

**BLURRING THE CATEGORIES OF CRIMINAL LAW
AND THE LAW OF WAR
– EFFORTS AND EFFECTS IN THE PURSUIT OF
INTERNAL AND EXTERNAL SECURITY* –**

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The technical, economic, and political changes associated with the modern risk society foster new forms of complex crime that pose significant risks, especially in the areas of terrorism, organized crime, and economic crime. These new risks and forms of complex crime push traditional criminal law to its functional limits – with regard to the safeguarding of both security and liberty. States tend to respond to these kinds of changes by employing two strategies in the reform of their law: first, the reach of the criminal law is extended and traditional due process and other protections reduced; second, the criminal law is supplemented or indeed replaced by

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other legal instruments deemed better suited to achieving the goal of guaranteeing security in specific areas.¹

Both of these strategies – the reduction of fundamental rights within the criminal law and the «outsourcing» of risk management to areas outside the purview of criminal law – are relevant in light of the topic addressed by the XVth International Congress of Social Defense on «Criminal Law between War and Peace.» As a consequence, an analysis of the present developments in crime and crime control «between War and Peace» raises two issues with which the congress should deal: the possible «law of war» within criminal law and the law of war independent of criminal law.

The first issue – the «law of war» *within* the criminal law – brings up the question of *Feindstrafrecht*, so-called «enemy criminal law.»² «Enemy» status is a category of war and of the law of war. It illustrates the question of whether, in cases of complex crime in the modern risk society, criminal law is becoming approximated to the law of war, particularly in the «battle» against economic crime and organized crime, the «war» against drug trafficking, and the so-called «war on terrorism.»

The second issue – the law of war *independent* of criminal law – concerns not only police, intelligence, and immigration law but especially the law of war itself. This is the case, for example, in the areas of terrorism and organized crime. The application of the law of war after the attacks of September 11, 2001, has challenged fundamental categories of law and politics that are also central to criminal law, namely, the distinction between crime and war, the distinction between internal and external security, and – in consequence – the distinction between criminal law and

1 These changes in today's global risk society are at the heart of the current criminal law research program of the Max Planck Institute for Foreign and International Criminal Law in Freiburg, Germany. For an overview on the research program of the Institute in the area of criminal law, see *Sieber*, Grenzen des Strafrechts, *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* Vol. 119 (2007), pp. 1-68. Spanish translation by Eduardo Demetrio Crespo: Límites del Derecho Penal, *Revista Penal* 2008, issue 22, pp. 125-159; Portuguese translation by Alessandro Hirata: Limites do Direito Penal, *Cadernos Direito GV* 2008, Vol. 5 No. 3, pp. 5-89.

2 See *Jakobs*, Feindstrafrecht? – Eine Untersuchung zu den Bedingungen von Rechtlichkeit, *Online-Zeitschrift für Höchststrichterliche Rechtsprechung im Strafrecht (HRRS)* 2006, pp. 289–297 (295); *Jakobs*, Terroristen als Personen im Recht?, *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* Vol. 117 (2005), pp. 839-851. See also *Bung*, Feindstrafrecht als Theorie der Normgeltung und der Person, *Online-Zeitschrift für Höchststrichterliche Rechtsprechung im Strafrecht (HRRS)* 2006, pp. 63-71; *Hörnle*, Deskriptive und normative Dimensionen des Begriffs «Feindstrafrecht», *Goldammer's Archiv für Strafrecht (GA)* 2006, pp. 80-95. From the Spanish-speaking world, see *Gómez-Jara Díez*, Enemy Combatants versus Enemy Criminal Law, *Buffalo Criminal Law Review (Buff. Crim. L. Rev.)*, 2008 (available at SSRN: <http://ssrn.com/abstract=1097066>) [last visited Sept. 2008]; *Zaffaroni*, El Enemigo en el Derecho Penal, Bogotá 2006. See also *Fletcher*, Rethinking Criminal Law – The Universal Part § 3.4 (available at www.law.upenn.edu/fac/npersily/Fletcher.pdf) [last visited Sept. 2008].

the law of war. These categories, each of which is associated with certain intrusive powers and each of which recognizes specific due process and other fundamental rights, have become blurred in the struggle to prevail against international terrorism and organized crime.³

The *aim of this report* is to analyse the extent, the techniques, and the consequences of these new developments of a «war against crime». The analysis is structured in four parts: The *first part* consists of a short introduction that illustrates the main areas in which the categories of criminal law and the law of war, in particular, are blurring. The *second part* analyzes the question of a possible law of war *within* criminal law and the other branches of internal security law. This part (which concentrates on criminal law) is based primarily on those European legal systems that have responded to the new threats of terrorism and organized crime especially by means of criminal law, police law, and intelligence law. The *third part* deals with the law of war beyond the beforementioned traditional categories of «internal security law.»⁴ It concentrates on the American system, which, in its fight against terrorism, has not limited itself to criminal law but has to a great extent resorted to the law of war. The description of these developments – a possible law of war within criminal law and the law of war independent of criminal law – will facilitate a better understanding of the risks involved in the recent legal developments and allow conclusions to be drawn in the *last part* with regard to the future study of legal responses to the threats of terrorism and organized crime especially in situations between war and peace.

I. THE BLURRING OF LEGAL CATEGORIES

The most significant blurring of categories, the blurring of crime and war as well as of domestic and international security at the core of the issues described above, is based on the fact that crime in the modern risk society is no longer a threat just to the individual citizen but may also lead to political risks and may even threaten national security. This can be seen, in particular, in the form of politically, ethnically, and religiously motivated terrorism. Religiously motivated offenders are, in fact,

³ See *Beck*, *Das Schweigen der Wörter, Über Terror und Krieg*, Frankfurt 2002, pp. 10f. For more information on these developments, see part II., *infra*.

⁴ In this analysis, the term «law of war» is used not in the technical sense of international humanitarian law (IHL), but in the broader sense of all types of law based on the paradigm of war and the use of military force. Thus, the term also covers provisions for which the justification by international humanitarian law is controversial, rules of engagement in military operations, rules of other use of military means for law enforcement purposes, and specific war powers of national law. This broad approach is based on the objective of this report, namely, the analysis of all types of law that replace, supplement, or enforce the traditional provisions of criminal law.

willing to sacrifice their lives and are therefore usually no longer able to be swayed by means of criminal law. They succeed in using the technical infrastructure and resources of their opponents for the purposes of technical communication, recruiting efforts, training measures, fund raising, and even as weapons. Their crimes lead not only to extensive physical damage but also, by means of the projected messages and images, to the achievement of much more far-reaching psychological and political objectives: terrorist violence spreads fear and terror, which – amplified by media coverage – cut to the quick of modern societies’ sensitive economic and political structures with the goal of making them subject to political blackmail. In this way, terrorism, with its asymmetrical, quasi-warlike methods, pursues primarily political goals (such as causing the withdrawal of Western states from specific areas or the destabilization of moderate governments).⁵ Such actions are not only «ordinary» crime but pose a direct threat to the security of the state.

These political risks exceed the dimensions of traditional crime and can lead to large-scale violent conflicts and «new wars.» Unlike traditional wars, these «new» or «small» wars no longer take place between territorial states but rather are asymmetrical conflicts between territorial states and networks that are often internationally organized.⁶ The new, warlike conflicts involving these kinds of internationally structured networks therefore put into perspective the conventional distinction between internal and external security as well as between crime and war. The «new wars» – as, in recent years for example, in the former Yugoslavia, Afghanistan, and Pakistan – are frequently waged by the police, the military, secret services, special troops, and international peacekeeping forces. In the aftermath of September 11, 2001, NATO⁷ and the United Nations Security Council⁸ recognized that the inherent right of individual or collective self-defense had been triggered by

5 See *Münkler*, *Die neuen Kriege*, 2nd ed. Reinbeck 2005, pp. 175-205; *Münkler*, *Der Wandel des Krieges, Von der Symmetrie zur Asymmetrie*, 2nd ed. Weilerswist 2006, pp. 221-247. For a discussion of the situation in Germany, see *Bundesministerium des Innern/Bundesministerium der Justiz* (eds.), *Zweiter Periodischer Sicherheitsbericht*, 2006, pp. 174-190.

6 This metamorphosis from wars between nation states to new asymmetric forms of war can be seen as an indication of the loss of significance of the community of states and the growth in importance of new political actors. On this point, see *Münkler*, *Neue Kriege, Terrorismus und die Reaktionsfähigkeit postheroischer Gesellschaften*, in: *Bundeskriminalamt* (ed.), *Neue Allianzen gegen Kriminalität und Gewalt*, 2006, pp. 17-31, pp. 28ff.

7 Press Release, NATO, *Invocation of Article 5 Confirmed* (Oct. 2, 2001), available at <http://www.nato.int/docu/update/2001/1001/e1002a.htm> [last visited Sept. 2008]; *Würtenberger*, *Das Polizei- und Sicherheitsrecht vor den Herausforderungen des Terrorismus*, in: *Masing/Jouanjan* (eds.), *Terrorismusbekämpfung, Menschenrechtsschutz und Föderation*, Tübingen 2008, pp. 27-48 (28ff.).

8 Security Council Resolution 1368, UN SCOR, 56th Sess., 4370th mtg. at 1, UN Doc. S/Res/1368 (2001); Security Council Resolution 1373, UN SCOR, 56th Sess., 4385th mtg. at 1, UN Doc. S/Res/1373 (2001).

the terrorist attacks on the United States. This development has led to the above-mentioned blurring of the traditional categories of internal (domestic) and external (foreign) security when risks to domestic security can only be prevented abroad. In addition, in light of the broad spectrum of types of terrorist attacks, difficult questions arise as to how to distinguish between criminal law and the law of war, how to differentiate between a «domestic» state of emergency and an «international» state of self-defense, and how to draw a distinction between the scope of the right of self-defense recognized by Art. 51 of the UN Charter and that accorded by customary international law.⁹

A similar development can be seen in some areas of organized crime. This is not limited to countries in which organized offenders or enterprises corrupt state actors. Political risks also result when – as in Latin America – competing drug dealers and other criminal organizations join forces with local warlords and paramilitary groups and challenge the state's monopoly on the use of force, developments that often culminate in the combination of terrorism and organized crime.¹⁰ Similar phenomena can be found in – predominantly African – countries in which criminal enterprises and local warlords forcibly exploit natural resources.¹¹ In these areas, the «war on organized crime» is also not only led by the judiciary and the police by means of criminal law and police law but also by the military based on the law of war. Thus, not only in the field of terrorism but also in areas of organized crime, the boundaries between crime and war are becoming blurred both with regard to the underlying phenomena and to their legal provisions.

These processes of the blurring of categories can be observed not only in the context of criminal law and the law of war but also within the various legal branches of internal security law. In many areas of complex crime – such as terrorism, organized crime, economic crime, and cybercrime – criminal law is substituted or

9 See, e.g., *Fletcher/Ohlin*, *Defending Humanity*, Oxford 2008, pp. 30-106. See also III.A., *infra*.

10 See *Diwell*, *Der ganzheitliche Bekämpfungsansatz – eine neue Strategie in der Auseinandersetzung mit dem islamistisch motivierten Terrorismus*, in: *Griesbaum et al.* (eds.), *Strafrecht und Justizgewährung*, Festschrift für Kay Nehm zum 65. Geburtstag, Berlin 2006, pp. 101-109 (107).

