

The international fight against terrorism and the protection of human rights: with recommendations to the German government and parliament

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German Government and Parliament

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Imprint

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Study

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With Recommendations to the
German Government and Parliament

Wolfgang S. Heinz
Jan-Michael Arend



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for Human Rights

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Peter Jaschner: Translation

Preface

The attacks in Tunis, Bali, Riyadh, Moscow, Madrid and London show that terrorism continues to pose a considerable threat. Clearly, the issue at hand is how the international community can defend itself against the danger of terrorism without betraying its own professed values.

Democracies can undermine their own substance when they violate human rights and international humanitarian law or when some politicians, or the media, create a climate in which such violations are, as it were, preemptively justified and excused as measures of self-defense ("global war on terrorism"). How this makes actual violations more likely is exemplified by the human rights violations and war crimes in Iraq and Afghanistan.

In July 2003 the German Institute for Human Rights published its first study entitled *The International Fight against Terrorism and the Protection of Human Rights*. It reported important events from October 2001 to April 2003, analyzed them and made recommendations. The study underlined that, even in democratic countries, the fight against terrorism had led to a loss of control, and even to the deliberate creation of "islands outside the law" for the detention of prisoners. In terms of the rule of law, this was a rather worrying development. In particular, the study criticized violations of human rights and international humanitarian law in Afghanistan and Guantánamo, Cuba. It called for comprehensive and independent monitoring of the human rights situations in countries involved in the fight against terrorism, especially if the latter is conducted as part of a war.

One year on, the cases of torture, above all in Iraq, that were made public in May 2004 have confirmed earlier fears to such an extent as could not have been anticipated in 2003.

This publication is a shortened version of the study "Internationale Terrorismusbekämpfung und Menschenrechte. Entwicklungen 2003/2004 (The International Fight against Terrorism and the Protection of Human Rights)". The English version takes into account two new reports that came out after the publication of the original German version in August 2004. It focuses on the question of how governments can thwart terrorism and terrorists, actual as well as putative, and on control measures that might prevent the violation of human rights. It also looks at German military operations abroad and formulates recommendations for the German government and parliament.

The study is intended for persons interested in this subject who work in politics, academia and the media and, not least, for the general public.

Finally, we would like to thank everybody who contributed to this study and who offered their critical comments. Special thanks go to Anna Würth, Bernhard Schäfer, André Quack, Katrin Schweppe, Stella Ogunlade, Ruth Weinzierl and Anne Sieberns, who supported us with her excellent library services.

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Executive Summary

Internationally, the fight against terrorism is conducted, on the one hand, by countries cooperating within the United Nations (Counter-Terrorism Committee (CTC) of the U.N. Security Council) and on the other hand, by a coalition of more than 60 countries under U.S. leadership (*Operation Enduring Freedom*). The coalition comprises democracies, authoritarian governments and dictatorships.

During the reporting period from May 2003 to July 2004 there were again a considerable number of terrorist attacks, even if not on the scale of September 11, 2001. Terrorism continues to pose a significant threat. The international community must take decisive action to counter this threat. The question is therefore which strategies and rules should be applied to the fight against terrorism, and who should check the compliance with these rules.

It is very important not to exempt the fight against terrorism from the obligations imposed by international human rights norms and other relevant rules under international law. Any policy of fighting terrorism that is insensitive to this concern, or even fails completely in this regard, undermines the very notion of what it means to be a democracy. What is more, it encourages sympathy for terrorists and violent attacks on the West, especially in a region of the world, like the Middle East, where people find it very hard to deal with their historical experience of injustice in the form of colonialism, the continuing conflict between Israel and the Palestinians, as well as the support lent to autocratic and repressive governments by western policies.

The first part of the study sketches current developments in the international fight against terrorism, first at the United Nations, by the group of 8 and then at the European Union. For a long time, the subject of human rights was neglected in policy debates. Thus, it was not until 2003 that the Security Council of the United Nations agreed on resolution 1456 requiring measures against terrorism to conform to human rights,

international humanitarian law and the right of protection for refugees. Concerning the fight against terrorism, the ability of the United Nations to observe a country's human rights practice by means of so-called monitoring mechanisms is not very well developed. At least, the work that the United Nations has done so far in this complex and rapidly changing area must be considered inadequate, especially with regard to its reporting on individual countries. Of course, this work largely depends on the initiatives and the political will of its member states, and that means, it depends on whether and to what degree they are willing to instruct the U.N. to monitor the fight against terrorism critically, and whether they are open to recommendations.

