Terror and Law

German Responses to 9/11

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Abstract

In reaction to the 9/11 terror attacks the German Parliament enacted a number of statutes under the auspices of the so-called war against terror. The repressive new legislation aims at enhancing surveillance and control by police and intelligence agencies by introducing, for example, new passports and ID-cards. In order to prevent attacks similar to those of 9/11, Parliament even established statutory authority to shoot down, using military force, passenger planes being used as a weapon. At the same time the Federal Public Prosecutor General has prosecuted a number of persons as alleged supporters of the 9/11 pilots, and several others, as alleged Islamic terrorists. These forceful reactions of both Parliament and the Public Prosecutor proved premature and were overturned by Germany's highest courts. The fight against terrorism has thus been shown to be bound by constitutional law and general principles of law; such special measures still need, ultimately to adhere to the rule of law.

1. Germany's Attentiveness to Terrorism

Since the 1970s and the passing of the heyday of the Rote Armee Fraktion (RAF) terrorist group, Germany has been left relatively untouched by terrorist crimes. If a terror attack was launched on German soil it was directed against non-German nationals, as for example the attack on the Israeli Olympic team in Munich in 1972, or the bombing of the 'La Belle' night-club in Berlin in 1986, which must be seen in the context of the conflict between Libya and the USA.[1] Whereas during the 1970s repressive legislation was introduced and the German judicial system — that is, judges and prosecutors — had to struggle

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1 The latest judgment in this case is: Bundesgerichtshof, Judgment of 24 June 2005, *Neue Juristische Wochenschrift* (2004) 3051; see P. Hoffmann, 'Terror and Law: The sentencing concerning a terrorist bombing under the German Penal Code: The La Belle Trial', 6 *German Law Journal* (2005) 667.

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with well-organized and highly ideological terrorists of German nationality,[2] the primary focus for police and prosecutors in the subsequent two decades rested on different issues, such as organized economic crimes,[3] e.g. smuggling or trafficking in human beings; systematic political crimes in the former German Democratic Republic (GDR);[4] and war-related crimes in the Balkans.[5]

This feeling of relative security from terrorist attacks amongst the German population was substantially shaken by the 9/11 terror attack in the USA and by the fact that this catastrophic act had been planned in Hamburg, Germany. Since then Germans have not only feared that they might become victims of terrorism, but are also afraid of providing a safe harbour for the planning and instigation of terrorist acts. Thus, both legislative and prosecuting agencies have felt it necessary to act and implement special anti-terror measures to fight these anxieties.

It is the aim of this article to give a short overview of the measures taken, and to explain why some legislation overshoots the mark of constitutionality (*infra* 2) and some prosecutorial activity infringed due process of law (*infra* 3).

2. Legislation

In the wake of 9/11, the so-called 'red-green coalition' under Chancellor Schroeder was forced to deal with the shock the attacks had provoked in Germany. In order to calm society, a wide range of new legislation was deployed. Before looking at important anti-terror amendments to the Criminal Code and the Code of Criminal Procedure (*infra* 2.B), I will first examine what was probably the most far-reaching statutory measure implemented in reaction to 9/11.

*A. Air Security Act (***Luftsicherheitsgesetz***)*

On 11 January 2005, German Parliament passed the Air Security Act that contains a number of regulations for harsher security screenings at airports,

2 The difficulties may be seen e.g. in European Commission of Human Rights, *Ensslin, Baader and Raspe v. Germany*, Applications 7572/76, 7586/76 and 7587/76, DR 14, 64.

3 See e.g. the latest approaches to money laundering, H. Kudlich and F. Melloh, 'Money Laundering and Surveillance of Telecommunication – The Recent Decision of the Bundesgerichtshof (BGH – Federal Court of Justice)', 5 *German Law Journal* (2004) 123.

4 See e.g. the first of the so-called boarder guard cases, Bundesgerichtshof, Judgment of 3 November 1992, 100 *International Law Reports* (1995) 364; and the case against political leaders in the GDR, *Streletz, Kessler and Krenz v. Germany*, online at www.echr.coe.int (homepage, visited 30 August 2006.)

5 See e.g. C. Safferling, 'Public Prosecutor v. Djajić. No. 20/96, excerpted in 1998 Neue Juristische Wochenschrift 392', 92 *American Journal of International Law* (1998) 528; C. Hoss and R. Miller, 'German Federal Constitutional Court and Bosnian War Crimes', 44 *German Yearbook of International Law* (2001) 576.

and as such fulfils the transformation requirements established by the European Regulation on Air Security.[6] It also, however, gives the federal government the power to take military measures to deal with terrorism aboard an aircraft.[7] Ultimately, the Minister of Defence would be empowered to order the use of military force against an aircraft set to be used for attacks on peoples' lives, if this imminent danger cannot be averted by any other means (Section 14(3) Air Security Act).