11 The political risks engendered in such circumstances gain in significance when the state itself becomes a global security risk by failing, in fact, to fulfill its local protective function (as a failed state) or normatively (as a lawless state) and, as a result, by creating crime havens (or safe harbors) for organized criminal groups (e.g., the former Yugoslavia) or for terrorists (e.g., Yemen or Somalia) on a global level. On the development of failed states, see *Münkler*, *supra* (n. 6), in: *Bundeskriminalamt* (ed.), *supra* (n. 6), 2006, p. 24. On the normative description of failed states, see *Geiß*, «Failed States,» *Die normative Erfassung gescheiterter Staaten*, Berlin 2005. For an overview of the factual bases of economic crime in collapsed states and their international effects, see *Gros*, *Trouble in Paradise – Crime and Collapsed States in the Age of Globalization*, 43 *British Journal of Criminology*, pp. 63-80 (2003).

replaced by other branches of law: The gathering of evidence is carried out both on the basis of criminal law as well as on the basis of preventive police law and intelligence law. In some countries, the arrest of dangerous persons can be based not only on criminal law but also on detention orders of police law or by administrative law. In addition, foreigners who allegedly commit crimes are subject to measures of immigration law.

In view of this trend, the following discussion will shed light on the developments and legal relationships between the above-mentioned subareas in the emerging discipline and the new architecture of security law. It will first deal with internal security law and especially the current extension of criminal law that can be seen in European countries in the fight against terrorism, organized crime, and other complex crimes (the controversial question of *Feindstrafrecht*, so-called «enemy criminal law,»). After that it will analyze the application of the law of war outside the established categories of «internal security law,» especially as developed in the United States, as used against the new threats of terrorism.

II. THE CHANGES WITHIN CRIMINAL LAW

The expansion of classical, liberal criminal law beyond its hitherto existing borders can be observed not only in the context of the «war on terror» but also – in many legal systems – in the «wars» on economic crime and organized crime. The developments in these areas are characterized, in general, by a stronger orientation of the criminal law towards prevention and security as well as by the corresponding ability of the state to intervene prior to the commission of a crime and prior to the concretization of suspicion against a particular individual for a particular offense.¹²

This approach – expressed in terms of categories recognized by the German classification system – encompasses the following developments: A) the attachment of criminal liability at an earlier point in the unfolding of a criminal offense in the field of substantive law; B) the expansion of preventive surveillance measures, the reduction of legal guarantees, and the creation of special competencies in the context of criminal procedure; C) the increase in the obligations of private persons to

¹² See *Beck*, Unrechtsbegründung und Vorfeldkriminalisierung, Berlin 1992; *Jakobs*, Kriminalisierung im Vorfeld einer Rechtsgutsverletzung, *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* Vol. 97 (1985), pp. 751-785, as well as the discussion of Entscheidungen des Bundesgerichtshofs in Strafsachen (BGHSt) Vol. 47, p. 214 in *Rath*, Bandenmitgliedschaft durch Zusage späterer Gehilfenfähigkeit?, *Goldammer's Archiv für Strafrecht (GA)* 2003, pp. 823-840. For commentary on the subsequent critique expressed by the Frankfurt school in the 1990s, see *Schünemann*, Kritische Anmerkungen zur Situation der deutschen Strafrechtswissenschaft, *Goldammer's Archiv für Strafrecht (GA)* 1995, pp. 201-229 (210f.).

cooperate both in anticipation of criminal proceedings as well as and independent of such proceedings; D) the creation of inter-institutional and international task forces as part of a new «architecture of security»; and E) the introduction of new measures in criminal and administrative law that limit the liberty of persons presumed dangerous.

A. Earlier Attachment of Criminal Liability in Substantive Criminal Law

In substantive law, the earlier attachment of criminal liability is evident, for example, in the reaction to the risks posed by complex offender constellations, especially the risks posed by criminal offenses committed on the basis of a division of labor by organized offender groups, networks, or cells: legislatures all over the world have responded and case law ensued in connection with these risks – especially those posed by organized crime and terrorism – by enacting so-called «organizational offenses» or «membership crimes» (such as providing support to criminal or terrorist organizations), conspiracy-related offenses, special legal instruments that facilitate the attribution of criminal liability (such as joint criminal enterprise, vicarious liability, and strict liability), as well as by establishing other means of providing for the earlier attachment of criminal liability.¹³ A comparable, substantive-legal emphasis on new, supra-individual legal interests, represented by abstract endangerment offenses (*abstrakte Gefährungsdelikte*),¹⁴ and possession

13 In the «*organizational offenses*» or «*membership crime*» context, for a discussion of the definition of «criminal associations,» see BGH, *Neue Juristische Wochenschrift* (NJW) 2005, pp. 80-83; for criticism of expanding offenses to include even earlier stages, see *Jakobs supra* (n. 2) HRRS 2006, p. 295; *Roxin*, Was darf der Staat unter Strafe stellen? Zur Legitimation von Strafdrohungen, in: *Dolcini/Paliero* (eds.), *Studi in onore di Giorgio Marinucci*, Milano 2006, pp. 717-737 (734); *Schroeder, F.-C.*, Die Straftaten gegen das Strafrecht, Berlin 1985, pp. 17, 28-29; for a discussion of the Europeanization of the definition of «association,» see *Kreß*, Das Strafrecht in der Europäischen Union vor der Herausforderung durch organisierte Kriminalität und Terrorismus, *Juristische Arbeitsblätter* (JA) 2005, pp. 220-228; *von Heintschel-Heinegg*, Gemeinschaftskonforme Auslegung des Vereinigungsbegriffs in den §§ 129 ff. StGB, in: *Hoyer et al.* (eds.), *Festschrift für Friedrich-Christian Schroeder*, Heidelberg 2006, pp. 799-808. For a discussion of *conspiracy offenses* in the United States, see *Katyal*, Conspiracy Theory, 112 *Yale Law Journal* (Yale L.J.), pp. 1307-1398 (2003); *Siesseger*, Conspiracy Theory: The Use of the Conspiracy Doctrine in Times of National Crisis, 46 *William & Mary Law Review* (Wm & Mary L. Rev.) pp. 1177-1218 (2004). For a discussion of the *special legal instruments in use at the international criminal law level* to facilitate the attribution of criminal liability, see *Danner/Martinez*, Guilty associations: joint criminal enterprise, command responsibility, and the development of an international criminal law, 93 *California Law Review* (Cal. L. Rev.), pp. 75-169 (102ff.) (2005). See also the discussion at I.E., *infra*.

14 «Abstract endangerment offenses» – such as drunk driving – are conduct offenses that are penalized because of the general or abstract dangerousness of the *actus reus* to certain protected legal interests (actual danger is not a definitional element of such offenses).

offenses, is also apparent in the areas of economic crime (particularly environmental crime) and organized crime.¹⁵

The relationship between these early-attachment crimes and the prevention paradigm analyzed above is particularly obvious in recent deliberations of the German Federal Ministry of Justice on the criminalization of activities in anticipation of offenses prohibited by § 129a German Criminal Code:¹⁶ the criminalization of participation in terrorist training abroad, currently the subject of debate, would help prevent potential terrorist attacks by allowing law enforcement to take early, preventive action against persons – including potential «sleepers» – (e.g., upon their return to Germany).¹⁷ In such cases, the earlier attachment of the protections afforded by the criminal law is often accompanied by an increase in the prescribed sentencing range.¹⁸

B. Procedural Changes

The increased risks as well as the investigative and evidentiary problems encountered in the context of new complex criminality have consequences particularly for the law of criminal procedure. For example, more prevention-oriented steps are being taken prior to the concretization of suspicion, such as preventive «dragnet investigations»¹⁹ or covert IT-supported intervention and surveillance

15 See *Jakobs supra* (n. 4), ZStW Vol. 97 (1985), pp. 751-785. On the subject of supra-individual legal interests and endangerment offenses, see *Greve, Sheep or Wolves*, European Journal of Crime, Criminal Law and Criminal Justice 2005, pp. 515-532; *Hassemer, Sicherheit durch Strafrecht, Strafverteidiger (StV) 2006*, pp. 321-332 (326f.); *Hefendehl, Kollektive Rechtsgüter im Strafrecht*, Cologne 2002; *Tiedemann, Tatbestandsfunktionen im Nebenstrafrecht*, Tübingen 1969, pp. 111ff.; *Wohlers, Deliktstypen des Präventionsstrafrechts – Zur Dogmatik „moderner« Gefährdungsdelikte*, Berlin 2000; *Zieschang, Die Gefährdungsdelikte*, Berlin 1998, pp. 214-220, 245-251, 388-393. For a discussion of possession offenses, see *Struensee, Besitzdelikte*, in: *Samson* (ed.), Festschrift für Gerald Grünwald zum siebenzigsten Geburtstag, Baden-Baden 1999, pp. 713-729.

16 See Entwurf eines Gesetzes zur Bekämpfung des Aufenthalts in terroristischen Ausbildungslagern, Deutscher Bundestag, Drucksache 16/7958 of 30.01.2008. A changed version of the law was presented by the Ministry of Justice on 21.04.2008. According to a press release from the Ministry of Justice dated 29.09.2008, the revised draft law has been agreed upon among the responsible federal ministries, the federal states, and the involved associations. Subsequently, the federal cabinet will deal with the draft law in October 2008.

17 See II.E, *infra*. For a discussion, from an American perspective, of the legislative options with regard to the issue of «sleepers,» see *Chesney, The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 Harvard Journal on Legislation (Harv. J. on Legis.), pp. 1-89 (2005). See also 18 USC §§ 2339-2339D.

18 See also *Hassemer, supra* (n. 15), StV 2006, p. 323.

19 On the use of preventive «dragnet» searches, see Bundesverfassungsgericht (BVerfG), Neue Juristische Wochenschrift (NJW) 2006, pp. 1939-1951; *Lisken, Zur polizeilichen Rasterfahndung*, Neue Zeitschrift für Verwaltungsrecht (NVwZ) 2002, pp. 513-519.

operations that enable authorities to investigate citizens' conversations, telephone calls, computer data, whereabouts, and bank accounts and to collect large amounts of personal, stored data.²⁰ In the future, a combination of these investigative methods with the techniques of risk profiling could lead to the development of new, global systems of surveillance of «suspicious» or «dangerous» persons.²¹ German legal reform measures undertaken after the attacks of September 11, 2001 demonstrate that the secret gathering and linking of information from the (repressive) criminal justice system, preventive police work, as well as the activities of various civil and military intelligence agencies are essential cornerstones in counterterrorism activities.²² The notion of «preparing for criminal prosecution» (*Vorsorge für die Strafverfolgung*),²³ which is linked to these actions demonstrates the blending of prevention and repression. Thus, the trend towards a decisive, preventive role for the criminal law – already illustrated by the availability of preventive (pre-trial) custody, the expansion of the law of non-punitive sanctions, and, in particular, preventive post-imprisonment detention – is reinforced.²⁴

Furthermore, the law of criminal procedure has been subject to a stripping away of legal guarantees and safeguards. This is best illustrated on the international level by the freezing of assets of suspected terrorist organizations in administrative supranational proceedings without adequate consideration of the procedural rights of the concerned persons.²⁵ Further examples are manifold. In France, the possible

20 On the practice and efficiency of telephone surveillance in Germany, see *Albrecht/Grafel/Kilchling* Rechtswirklichkeit der Auskunftserteilung über Telekommunikationsverbindungsdaten nach §§ 100g, 100h StPO, Freiburg 2008 and *Albrecht/Dorsch/Krüpe*, Rechtswirklichkeit und Effizienz der Überwachung der Telekommunikation nach den §§ 100a, 100b StPO und anderer verdeckter Ermittlungsmaßnahmen, Freiburg 2003. On the role of intelligence agencies, see *Paeffgen*, «Vernachrichtendienstliche» von Strafprozeß- (und Polizei)recht im Jahr 2001, *Strafverteidiger (StV)* 2002, pp. 336-341; *Paeffgen*, Vernachrichtendienstliche des Strafprozesses, *Goldammer's Archiv für Strafrecht (GA)* 2003, pp. 647-671.

21 See also *Albrecht*, Der Wandel im Konzept der Sicherheit, *Juristische Ausbildung (JURA)* (Ungarn) 2005/2, 7-19, 11f.; *Klett-Straub*, Data Screening of Muslim Sleepers Unconstitutional, 7 *German Law Journal*, pp. 967-975 (2006).