As yet, there is very little cooperation between the Counter-Terrorism Committee (CTC), made up of Security Council members, and the Office of the United Nations High Commissioner for Human Rights (UNHCHR). The Commission on Human Rights (CHR) does very little reporting on individual countries regarding the compliance of their measures against terrorism with human rights norms, whereas, in its thematic reporting, it does address important problems like torture.

There has been no progress on the question of a Comprehensive U.N. Convention against international terrorism. After September 11, 2001, the lack of an internationally recognized definition made it easier for governments to denounce their domestic opposition or the independence movements of certain ethnic groups as terrorists.

Already in 2002 the European Union managed to agree on a common definition of terrorism in a framework decision. Strongly affected by the terrorist attacks first in the USA and then in Madrid, the EU decided on comprehensive cooperation in the fight against terrorism. This covers the cooperation of the various national intelligence services, as well as that of EUROPOL and EUROJUST. The exchange of data agreed upon is problematic from the point of view of human and funda-

mental rights, because, among other things, it is not subject to any parliamentary checks and its purpose is not defined clearly enough. Another cause for concern is the European arrest warrant. Already adopted in June 2002, it has not yet been implemented as national law in various Member States. In the case of so-called EU harmonized catalogue of criminal acts, for example, it will no longer be checked if the offense in question is considered a punishable act in both countries involved in the extradition proceedings.

The second part of the study looks at the connection between security policy and human rights. In general, it can be said that statements on security policy from the USA, NATO and the EU refer to the fight against terrorism as a military task more and more often. This goes hand in hand with the explicit willingness to use military force anywhere in the world. While the EU, in this context, refers to the U.N. charter as the fundamental framework for international relations, the USA and NATO make no mention of the authority of the U.N. Security Council to legitimize the use of force beyond self-defense.

As part of the international fight against terrorism, the German army, the Bundeswehr, operated in Afghanistan (the Special Forces Command – *Kommando Spezialkräfte*). Another 250 soldiers are deployed at the Horn of Africa. In the future, the number of such international missions will probably rise. The fight against terrorism is very different from U.N. peacekeeping operations, which have so far been the main rationale for international *Bundeswehr* missions. This change raises questions concerning the adequate training of soldiers, as well as legal issues such as the treatment of suspected terrorists and prisoners of war. In addition, policymakers will have to devise mechanisms for detecting and prosecuting possible human rights violations by members of the German military or the anti-terror alliance, as well as a framework for human rights reporting by *Bundeswehr* personnel.

In concluding, it must be said that the international fight against terrorism in 2003/2004 was characterized by severe weaknesses as far as the compliance with human rights standards and international humanitarian law was concerned.

In view of the current political debate on how to fight terrorism effectively while respecting the rule of law, the German Institute for Human Rights considers it an absolute necessity that the German government and parliament take proactive measures in foreign and security policy to reduce the likelihood of future violations:

- German policy should view the fight against terrorism as, above all, a fight against international crime, rather than as a “war”.
- If, however, military operations are seen as necessary nevertheless, they should, as a matter of principle, be based on a resolution of the U.N. Security Council.
- The Federal Government should do more to support initiatives at international organizations aimed at systematically monitoring the compliance with human rights norms and international humanitarian law.
- Compliance with human rights standards in the fight against terrorism should also be systematically monitored as part of German relations with third countries. If such compliance is unsatisfactory there should be appropriate political reactions.
- Human rights defenders must be better protected in the fight against terrorism.
- The German parliament should intensify its oversight of international missions and inform the public as comprehensively as possible, especially in the case of anti-terrorist missions. This includes the informed monitoring of the compliance with human rights laws in the countries of deployment.