1. Aim and Purpose of the Act

The aim of the Act is laid down in Section 1: it serves the protection of the security of the airspace against hijacking, sabotage and acts of terrorism.[8] It is clearly based on the experiences of 9/11, and thus is a contribution to the global struggle to enhance air security in order to avoid terror attacks on aircrafts. The Act contains a number of provisions addressing airport security; Section 11 contains a list of items prohibited onboard a plane, or in security areas on the ground. The possession of such items is a criminal offence according to Section 19 of the Air Security Act. This statutory rule has been strictly implemented, as shown in the case of a TV-journalist who wanted to demonstrate the negligence of the ground security personnel at German airports and smuggled a 'butterfly knife' onboard an aircraft. He was found guilty and fined for the possession of a prohibited item.[9]

The Act goes a step further, and provides a legal basis to react if an aeroplane has been hijacked. In a scenario identical to the 9/11 attacks on the World Trade Center and the Pentagon, the German government would have the power to take forcible measures against hijacked passenger planes such as forcing the plane to land, threatening the use of anti-aircraft weapons and ultimately shooting the plane down before it crashes into a building and causes innumerable casualties, i.e. when the plane has been transformed into a weapon by terrorists.[10]

2. Constitutionality of the Act

The Air Security Act was challenged by several individuals before the Federal Constitutional Court (*Bundesverfassungsgericht*). They claimed unconstitutionality because the authorization according to Section 14(3) of the Air Security Act violates Article 35 of the German Federal Constitution (*Grundgesetz*)

6 Regulation (EC) No. 2320/2002 of the European Parliament and of the Council of 16 December 2002 (OJ L 355, 30.12.2002), 1; amended by Regulation (EC) No. 849/2004 of the European Parliament and of the Council of 29 April 2004 (OJ L 158, 30.4.2004), 1.

7 Luftsicherheitsgesetz of 11 January 2005, Bundesgesetzblatt 2005 I, at 78.

8 See also the *travaux préparatoires*, Bundestags-Drucksache 15/2361, 14 January 2004, at 14.

9 Oberlandesgericht Düsseldorf, Judgment of 25 October 2005, 59 *Neue Juristische Wochenschrift* (2006) 630.

10 Compare Bundestags-Drucksache 15/2361, 14 January 2004, 21.

by which domestic security is foremost a matter for the federal states and not the federal government; furthermore they claimed that the power to shoot down a passenger plane infringes on the right to life according to Article 2(1) of the Constitution, and the dignity of the person as set forth in Article 1(1).[11]

In its decision of 15 February 2006, the Constitutional Court accepted these arguments and declared Section 14(3) of the Air Security Act unconstitutional and void for two reasons.[12] First, the armed forces may be used for the sole purpose of defensive operations or in order to avert an imminent danger to the existence of the free democratic basic order of Germany or one of its federal states by virtue of Article 87a(1) of the Constitution. A terrorist attack, such as the one envisaged by the *travaux* does not fulfil these requirements. In any other case, the armed forces may only be deployed to support other agencies in the case of a natural disaster by virtue of Article 87a(2) and Article 35(2) and (3). This authorization was introduced after disastrous floods in north Germany in 1962, and does not contemplate the use of military weapons.[13] Despite this rather explicit and categorical argument of the Court, one must see the political context of the decision: the rather extensive discussions on the question of whether the armed forces should also be deployable internally has up to date not led to an amendment of the Constitution.[14] Should the *pouvoir constitué*, however, decide to modify the Constitution, the argumentation of the Court would break down in this regard. Second, the shooting down of an aeroplane carrying innocent passengers violates the right to life and dignity of human beings. This is the case because the state treats individuals (those on the plane) as mere objects, when ordering firing on a passenger plane.[15] In doing this, the state places itself on an equal footing to the terrorists. In addition, the factual basis of the decision to shoot down a plane is always insecure until the very last moment, so that the danger of premature decisions is far too high.[16] Neither can the wilful killing of the passengers of an aeroplane be justified by the argument that the reason for doing it is to save the lives of others.[17] Should the plane be unmanned or solely occupied by terrorists, however, the situation would be different. Criminals can be held responsible for their acts and may thus, as a last resort, be killed in order to rescue

11 An English version of the Federal Constitution may be found at: http://www.bundestag.de/htdocs_e/info/germanbasiclaw.pdf (visited 1 July 2006).