22 See also I.F., *infra*.

23 See *Weßlau*, Vorfeldermittlungen: Probleme der Legalisierung «vorbeugender Verbrechensbekämpfung» aus strafprozeßrechtlicher Sicht, 1989; *Wolter*, 35 Jahre Verfahrensrechtskultur und Strafprozessverfassungsrecht in Ansehung von Freiheitsentziehung, *Goldammer's Archiv für Strafrecht (GA)* 1999, pp. 158-181; *Kühne*, *Strafprozessrecht*, 6th ed. 2003, margin no. 393.

24 See I.E., *infra*.

25 On the *freezing of funds and other financial resources* on the basis of administrative regulations and on the lawfulness of such regulations on the European – and international – level, see Judgment of the Court of Justice of the European Communities of 03.09.2008, joint Cases C-402/05 P and C-415/05 P (Kadi, Al Barakaat). See also *Meyer/Macke*, Rechtliche Auswirkungen der Terroristenlisten im deutschen Recht, *Online-Zeitschrift für Höchstgerichtliche Rechtsprechung im Strafrecht (HRRS)* 2007, pp. 445-465.

duration of police custody based on the criminal law – especially for organized crime and terrorism – has been extended to four and six days. As a result, rule-of-law guarantees attached to custodial detention, such as the requirement of strong suspicion, the right of a detainee to appear before a judge, and the right to inform an attorney, have been weakened.²⁶ In addition, the French legal system is shifting the burden of proof by creating a general criminal offense of the inability to account for resources corresponding to lifestyle.²⁷ In Germany, the discussion on the legal limits of preventive counterterrorism measures with regard to the use of torture and the downing of hijacked aircraft²⁸ is indicative of the extent to which the new risks challenge the traditional limits of criminal law (despite the fact that there is an overwhelming rejection of any form of torture or aggressive interrogation techniques in Germany). In addition, investigation problems and the high incidence of criminal activity lead to the abandonment of a consistent application of norms in favor of consensual settlement strategies such as plea agreements or alternative methods of settlement.²⁹ Problems associated with these kinds of informal methods of case settlement are apparent in the United States where, in individual cases, the prosecuting authorities may leverage a plea agreement by suggesting that the failure

26 See Act No. 2003-239 of 18.3.2003 and Art. 706-88 French *Code de procédure pénale* and Pfützner, *Organisierte Kriminalität im französischen Strafverfahren*, Berlin, 2008, pp. 123-180.

27 See, e.g., Art. 321-6 *Code Pénal*, the general criminal offense of the inability to account for resources corresponding to lifestyle, enacted in France in 2006 (see also the corresponding special offense for terrorism in Art. 421-2-3 *Code Pénal*).

28 On the torture debate see *Brugger*, Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter, *Juristenzeitung (JZ)* 2000, pp. 165-173; *Reemtsma*, Folter im Rechtsstaat?, Hamburg 2005; *Saliger*, Absolutes im Strafprozeß? Über das Folterverbot, seine Verletzung und die Folgen seiner Verletzung, *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* Vol. 116 (2004), pp. 35-65; *Roxin*, Kann staatliche Folter in Ausnahmefällen zulässig oder wenigstens straflos sein?, in: *Arnold et al.* (eds.), *Menschengerechtes Strafrecht*, München 2005, pp. 461-471 (468 f.); *Wittreck*, Menschenwürde und Folterverbot, *Die öffentliche Verwaltung (DÖV)* 2003, pp. 873-882. On the invalidity of the Aviation Security Act provision purportedly conferring authority to down aircraft, see *BVerfG*, *Neue Juristische Wochenschrift (NJW)* 2006, pp. 751-761 and *Hetzer*, Terrorist Attacks – Criminal Prosecution or National Defence? *European Journal on Criminal Policy and Research*, Vol. 13, Nos. 1-2 (April 2007), pp. 33-55.

29 On plea agreements, see generally *Bundesgerichtshof (BGH)*, *Neue Juristische Wochenschrift (NJW)* 2005, pp. 1440-1447; *Bundesrechtsanwaltskammer* (German Federal Bar Association), *Vorschlag einer gesetzlichen Regelung der Urteilsabsprache im Strafverfahren*, *Zeitschrift für Rechtspolitik (ZRP)* 2005, pp. 235-241; *Schünemann*, Zur Entstehung des deutschen «plea bargaining», in: *Lorenz et al.* (eds.), *Festschrift für Andreas Heldrich*, Munich 2005, pp. 1177-1195. For the new solutions in Italy, see *Jarvers*, *Massen- und Kleinkriminalität vor dem italienischen Friedensrichter*, Berlin 2007. For developments across Europe, see *Wade et al.*, When the line is crossed... paths to control and sanction behaviour necessitating a state reaction, *European Journal on Criminal Policy and Research*, Vol. 14, Nos. 2-3 (September 2003), pp. 101-122.

to come to an agreement could lead to the recategorization of the suspect as an «enemy combatant» and the transfer of the case to military jurisdiction.³⁰

Some countries have established special prosecution authorities and courts (usually regional) for selected offense types (e.g., for economic crime, organized crime, terrorism, or complex crime).³¹ Other countries have developed special investigative measures, which, in some cases, are even being employed in investigations of ordinary criminal offenses as a result of broadly formulated usage rules and/or extensive predicate offense catalogues.³² Also under consideration are special measures to be applied exclusively to specific groups of offenders whose behavior is deemed to represent a permanent breach with society, as described by the German catchphrase *Feindstrafrecht*, which can be roughly translated as «enemy criminal law» (law that applies to those, such as terrorists, who choose to stand «outside of society» and work to destroy its norms and values).³³ If this catchphrase is not simply used in order to critically describe current developments but rather is formulated as a recommendation concerning steps that should be taken, then the perils of abandoning traditional constraints on criminal law should be readily apparent.

In various countries, however, constitutional courts have limited the extension of such intrusive measures in the area of criminal law, police law, and law on intelligence agencies. This can be seen especially in Germany, where the Federal Constitutional Court, using the constitutional guarantee of «human dignity» in the context of protecting individual privacy, developed a right of the individual to self-determination relating to personal data and a right to the confidentiality and

30 See Meyer, Plea bargaining im Krieg gegen den Terror, Online-Zeitschrift für Höchststrichterliche Rechtsprechung im Strafrecht (HRRS) 2006, pp. 178-185; Takei, Terrorising Justice: An Argument that Plea Bargains Struck under the Threat of «Enemy Combatant» Detention Violate the Right to Due Process, 47 Boston College Law Review (B.C. L. Rev.), pp. 581-626 (2006).

31 In England and Wales, for example, the Serious Organised Crime Agency (SOCA) and the Serious Fraud Office. For an overview of the extent of specialization in criminal justice systems across Europe and in the USA, see the comparative analysis within the MPI's «Rethinking European Criminal Justice» project, forthcoming, which shows this development to be very common. On the jurisdiction of specialized tribunals for cases of «great complexity» or «extreme complexity» (*grande complexité* or *très grande complexité*), see Arts. 704 and 706-75 French *Code de procédure pénale*.

32 Traditionally, special coercive measures for selected offenses are available in France, e.g., for terrorist, economic, and financial offenses, corruption at the European level, maritime offenses, military and state security matters, as well as damage to health. For those offenses included in a long catalogue of organized crime offenses, Art. 706-73 ff. *Code de procédure pénale* introduced by Act no. 2004-204 of 9.3.2004 now permits, in addition, an extended term of police detention, expanded telephone surveillance, night searches, covert investigations, as well as acoustic and visual monitoring of rooms. For recent anti-terrorism developments in France, see Act no. 2006-64 of 23.1.2006 and the detailed analysis of Pfitzner, Organisierte Kriminalität im französischen Strafverfahren, Berlin, 2008.

33 See the references *supra* n. 4.

integrity of information-technological systems. As early as 1983, the Constitutional Court stopped an extensive collection of data for census purposes.³⁴ In 1999, the Constitutional Court limited the transfer of data collected by intelligence agencies in strategic telephone tapping for use in the criminal justice system where such far-reaching, intrusive techniques could not have been justified.³⁵ In 2004, it limited the application of clandestine acoustic surveillance in private homes to such a broad extent that today the respective provisions are applied extremely rarely.³⁶ In 2006, the court restricted «dragnet investigations» to cases of concrete dangers to important legal interests.³⁷ A 2008 decision developed strict limitations on the automatic collection and linkage of data obtained by road traffic controls based on the screening of license plates.³⁸ In 2008, the Constitutional Court also declared unconstitutional vague provisions of a German state intelligence law permitting clandestine «online-searches» in computer systems.³⁹

In other countries as well as on the European level, the extension of intrusive state powers has also been limited by the courts. In France, for example, the Cour Constitutionnel upheld the special proceedings on organized crime; however, it declared void a provision that had limited the judicial control of the prerequisites for applying these special proceedings.⁴⁰ On the European level, the European Court of Justice declared the system of «smart sanctions» of the UN Security Council illegal.⁴¹ These court decisions are important for upholding the balance between the protection of security and liberty. However, they do not change – but rather confirm – the trend that the new threats of terrorism and organized crime as well as their perception by the public are shifting the balance between security and liberty in favor of security interests.

34 See Entscheidungen des Bundesverfassungsgerichts (BVerfGE) Vol. 65, 1-71 (41ff.).

35 See Entscheidungen des Bundesverfassungsgerichts (BVerfGE) Vol. 100, 313-403 (358ff.).

36 See Entscheidungen des Bundesverfassungsgerichts (BVerfGE) Vol. 109, 279-301 (308ff.). For an empirical evaluation of the actual practice, see *Meyer-Wieck*, *Der Große Lauschangriff*, Berlin 2005.

37 See Bundesverfassungsgericht, *Neue Juristische Wochenschrift* 2006, 1939-1951; *Schewe*, *Das Ende der präventiven Rasterfahndung zur Terrorismusbekämpfung*, *Neue Zeitung für Verwaltungsrecht (NVwZ)* 2007, 174-177.

38 See Entscheidungen des Bundesverfassungsgerichts (BVerfGE), *Neue Juristische Wochenschrift NJW* 2008, 1505-1516.

39 See *Neue Juristische Wochenschrift (NJW)* 2008, 822-837.

40 Cour Constitutionnel No. 2004-492 of 2 March 2004. For details, see *Pfützner*, *supra* n. 26, pp. 20-32.

41 See n. 25, *supra*.

C. Obligations of Private Persons

In response to difficulties encountered by the state in carrying out investigations in both the criminal and non-criminal arenas, fundamental changes can also be seen in the increasing obligations of private persons to support criminal investigations. This not only concerns duties to impart knowledge of future terrorist acts to the state,⁴² it also includes duties to submit to and engage in surveillance activities in anticipation of criminal prosecution as well as independent of such proceedings. These obligations encompass both specialized know-how (e.g., for investigations in the complex environment of computer technology⁴³) as well as the creation, disclosure, and analysis of private data sets for preventive purposes and for the purpose of preparing for future prosecution. The latter is clearly evident in efforts to combat money laundering⁴⁴ and to control securities trading⁴⁵ as well as in the area of telecommunications surveillance – with its obligations to make technical surveillance techniques available and to preserve data.⁴⁶ The resulting privatization

42 For England and Wales, see section 38b of the Terrorism Act 2000, which makes «failure to disclose information about acts of terrorism» a criminal offence. In Germany, the new draft law of 2008 for the prosecution of the preparation of serious violent acts (presented n. 56, *infra*) also provides for the criminalization of the nondisclosure of knowledge about terrorist acts by extending § 138 Criminal Code.

43 See *Bär*, Der Zugriff auf Computerdaten im Strafverfahren, Cologne et al. 1992, pp. 367ff., 387ff.; *Kugelmann*, Völkerrechtliche Mindeststandards für die Strafverfolgung im Cyberspace – Die Cybercrime-Konvention des Europarates, Telekommunikations- und Medienrecht (TMR) 2002, pp. 14–23 (18f.).