1 The International Fight against Terrorism

1.1 The United Nations and the Fight against Terrorism: The Roles of Security Council, General Assembly, the Commission on Human Rights, and the Office of the U.N. High Commissioner for Human Rights

The basis for the fight against terrorism within the framework of the United Nations (U.N.) is intergovernmental cooperation with the objective of jointly prosecuting the perpetrators. Although it has as yet not been possible to agree on a Comprehensive Convention against international terrorism collectively, because U.N. members do not see eye to eye on this issue, a number of terrorist crimes have been defined in twelve conventions since 1963.¹

The discussions in the U.N. General Assembly on a Comprehensive Convention against International Terrorism have not made any progress, because it has been impossible to overcome the disagreements, especially between western countries and the members of the Organization of the Islamic Conference (OIC), concerning the legal appraisal of the fight against foreign occupation. A solution to this problem seems rather unlikely in the short term.² However, in the Report of the High-level Panel on Threats, Challenges and Change

to U.N. Secretary-General Annan, the following definition was suggested in December 2004:

"...we believe there is particular value in achieving a consensus definition within the General Assembly, given its unique legitimacy in normative terms, and that it should rapidly complete negotiations on a comprehensive convention on terrorism.

164. That definition of terrorism should include the following elements:

- (a) recognition, in the preamble, that State use of force against civilians is regulated by the Geneva Conventions and other instruments, and, if of sufficient scale, constitutes a war crime by the persons concerned or a crime against humanity;*
- (b) restatement that acts under the 12 preceding anti-terrorism conventions are terrorism, and a declaration that they are a crime under international law; and restatement that terrorism in time of armed conflict is prohibited by the Geneva Conventions and Protocols;*
- (c) reference to the definitions contained in the 1999 International Convention for the Suppression of the Financing of Terrorism and Security Council resolution 1566 (2004);*
- (d) description of terrorism as "any action, in addition to actions already specified by the existing*

¹ This refers to the following conventions:

Convention on Offences and Certain Other Acts Committed on Board Aircraft, adopted in Tokyo on September 14, 1963; *Convention for the Suppression of Unlawful Seizure of Aircraft*, The Hague, December 16, 1970; *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, Montreal, September 23, 1971; *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, New York, December 14, 1973; *Convention against the Taking of Hostages*, New York, December 17, 1979; *Convention on the Physical Protection of Nuclear Material*, Vienna, March 3, 1980; *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, Montreal, February 24, 1988; *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, Rome, March 10, 1988; *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, Rome, March 10, 1988; *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, Montreal, March 1, 1991; *International Convention for the Suppression of Terrorist Bombings*, New York, December 15, 1997; *International Convention for the Suppression of the Financing of Terrorism*, New York, December 9, 1999; On the international agreements and the role of international law see United Nations 2001, Bassiouni 2001 and Higgins/Flory 2002.

² <http://www.un.org/law/cod/sixth/57/docs.htm>, see, for example, U.N. doc. A/57/37.

conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, 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 to abstain from doing any act.³

It remains to be seen whether a strong enough political will can be mobilized among the various countries to get this definition, or a similar one, accepted.

The U.N. Security Council

Following September 11, 2001, the U.N. Security Council emphasized the obligations of countries to prevent acts of terror in its resolutions 1368 and especially 1373 of September 28, 2001.⁴ They state that each act of international terrorism is a threat to world peace and international security. Such acts must therefore be fought by all available legal means. The resolutions confirm the principle of individual and collective self-defense, as well as the duty of every government neither to tolerate nor to support any terrorist activities. A fifteen-member anti-terror committee, the U.N. Counter-Terrorism Committee (CTC), made up of Security Council members, receives reports from countries on their efforts and advises them on request. Moreover, a Counter-Terrorism Committee Executive Directorate was established in 2004.

In a session at the level of foreign ministers on January 20, 2003, the U.N. Security Council agreed on resolution 1456 (2003), which says that terrorism can be defeated only when the principles of the U.N. charter and international standards of law are observed. Somewhat more concretely, the resolution also states that measures against terrorism must, in particular, be consistent with human rights, the protection of refugees under international law, and international humanitarian law.

For the time being, the resolution surely is a positive step, but it cannot hide the fact that there are no clear mechanisms for deciding which U.N. agencies should be in charge of which specific tasks concerning the monitoring of the compliance with human rights norms.

Quite rightly, the resolution calls on the Office of the High Commissioner for Human Rights (UNHCHR) to take responsibility in this regard.