12 Bundesverfassungsgericht, Judgment of 15 February 2006, online at http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705.html (visited 1 July 2006).

13 *Ibid.*, §§ 110–117.

14 In 2004, the then opposition conservative party (CDU/CSU) proposed amendments to the Constitution aiming at putting the Air Security Act on a solid constitutional basis; see e.g. Bundestags-Drucksache. 15/2649, 9 March 2004. In the Grand Coalition between SPD and CDU/CSU, the question of using the armed forces at home is much debated.

15 Bundesverfassungsgericht, *supra* note 12, § 124.

16 *Ibid.*, § 129.

17 *Ibid.*, § 139; see also W. Höfling and S. Augsberg, 'Luftsicherheit, Grundrechtsregime und Ausnahmezustand', 60 *Juristenzeitung* (2005) 1080, at 1088.

hostages or other innocent people.[18] This second point cannot be overcome by swiftly amending the text of the Constitution. According to Article 79(3), the respect for the dignity of any person is included as an inalienable part of the Constitution. In the context of the debate about sacrificing rights of the individual for an allegedly higher security for all, the decision of the Constitutional Court is a welcome and necessary sign that this process has some categorical limits. The weighing of one life against another constitutes one of these inalienable limitations.

B. Reform of Police Law and Criminal Law

Since September 2001, German Parliament has passed a number of statutes aiming at tightening both preventive and repressive measures in the 'fight against terrorism'. This was done not only through the so-called Suppression of Terrorism Act (*Terrorismusbekämpfungsgesetz*),[19] but also via several other amendments in the field of criminal law and procedure. It is difficult to pinpoint legislative activity as an anti-terror measure, mainly because there is no definition of terrorism in German law. However, the German government has repeatedly warned that terrorism is an international threat, supported by a supra-national network of logistical alliances and operative structures.[20] Whereas before 9/11 terrorism in Europe was perceived as primarily a regional problem (Northern Ireland, Basque Region) attributable to a relatively small group of fundamentalists (RAF, IRA or ETA), the scope of terrorism has now widened dramatically.[21] Thus the globalization of terrorism is the main focus of the newly implemented legislative measures.

1. Substantive Criminal Law

The German Criminal Code (*Strafgesetzbuch*) contains a provision, Section 129a, which prohibits the founding of, membership in or support of a terrorist organization.[22] Although the title of this provision uses the term 'terrorist' organization, the norm is not intended to apply exclusively to terrorist groups. Its ambit extends to every organization that aims at killing, kidnapping or sabotage.[23] This provision has been amended by Section 129b

18 *Ibid.*, §§ 140–154.

19 Gesetz zur Bekämpfung des internationalen Terrorismus, 9 January 2002, Bundesgesetzblatt 2002 I, 361.

20 The wording is repeated in several parliamentary documents, see e.g. Bundestags-Drucksache 14/7727, 4 December 2001, at 1; Bundestags-Drucksache 14/7386, 8 November 2001, at 35.

21 See the analysis of O. Lepsius, 'Liberty, Security, and Terrorism: The Legal Position in Germany', 5 *German Law Journal* (2004) 435, at 438.

22 For an English version of the German Criminal Code see: http://www.iuscomp.org/gla/statutes/StGB.htm (visited 1 July 2006).

23 See H. Tröndle and T. Fischer, *Strafgesetzbuch und Nebengesetze* (54th edn., Munich: C.H. Beck, 2006), §129a, marginal no. 2.

of the Criminal Code;[24] now its scope also encompasses foreign organizations, both criminal and terrorist.[25] Section 129b differentiates between organizations within the European Union (EU) and non-EU states. For the former, the amendment is based on a European joint action of 1998.[26] For the latter, prosecution is possible only if the following preconditions are met: prosecution is limited to cases in which criminal activity is committed on German territory, or where perpetrators or victims are German nationals, or present on German territory. Furthermore, prosecution needs to be authorized by the Ministry of Justice, which will take into account whether the criminal or terrorist group aims at destroying the basic values of the democratic state or the peaceful coexistence of peoples. So far, the provision has not found wide application. The Constitutional Court has cited the norm in an extradition case and upheld the use of undercover agents against foreign criminal organizations by virtue of Section 110a of the Code of Criminal Procedure (*Strafprozessordnung*). It has thereby accepted that crimes in connection with a foreign terrorist organization pursuant to Section 129b of the Criminal Code belong to the field of highly dangerous criminal activities.[27]