44 See §§ 2, 3, 6, 9, 11 German Money-Laundering Act (GWG) and Arts. 6ff. of the Directive 2005/60/EC of the European Parliament and of the Council of 26.10.2005, OJ L 309/15 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. For a discussion of the situation at the international level, see, e.g., *Pieth*, A Comparative Guide to Anti-Money Laundering, Cheltenham 2004.

45 See §§ 9, 10, 33 para. 1 No. 3 Wertpapierhandelsgesetz (German Securities and Trade Act); Art. 6 para. 6 and Art. 19 of the Directive 2003/6/EC of the European Parliament and of the Council of 28.1.2003, OJ L 96 on insider dealing and market manipulation (market abuse) (the quoted provisions were not amended by Directive 2008/26/EC).

46 On data retention, see Directive 2006/24/EC of the European Parliament and of the Council of 15.3.2006, OJ L 105/54 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks; *Breyer*, Die systematische Aufzeichnung und Vorhaltung von Telekommunikations-Verkehrsdaten für staatliche Zwecke in Deutschland, Berlin 2005. On the obligations of private persons with regard to criminal prosecution, see *Hamm*, «Überwachungssicherheit» – wer soll sicher vor wem oder was sein?, Neue Juristische Wochenschrift (NJW) 2001, pp. 3100-3101 as well as the requirements in Art. 19 para. 4 of the Convention on Cybercrime, ETS No. 185 of 8.11.2001 (on this point, see also Explanatory Report, paras. 200-202).

of both (preparation for) criminal prosecution and the maintaining of security⁴⁷ leads in some cases also to interference with privileged relationships (e.g., lawyers are obliged to participate in anti-money-laundering activities).⁴⁸ The desire to make use of private data in order to maintain security will continue to increase in the future, especially with regard to the targeting of suspected terrorists. Software tools already in existence today can generate detailed personality profiles from public sources and databases in no time at all. The large amounts of personal data in the hands of the private sector, the technical possibilities for data mining as well as the corresponding desires on the part of private and public security agencies will lead in many countries to a need for an entirely new dimension of data protection and to the participation of private entities in the provision of security.

D. Inter-Institutional and International Task Forces

In order to optimize investigations, the competences of security agencies, previously rigidly separated, are increasingly undergoing consolidation and are being shared by working groups composed of representatives of various – criminal and non-criminal – investigative agencies. Information that used to be jealously guarded is now shared, and the possibility of retrieving information from selected databases is no longer reserved for a particular agency. In Germany, representatives from the office of the Attorney General, the police, customs, immigration, intelligence, and the military are working together in inter-institutional task forces as part of a new «architecture of security» with a «comprehensive battle plan.» The task forces also rely on the expertise of private entities responsible for the fight against money laundering. In the context of this cooperation and its supporting «anti-terror file,» the distinction between prevention and repression – central to German security law – is

⁴⁷ See *Ziercke*, Internationale Erscheinungsformen von Kriminalität und Gewalt – internationale Kooperationsformen und die Rolle des BKA, in: *Bundeskriminalamt* (ed.) *supra* (n. 6), pp. 33-48 (42ff.).

⁴⁸ See Directive 2001/97/EC of the European Parliament and of the Council of 4.12.2001, OJ L 344/76, amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering. For Germany, see the Gesetz zur Verbesserung der Bekämpfung der Geldwäsche und der Bekämpfung der Finanzierung des Terrorismus of 8.8.2002, BGBl. I, 2002, 3105; *Herzog/Müllhausen*, Geldwäschebekämpfung und Gewinnabschöpfung, München 2006; *Wegner*, Die Reform der Geldwäsche-Richtlinie und die Auswirkungen auf die rechtsberatenden Berufe, Neue Juristische Wochenschrift (NJW) 2002, pp. 794-96.

blurred even further.⁴⁹ On the international level as well, supranational governmental networks have been formed to counter transnational offender networks.⁵⁰

This new «architecture of security» with its flexible elements and institutions is often characterized by a lack of transparency and a lack of control mechanisms. Deficits in control arise particularly when specific instances of cooperation and specific powers of intervention are decided upon at the international level and implemented by means of intergovernmental cooperation at the executive level. This is due to the fact that, in comparison to the national level, this level is subject to greater deficits in the areas of democracy and transparency. The practical importance of police manuals and «best practice» guides is illustrated, for example, by the fact that they are part of the «acquis» as far as candidate countries to the European Union are concerned. The fragmentation of international bodies that deal with security issues and recent efforts to improve coordination – such as the peer review procedures of the OECD, the Council of Europe, the European Community, and the UN⁵¹ – add to the complexity and lack of transparency of intergovernmental cooperation. This is especially true of cooperation among executive agencies that takes place in the context of loosely associated, flexible networks. The problems of control and legitimacy experienced by these multi-level systems are particularly apparent in the context of the international prosecution of terrorism, when far-reaching executive powers – often undertaken in an extraterritorial context – are claimed and exercised for the purpose of the taking into custody of suspects,⁵² the

49 See the so-called Common Files Act [*Gemeinsame Dateien-Gesetz*] Bundesgesetzblatt (BGBl.) I 2006, 3409. On the new «architecture of security» and the new anti-terror file, see *Nehm*, Das nachrichtendienstliche Trennungsgebot und die neue Sicherheitsarchitektur, *Neue Juristische Wochenschrift* (NJW) 2004, pp. 3285-3295; *Roggan/Bergemann*, Die neue Sicherheitsarchitektur der Bundesrepublik Deutschland, *Neue Juristische Wochenschrift* (NJW) 2007, pp. 876–881; *Ruhmannseder*, Vernetzte Terrorismusbekämpfung mit Hilfe der sog. Antiterrordatei, *Juristische Ausbildung* (JA) 2008, pp. 373-375; *Schily*, Die Bildung von Allianzen gegen Kriminalität und Gewalt als nationale und internationale sicherheitspolitische Herausforderung, in: *Bundeskriminalamt* (ed.) *supra* (n. 6), pp. 7-16, pp. 12f.; *Würtenberger supra* (n. 7), in: *Masing/Jouanjan* (eds.), *supra* (n. 7), pp. 30-36; *Zöller*, Der Rechtsrahmen der Nachrichtendienste bei der Bekämpfung des internationalen Terrorismus, *Juristenzeitung* (JZ) 2007, pp. 763-771.

50 See *Albrecht supra* (n. 21), *JURA* (Ungarn) 2005/2, 7-19, 17; *Diwell supra* (n. 10), *Berlin* 2006, pp. 101-109 (103ff., 109); *Nadelmann*, *Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement*, Cambridge, MA 1993, pp. 103-88. For the example of the EU Police Chiefs Operational Task Force, see *Peers*, *EU Justice and Home Affairs Law*, Oxford 2006, pp. 541-2 and JHA Council press release 14615/04, 19th November 2004.

51 See *Sieber*, *Strafrechtsvergleichung im Wandel*, in: *Sieber/Albrecht* (eds.), *Strafrecht und Kriminologie unter einem Dach*, Freiburg 2006, pp. 78-151, pp. 88, 90. See also the articles in *Biolley/Weyembergh* (eds.), *Comment évaluer le droit pénal européen*, Brüssel 2006.

52 See III.D. and E., *infra*.

«freezing» of their assets,⁵³ telephone surveillance,⁵⁴ or obtaining access to data available from the Society for Worldwide Interbank Financial Telecommunication (SWIFT).⁵⁵ Virtually all the problems associated with the territorial and functional limits of criminal law are in evidence here.

E. Measures Limiting the Liberty of the «Presumed Dangerous»

Important changes both within and independent of the criminal law come about as the result of new measures that impinge upon the liberty of supposedly dangerous individuals. This issue is clearly illustrated, for example, by the question of whether and how to proceed in the case of a person who travels to a terrorist training camp, who returns from such a camp, or who for other reasons is suspected of being a terrorist «sleeper» or is presumed dangerous, even though the person has never been convicted of criminal activity.

In an attempt to deal with these problems, the German Government is currently planning a solution that would extend the concept of earlier attachment of criminal liability in substantive criminal law as described above beyond the aforementioned «membership crimes» and «conspiracy crimes,» which do not apply if terrorism is no longer organized by structured groups or by fixed agreements but only in loose networks and non-binding relationships. In response to this change in terrorist activities, a draft law now proposes the addition of two new provisions to the German Criminal Code on the preparatory acts of single perpetrators: «preparation of a serious violent act endangering the state» (draft § 89a Criminal Code), «initiation of contacts in order to commit a serious violent act endangering the state» (draft § 89b Criminal Code) and «guidance to commit a serious violent act» (draft § 91 Criminal Code).⁵⁶ The first provision would criminalize the preparation of serious violent acts by giving or receiving certain instructions, by possessing or transferring weapons or dangerous substances and items, or by collecting funds. The second provision would cover the contact with criminal organizations with the aim to receive training in preparation for committing serious violent acts. The third provision would punish the appraisal or distribution of texts containing instructions for committing serious violent acts or the appropriation of such texts with the intention to commit a serious

⁵³ See II.B. n. 25, *supra*.

⁵⁴ For the interception of private and commercial communications by means of the Echelon interception system, see the report of the European Parliament of 11.7.2001, A5-0264/2001 PAR1.

⁵⁵ «Bank Data Is Sifted by U.S. in Secret to Block Terror,» *The New York Times*, 23.06.2006, see also European Parliament resolution on the interception of bank transfer data from the SWIFT system by the US secret services, 06.07.2006.

⁵⁶ See Entwurf eines Gesetzes zur Verfolgung der Vorbereitung von schweren staatsgefährdenden Gewalttaten, Deutscher Bundestag, Drucksache 16/11735 of 27.01.2009.

violent act. These provisions could enable the taking of preventive action against certain «sleepers» in specific and clearly described cases at an early stage.

However, the potential for legislative over-reaching in the enactment of preventive, «anticipatory» criminal offenses and the potential for an abuse of detention while awaiting trial based on the likelihood of recidivism (an existing basis for detention in the context of selected offenses, § 112a German Code of Criminal Procedure) clearly illustrate the problems and dangers of such a «system change» that sees criminal law serving direct preventive purposes.⁵⁷ This is particularly true when the implementation of measures is triggered by these anticipatory offenses, such as the broadly drafted statutes on criminal and terrorist organizations in §§ 129 and 129a German Criminal Code, which already allow significant procedural intervention with an eye towards prevention.⁵⁸ Thus, the achievement of direct preventive purposes by means of the criminal law raises additional and difficult questions as to the definition of the legal interest injured by the incriminating act and as to the justification of such an early «anticipatory» attachment of criminal liability.⁵⁹ The example of a sojourn in a terrorist training camp points to the fact that, given its classic, traditional tasks of repression and protection of legal interests as well as its principle of personal culpability, criminal law, from a systematic perspective, is fundamentally unsuited for the pursuit of purely preventive goals.

Yet, the rigorous requirements of post-imprisonment preventive detention (§ 66 German Criminal Code) show that, when tied to the safeguards afforded by the criminal law, purely preventive measures against «dangerous persons» can also be regulated in an independent «track.»⁶⁰ Although post-imprisonment preventive

⁵⁷ On rule-of-law and criminal policy criticisms of § 112a German Code of Criminal Procedure, see *Hassemer supra* (n. 15), StV 2006, pp. 321-332, (323ff.); *Roxin*, Strafverfahrensrecht, 25th ed. Munich 1998, § 30 margin no. 13f. On «apocryphal» grounds for detention, see *Spinellis*, Erklärte und «apokryphe» Ziele, Funktionen und Gründe der «vorläufigen Haft» im griechischen Strafprozess, in: *Hoyer et al.* (ed.), Festschrift für F.C. Schroeder, Heidelberg 2006, pp. 861-875 (867ff.). On the potential application of §§ 112 para. 3 and 112a German Code of Criminal Procedure on suspected terrorists, see *Walther*, Zeitschrift für Internationale Strafrechtsdogmatik (ZIS) 2007, pp. 464-475, pp. 467f.

