

Book review – Hans-Joachim Koch (ed.), *Terrorismus – Rechtsfragen der äußeren und inneren Sicherheit* (Baden-Baden: Nomos, 2002)

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Hans-Joachim Koch (Hrsg.), *Terrorismus – Rechtsfragen der äußeren und inneren Sicherheit* (Baden-Baden: Nomos, 2002); Symposium für Hans Peter Bull und Helmut Rittstieg am 31. Mai 2002, 152 S., brosch., 22,- EURO, ISBN 3-7890-8296-1

Since September 11, terrorism and the question of how to deal with it have become the central focus of public attention, at least in the developed world. Plenty of articles and books have been written about this topic recently.¹

This slim new book, "Terrorism – Legal Questions Concerning External and Internal Security," edited by Hans-Joachim Koch, offers a collection of six essays by prominent German legal scholars. It is the product of a symposium held at the Europa-Kolleg in Hamburg on 31 May 2002 in honor of professors Hans Peter Bull and Helmut Rittstieg, who retired from Hamburg University in 2002. Questions of internal and external security have played a central role in the life and work of both professors.

Helmut Rittstieg, who died shortly before the symposium could be held, primarily taught administrative, European and international law. In his work he focused on legal instruments for securing international peace. Rittstieg was a critical scholar of international law, who always kept a sharp eye on political developments, especially in the field of international relations. In the last months of his teaching, Rittstieg focused on the war against terror and its implications.

¹ See for example the latest book by Alan M. Dershowitz, *Why Terrorism Works – Understanding the Threat, Responding to the Challenge* (New Haven and London: Yale University Press, 2002), which was reviewed in GLJ Vol. 4 No. 5, and Thomas L. Friedman, *Longitudes and Attitudes: America in the Age of Terrorism* (New York: Farrar, Straus & Giroux, 2002), Wesley K. Clark, *Winning Modern Wars: Iraq, Terrorism, and the American Empire* (forthcoming), Dieter S. Lutz and others, *Zukunft des Terrorismus und des Friedens. Menschenrechte – Gewalt – Offene Gesellschaft* (Hamburg: VSA, 2002), Ernst-Otto Czempiel, *Weltpolitik im Umbruch. Die Pax Americana, der Terrorismus und die Zukunft der internationalen Beziehungen* (Bonn: Bundeszentrale für Politische Bildung, 2002), Henryk M. Broder, *Kein Krieg, nirgends: Die Deutschen und der Terror* (Berlin: Berlin Verlag, 2002), Heribert Prantl, *Verdächtig. Der starke Staat und die Politik der inneren Unsicherheit* (Hamburg: Europa, 2002) – just to name a few.

Hans Peter Bull, who was the first German Federal Data Protection Commissioner and who also served for a long time as Minister of the Interior in one of Germany's states, Schleswig-Holstein, is a professor of public and administrative law.

That the symposium honoring these men's work should be held in Hamburg was also fitting for the sad prominence the city gained in the wake of September 11 as the residence of 3 of the 19 terrorists involved in the attacks on New York and Washington D.C.

This collection of essays spans topics from "What is Terrorism" (Dieter S. Lutz) through "Terrorism – a Crime under International Law" (Stefan Oeter) to "The New International Terrorism: Does International Law Change?" (Thomas Bruha). Other essays deal with "Freedom through Security?" (Erhard Denninger), "Secret Service Reconnaissance and Internal Security" (Christoph Gusy), and "The Contribution of the European Police Office (Europol) to the Fight against Terror" (Manfred Baldus). While the first three articles in the book cover mainly external security aspects of the fight against terror, the last three essays deal with internal (German/European) security. The book concludes with a summary of the plenary discussion of the symposium and a short article on Helmut Rittstieg by the editor.

The volume opens with an essay by the late Dieter S. Lutz, the former director of the Institute for Peace Research and Security Policy at the University of Hamburg and a central figure in peace research, on "What is Terrorism? Definitions, Change, Perspectives." Lutz tries to answer three questions: what is terrorism? What is new about today's terrorism? What does the future hold?

With regard to the first question, Lutz examines existing efforts to define terrorism, but he also rightly points out that there is no universally accepted definition. Lutz develops four definition criteria² and then comes to his own definition according to which a "terrorist is an illegal combatant, who uses illegal means."³ However, he points out that his definition should only be used to show what does *not* constitute terrorism.⁴ In answering his second question, Lutz correctly shows that the events of September 11 were not as unexpected as politicians now like to portray them. However, he also clearly demonstrates that these attacks opened a new chapter in the history of terrorism and broke with old taboos.