The provision has been criticized for being too vague; for being in conflict with the ordinary rules on the applicability of the Criminal Code according to Sections 3–7; and for opening the way to the government influencing the work of the Public Prosecutor.[28] Indeed, the ambit of the norm stretches far into the apron of a criminal act.[29] Furthermore, it seems odd that in this case it is the Minister of Justice who has to decide whether prosecution is to go ahead, whereas in the case of international criminal law, by virtue of the principle of universality according to Section 1 of the German International Criminal

24 See 34th Strafrechtsänderungsgesetz, 22 August 2002, Bundesgesetzblatt 2002 I, 3390-3392. See U. Stein, 'Kriminelle und terroristische Vereinigungen mit Auslandsbezug seit der Einführung von § 129b StGB', 23 *Goltdammer's Archiv für Strafrecht* (2005) 433; G. Altvater, 'Das 34. Strafrechtsänderungsgesetz — § 129b StGB', *Neue Zeitschrift für Strafrecht* (2003) 179.

25 In the case Bundesgerichtshof, Judgment of 16 March 2004, 24 *Neue Zeitschrift für Strafrecht* (2004) 574, the provision was cited in connection with a criminal organization in the area of international tax evasion.

26 Joint action of 21 December 1998, adopted by the Council on the basis of Art. K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organization in the Member States of the European Union, OJ L 351, 1, of 29 December 1998; this joint action was expanded by the Council Framework Decision of 13 June 2002 on combating terrorism, OJ L 164, 3, of 22 June 2002; see C. Kress, 'Das Strafrecht in der Europäischen Union vor der Herausforderung durch organisierte Kriminalität und Terrorismus', *Juristische Arbeitsblätter* (2005) 220.

27 Bundesverfassungsgericht, Judgment of 5 November 2003, 57 *Neue Juristische Wochenschrift* (2004) 141, 145.

28 See e.g. Stein, *supra* note 24, at 433, 447–458; Kress, *supra* note 26, at 220, 226–228; cf. also Tröndle and Fischer, *supra* note 23, § 129b, marginal nos 8–11; and less critical Altvater, *supra* note 24, at 179, 180–182.

29 See Bundesgerichtshof, Judgment of 28 October 2004, 25 *Neue Zeitschrift für Strafrecht — Rechtsprechungsreport* (2005) 73. In this case, the Federal Court of Justice has ruled that the support or promotion of a criminal or terrorist organization must pertain to a concrete organization.

Law Code (*Völkerstrafgesetzbuch*)[30] it is up to the office of the Prosecutor to decide whether or not the prosecution is to continue.[31] According to the 'principle of legality' in German criminal law, the Prosecutor has a duty to prosecute if there are substantial grounds to believe that a crime has been committed with only few discretionary elements; the governmental competence to influence discretion in the application of Section 129 departs significantly from this established approach.

2. *Procedural Law*

The German Code of Criminal Procedure has been immensely modified in the course of the past decades. One of the reasons for this development is the necessity for investigating agencies to be brought up to date concerning technical means of surveillance. The latest amendment in this regard was the introduction of the so-called IMSI-Catcher by virtue of Section 100i.[32] The use of such a device puts the police in a position to identify mobile phone users in order to apply for permission to implement telephone surveillance (Section 100a), or to find out the whereabouts of a suspect in order to serve an arrest warrant. The use of the IMSI-Catcher for any other purpose is prohibited.[33] According to Sections 100i(4) and 100b(1), the use of an IMSI-Catcher requires prior authorization by a judge or, in the case of emergency, by the Prosecutor.

In a judgment pertaining to the constitutionality of police laws in the federal state of Lower Saxony, the Federal Constitutional Court stated that the Federal Parliament used its competence to legislate in the field of interception of telecommunication, according to Article 74(1)(1) of the Constitution, in an exhaustive way.[34] The federal states are, therefore, not permitted to implement further legislation justifying the use of surveillance means for reason of crime prevention. This judgment follows from a long line of decisions demonstrating the Constitutional Court's rather restrictive view of the permissible uses of technical devices in criminal prosecution. The leading decision on acoustic surveillance of housing space of 3 March 2004,[35] drew a line and vetoed

30 For an English translation see: 1 *Annual for German and European Law* (AGEL) (2003) 667; a short summary may be found in C. Safferling, 'Germany's Adoption of an International Criminal Code', 1 *AGEL* (2003) 365.

31 See e.g. the proceedings against US defence secretary Donald Rumsfeld; Holtfort-Stiftung (ed.), *Strafanzeige./Rumsfeld u.a.* (Berlin: Holtfort-Stiftung, 2005); Federal Attorney General, Decision of 10 February 2005, *Juristenzeitung* (2005) 331, Higher Regional Court Stuttgart, Decision of 13 September 2005, *Juristenzeitung* (2006), 208.