⁵⁸ For a critical assessment of these organizational crimes, see n.13, *supra*.

⁵⁹ On the – controversial – value of the «Rechtsgut» (legal interest) theory, see *Roxin*, Strafrecht. Allgemeiner Teil – Grundlagen, 4th ed. Munich 2006, § 2 margin nos. 1-141 (margin nos. 2ff.); *Dubber*, Positive Generalprävention und Rechtsgutstheorie: Zwei zentrale Errungenschaften der deutschen Strafrechtswissenschaft aus amerikanischer Sicht, Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW) Vol. 117 (2005), pp. 485-518 (501ff.); *Hassemer/Neumann*, in: *Kindhäuser/Neumann/Paeffgen* (eds.), Nomos Kommentar Strafgesetzbuch, 2nd ed. Baden-Baden 2005, preliminary remarks to § 1 margin no. 108-195; *Wohlens*, Rechtsgutstheorie und Deliktstruktur, Goldammer's Archiv für Strafrecht (GA) 2002, pp. 16-20 (16f.).

⁶⁰ See Entscheidungen des Bundesverfassungsgerichts (BVerfGE) Vol. 109, pp. 133-190 (133ff.). On the categorization of post-imprisonment detention (*Sicherungsverwahrung*) as criminal law in terms of the Basic Law's allocation of power, see Bundesverfassungsgericht (BVerfG), Neue Juristische

detention and other security measures do not incorporate the principle of culpability, the cumulative influence of the requirement of repeated convictions of serious crimes, the criminal procedural guarantees, and the prognosis – subject to judicial evaluation – regarding future dangerousness provide better safeguards than those offered by preventive police measures.

Thus, the question remains open as to whether a linkage – still to be defined more clearly – between highly invasive preventive measures and the criminal law – with its tie to a concrete, door-opening offense, its oversight by an independent prosecutor, its subordination to judicial authority, and its other safeguards – is not better suited for the protection of liberty than is a classic, traditional police law, which relies on an imprecise concept of danger and is limited only by the principle of proportionality (but whose actions today also require the imprint of judicial authority). There are good reasons why the present German police law operates within a severely limited framework and foresees police authority to take «dangerous persons» (soccer hooligans, for example) into custody for only a short period of time.⁶¹

English law, however, exemplifies the advantages and disadvantages of a unified police and criminal law system that does not strictly differentiate between repression and prevention. With its newly created control orders, the English system provides police and courts with far-reaching security powers and has already established standardized procedures for a derogation from human rights obligations as permitted by Art. 15 ECHR.⁶² This model of excessive

Wochenschrift (NJW) 2004, pp. 750-761. On the jurisprudence of the Federal Supreme Court (BGH) regarding the newly enacted § 66b German Criminal Code (preventive detention imposed subsequent to prison sentence), see the judgments in *Strafverteidiger* (StV) 2006, pp. 63–71; see also *Ullenbruch*, *Nachträgliche Sicherungsverwahrung – heikle Materie in den Händen des BGH!*, *Neue Juristische Wochenschrift* (NJW) 2006, pp. 1377-1385.

61 See, e.g., § 28 PolG-BW (Police Law, Baden-Württemberg); Arts. 17, 20 BayPAG (Bavarian police law) (detention for a maximum of two weeks). See also the draft of Art. 24e Schweizer Bundesgesetz zur Wahrung der inneren Sicherheit (Swiss domestic security law) (24-hour limit).

62 For information on control orders, see the Prevention of Terrorism Act 2005 of 11.3.2005. On anti-terror measures in the United Kingdom, see also the Terrorism Act 2000 of 20.7.2000, the Anti-Terrorism, Crime and Security Act 2001 of 14.12.2001, and the Terrorism Act 2006 of 30.3.2006 as well as the House of Commons/Home Affairs Committee, *Terrorism Detention Powers*, Fourth Report of Session 2005-06, Vol. 1, London, 20 June 2006. For an overview of the Government's Counter-Terrorism Proposals, see House of Commons, Home Affairs Committee, *The Government's Counter-Terrorism Proposals*, First Report of Session 2007-08, Vol. I, 13.12.2007, HC 43-I, pp. 6ff. In January 2008, a new Counter-Terrorism Bill was introduced into Parliament. By means of this bill, the government seeks to extend the maximum duration of pre-charge detention for terrorist suspects from 28 days to 42 days, see Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights* (Tenth Report): Counter-Terrorism Bill, Twentieth Report of Session 2007-08, 12.05.2008, HL 108/HC 554, pp. 6ff.

police law can lead to more severe restrictions of human rights than the German model of overloading criminal law with preventive tasks.

F. The Emergence of a New Security Law

The previous analysis shows that, in the course of the described developments, classical legal categories have become blurred as have the protective guarantees associated with them: the twin needs of engaging in preventive activities and identifying «suspicious» or «dangerous» persons are primarily responsible for the extensive breakdown of the distinction between *repressive criminal law responses and preventive police activities* – a distinction that is (or was) fundamental to Continental European criminal law. This is especially true when the gathering of information in the areas of organized crime and terrorism is not linked to the concrete suspicion of a specific criminal act but rather to a more or less abstract security risk. One result of this emphasis on prevention is that the regulation of new methods of intervention designed to combat terrorism is no longer located solely in the law of criminal procedure but can be found in police law as well. The extension of preventive police powers becomes obvious in the new German law on the Federal Police Agency providing many coercive powers of the criminal law system, which are, however, linked to similar procedural safeguards as in the traditional criminal law system.⁶³

Similar developments can be found in the area of the *law on intelligence agencies*, which have gained more intrusive coercive powers as well as the right to transmit certain results of their investigations to traditional criminal law authorities.⁶⁴ A main focus of the German legal reform measures after the attacks of September 11, 2001 has been on establishing new powers of the various intelligence and police agencies to demand and access all types of information and to link the relevant data in a combined «counter-terrorism-database.» As mentioned above, this database can be accessed by federal and state police agencies, the various federal and state intelligence agencies, and the customs and excise agency (*Zollkriminalamt*).⁶⁵ Thus,

⁶³ See Bundeskriminalamtgesetz of 7. Juli 1997 (BGBl. I S. 1650), most recently amended by Article 1 of the Law of 25 December 2008 (BGBl. I S. 3083).

⁶⁴ See Sieber, Ermittlungen in Liechtenstein, *Neue Juristische Wochenschrift* (NJW) 2008, pp. 881-886. The article examines the recent case in which the German foreign intelligence agency (*Bundesnachrichtendienst*) purchased a huge amount of customer data from a former employee of a Liechtenstein trust. The data contained information on both serious cases of money laundering (for which the foreign intelligence agency is competent) and on instances of tax fraud (for which the agency is not competent). The *Bundesnachrichtendienst* passed on the information concerning tax fraud to the tax authorities, who used it to initiate criminal proceedings.

⁶⁵ See *Würtenberger supra* (n. 7), in: *Masing/Jouanjan* (eds.), *supra* (n. 7), p. 36.

in Germany, the above-mentioned strengthening of central federal police powers as well as the improved cooperation and the improved data sharing among different (especially police and intelligence) agencies has led to a fundamental shift in the architecture of security law, namely, to a serious (but still limited) erosion of the principles of a horizontal separation of decentralized state police powers as well as the «principle of separation» of police and intelligence agencies (the so-called *Trennungsprinzip*). Both principles were installed after World War II as a reaction to the abuses of power by the formerly centralized «secret state police,» the Gestapo.⁶⁶

Security is also pursued by means of other areas of administrative law, such as *immigration law*, foreign trade law, and telecommunications law. Since foreigners are often considered particularly dangerous and since they are subject to regulation by immigration law and other laws applicable only to non-citizens, numerous countries now have a «dual legal system» that distinguishes between nationals and non-nationals.⁶⁷ In addition to traditional deportation, such systems also expose the latter to detention without charges, non-recognition of the presumption of innocence, and «ethnic profiling.»⁶⁸

However, the most significant consequences of the additional application of another category of law and an «outsourcing» of crime prevention to other legal branches outside criminal law can be witnessed with respect to the application and expansion of the law of war, which will be described in the following.⁶⁹

66 See *Würtenberger supra* (n. 7), in: *Masing/Jouanjan* (eds.), *supra* (n. 7), pp. 30-36.

67 On the amended German immigration law and its role in the fight against terrorism, see *Marx*, *Terrorismusvorbehalte des Zuwanderungsgesetzes*, *Zeitschrift für Ausländerrecht und Ausländerpolitik* (ZAR) 2004, pp. 275-282; *Tams*, *Die Abschiebungsanordnung nach § 58 a Aufenthaltsgesetz*, *Deutsches Verwaltungsblatt* (DVBl.) 2005, pp. 1482-1487; *Welte*, *Die Meldepflicht gefährlicher Ausländer*, *Zeitschrift für Ausländerrecht und Ausländerpolitik* (ZAR) 2006, pp. 381-383.

68 See *Eckert*, *The Politics of Security*, Max Planck Institute for Social Anthropology Halle, Working Papers No. 76, 2005. On the possibility in the United States of denationalizing naturalized citizens, see *Hooker*, *The Past as Prologue: Schnerman v. United States and Contemporary Questions – Citizenship and Denationalization*, 19 *Emory International Law Review* (*Emory Int'l L. Rev.*), pp. 305-81 (2005). On the possibility in Canada of detaining foreign nationals in a special deportation proceeding, see the «security certificate» procedure set out in Part I Division 9 of the Canadian Immigration and Refugee Protection Act (judicial review of detention and subsequent deportation may take place in the absence of the detainee and the detainee's attorney and on the basis of secret information).

69 For these changes, see – in addition to the references *supra* n.49 – also *Herzog*, «Terroristische Netzwerke» und para-totalitäres Strafrechtsdenken, in: *Nuotio* (ed.), *Festschrift in Honour of Raimo Lahti*, Helsinki 2007, pp. 111–117; *Jung*, *Uses and Abuses of Criminal Law Responses to Terrorism*, in: *Nuotio* (ed.), *Festschrift in Honour of Raimo Lahti*, Helsinki 2007, pp. 97-109 (106ff.).

III. THE APPLICATION AND EXPANSION OF THE LAW OF WAR

The dissolution, described above, of the categories of domestic and international security as well as of those of crime and war in the context of the new «asymmetrical wars» being waged between nation states and international networks has prompted some states to consider terrorism from the perspective of external security. The following resort to measures based on the war paradigm in the efforts to combat terrorism has the perceived benefit for states of significantly expanding the scope of their intrusive powers.⁷⁰

The discussion on the application of military force against suspected terrorists – which had previously been used chiefly by the United States and Israel – gained a certain (limited) currency in Germany in early 2007: A draft law was put forward by the German Minister of the Interior that would amend Art. 87 a para. 2 of the German Basic Law to allow the German military to shoot down a hijacked aircraft. In a previous decision on the Aviation Security Act (*Luftsicherheitsgesetz*), the German Constitutional Court had ruled out such military action as a violation of the Basic Law.⁷¹ A similar development can be witnessed in Italy, where the government is planning to use military paratroopers to fight organized crime.⁷² These cases do not deal with the application of international humanitarian law to cases of terrorism but only with the enforcement of national public law by military force.

The shift to the war paradigm is more clearly illustrated by the counter-terrorism measures adopted by the United States. Indeed, the development of the concept of «war on terror» by the US government not only serves the rhetorical purpose of mobilizing all resources (as would be the case in a «war on poverty») but also serves as a means of legitimizing forms of legal intervention that are incompatible with the classic (peacetime) «law enforcement» approach.⁷³ In addition, the powers

⁷⁰ *Ackerman*, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*, New Haven 2006, p. 13.