Lutz concludes with a rather pessimistic look to the future. Hinting at Francis Fukuyama's "The End of History,"⁵ which infamously claimed that the end of the

² See Lutz, 9-10, 16.

³ Lutz, 17.

⁴ Lutz, 10.

⁵ Francis Fukuyama, "The End of History?", *National Interest* 18 (1989), 4.

Cold War marked the triumph of liberalism and thus the end of the struggle of the big ideas, Lutz suggests that the West missed a big opportunity in the aftermath of the Cold War to remake the world both better and more just – an opportunity missed through arrogance and the concentration on the pursuit of national interests rather than any attempt to balance interests. He predicts a dire future in which we might face not only a “clash of civilizations,”⁶ but also a war of religions, of poor against rich, of the race against race, and the breakdown of civilization as we know it.⁷ In order to avoid this development, Lutz pleads for a “just peace,”⁸ which must be reached through dialogue and cooperation. At the beginning of this process stands – according to Lutz – the acceptance of one’s own vulnerability. In May 2002 – when the piece was written – Lutz still saw a chance for reaching such a “just peace.” However, his contribution suggests that it is unlikely that, following the war in Iraq, he would be as optimistic now as he was more than a year ago.

Stefan Oeter, Director at the Institute for International Affairs at Hamburg University, begins his essay on “Terrorism – a Crime under International Law?” by describing the widespread insecurity when it comes to dealing with terrorism. “One person’s terrorist, is the other person’s freedom fighter” was the gist of the debate for a long time.⁹ Today, he argues, the open question of the debate is not whether acts of terrorism are damnable crimes (they are), but how exactly these crimes sit within the rubric of international law. Oeter rightly points out that acts of terrorism are first and foremost crimes under domestic criminal law. Generally, international law does not say how these crimes should be prosecuted. However, in the last decades, international law has come a long way towards outlawing all forms of terrorism – even if terrorism as such does not constitute a criminal act under international law (as opposed to genocide or crimes against humanity). Oeter reminds the reader that the 1998 draft of the Statute of the International Criminal Court foresaw a definition of terrorism and a criminal offence called terrorism. However, states were not ready to include this in the final version of the Statute. Oeter sees good reasons for this decision. According to him, there already exists a worldwide obligation for the criminal prosecution of terrorist acts according to the principle of universality. Additionally, some forms of terrorism fall under specific anti-terrorism treaties, such as the International Convention for the Suppression of

⁶ This phrase does, of course, refer to Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Touchstone, 1996, first paperback edition).

⁷ Lutz, 23, 25.

⁸ With the use of the words “Just Peace”, Lutz hints at the concept of “Just War.” See for this play on words also the book by Simon Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law* (Oxford: Oxford Monographs in International Law, 2001).

⁹ Oeter, 31.

Terrorist Bombings or the Convention on the Physical Protection of Nuclear Material.¹⁰ An “International Convention for the Suppression of the Financing of Terrorism” has not been ratified by many states yet, but has – in most of its parts – been put into force by the Security Council in its Resolution 1373 following the events of September 11. Oeter points out that the new, noteworthy component of this Convention is that States for the first time ever agreed on an abstract definition of terrorist offences (“...any other act intended to cause death or serious bodily injury to a civilian, or any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.”).¹¹

Oeter continues with some thoughts on “state terrorism” and “national fights for liberation.”¹² He points out that there is no justification in international law for terrorist acts like the suicide bombings by Hamas against civilians in the Palestinian-Israeli conflict, which are committed within the framework of a national liberation struggle. However, he sees room for the justification of acts committed against military targets of an illegal occupying power. Such liberation struggles, however, are nevertheless bound by international humanitarian law.¹³ With regard to state terrorism, he demonstrates that certain acts committed by state organs can consequently be defined as terrorism if they are meant to intimidate a (civilian) population as such. He calls this the “dark sides” of modern statehood.¹⁴ According to Oeter, there cannot be any useful distinction between private or state actors: Rather, what is important are the modalities and objectives of such acts. Of course, one should point out that this aspect is the continuing subject of fierce debate and thus the answer might be more unclear than Oeter is suggesting.

Oeter concludes his essay with a look at the political debate on whether it is useful to include terrorism in the jurisdiction of the International Criminal Court (against which the current U.S. Government is vigorously fighting with all diplomatic means). He thinks that the disadvantages of such an inclusion would outweigh the obvious advantages.¹⁵ However, his arguments for this (for example that the Court might be overloaded with work if it really wants to prosecute all terrorist acts – and states will never be willing to give it the necessary financial and personnel means to deal with these cases) are generally not particularly convincing.