The U.N. General Assembly

In 2002 Mexico was able to get resolution 57/219 accepted by the General Assembly (GA). The resolution requires countries to ensure the compatibility of anti-terrorist measures with international law, and in particular, with human rights, the protection of refugees and international humanitarian law ("protection of human rights and fundamental freedoms while countering terrorism"). The resolution also calls for complying with the recommendations of special procedures and mechanisms set up by the Commission on Human Rights (CHR), as well as with the views of the relevant U.N. treaty bodies. The U.N. High Commissioner of Human Rights is requested to examine the question of fighting terrorism and the protection of human rights, taking into account reliable information, to formulate general recommendations regarding the obligations of countries to promote and protect human rights, and to support those countries that ask for help. Another resolution to this effect was adopted by the GA in 2003.

The U.N. Commission on Human Rights (CHR)

At the 58th session of the CHR⁵ in 2002, Mexico proposed a draft resolution which included human rights requirements for the fight against terrorism and called for systematic monitoring by the U.N. High Commissioner for Human Rights. But the draft had no chance of being supported by the majority and was therefore withdrawn. At least the CHR passed a resolution proposed by Algeria, entitled "Human Rights and Terrorism", it cautiously reminded the international community of the need to comply with human rights and humanitarian standards in the fight against terrorism. In addition, the UNHCHR was asked to advise countries on their anti-terrorist measures if they so requested (Res. 2002/35).

During the 59th session in 2003, Algeria (Res. 2003/37) and Mexico (Res. 2003/68) again submitted a draft resolution each. The resolution initiated by Algeria, which was subsequently adopted, essentially reiterated

³ U.N. 2004a, para 163 and 164.

⁴ U.N. document S/RES/1373 (2001); this one and other resolutions can be found at: <http://www.un.org/Docs/sc/committees/1373> (07-26-2004); on the Security Council's role for the protection of human rights see Ramcharan 2002.

⁵ Currently, 53 countries are represented in the CHR.

the one passed at the 58th session. Mexico, this time, succeeded in getting a resolution accepted. This resolution, which was also supported by Germany, called on the UNHCHR (1) to continuously check compliance with the protection of human rights in the fight against terrorism, (2) to make general recommendations to the various countries concerning the measures taken by them in this area, and (3) to keep advising and assisting countries on request.

In 2002 and 2003, the various governments would not take up the proposal of nongovernmental organizations (NGOs) to appoint an independent special rapporteur on terrorism at the CHR, which would have made on-spot inspections possible.⁶ But in 2004, the commission at least agreed on a proposal by Mexico to designate an independent expert as an adviser to the UNHCHR, which carried significantly less weight in terms of U.N. politics, however (Res. 2004/87, see appendix document 1).

In his first report, the new independent expert, Prof. Robert K. Goldman from the American University analysed U.N. monitoring mechanisms with a view to following anti-terrorism policies and practices. While applauding initiatives of various U.N. human rights bodies and mechanisms, he concluded that neither the treaty-body system nor the special procedures of the U.N. Commission on Human Rights provide for universal, comprehensive and timely monitoring of national counter-terrorism measures and their conformity with international human rights standards.⁷

"It is important", he writes, "that significant steps have been taken by the UN human rights system to address the protection and promotion of human rights in the struggle against terrorism. Nevertheless, the independent expert considers that, given the gaps in coverage of the monitoring systems of the special procedures and treaty bodies and the pressing need to strengthen human rights protections while countering terrorism, the Commission on Human Rights should consider the creation of a special procedure with a multidimensional

mandate to monitor States' counter-terrorism measures and their compatibility with human rights law."⁸

At the 60th session of the CHR, Cuba, a traditional opponent of the USA, intended to introduce a resolution designed to censure the human rights violations at the Guantánamo military base and to have the situation evaluated by a special rapporteur. Moreover, the UNHCHR was to submit a report on Guantánamo. Due to U.S. pressure, the proposal was never voted on. In the end, Cuba withdrew its draft resolution on April 22, 2004.