⁷¹ See *supra* n.28. On the new alliances between the police and the military, see for Germany *Ziercke*, *Internationale Erscheinungsformen von Kriminalität und Gewalt – internationale Kooperationsformen und die Rolle des BKA*, in: *Bundeskriminalamt* (ed.), *supra* (n. 6), pp. 33-48 (44 f.); *Kästner*, *Statement zum gegenwärtigen Stand und zu den künftigen Entwicklungen von Sicherheitskooperationen*, in: *Bundeskriminalamt* (ed.), *supra* (n. 6), pp. 71-72. Otherwise, up until now, military action against terrorism has been broadly rejected in Germany, see *Schily*, *supra* (n. 49), in: *Bundeskriminalamt* (ed.), *supra* (n. 6), pp. 7-16 (13 f.). Thus, the Federal Constitutional Court decision on the Aviation Safety Act mentioned in the text did not deal with the involvement of military forces in defensive or combat missions but rather in their providing administrative assistance to the police. See *Bundesverfassungsgericht* (BVerfG) *Neue Juristische Wochenschrift* (NJW) 2006, pp. 751-761 (754ff.).

⁷² See, e.g., *Süddeutsche Zeitung* No. 225 of 26 Sept. 2008, p. 9.

⁷³ See *Ackerman*, *The Emergency Constitution*, 113 *Yale Law Journal* (Yale L.J.), pp. 1029-1091 at 1032ff. (2004); *Meierhenrich*, *Analogies at War*, 11 *Journal of Conflict and Security Law*, pp. 1-40 at 7ff. (2006).

purportedly stemming from the law of war as well as other claimed powers can be interpreted by the executive extremely broadly. Indeed, such interpretations have led to substantial legal controversy. The American «war on terror» is a striking example of the fact that the combination of various individual reforms may lead to serious violations of traditional fundamental values, even in a state with a well-established tradition of protecting these rights. The American example also shows that in many cases the violation of human rights through measures adopted in the context of the «war on terror» must not be intentional as such, but are instead the unfortunate by-product of an approach aimed at combating terrorism in which security objectives are considered paramount and the strict adherence to human rights norms is seen as hindering the optimal pursuit of these objectives.⁷⁴ Indeed, in the aftermath of the terrorist attacks of September 11, 2001, this reality has led to the strengthening of the perception in the Bush administration that human rights and due process rights bear a more antagonistic relationship to national security interests than a complimentary one.⁷⁵ However, since the outbreak of hostilities in Afghanistan and the broadening of the «war on terror,» the US judiciary has played a significant counter-role in attempting to limit actions taken by the executive and legislative branches that may unduly sacrifice civil liberties in the name of national security.⁷⁶ It is therefore imperative in seeking to understand this phenomenon that the individual elements whose combined effects have led to the apparent conflict between national security and civil liberty in the United States be more closely examined within their overall context.

The following remarks analyze this process of fighting terrorism by means of the war paradigm using the United States as an example, since the legal development in this country shows that not even a country that has traditionally been seen as a long-standing representative of liberty and as the leader of the free world is immune to such developments if it is heavily targeted by the new conflicts and asymmetric wars. The analysis of the responses of the United States to the attacks of September 11, 2001 based on the «paradigm of war» illustrates the application, extension, and even the abuses of the law of war in reacting to such situations. The following sections will address A.) the justification of the law of war in specific areas of crime, B.) the use of special «war powers,» C.) the reduction of procedural rights, D.) the deprivation of liberty in special facilities, and E.) extraordinary and irregular renditions and abductions.

⁷⁴ Donnelly, *International Human Rights: Unintended Consequences of the War on Terrorism*, in: Weiss/Crahan *et al.* (eds.), *Wars on Terrorism and Iraq: Human Rights, Unilateralism and U.S. Foreign Policy*, Routledge, New York 2004, p. 104.

⁷⁵ Donnelly *supra* (n. 74), at 106.

⁷⁶ E.g., *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) at 2276-77.

A. Justification for Implementing the «Law of War» Paradigm

The American concept of «war on terror» has been used primarily to justify powers stemming from the law of war that far exceed the scope of measures at the state's disposal pursuant to criminal law and police law. This concept of broadening intrusive coercive powers can be illustrated with two examples: In strict contrast to the law of criminal procedure and police law, international humanitarian law as interpreted by the United States allows for the killing of individuals directly participating in hostilities (and therefore the killing of presumed terrorists) under certain conditions.⁷⁷ Persons directly participating in hostilities who are suspected of being terrorists may also be imprisoned for the duration of the conflict – without any evidence of a concrete criminal offense.

Prior to September 11, 2001, however, the provisions of international humanitarian law that allowed for the killing of enemies and for this kind of detention were clearly premised upon an armed conflict with identified geographical and temporal boundaries. Against this backdrop, the use of the «war» paradigm in the terrorism context may have particularly egregious human rights consequences given the lack of such limitations. As a result, some have been led to qualify the war on terror as a «war without end.»⁷⁸

From the Bush administration's perspective, the theoretical justifications advanced to justify the declaration of «war» were the attacks on American interests perpetrated by Al Qaida and the Taliban, characterized as «acts of war» by the United States, as well as the fatwa signed by Osama Bin Laden himself «declaring war on the United States.»⁷⁹ The administration has argued that these events have drawn the country into a continuing, long-term armed conflict. Furthermore, as noted above,

⁷⁷ The legal perspective on targeted killing of terrorist enemies has been extensively discussed in Israel. See *Gross, The Struggle of Democracy Against Terrorism*, Charlottesville, 2006, pp. 220ff.; see also the comprehensive decision by the Israeli High Court of Justice H CJ 769/02 of 13.12.2006. In this decision, Israel's highest court considers as self-evident the fact that criminal measures to fight terrorists are insufficient. However, in his opinion, Chief Justice *Barak* – unlike the Bush administration – does not recognize the existence in international armed conflicts of the category «unlawful combatants» in addition to the categories «combatants» and «civilians.» He justifies the legality of targeted killing by seeing it as an action, permitted by the law of war, against civilians who support active combatants (see paras. 30ff.); for a slightly different interpretation, see the concurring opinion of Vice President *Rivlin*, who considers it unimportant whether the newly recognized category is derived from the existing combatant category («unlawful combatants») or from the existing civilian category («uncivilized civilians») (see para. 2 of his opinion).

⁷⁸ *Ehrenreich Brooks, War Everywhere: Rights, National Security, and the Law of Armed Conflict in the Age of Terror*, 153 *University of Pennsylvania Law Review* (U. Pa. L. Rev.), pp. 675-761 at 725ff. (2004).

⁷⁹ *Ehrenreich Brooks supra* (n. 78), 153 U. Pa. L. Rev., pp. 675-761 at 717 (2004).

this rationale has been extended beyond the geographical limits of the conflict with the Taliban in Afghanistan and has been progressively expanded to address all forms of international terrorism.⁸⁰ Indeed, the Bush administration claimed that it may attack suspected terrorists at any time, regardless of their geographical location, and may imprison them for the duration of the «war on terror.»⁸¹

The US Supreme Court's opinion in *Hamdi*,⁸² however, imposed important limits on this argument. In that judgment, the Court held that «indefinite detention for the purpose of interrogation is not authorized.»⁸³ It nonetheless found that detention for the purpose of preventing the detainee from rejoining the hostilities was justified as long as «United States troops are still involved in active combat in Afghanistan» and not for the duration of the «war on terror» as such.⁸⁴ In *Boumediene v. Bush*,⁸⁵ the June 2008 decision on the rights of suspected terrorist detainees, the Supreme Court reaffirmed that given the possible length of American military involvement in Afghanistan, the imprisonment of detainees could potentially be lengthy, lasting a generation or more.⁸⁶

B. Use of Special «War Powers»

The new mechanisms described above are supplemented by a second type of extraordinary powers that are also grounded in the war paradigm. According to the Bush administration, the President could rely on the «war powers» vested in him by the US Constitution in his capacity as «commander in chief.» Following this interpretation, the President claimed the authority to enact security measures for the duration of the «war on terror,» including far-reaching executive orders that, in times of peace, would otherwise require legislative enactment.⁸⁷ Pursuant to such «presidential orders,» presumed terrorists could be declared «enemy combatants» in complete defiance of the procedure set forth under Geneva law governing prisoners

80 See *Bellinger*, Fifth Anniversary of September 11th Attacks, Remarks, Rome, September 11, 2006, http://useu.usmission.gov/Dossiers/US_EU_Combat_Terrorism/Sep1106_Bellinger_Rome.asp [last visited Sept. 2008].

81 On the merits of this justification, see *Ackerman supra* (n. 73), 113 Yale L.J., pp. 1029-1091, 1032ff. (2004). See also *Fletcher/Ohlin*, *Defending Humanity*, Oxford et al. 2008. For further references see also *infra* n.121.

82 *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2634 (2004).

83 *Hamdi*, 124 S. Ct. at 2641.

84 *Hamdi*, 124 S. Ct. at 2642.

85 *Boumediene*, 128 S. Ct. 2229 (2008).

86 *Boumediene*, 128 S. Ct. at 2270.

87 See *Burnham*, *Introduction to the Law and Legal System of the United States*, 3rd ed. 2002, pp. 665ff.; *Ramsey*, *Textualism and War Powers*, 69 *University of Chicago Law Review*, pp. 1543-1638 (2002).

of war, the telephones of United States citizens could be tapped by the National Security Agency without judicial authorization,⁸⁸ and special military tribunals could be set up to try suspected terrorists.⁸⁹

C. Reduction of Procedural Rights

The adoption of a normative corpus made up of extraordinary legal provisions that fall outside the scope of traditional «law enforcement» was also intended to justify the dismantling of due process rights as well as the adoption of ad hoc procedural frameworks. This is particularly true of the rules governing the admissibility of evidence in the Military Commission Trials at Guantánamo, which – among other things – permit hearsay evidence to be used against detainees.⁹⁰ In addition to the instauration of in camera trials and the use of hearsay evidence, the admissibility of testimony obtained through torture is not categorically excluded.⁹¹ The curtailment of procedural rights affecting the suspected terrorist's ability to defend himself was sharply criticized by the Supreme Court in *Boumediene*, especially in light of the potentially lengthy detention period to which these individuals might be subjected.⁹²

Initially, the very labeling of terrorist suspects as «enemy combatants» was intended to block the access of such individuals to regular courts as well as to circumvent the legal guarantees afforded to prisoners of war by the Geneva

88 See *Pious*, *The War on Terrorism and the Rule of Law*, Roxbury, Los Angeles 2006, pp. 62ff; *Wang*, *Recent Development: The USA Terrorist Surveillance Program*, 43 *Harvard Journal on Legislation*, pp. 517-534 (2006). For a discussion of the President's statutory and constitutional authority to conduct foreign intelligence surveillance, see *Kris/Wilson*, *National Security Investigations & Prosecutions*, Eagan, Mn. 2007, Chapter 15. Responding to severe criticism of the executive's surveillance program, Congress finally passed the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (2008). Amending the 1978 Foreign Intelligence Surveillance Act, the law brings government's surveillance activities within the reach of the legislative branch, yet under many circumstances its provisions lack the traditional requirement of individual prior judicial authorization.

89 See *Koh*, *The Case Against Military Commissions*, 96 *American Journal of International Law* (Am. J. Int'l L.), pp. 337-344 (2002). The latter measure was declared unconstitutional by the US Supreme Court in the *Hamdan* decision (*Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006)). Pursuant to the Military Commission Act of 2006, these tribunals will henceforth operate, in reaction to *Hamdan*, on the basis of a new legal justification. See *Military Commissions Act of 2006*, Pub. L. No. 109-366, 120 Stat. 2600 (2006) as well as *The Manual for Military Commissions, 2007* (<http://www.defenselink.mil/news/commissionsmanual.html> [last visited Sept. 2008]; *Katyal*, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 *Harvard Law Review* (Harv. L. Rev.), pp. 65-123 (2006).

90 See 10 USC § 949a(b)(2)(E); *Addicott*, *Terrorism Law*, Tucson 2007, pp. 87, 108.

91 See *Military Commissions Act of 2006* Sec. 3(a)(1), Pub. L. No. 109-336, 120 Stat. 2600, 2607, codified at 10 USC § 948r.