32 Gesetz zur Änderung der Strafprozessordnung of 6 August 2002, Bundesgesetzblatt 2002 I, 3018.

33 See H. Hilger, 'Gesetzgebungsbericht: Über den neuen 100i StPO', *Goltdammer's Archiv für Strafrecht* (2002) 557, at 558.

34 Bundesverfassungsgericht, Judgment of 27 July 2005, 58 *Neue Juristische Wochenschrift* (2005) 2603, 2606.

35 Bundesverfassungsgericht, Judgment of 3 March 2004, 57 *Neue Juristische Wochenschrift* (2004) 999.

electronic surveillance in the substantially intimate sphere of private premises.[36] Nevertheless, data that do not belong to this inner sphere of privacy, but pertain to criminal conduct may be collected and used for prosecution. This decision proves that basic rights are sacrificed step by step, for the sake of crime control, and that the Court might slow down this process, but that it is neither willing nor in a position to stop this development.

In the field of serious crimes and terrorism, the threshold for the implementation of secret surveillance methods is usually easy to overcome. In addition to references to murder, manslaughter and hostage-taking, the catalogue of Section 100a of the Code of Criminal Procedure also contains a reference to Section 129a and b of the Criminal Code. In order to trigger the implementation mechanism for electronic surveillance, the police need merely show, pursuant to Section 100a(1) of the Code of Criminal Procedure, that there is certain evidence underpinning a suspicion that such a criminal act was committed, attempted or prepared. Electronic surveillance, it seems, is no longer governed by questions of legitimacy, but solely by the question of practicality. Every method that is practical, will be used by police and agencies.[37] Often enough the courts have given up any serious control of investigation methods.

3. *Cooperation and Control*

Anti-terror legislation passed by the German Parliament has addressed several other issues, which can be divided roughly into matters of cooperation and of control.

Recent legislation aims at enhancing cooperation between police, prosecution services and intelligence agencies, both nationally and internationally.[38] Thus competences of the federal agencies have been widened, and the possibility to share sensitive and personal data between the different services was enhanced. The main German intelligence agencies may now request data from banks and other financial institutions, from the post office, telecommunication companies and airlines.[39]

36 For a review of this decision in English see J. Stender-Vorwachs, 'The Decision of the *Bundesverfassungsgericht* of March 3, 2004 Concerning Acoustic Surveillance of Housing Space', 5 *German Law Journal* (2004) 1337.

37 See U. Eisenberg and T. Singelnstein, 'Zur Unzulässigkeit der heimlichen Ortung per "stiller SMS"', 25 *Neue Zeitschrift für Strafrecht* (2005) 62, at 67.

38 See e.g. the preparatory *travaux* to the Suppression of Terrorism Act, Bundestags-Drucksache 14/7727, 4 December 2001, at 1. The German government is urging further enhancement of this cooperation, see the Draft of a *Terrorismusbekämpfungsergänzungsgesetz* (Amended Suppression of Terrorism Act), Bundesrats-Drucksache 545/06, 11 August 2006, 1.

39 Art. 1 of the Suppression of Terrorism Act, *supra* note 38.

Discussion of the European Arrest Warrant has occurred in this context. With the Framework Decision on the European Arrest Warrant,[40] the EU aimed at enhancing the prosecutorial and police cooperation amongst Member States by introducing the principle of mutual recognition into criminal procedure.[41] Under Article 2(2) of the Framework Decision, dual criminality is not required for surrender in cases of serious crimes, such as terrorism. The German implementing law, the European Arrest Warrant Act (*Europäisches Haftbefehlsgesetz*),[42] however, was declared unconstitutional and void by the Federal Constitutional Court in 2005.[43] The Court found that the European Arrest Warrant as it was implemented in the German Act violates the basic right of every German citizen to be tried by a criminal trial system known to him according to Article 16(2) of the Constitution, by virtue of which 'no German may be extradited to a foreign country'. Before a German citizen can be extradited, the courts must, therefore, evaluate whether the person to be extradited will enjoy similar safeguards and procedural guarantees abroad as in Germany. According to the decision of the Court, extradition (or surrender) of a German national, as a rule, is unconstitutional if the criminal act committed shows a genuine domestic link, e.g. if it is committed solely on German territory. This and similar decisions taken by other national courts, constituted a clear backward step for the efficiency of European cooperation.[44] The national systems, however, have proven to be reliable institutions to safeguard basic rights, and prevent a policy of efficiency becoming an overriding principle.