¹⁰ See for the complete list Oeter, 35 et seq.

¹¹ Article 2 para. 1 b) of the International Convention for the Suppression of the Financing of Terrorism.

¹² Oeter, 40 et seq.

¹³ Oeter, 45 et seq.

¹⁴ Oeter, 50.

¹⁵ Oeter, 49.

Thomas Bruha's essay on "New International Terrorism: Does International Law Change?" is a remarkable *tour de force*. It spans topics from "what is *new international terrorism*" (which he abbreviates "NIT" – a rather odd and pretty useless new acronym) through "was the U.S. response to the September 11 attacks legal under international law" to "how can and must international law change in order to adapt to the new circumstances and to NIT."

In the first part of his essay, Bruha, who is a professor of international law at Hamburg University, describes what is new about this new form of international terrorism – the arguments he uses here are well known and can for the most part be found in Lutz's contribution. Bruha then repeats his justification of the U.S. attacks on Afghanistan under international law, which he has already made elsewhere.¹⁶ What is most interesting about his essay is the last part in which he describes the need for international law to adapt in order to deal with the new forms of terrorism that are being developed. However, his suggestions are very limited. Bruha is strongest, where he argues for the need to adhere to humanitarian law – even if terrorists do not follow the rules – and the need to defend human rights – even the rights of accused terrorists (i.e. those being held in Guantanamo Bay). He rightly points out that human rights can be limited under certain circumstances, but that there are some rights (for example the prohibition of torture and "nulla poena sine lege") that are fundamental and cannot be limited under any circumstances. He sees these "basic standards of civilization"¹⁷ threatened by the war against terror – and the year that passed since the symposium was held proves him right. All around the world, human rights are under attack these days by state institutions that justify their attacks with the war against terror. However, it is absolutely necessary to be aware of the fact that the very rights that western states such as the U.S. want to "defend" are being severely and dangerously limited by them – at home and abroad – in the process.

Last but not least, Bruha asks whether there is a renaissance of the "just war" doctrine, as both – "victim states" of terror and terrorists themselves – are making use of this concept to defend their actions.¹⁸ Bruha sees this seeming revival as a misapprehension or a conscious disregard of international law and the UN system.¹⁹ He points out that a "just war" concept is incompatible with the basic

¹⁶ See Thomas Bruha/Matthias Bortfeld, "Selbstverteidigung und Terrorismus. Voraussetzungen und Umfang erlaubter Selbstverteidigungsmaßnahmen nach den Anschlägen vom 11. September 2001", *Vereinte Nationen* 49 (2001), 161.

¹⁷ Bruha, 79.

¹⁸ Bruha, 80.

¹⁹ Bruha, 81.

philosophy of the UN Charter. Finally, he warns that a thorough analysis of international law and the competencies of the Security Council is almost completely missing in the current (pre-war-in-Iraq!) debate.²⁰

As we see today, Bruha was right about this a year ago and we are now – at least since the start of the war in Iraq – further down the slippery slope of undermining international law.

With his article on “Freedom through Security?”, Erhard Denninger, a professor of public law at Frankfurt University, begins the part of the book that deals with domestic (mostly German) security aspects of the fight against terror. He sheds light on the new German “Law on Fighting International Terrorism” of 9 January 2002. Denninger’s central concern is to defend freedom against security. He is right in pointing out that there cannot be complete security on earth and that anyone who promises such complete security is simply not being serious.²¹ His central thesis is that the logic of the functioning of the liberal state based on the rule of law (*Rechtsstaat*), which is based on freedom and autonomy of the individual, and the logic of the security- or *prevention-state* are mutually exclusive.²² Nevertheless, he argues that a coherent security policy that does justice to both logics needs to be developed.²³ The contrast between security and freedom runs throughout Denninger’s essay. As an example, he mentions that in the draft of the German “Law on Fighting International Terrorism” the word “security” appears 37 times while the word “freedom” is not used at all.²⁴ The pursuit of the unreachable ideal “security” is part of the logic of the prevention-state. Any state that promises full “security” gives a promise that it can never fulfill, but that forces it to be constantly active. Denninger warns that the securitization of all policy endangers the achievements of a state based on the rule of law.²⁵ In the extreme case, he warns, the new German law (and parts of other new laws passed after September 11) might even be unconstitutional and might run contrary to the declared political intention of better integrating resident foreigners in Germany.²⁶

²⁰ Bruha, 81.