92 *Boumediene*, 128 S. Ct. at 2266-2271.

Conventions.⁹³ Consequently, the review of individual charges against the internees was performed exclusively by internal military tribunals, the combatant status review tribunals (CSRTs), established by the Defense Department. In June 2004, the US Supreme Court asserted the rights of Guantánamo Bay detainees to challenge their detention in US civil courts.⁹⁴ Subsequent legislation passed by a Republican Congress, the Detainee Treatment Act of 2005⁹⁵ and the Military Commissions Act of 2006,⁹⁶ was evidence of renewed attempts to partially reverse this decision as well as to secure the judicial supremacy of military courts. In June 2008, however, the US Supreme Court held in *Boumediene v. Bush*⁹⁷ that persons detained at Guantánamo have a constitutional right to challenge their continued detention in the federal district courts. The Court declared unconstitutional a provision of the Military Commissions Act of 2006 that denied the federal courts jurisdiction to hear habeas corpus applications from the detainees.⁹⁸

D. Deprivation of Liberty in Special Facilities

The categorical referral of terrorism matters to the military has ultimately enabled the imprisonment of suspects in facilities other than the ordinary detention facilities found in the United States. The Bush administration opted to intern foreign terrorism suspects at military bases and secret CIA prisons outside US sovereign territory in an attempt to hinder these detainees from benefiting from the fundamental rights enshrined in the US Constitution.⁹⁹ Although the United States has historically acknowledged the importance of the Geneva Conventions and has adhered to the provisions contained therein (including those regarding the treatment of captured enemy soldiers), the administration of George W. Bush consistently rebuffed the

93 See Geneva Convention (III), Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 which provides in Article 5: «Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [i.e. POWs], *such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.*» [emphasis added]. See *David*, *Principes de droit des conflits armés*, 3rd ed., Précis de la faculté de droit, Université Libre de Bruxelles, Brussels, 2002, pp. 452ff.

94 See *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

95 Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2739-2744 (2005).

96 Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

97 128 S. Ct. 2229 (2008).

98 See *Greenhouse*, *Justices*, 5-4, *Back Detainee Appeals for Guantánamo*, N.Y. Times, June 13, 2008, at A1.

99 *Crook*, *President Confirms Secret Detentions, Transfers CIA Detainees to Guantanamo Bay*, 100 *American Journal of International Law*, pp. 936-939 (2006).

application of certain firmly established norms of international humanitarian law it considered as too onerous or as jeopardizing national security interests, while at the same time adapting or manipulating other norms to suit its policy agenda.¹⁰⁰ Through a controversial interpretation of its international obligations, the Bush administration based its case for the legality of the detention of suspected terrorist on international humanitarian law while at the same time seeking to deny the rights conferred upon these detainees by the very same body of law.¹⁰¹

In *Rasul*,¹⁰² the US Supreme Court held that while Cuba had full sovereignty over its territory, the lease agreement for the base at Guantánamo Bay conferred upon the United States «complete jurisdiction and control over and within» the territory of the Guantánamo Bay military base.¹⁰³ Therefore, according to the Supreme Court, the Guantánamo naval base was within US territorial jurisdiction.¹⁰⁴ The Court reaffirmed these findings in *Boumediene*, noting that the United States has «total military and civil control over the base.»¹⁰⁵ In addition, pursuant to the *Hamdan* decision, the United States is obliged, at a minimum, to respect the provisions of Common Article 3 of the four Geneva Conventions,¹⁰⁶ which are considered to constitute the minimum set of rights applicable under international humanitarian law.¹⁰⁷ At this point, however, it must be pointed out that the majority of the courses

100 Roth, *The Fight against Terrorism: The Bush Administration's Dangerous Neglect of Human Rights*, in: *Weiss/Crahan et al.* (eds.), *Wars on Terrorism and Iraq: Human Rights, Unilateralism and U.S. Foreign Policy*, Routledge, New York 2004, pp. 116-117. Roth points out that, while the Bush administration persistently sought to downplay the importance of the Geneva Conventions, *inter alia* by claiming they were outdated and anachronistic, American officials nonetheless regularly enjoined states holding American soldiers captive to treat them as prisoners of war and to afford them the corresponding legal rights associated with this status (e.g., coalition prisoners held by Iraq following the commencement of the US-backed invasion of that country).

101 Sloss, *Rasul v. Bush*, 98 *American Journal of International Law* (Am. J. Int'l L.), pp. 788-98, 797-98 (2004). See also Stein, *How Much Humanity Do Terrorists Deserve*, in: *Delissen/Tanja* (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead*, Martinus Nijhoff Publishers, Dordrecht 1991, pp. 567-81 (573-74). See Arnold, *Roberta*, *Human Rights in Times of Terrorism*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV) 66 (2006), pp. 297-320 (310ff.); Oeter, *Terrorismus und Menschenrechte*, *Archiv des Völkerrechts* 40 (2002), pp. 422ff. (437ff.).

102 *Rasul v. Bush*, 124 S. Ct. 2686 (2004). For a summary of the opinion, see Sloss, *Rasul v. Bush*, 98 *American Journal of International Law* (Am. J. Int'l L.), pp. 788-98 (2004).

103 *Rasul*, 124 S. Ct. at 2690-91. See *Lease of Lands for Coaling and Naval Stations*, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418.

104 *Rasul*, 124 S. Ct. at 2696-98.

105 *Boumediene*, 128 S. Ct. at 2248.

106 *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2798 (2006).

107 See *Prosecutor v. Tadic*, 17 July 1995, (Case No. IT-94-1-T), Trial Chamber (10 Aug. 1995) and *Nicaragua v. United States*, 1986 I.C.J. 4.

of action already described result from specifics of US constitutional doctrine or are made possible by the US Constitution.¹⁰⁸

E. Extraordinary and Irregular Renditions and Abductions

According to the June 2006 report by Dick Marty, special investigator for the Council of Europe,¹⁰⁹ as well as an abundance of other media¹¹⁰ and NGO reports,¹¹¹ another level seemed to exist at which measures in the war against terror are carried out in disregard of both national obligations and international agreements. These measures include the CIA's «extraordinary renditions,»¹¹² which involve kidnapping terror suspects on the territory of other sovereign states¹¹³ or their complicit hand-over by the respective governments¹¹⁴ and subsequently detaining (often incommunicado) and interrogating them outside the United States in complete disregard of established rule-of-law standards.¹¹⁵ They also include aggressive and inhumane interrogations

108 For this reason, a possible topic for future research is whether or not such changing relationships, including in the catalogue of measures adopted, is also reflected within other states affected by terrorism: in other words, whether developments similar to those in the United States could be reproduced outside the American constitutional context.

109 *Marty*, Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states, Draft report – Part II (Explanatory memorandum), AS/Jur (2006) 16 Part II (7.6.2006); *Marty*, Alleged secret detentions in Council of Europe member states, Information Memorandum II, AS/Jur (2006) 03 rev. (22.1.2006), *Marty*, Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report (Explanatory memorandum), 7 June 2007.

110 *Priest*, CIA Holds Terror Suspects in Secret Prisons: Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11, *Washington Post*, November 2, 2005; Page A01; Bush admits to CIA secret prisons, *BBC News*, September 7, 2006; Bush: CIA holds terror suspects in secret prisons, *CNN*, September 7, 2006; *L'archipel des prisons secrètes de la CIA*, *Le Monde diplomatique*, August 2006.

111 United States of America: A case to answer. From Abu Ghraib to secret CIA custody: The case of Khaled al-Maqtari, *Amnesty International*, 14 March 2008; U.S. Responsibility for Enforced Disappearances in the «War on Terror,» *Human Rights Watch*, June 27, 2007, No. 3.

112 *Satterthwaite*, *Torture by Proxy: International and Domestic Law Applicable to «Extraordinary Renditions,»* in: *Silkenat/Shulman* (eds.), *The Imperial Presidency and the Consequences of 9/11*, Vol. 2, Preanger Security International, Westport 2007, pp. 257ff.

113 The most notorious of these cases in Germany is the Khaled El-Masri case, in which a German national of Lebanese origin was abducted in Milan by CIA agents; see *Steiger*, *Die CIA, die Menschenrechte und der Fall Khaled el-Masri*, Potsdam 2007.

114 For the extraordinary results of pressure applied to allied governments by the USA in such processes, see *Maljević*, *Extraordinary Renditions – Shadow Proceedings*, *Human Rights and «the Algerian six» in Bosnia and Herzegovina*, in: *Wade/Maljević* (eds.), *A War on Terror? The European Stance on a new threat, new laws and human rights implications*, New York 2009 (forthcoming).

115 See *supra* n. 109.

conducted by individuals linked to the CIA, US military forces,¹¹⁶ or sympathetic regimes,¹¹⁷ in many cases alleged to amount to torture.¹¹⁸ Thus, the fact that some countries question the extraterritorial application of human rights and – more specifically – the fact that some fail to respect the principle of non-refoulement considerably weakens the protection of the individual under international law.

IV. RESULTS AND CONSEQUENCES FOR FUTURE RESEARCH

The foregoing – descriptive – analysis has identified in the context of terrorism and organized crime an area in which the classic differentiations of internal and external security, of peace and war, and of crime and war are blurring. In this area, for example, while the criminal justice system is prosecuting suspects for crimes they allegedly committed in the past and is – aside from police law and intelligence law – also seeking to prevent future dangers by means of penal law, the military, in a war against enemies, is simultaneously attempting to fight these very activities on the basis of the law of war.

A closer analysis of these legal changes distinguishes among three specific developments: the simultaneous application of various traditional branches of law (infra A.), the extension of these branches beyond their traditional limits (infra B.), and the resulting blurring of the different legal categories (and *propria*) of these branches under a vast umbrella of security (infra C.). Taken together, these changes and the emerging new paradigm of security lead to serious problems for the protection of fundamental human rights, challenge traditional legal systems, and require new research efforts in order to develop a consistent architecture of security law (infra D.).

A. The Simultaneous Application of Traditional Branches of Law

The above analysis has shown that international terrorism and specific forms of organized crime are no longer being prosecuted solely by the criminal law but are also being «fought» by means of multiple branches of law. These branches of law

116 See *Rodley*, The Prohibition of Torture: Absolute Means Absolute, in: *Kaleck et al.* (eds.), pp. 185-200 (187ff.). On interrogation of persons under the detention of the Department of Defense, see Detainee Treatment Act of 2005, Pub. L. No. 109-148, secs. 1001–1004, 119 Stat. 2739 (codified as amended at 42 U.S.C. § 2000dd). See also documents related to an internal FBI investigation of the interrogation techniques in use at the Guantánamo Bay detention facility at <http://foia.fbi.gov/foiaindex/guantanamo.htm> [last visited Sept. 2008].

117 *Margulies*, Guantanamo and the Abuse of Presidential Power, Simon & Schuster, New York 2006, pp. 182ff.

118 *Flaherty*, Human Rights Standards Applicable to the United States' Interrogation of Detainees, in: *Silkenat/Shulman* (eds.), The Imperial Presidency and the Consequences of 9/11, Vol. 1, Preanger Security International, Westport 2007, pp. 182ff.

can traditionally be placed in two main conceptual categories: the first category, «internal security law,» is composed of criminal law, police law, and other types of administrative law; the second category, «external security law,» describes the fight, based on the law of war, against the external risks posed by terrorist and organized criminal activities. Intelligence law and immigration law support legal interventions in both categories.¹¹⁹

This intensifies a simultaneous application of different legal categories of traditionally separate branches of law under a new paradigm of security.¹²⁰ This new paradigm creates new powers for a multitude of different agencies, each of which has specific competences in different branches of law. In many cases, these branches of law provide similar solutions and functional equivalents for the same security requirements. This can be seen, for example, in the area of clandestine investigation techniques, in which the arsenals of police law and criminal law are coming to look more and more like those of intelligence agencies. The same development, namely, the creation of functional equivalents in different branches of law, can also be seen with respect to the aim of depriving dangerous persons of their freedom of movement. This aim can be achieved by means of criminal law, police law, immigration law, and international humanitarian law.