The relationship between human rights and the fight against terrorism receives rather uneven consideration from the country rapporteurs of the commission. Unlike Afghanistan and Iraq, there are no rapporteurs for many relevant countries. U.N. working groups and thematic rapporteurs have, on the other hand, been quite active on issues such as arbitrary arrests, arbitrary executions, torture, and the independence of the judiciary and other representatives of the administration of justice.⁹

The U.N. Sub-Commission on the Promotion and Protection of Human Rights appointed a special rapporteur, Kalliopi K. Koufa. Since 1997 she has submitted rather technical reports on general trends in the fight against terrorism and the protection of human rights, usually every two years.¹⁰

The Office of the U.N. High Commissioner for Human Rights

The UNHCHR continues to acquire the necessary competence on the subject of combating terrorism. Yet, an offer made by Mary Robinson, the former U.N. High Commissioner for Human Rights to work together with the Counter-Terrorism Committee of the U.N. Security Council was not taken up for a long time. Likewise, there was no response to proposals for human rights criteria to be considered in the evaluation of country reports.¹¹ In 2002 a meeting took place with Robinson's successor, Sergio Vieira de Mello, but as yet coopera-

6 "Joint declaration on the need for an international mechanism to monitor human rights and counter-terrorism" (2004). 78 NGOs supported this proposal. They included Human Rights Watch, amnesty international, FIDH (IFRM), the International Commission of Jurists, and others; <http://www.fidh.org/IMG/pdf/jointdeclaration1211a.pdf> [website accessed on June 22, 2004].

7 United Nations 2005, para. 84 and 87.

8 United Nations 2005, para. 91.

9 See United Nations 2004b.

10 Sub-commission resolution 1997/39. Reports were submitted in 1997, 1999 and 2002 (E/CN.4/Sub.2/1997/28; E/CN.4/Sub.2/1999/27; E/CN.4/Sub.2/2002/35). See also U.N. doc. E/CN.4/Sub.2/2003/WP.1 and Add.1 and 2.

11 See Mary Robinson's proposal for "further guidance" for the submission of reports pursuant to paragraph 6 of Security Council resolution 1373 (2001) (UN doc. E/CN.4/2002/18, pp. 17-21).

tion between the Security Council (CTC) and UNHCHR appears to be very limited. To this day, the reporting guidelines of the Counter-Terrorism Committee do not include any human rights aspects.¹²

In July 2003 the UNHCHR published a *Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights while Countering Terrorism*, which contains a collection of relevant standards and recommendations.¹³

In conclusion, it can be said that at the U.N. the possibilities of observing the practices of various countries, the so-called monitoring mechanisms, are developed rather weakly with regard to the fight against terrorism. So far, at least, the work of the United Nations concerning this complex and rapidly changing subject area must be considered as insufficient, especially with respect to country reporting. Of course, this work essentially depends on the initiative and the will of its member states. This means whether, and to what extent, these countries are ready to have the U.N. critically monitor the fight against terrorism, and whether they are open to recommendations to this effect.

1.2 Human Rights and International Humanitarian Law

International humanitarian law developed before the international protection of human rights, which sprang from the establishment of the United Nations. It comprises internationally binding minimum standards for international and non-international armed conflicts, particularly with regard to the treatment of sick and wounded military personnel as well as the treatment of prisoners of war and civilians. International humani-

tarian law is based on the body of law laid down in the various Hague conventions,¹⁴ the four Geneva Conventions of 1949 and two Additional Protocols of 1977 on international and non-international conflicts. The first and second conventions relate to sick and wounded military personnel, the third to the protection of prisoners of war, and the fourth to the protection of the civilian population.¹⁵ Almost all countries have ratified the four conventions. This is not true for the two additional protocols, however.

The International Committee of the Red Cross (ICRC) can be called the protector of international humanitarian law, even though this role should actually be the responsibility of, above all, the individual countries.

For a long time, international law considered the international protection of human rights to apply to national situations below the threshold of armed conflict.

The *Handbook of International Humanitarian Law in Armed Conflicts* defines as acts of war "an international conflict exists if one party uses force of arms against another party. This shall also apply to all cases of total or partial military occupation, even if this occupation meets with no armed resistance (Art. 2, para. 2 common to the Geneva Conventions). The use of military force by individual persons or groups of persons will not suffice. It is irrelevant whether the parties to the conflict consider themselves to be at war with each other and how they describe this conflict."¹⁶

There is no international institution that might determine when a conflict has become an "armed conflict" in terms of international law. However, the U.N. Security Council can look at such situations and declare them to be conflicts of this type. The same is true for the International Court of Justice, although it usually gets to adjudicate international disputes only after the fact.

¹² See <http://www.un.org/Docs/sc/committees/1373/> and http://www.un.org/Docs/sc/committees/1373/human_rights.html. On the role of the Security Council see Human Rights Watch 2004a.