²¹ Denninger, 84.

²² See Denninger, 84.

²³ Denninger, 86 et seq.

²⁴ Denninger, 87.

²⁵ See Denninger, 89 et seq.

²⁶ Denninger, 92.

Denninger's warnings should be taken seriously. However, one misses in his article an answer to the question he himself raised: how can a coherent security policy that reconciles freedom and security be developed or where does the compromise lie?

In his contribution on "Secret Service Reconnaissance and Internal Security," Christoph Gusy, a professor of public law at Bielefeld University, outlines a particular method of looking for sleeper cells (*Schläfer*) – collecting and electronically screening data of potential suspects (*Rasterfahndung*). He asks whether the architecture of the German security authorities is ready for the search for members of sleeper cells (*Schläfer* is a term that originated in the world of the intelligence services and that describes a "potential suspect", i.e. a person who so far acted legally, acts legally and will most likely act legally in the near future, but who, under the cover of legality, is building his/her capacity to act²⁷) and whether the "Rasterfahndung" is at all suitable for detecting members of such sleeper cells. "Rasterfahndung" was invented in the 1970ies when Germany was shattered by terrorist acts, mainly of the RAF-group.²⁸ Briefly, "Rasterfahndung" is a method whereby data of a group of people, which is characterized in a general way, is screened by computers looking for special features or profiles that generally characterize a group of (potential) criminals. The high risk that innocent people are also screened, their data saved, and their human rights (right to privacy, right to their home) violated, "Rasterfahndung" is allowed only under very strict preconditions. In fact, most data collected belong to absolutely innocent people.²⁹ Gusy spends most of his essay describing the various legal preconditions of conducting a "Rasterfahndung" under different German state and federal laws, their history, and how such a search is conducted. He points out that the successes of this method are so far very limited and that any such success usually involved solving a crime that had already been committed – not prevented one. Gusy thus unsurprisingly comes to the conclusion that the "Rasterfahndung" method is unsuitable for detecting sleeper cells.³⁰ He sees his essay as a contribution to the discussion on finding better and more suitable methods for identifying sleeper cells, but unfortunately does not suggest any concrete or viable solutions to this end.

²⁷ See Gusy, 96.

²⁸ The RAF (Red Army Faction) was a terrorist group with Marxist views that committed brutal attacks, including murder and hostage-taking, on high-ranking figures of German political and economic life.

²⁹ Gusy, 108.

³⁰ Gusy, 119.

The last essay in this book was contributed by Manfred Baldus of the University of the Armed Forces in Hamburg and deals with "The Contribution of the European Police Office (Europol) to the Fight against Terror." His essay is mainly a description of the history, mission and tasks of Europol. The establishment of Europol was agreed in the Maastricht Treaty on the European Union in 1992. It is based in The Hague, The Netherlands and started limited operations in 1994. After the Europol Convention was ratified by all EU member states and came into force in 1998, Europol commenced its full activities on 1 July 1999. Its mandate is to support the law enforcement activities of the member states in combating and preventing serious international crimes, such as terrorism. It has no executive powers. Baldus spends some time explaining how the fight against terrorism became part of Europol's mandate against initial opposition by some member states, notably Great Britain.³¹ He then focuses on Europol's contribution to the fight against terrorism, which he concludes has so far been limited.³² However, it is notable that among the new developments since publication of the volume is the signing of a full co-operation agreement between Europol and the U.S. Law Enforcement Authorities in December 2002 – an agreement which includes the exchange of personal data and is seen as a first step in joint European and U.S. efforts in fighting terrorism supplementing the bilateral cooperation that already exists between the U.S. and individual EU member states.³³ But Baldus' warning – that one should not overestimate Europol's capabilities in the fight against terrorism and that most of its benefit is so far "symbolic"³⁴ – should still be taken seriously.

In conclusion, most of the essays in this book offer important background information on terrorism and the various legal instruments used to fight it, which can be very useful in the current debate – especially for non-German readers who want to understand the current thinking at German universities and the latest legislative developments in Germany in the fight against terrorism.

³¹ Baldus, 121 et seq.

³² However, one needs to take into account that Baldus finished his research for the essay on 31 May 2002. For more current information see, for example, Europol's website at www.europol.eu.int.

³³ See Europol Press Release, 20 December 2002, available at www.europol.eu.int.

³⁴ Baldus, 136 et seq.