none such institution exist within the new matrix of transnational data mining. If we want to prevent established levels of protection from being hollowed out by global security networks we also need to think about ways how to establish a transnational data protection authority that is able to supervise transnational data mining activities.

Militant security governance activities such as the NATO decision on 'renegade' aircrafts are even more difficult to constrain. Transnational governance structures, once hailed as agents of a golden future of a new world order⁸³, are an important part of an inevitable transformation of international law into global domestic law, but they also tend to undermine modern concepts of democratic societies guided by rule of law/*Rechtsstaat* principles.⁸⁴ Minimum requirements such as public decision-making, transparency, formal rules for an establishment and transposition of regulatory concepts into domestic law, or clearly defined rules of legal accountability, all of this is lacking when governmental actors meet behind closed doors of transnational arenas and predetermine crucial transformations of domestic legal orders.

Governments can use this constellation for doing dirty work, and they do this more and more often. They take governance regulations, co-drafted by themselves, as an excuse and as an argument for alleged regulatory necessities, on the one hand, and they can escape public scrutiny by blaming the same governance networks for regulatory pressure, on the other. It is about time that we start thinking about a more structured approach towards transnational governance phenomena, instead of ignoring their effects on individual rights and downplaying the limits they impose on

⁸² For example, the PNR data exchange affects millions of tourists visiting the U.S. every year, and the SWIFT agreement covers millions of bank transfers between Europe and the U.S.

⁸³ Ann-Marie Slaughter (2005) *A New World Order*, Princeton: Princeton University Press.

⁸⁴ For a critical account of transnational governance structures, see Rainer Nickel (2010) 'Participatory Transnational Governance' in Christian Joerges and Ernst-Ulrich Petersmann (eds) *Constitutionalism, Multilevel Trade Governance, and Social Regulation*, 2nd ed., Oxford: Hart Publishing.

legislative rooms for manoeuvre.⁸⁵ We will need to establish new accountability structures for this post-national constellation of transnational governance networks. Otherwise we will end up with just another layer of global governmentality that enslaves us and transfers the world order into a transnational realm of necessities, including organised state cruelty.

⁸⁵ Examples and analyses of influential transnational governance regulations can be found in Armin v. Bogdandy and Matthias Goldmann (2009), *Die Ausübung internationaler öffentlicher Gewalt durch Politikbewertung. Die PISA-Studie der OECD als Muster einer neuen völkerrechtlichen Handlungsform*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 69: 51- 101 (on the OECD Programme for International Student Assessment, PISA); Rainer Nickel (2009) 'Verwaltungsrecht und Rechtsverwaltung in der Weltgesellschaft', in Hauke Brunkhorst (ed.) *Demokratie in der Weltgesellschaft, Sonderband Soziale Welt*, 18: 143-158 (on the Joint Aviation Authorities, JAA).

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