¹³ <http://www.unhchr.ch/html/menu6/2/digest.doc>.

¹⁴ In particular, cf. the Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Hague Convention on War on Land) (4th Hague Convention of October 18, 1907).

¹⁵ 1st Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; 2nd Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; 3rd Geneva Convention Relative to the Treatment of Prisoners of War; 4th Geneva Convention relative to the Protection of Civilian Persons in Time of War (for German text see [German] Federal Law Gazette (*Bundesgesetzblatt*), 1954 II, pp. 783, 813, 838, 917, and 1956 II, p. 1586). Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of June 8, 1977 (Fed. Law Gaz. 1990 II, p. 1551); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of June 8, 1977, (Fed. Law Gaz. 1990 II, p. 1637). The Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Hague Convention on War on Land) (4th Hague Convention of October 18, 1907).

¹⁶ Christopher Greenwood in Fleck 1995, pp. 40-41.

The perception of a domestic crisis as an "armed conflict" is a highly explosive political issue for most governments, because they usually refuse "to recognize" their opponents as a party to a conflict. Rather, they regard them as members of criminal, and often terrorist, organizations that must be destroyed. Time and again, the ICRC has therefore stressed that the recognition as a party to a conflict does not bestow any special legal status.

There is a certain grey area of situations that are hard to deal with because they fall somewhere in between. They include, for example, crises characterized by mass demonstrations and sporadic acts of violence, although, properly speaking, there is no military entity opposing the government.¹⁷

In recent years, international law has been increasingly dominated by the view that fundamental human rights must apply to armed conflicts, too. That is to say that the two systems of protective rights are not to be seen as separate. At this point, it is useful to recall that human rights must not be derogated and must also be respected in emergency situations and in times of emergency (article 4, section 2 International Covenant on Civil and Political Rights and article 15, section 2 ECHR).

This shows that international humanitarian law and the protection of human rights overlap substantially, as, for example, in the following areas:

- the prohibition of genocide and slavery
- the prohibition of torture, hostage-taking and arbitrary killings
- the right to live
- the obligation to respect the dignity of the human being
- the prohibition of inhumane treatment and discrimination, as well as
- due process and access to a court of law.¹⁸

For suspected terrorists, such as the prisoners at Guantánamo, this means that they may have to be considered prisoners of war. The question of the types of personnel that fall under the protection of the third Geneva convention (article 4) must be addressed. In case of doubt, a competent tribunal must determine the status of detainees, according to article 5 of the Third Geneva Convention.¹⁹ An order of the commander-in-chief, for example, the American president George W. Bush, is not sufficient for such a decision.

If prisoners of war are accused of crimes an investigation can be launched, and those convicted can be punished accordingly. Prisoners of war are not immune from criminal prosecution.²⁰ Giving them the status of prisoners of war is only meant to make sure that they are treated in accordance with the Third Geneva Convention of 1949. A person's status as a prisoner of war is therefore quite compatible with his prosecution for any suspected crimes, including acts of terrorism.²¹ However, the Third Geneva Convention stipulates that the sentencing of a prisoner of war can only be legally binding if it is done by the same courts, and according to the same procedural rules, that members of the detaining country's military are subject to. In addition, the pertinent provisions of chapter III (article 82 ff.) must be observed.

1.3 The Role of Combating Terrorism in the Group of Eight

Originally, the Group of Eight (G8) was intended as a forum for the personal exchange of views on economic-policy issues at the highest governmental level. For some time now, there have been efforts in the G8 to coordinate security policy among Member States as well.²²

¹⁷ See Harroff-Tavel 1993.

¹⁸ Mohr [n. d.], p. 1. Exhaustive, and thus in place of many others: Grote 2003. As a general rule, on international humanitarian law see Fleck 1995, on the right of peoples to self-determination and international humanitarian law see Chadwick 1996. On the role of the ICRC concerning countries where violence is used below the threshold of an armed conflict see Harroff-Tavel 1993. On terrorism and international humanitarian law see ICRC: International Humanitarian Law and Terrorism: Questions and Answers – <http://www.icrc.org/Web/eng/siteeng0.nsf/html/5YNLEV> [July 26, 2004].