The combination of these different approaches, the cooperation of various agencies, and the exchange of data among these agencies is part of the efforts being made to improve security. However, the cooperation of agencies with traditionally different functions can lead to distortions and can raise questions of justification, for example, with respect to the transfer of data between the various legal systems.

B. The Extension of Existing Branches of Law Beyond Their Traditional Limits

In both categories – that of external and that of internal security law –, the comparative analysis shows an extension of limits and a reduction of safeguards of the respective traditional branches of law in the attempt to create more security.

¹¹⁹ External security law can be found beyond the realms of the law of war, e.g., also in broader foreign and aid policy, infused with ideas stemming from the war on terror (details of which cannot, however, be explored here).

¹²⁰ For the comprehensive debate on the effect of the securitization trend, see, e.g., *Braithwaite*, *The New Regulatory State and the Transformation of Criminology*, 40 *British Journal of Criminology* (Brit. J. Criminology), pp. 222-238 (2000).

With respect to the various branches of law that compose «*internal security law*,» this is especially clear in the area of criminal law. The international survey of criminal law discussed above revealed a multitude of changes in the techniques of criminal law, such as early attachment of criminal liability, secret investigation measures and other procedural changes, construction of powerful databases, close cooperation between various agencies in inter-institutional and international task forces, and public-private partnerships. A significant result of these changes is the fact that criminal law has become overloaded with preventive functions that exceed the traditional approach of «prevention by repression.» At the same time, police law is also upgrading its arsenal.

In «*external security law*,» a new law of war has, in a similar manner, been extended beyond its traditional limits. In the United States, for example, the war paradigm is not only applied to situations that do not fall within its traditional scope of application, there also is broad use of presidential war powers, interrogation techniques are becoming more aggressive, secret surveillance is being extended on an international basis, and the rules of evidence have been changed. New coercive measures have been invented and in some cases even exercised on the territories of foreign states. Other examples of a new reading of the law of war are the creation of the hitherto unknown group of persons known as «illegal combatants» (a group that falls outside the traditional safeguards of international humanitarian law), the deprivation of liberty in special facilities, as well as extraordinary and irregular renditions and abductions.

A closer analysis of these parallel changes in internal and external security law brings to light two separate techniques for extending the limits of long-established branches of law: The first and quite obvious technique is the reduction of traditional safeguards, for example, with respect to the regulation of (clandestine) collection and collation of data, the laws of evidence, defense rights, and the criminal law principles of legality, culpability, and the presumption of innocence in the field of criminal law and the creation of a new category of «illegal combatants» in international humanitarian law. In many countries, however, an extension of security interests in these areas has been limited by court decisions. The second – less obvious, but in its consequences even more far-reaching – technique is the extension of the various branches of law beyond their traditional subject matter. The latter can be the case, for example, when criminal law is used to prevent imminent dangers (e.g., in the area of membership crime) or when the law of war is applied to fight crime in situations not constituting an armed conflict.

It is obvious that this development can improve security but that it creates, at the same time, serious problems for the protection of fundamental human rights. This is true both for internal as well as external security law. However, a comparison of the two categories shows that the extension of the war paradigm poses more serious

threats to the protection of fundamental human rights than does the extension of the limits of traditional criminal law. This is because the war paradigm can be much more intrusive from the perspective of fundamental human rights than the criminal law, as was illustrated above with respect to the legitimization of killing or long-term detention. In addition, the corresponding procedural safeguards can be reduced more easily in times of war than during peacetime, when civil liberties must be fully respected. Criminal law – with its tie to a concrete, door-opening offense, its oversight by an independent prosecutor, its subordination to judicial authority, and its other safeguards and principles – is likely to be better suited for the protection of liberty than classic, traditional police law, which relies on a more imprecise concept of danger and is limited by the principle of proportionality (but whose actions in many countries also require the imprint of judicial authority) only. The high protective standards of criminal law are also apparent in a comparison of criminal law and intelligence law with respect to the prerequisites of wire-tapping: in the criminal law of many countries, wire-tapping cannot be ordered by an administrative authority but rather requires a judicial order.

C. The Blurring of Legal Categories

The simultaneous application of traditional branches of law, the extension of the various branches of law beyond their traditional subject matter, and the reduction of traditional safeguards lead, as indicated above, to the blurring of fundamental legal categories, a situation that challenges the traditional architecture of the laws associated with public security. In the areas of external and internal security law, the blurring of fundamental legal categories takes place when clear-cut cases of crime are fought not under the aegis of the criminal law but under the law of war. A similar blurring of categories within the area of internal security law can be seen in the conflation of repressive and preventive aims. This is the case when criminal law takes leave of its repressive functions and assumes more directly preventive functions – functions that at least in German law are traditionally associated with police law. An example of this – discussed above – is the earlier attachment of criminal law, a step taken in the attempt to decrease the risk of future terrorist attacks.

The changes in the range of traditional legal limits and concepts as well as the resulting blurring of classic legal categories can be clearly illustrated with respect to the above-mentioned security problem posed by «dangerous persons» who, it is suspected, will commit terrorist acts in the future: Not only in criminal law but also in the law of war, the freedom of movement of so-called «dangerous» persons is limited primarily by changing the range of the respective laws. Because *international humanitarian law* – which in international armed conflicts grants the authority to take prisoners of war and to intern persons constituting a security threat

without attributing criminal acts – cannot be applied to purely individual crimes, the United States had to extend its application with respect to space and time in order to apply it to loose networks of suspected enemies. *Criminal law* in Europe shows similar aims and techniques: since criminal law – which is based on the concept of committing harm and requires the identification and the attribution of guilt to individual criminals – can easily be applied to specific terrorist and organized crimes, continental law countries have added «membership crimes» to the arsenal of substantive criminal law designed to prevent future crimes. These membership crimes enable the state to take preventive action against all members and supporters of criminal and terrorist groups, even persons who attend a terrorist training course. These statutes, designed with dangerous groups in mind, provide for lengthy sentences that might be combined with detention while awaiting trial based on the likelihood of recidivism. Similar fundamental changes in *police law* are illustrated by the control orders in England and Wales, which in substance attribute functions of the criminal justice system to the police and simultaneously permit the execution of these functions without the procedural safeguards of court proceedings.

The blurring of these fundamental categories can be risky, since the various branches and categories of law form coherent legal subsystems with corresponding aims, means, and – especially – safeguards for human rights. Consequently, the elements of these systems should not be mixed arbitrarily or transferred arbitrarily to other systems. For example, the protection of fundamental rights may be threatened if certain aims, functions, or measures of one branch of law are shifted to another branch without a corresponding transfer of the respective safeguards, as illustrated by the control orders in England and Wales. Thus, the blurring of legal categories can contribute to the further dismantling of the safeguards of fundamental human rights. This development is highly critical for criminal law with its well-developed system and its traditional legal safeguards.

D. Consequences

As a result of these developments, it should be a matter of concern when the traditional safeguards of criminal law are abandoned and traditional areas of criminal law are taken over by other branches of law that respond to criminal activity with solutions that might be functionally equivalent to those of the criminal law. In light of the results of the present analysis, this development presents two main tasks for future research.

In a first step, the present *architecture of the overall security law* must be critically analyzed and its categories as well as their aims, justifications, and prerequisites identified. In the traditional area of *external security law*, this step has to deal with the application of international humanitarian law to international armed conflicts

(between state actors) as well as to transnational and domestic armed conflicts (between state and non-state actors). It should also consider the new asymmetric application of the laws of war and their new constructs, such as illegal combatants.¹²¹ As far as the traditional area of *internal* security law is concerned, the structural analysis of current security architecture must critically examine the justification for the practical separation of three categories that play an important role in countries such as Germany: 1. (backward-looking) repressive criminal law (with the goal of solving past crimes); 2. (forward-looking) preventive police law (with the goal of maintaining order and preventing future harm); as well as 3. (forward-looking) intelligence law (with the goal of preventing future harm caused by inchoate security threats in specific areas at an early time).¹²² This analysis should also consider the safeguarding functions of these classifications that are based, among other things, on the separation of institutional powers, the limitation of the use of data, specific justifications, and specific application requirements of coercive powers.

Based on this structural analysis of the new security architecture, future research should, in a second step, examine the limiting principals and the mechanisms for the protection of human rights in the various branches of law. This comparative analysis of the safeguards built into the traditional branches of law must also answer the questions of whether and to what extent a *general* concept of human rights protection can compensate for the blurring in the application of the various categories of law or whether – additional – *specific* safeguards and principles of the various branches of law must also play a major role. This report supports the hypothesis that many safeguards (often those derived directly from fundamental rights) are applicable in all branches of law whereas other safeguards and the prerequisites for their application are often specific to a particular branch of law (such as the principles of harm and of culpability in criminal law). Based on this hypothesis, the separation of at least some of the above-mentioned branches of law has a significant protective function that should not be blurred absent careful consideration.

121 See *Brooks*, 153 *University of Pennsylvania Law Review*, pp. 675-761 (2004); *Crawford*, 20 *Leiden Journal of International Law* 441-465, pp. (2007); *Pawlik*, *Der Terrorist und sein Recht*, Muenchen 2008, pp. 25-51; *Sassòli*, *Transnational Armed Groups and International humanitarian Law*, Harvard 2006; as well as the contributions of *Stuby*, *Kress* and *Hankel*, in: *Hankel* (ed.), *Die Macht und das Recht*, Hamburg 2008, pp. 266-300, 323-385, 414-460. See also *supra* II.A with further references.

122 See, e.g., *Baumann*, *Deutsches Verwaltungsblatt (DVBl.)* 2005, pp. 798-805; *Hassemer*, *supra* (n. 15), *StV* 2006, p. 323-324; *Möstl*, *Die staatliche Garantie für die öffentliche Sicherheit und Ordnung*, Tübingen 2002, pp. 408ff.; *Ross*, *The Elusive Line Between Prevention and Detection of Crime in German Undercover Policing*, in: *Dubber* (ed.), *Police and the Liberal State*, Stanford, 136-156 (2008).

The proposed analysis must not lead to a complete refusal to accept any shifts or transfers whatsoever among the traditional legal categories. If these shifts are handled carefully, they can serve as the basis for creative new solutions. The German system of post-imprisonment detention, for example, shows that the implementation of preventive functions by the criminal law is possible under the German constitution and can even lead to a more effective protection of both security interests and fundamental human rights – if the preventive measures are limited by certain elements, procedures, and the strong protective safeguards of criminal law. The emergence of new categories of law somewhere between criminal law, police law, and international humanitarian law might also be discussed. If the «outsourcing» of traditional tasks of criminal law can be justified in terms of the basic concepts of other branches of law, the transfer of these tasks can be accompanied by a simultaneous «outsourcing» of traditional criminal law safeguards, which could be applied in a similar or different manner. In light of the current situation and the existing paradigm shifts, the law should be open to new approaches that can better deal with the protection of security and liberty. However, any such considerations and any proposals for future solutions first require a thorough analysis, as mentioned above, of the differing aims, concepts, justifications, scopes of application, coercive powers, legal consequences and legal safeguards of the existing and future branches of security law.

As a consequence, future research must examine in more detail these fundamental and categorical questions with respect to the emerging new architecture of security law and the scope and limits of criminal law, police law, and international humanitarian law. This type of research will not only be an integral part of the research program of the Max Planck Institute for Foreign and International Criminal law, it is also an important focus of the Association Internationale pour la Défense Sociale, which has a long tradition of studying different mechanisms of social control and the protection of fundamental human rights. Thus, we are looking forward to productive cooperation between the two institutions, in general and in this new field of research, in particular, which was introduced – presciently – by its president with the XVth International Congress of Social Defense on «Criminal Law between War and Peace.»