In addition, anti-terrorism legislation gives priority to the highest possible levels of control. German citizens, therefore, must tolerate the collection and recording of personal data, such as fingerprints and biometric data on their ID-cards and passports.[45] Data from social security agencies may be used for finding wanted persons.[46] Much tighter control measures have been introduced to supervise non-German nationals: associations of foreigners may

40 EU Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, 2002/584 OJ L 190, 1.

41 The principle of mutual recognition is well known in civil law matters, and was developed further by the European Court of Justice beginning with the *Dassonville* case; its introduction into criminal law has provoked a considerable amount of criticism amongst criminal law scholars; see e.g. B. Schünemann, 'Ein Gespenst geht um in Europa – Brüsseler "Strafrechtspflege" intra muros', 149 *Goltdammer's Archiv für Strafrecht* (2002) 517.

42 Bundesgesetzblatt 2004, 1748.

43 Bundesverfassungsgericht, Judgment of 18 July 2005, 58 *Neue Juristische Wochenschrift* (2005) 2289; see S. Mölders, 'Case Note — The European Arrest Warrant in the German Federal Constitutional Court', 7 *German Law Journal* (2006) 45.

44 As to the Constitutional Court in Poland, see K. Kowalik-Bańczyk, 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law', 6 *German Law Journal* (2005) 1355, at 1358–1360.

45 The Passport Act (*Passgesetz*) was amended in this regard by Art. 7 of the Suppression of Terrorism Act; Art. 8 of the Suppression of Terrorism Act amended the Act on Identity Cards (*Gesetz über Personalausweise*), accordingly.

46 Art. 18 of the Suppression of Terrorism Act, *supra* note 38.

be closely watched and outlawed more easily as the religious exception under the prior Section 2 of the Statute concerning Associations (*Vereinsgesetz*) was abolished;[47] also their residence permits will now contain biometric data, and foreigners' voices may be recorded in order to secure their identity.[48] Asylum laws were also tightened once again.[49]

3. Jurisprudence

The shock of the 9/11 attacks has not only inspired Parliament to issue a whole set of counter-terrorism measures. In their wake, the Federal Public Prosecutor General (*Generalbundesanwalt*)[50] also proved willing to act swiftly in charging and trying alleged terrorists, particularly as it turned out that the 9/11 attacks were planned and masterminded in Hamburg, Germany. As a result, the Hamburg Higher Regional Court (*Oberlandesgericht*) convicted two students, Mounir El Motassadeq and Abdelghani Mzoudi, for their involvement in the 9/11 attacks. Both judgments were overturned on appeal by the Federal Court of Justice (*Bundesgerichtshof*). *El Motassadeq* and *Mzoudi* represented the first cases in which a court dealt with the issue of criminal responsibility of individuals for the 9/11 attacks. The case against El Motassadeq has become a test case for Germany's criminal trial system in terrorist matters.[51] In the end, the defendant could not be held responsible for aiding and abetting the murder of the roughly 3000 victims of the 9/11 attacks, as he had been charged by the Prosecutor, but only for membership in a terrorist organization according to Section 129a of the Criminal Code. The case is still pending on appeal and the accused is on bail. This seems a rather meagre outcome of a trial against a person who lived with Mohamed Atta and other 9/11 pilots and travelled to Afghanistan to meet Al Qaeda leaders.

A. Procedural Idiosyncrasies of Trials against Terrorists

Trials against alleged terrorists and international terrorists[52] in particular are unique in several regards. Apart from the high security measures they attract, they receive an immense amount of media attention and are accompanied

47 Änderung des Vereinsgesetzes, 8 December 2001, Bundesgesetzblatt 2000 I, at 3319; see also Lepsius, *supra* note 21, at 440; the Statute concerning Associations was further tightened by Art. 9 of the Suppression of Terrorism Act, *supra* note 38.

48 Arts 10–15 of the Suppression of Terrorism Act, *supra* note 38.

49 *Ibid.*, Art. 12.

50 The Office of the Federal Attorney General is the organ competent for trying cases of national security by virtue of Section 142a, 120 of the Organization of the Courts Act (*Gerichtsverfassungsgesetz*).

51 The first and most important judgment of the Bundesgerichtshof against El Motassadeq is of 4 March 2004, 57 *Neue Juristische Wochenschrift* (2004) 1259.

52 For the difficulties of defining 'what is a terrorist' see the contributions of G.P. Fletcher, T. Weigend and A. Cassese in this issue.

by a highly emotional atmosphere. What is more, a trial like the one against El Motassadeq is also closely followed by an international audience, so expectations are high and prejudices may arise.