¹⁹ It does not have to be a regular court of law. Instead, it could also be a military court. For details, and on the "doubts", see Naqvi 2002, pp. 571ff., 574ff.: "The drafting history indicates therefore that a 'competent tribunal' is something more formal and judicial in character than the ICRC's original proposal of 'responsible authority', suggesting that the determination of status should be made by more than one person and with properly constituted procedures." (ibid., p. 578). See also articles 44 and 45, protocol I.

²⁰ Immunity extends only to legitimate acts of war by combatants, and therefore also to killing people (enemy soldiers), which in times of peace would be criminal acts. The crimes in question must be war crimes, crimes against humanity, or genocide.

²¹ See Gasser 2002, Petitpierre 2002, Gabor 2002 and Vöneky 2003.

²² The Group of Eight is made up of Canada, France, Germany, Great Britain, Italy, Japan, Russia, and the United States of America. In addition, the European Commission is also represented in this group.

This summit of governments has been dealing with questions relating to international cooperation in the fight against terrorism already since 1978. In 1996, at the conference of the seven foreign ministers of what then still was the G7, a catalogue of 25 measures against terrorism was passed. In view of the new challenges, it was updated in June 2002. The catalogue refers to national as well as international measures. They comprise

- the promotion of international treaties and conventions for combating terrorism,
- measures to prevent attacks with chemical, biological, radiological and nuclear weapons,
- the control of explosives and firearms,
- steps designed to prevent the financing of terrorism,
- the improvement of transportation security,
- the enhancement of domestic coordination at the national level,
- increased international cooperation, including the prevention of the abuse of the right to asylum by members of terrorist groups, the abolition, to the greatest extent possible, of obstacles to extradition, as well as effective mutual legal assistance,
- the investigation of potential links between terrorism and organized crime, and
- the support of other countries in their fight against terrorism, especially concerning the implementation of Security Council resolution 1373.

In preparation for the G8 summit on Sea Island in June 2004, the justice and interior ministers of the participating countries put together a list of recommendations, which, among other things, called for the greatest possible extension of investigating authority in the fight against terrorism. In doing so, however, they also stressed legal checks and control mechanisms. It was also in this connection that they recommended the flexible handling of rules excluding evidence obtained improperly from being used in court. The use of evidence gathered by investigating methods that are legal in one country should not be automatically prohibited if these methods are not permissible in the country where that particular case is being tried.²³

Recommendations, statements, and common positions made or adopted at the summit meetings and during preparatory, as well as subsequent, evaluation sessions are not legally binding for the participating countries. Rather, they are "solely" political in nature. Still, their significance should not be underestimated, as they indicate, to say the least, the views and the approach not only of the economically most influential countries.

1.4 The Policy of the European Union (EU)²⁴

Despite the worldwide fight against terrorism, there is as yet no internationally uniform and recognized definition of the concept of terrorism, for instance, at the level of the U.N.²⁵ The EU, however, adopted in its framework decision of June 2002 to combat terrorism a definition of terrorism. According to this definition, criminal acts are considered to be acts of terrorism if they are committed with the aim of " [...] seriously intimidating a population, or [...] seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization".²⁶

But this is a rather vague definition. In fact, it is so indefinite that there is a real danger of abuse or human rights violations respectively. Consequently, various civil and human rights organizations, including Statewatch and amnesty international²⁷, fear that this definition of terrorism might also be applied to militant street protests, such as those in Genoa in 2001, to forms of civil disobedience, such as sit-down blockades outside nuclear power plants, to the occupation of oil rigs, or to political strikes in public utilities.

At its spring summit two weeks after the terrorist attacks in Madrid of March 11, 2004, the EU pointed out that existing decisions on fighting terrorism had to be implemented in the various Member States. It also took some new measures.²⁸

²³ All documents can be retrieved at <http://www.g7.utoronto.ca/>.

²⁴ This section was written by Stella Ogunlade and André Quack.

²⁵ However, the *International Convention for the Suppression of the Financing of Terrorism* of December 9, 1999, U.N. Doc. A/RES/54/109, Annex, does contain a tentative definition of this term in art. 2, sec. 1 (b). Large parts of this convention were "incorporated" into international law by Security Council resolution 1373 (2001) of September 28, 2001. See Peterke 2001.