The presentation of a proper case against a terrorist, however, meets mainly with four serious difficulties. First, the alleged act is not an isolated incident, but originated in a complex organizational structure. The opacity of this structure may be so good that 'internal evidence', i.e. testimony form group members, is extremely rare. In order to induce 'insiders' to testify against their fellow terrorists, the German government contemplated the reintroduction of legislation that would allow for significant mitigation of punishment in return for the cooperation of the defendant (*Kronzeuge, pentito*).[53] Secondly, 'internal evidence' can only be acquired through informants or under-cover agents, who, as a matter of principle, are unavailable for testimony at trial, because otherwise their lives might be put at risk or further investigations might be endangered.[54] The difficulties multiply if informers are within intelligence agencies, as they are even more reluctant to appear in open court. Judges therefore must rely on hearsay evidence.[55] Thirdly, 'external evidence', i.e. evidence that does not relate directly to a member of the terrorist organization, has mostly weak circumstantial value. And fourthly, the international character of new forms of terrorist organizations exacerbates the difficulty of investigation. International cooperation in criminal affairs in general is a time-consuming matter, and the sharing of information between intelligence agencies of different states for presentation as evidence in a court is even more problematic.

53 The former programme was discontinued in 1999 without evaluation of its success; see e.g. H.-H. Kühne, *Strafprozessrecht* (6th edn., Heidelberg: C.F. Müller, 2003), § 53, marginal nos 800–801. Since 9/11, the discussion has come up again, see e.g. the proposal in Bundestags-Drucksache 15/2333, 13 January 2004. It has found strong support by the presiding judge in the *Al Tawhid* cases before the Higher Regional Court in Düsseldorf, see the reasoning of the judge at: http://www.olg-duesseldorf.nrw.de/presse/material/entscheid/vorwort.altawhid.pdf. (visited 1 July 2006). For a summary of the discussion, see J. Peglau, 'Überlegungen zu Schaffung neuer "Kronzeugenregelungen"', 34 *Zeitschrift für Rechtspolitik* (2001) 103; the latest proposal: Referentenentwurf, Entwurf eines Gesetzes zur Änderung des Strafgesetzbuchs, 18 April 2006 (unpublished).

54 For a summary of the difficulties raised by potential evidence of non-present witnesses in German and European criminal procedural law, see C. Safferling, 'Verdeckte Ermittler im Strafverfahren – deutsche und europäische Rechtsprechung im Konflikt?', 26 *Neue Zeitschrift für Strafrecht* (2006) 75.

55 A good example of the use of 'hearsay' evidence in German terrorist trials is the trial against Monika Haas, who was one of the members of the RAF, and who assisted in the abduction of the German industrialist Hanns Martin Schleyer and in the hijacking of the Lufthansa Airplane *Landshut* in 1977. Intelligence information was introduced into trial by hearsay evidence. This is a perfectly legitimate procedure in German criminal procedure. However, the value of hearsay evidence is not very high, so that the court needs corroboration through circumstantial evidence; see Bundesgerichtshof, Judgment of 11 February 2000, 53 *Neue Juristische Wochenschrift* (2000) 1661; as to hearsay evidence in general see C. Safferling, *Towards an International Criminal Procedure* (Oxford: OUP, 2003), 306–309.

B. Evidentiary Issues

The above idiosyncrasies mostly pertain to the evidentiary situation at trial. The main question at trial is: can the prosecutor prove the guilt of the accused beyond reasonable doubt? In *El Motassadeq*, the Federal Court of Justice to which the defendant appealed, was not convinced that the accused knew of the plans for the 9/11 attacks, and could thus be seen as supporting the later attackers.

1. Evaluation of Evidence

In *El Motassadeq*, the defence presented a case that was just as plausible as the Prosecutor's case. The accused did not deny that he knew the pilots of the 9/11 attacks, but he denied that he had any knowledge of the terror plans. He had flown to Afghanistan in order to be trained for the fight in Chechnya and to learn how to use a weapon, as is ordered by the Koran. To prove his case, the accused referred to Binalshib, a fellow student detained in the USA, who might have been able to testify in his favour. But obtaining Binalshib's testimony was impossible, because the US agencies did not cooperate and did not allow a German judge or agent to interview the witness.

The issue was not about a lack of evidence on the side of the Prosecutor, but about an obstacle for the defence in presenting its case properly, due to insufficient international cooperation. The Hamburg Higher Regional Court nevertheless convicted the accused on this shallow evidentiary basis.

2. The Benefit of the Doubt

The Federal Court of Justice quashed this conviction. According to Section 261 of the Code of Criminal Procedure, judges need to take into account all the evidence presented and must be convinced of the guilt of the accused to such an extent that all reasonable doubts are silenced.[56] If, however, not all significant facts could be established, the basis of the conviction becomes slanted. In such cases, the Court holds, judges must act extremely carefully in weighing the evidence[57] and might have to apply the principle *in dubio pro reo*.[58] In *El Motassadeq*, the judges had to take into account that the testimony of Binalshib might have supported the case of the accused.[59] The evidence presented at trial, without the cooperation of German and US authorities, was not strong enough to overcome any possible doubt. In a re-trial,

56 See L. Meyer-Goßner, *Strafprozessordnung* (47th edn., Munich: C.H. Beck, 2005), § 216, marginal no. 2; see also Safferling, *supra* note 55, at 259–260.

57 See *ibid.*, at 1261.

58 Any doubt should benefit the accused: *ibid.*, at 1261; see also R. Esser, *Auf dem Weg zu einem europäischen Strafverfahrensrecht* (Berlin: De Gruyter, 2002), 742–744 with a view to the requirements of the European Convention on Human Rights.

59 Bundesgerichtshof, *supra* note 51, at 1263.

El Motassadeq was consequently acquitted on the charge of aiding and abetting in murder, but was convicted for membership in a terrorist organization according to Section 129a of the Criminal Code, and sentenced to 7 years' imprisonment.[60]

In a similar case, *Mzoudi*, who was also a student in Hamburg and acquainted with the 9/11 pilots, had to be acquitted, because it could not be proven that he was more than just a fellow student.[61] In other cases tried before the Higher Regional Court in Düsseldorf against the terrorist group 'Al Tawhid', several group members were sentenced to imprisonment between 6 and 8 years according to Section 129a of the Criminal Code.

4. Terror and Law

As we have seen, Germany introduced a considerable amount of new legislation to support the 'war on terror'. German prosecutors have initiated immense activity to prevent, investigate and prosecute terror crimes. Some of these efforts were very successful, as e.g. in the case when an attempt to assassinate the former Iraqi Prime Minister, Iyad Allawi, during his visit to Berlin in December 2004 was detected and the instigators were arrested before they could accomplish their plan.[62] Other efforts were less 'successful', such as the prosecution of the alleged members of the so-called Hamburg terror cell. The case was not strong enough to convince the judges. However, German courts have been wise enough to discipline the prosecutors and not convict on mere suspicion, but insist on the fulfilment of the ordinary requirements of a fair trial, even against terrorists. Despite discussions about a special criminal law for 'enemies',[63] the Federal Court of Justice rightly relies on the rule of law. The German judiciary, therefore, follows in the tradition of

60 El Motassadeq has appealed against his sentence. After the conviction, the arrest warrant was reactivated, because the Prosecutor feared that the convicted person might disappear in view of his relatively long sentence (Section 112 of the Code of Criminal Procedure). On constitutional complaint of El Motassadeq to the Bundesverfassungsgericht, this decision was reversed, because the presence of the accused could be secured by other, less serious means (Section 116 of the Code of Criminal Procedure); see Bundesverfassungsgericht, Decision of 1 February 2006, online at http://www.bundesverfassungsgericht.de/entscheidungen/rk20060201_2bvr205605.html (visited 1 July 2006).

61 See Bundesgerichtshof, Judgment of 9 June 2005, 58 *Neue Juristische Wochenschrift* (2005) 2322.

62 A criminal trial against the planners of the assassination has not started yet; see Focus 51/2005, at 44–46.

63 The term '*Feindstrafrecht*' was crafted by G. Jakobs, 'Bürgerstrafrecht und Feindstrafrecht', in *Höchstrichterliche Rechtsprechung Strafrecht* 2004, 88 (online at http://www.hrr-strafrecht.de/hrr/archiv/04-03/hrrs-3-04.pdf; visited 6 August 2006); *idem*, 'Terroristen als Personen im Recht', 117 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2005) 839; a thorough analysis of this concept can be found in T. Uwer (ed.), *'Bitte bewahren Sie Ruhe' Leben im Feindstrafrecht* (Berlin: Uwer Books, Schriftenreihe Strafverteidigervereinigung, 2006).

Robert H. Jackson, the US Chief Prosecutor at Nuremberg, who in his speech to the American Bar Association on 13 April 1945, stated:

> But there is no reason for a judicial trial except to reach a judgment on a foundation more certain than suspicion or current rumour . . .. The ultimate principle is that you must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty.[64]

64 R.H. Jackson, 'The Rule of Law Amongst Nations', 31 *American Bar Association Journal* (1945) 290.