²⁶ Council framework decision of 13 June 2002 on combatting terrorism, Official Journal (OJ) of the EU, No. L 164/3 art 1. See generally on EU and terrorism http://ue.eu.int/cms3_fo/showPage.ASP?lang=en.

²⁷ For comments by amnesty international in the initial phase of EU discussions see <http://web.amnesty.org/library/Index/EN-GEUR010022002?open&of=ENG-LVA>. For statewatch see <http://www.statewatch.org/news/2002/jul/01terrdec.htm> [March 21, 2005].

²⁸ See the Declaration on Combating Terrorism, Annex to the Presidency Conclusions, European Council Brussels 25/26 March 2005, Bull. EU 3-2004, I. 28, see <http://europa.eu.int/abc/doc/off/bull/de/welcome.htm>.

Strengthening supranational and intergovernmental cooperation

At their summit in the spring of 2004, EU member countries adopted the so-called "solidarity clause", thereby committing their countries to assist each other politically, legally and militarily, if a member country was hit by a natural or man-made catastrophe, or by an act of terror. This means that art. 42 of the European constitution has, as it were, been enacted in advance, even though the constitution has not yet been ratified by all EU member states (it was rejected in France and the Netherlands). Item 2 of the statement of March 25, 2004 says that the "European Council welcomes the political commitment of the Member States and of the acceding States, taken as of now, to act jointly against terrorist acts, in the spirit of the solidarity clause contained in Article 42 of the draft Constitution for Europe."²⁹

Other agreements concerned the increased cooperation and permanent coordination of member states' intelligence services, police forces, and agencies concerned with the administration of justice by means of a Europe-wide information network.³⁰ The European police agency Europol, which so far has not had the authority to conduct its own investigations, is to receive more resources, to be allowed to start its own investigations, and to be linked up with national police forces and intelligence services. However, it is unlikely that there will be a European intelligence service in the near future.

At the spring summit, the Dutchman Gijs de Vries was appointed security coordinator³¹ in charge of coordinating the cooperation of EUROPOL, EUROJUST³² and national intelligence services. He was to submit specific

plans for improving the organization of the fight against terrorism within three months and to boost cooperation with third countries.³³

This kind of international cooperation gives 25 countries access to data that include some very sensitive information on matters concerning the police, intelligence services, foreign nationals and asylum seekers.

Such an exchange of data constitutes a serious problem with regard to EU law and constitutional law, because it is neither subject to parliamentary control nor tied to a clearly defined purpose. At the national level, the insufficient constraints placed on the use of data might lead to the violation of the "principle of clarity", which follows from the principle of the rule of law.³⁴ Another question concerns one's right to control the use of personal data about oneself (right to informational self-determination)³⁵ or the right to data protection (or data privacy). It remains to be examined whether this exchange of data, unrestricted by a clearly specified purpose is compatible with EU fundamental rights as enshrined in article 6, para 1, of the Treaty of the European Union and article 8 of the EU Charter of Fundamental Rights.³⁶

Gathering and exchanging data

In order to prevent extremists from entering the EU, it had been decided to include biometric data in visa and in permits of residence for non-EU citizens from 2006 onwards. Then, at the EU spring summit in 2004, it was decided to introduce the inclusion of such data in the passports of EU citizens, too, if possible already by the end of that very same year. Also, there were some ten-

²⁹ See <http://europa.eu.int/abc/doc/off/bull/de/welcome.htm> [July 27, 2004].

³⁰ "Irland will EU-Sicherheitskoordinator" (Ireland wants EU security coordinator), *Frankfurter Allgemeine Zeitung*, March 17, 2004; "Schröder und Chirac schöpfen Hoffnung aus dem Wahlsieg Zapateros" (Schröder and Chirac find hope in Zapatero's election victory), *Frankfurter Allgemeine Zeitung*, March 17, 2004.

³¹ He is attached to the European Council and reports to the High Representative for the Common Foreign and Security Policy (CFSP), Javier Solana.

³² EUROJUST comprises public prosecutors, judges and police officers delegated by EU Member States. They have equivalent authority, and their mandate is to facilitate the adequate coordination of national prosecutors' offices and to support criminal investigations related to organized crime. The agency was established by the Council at The Hague early in 2002.

³³ "Irland will EU-Sicherheitskoordinator" (Ireland wants EU security coordinator), *Frankfurter Allgemeine Zeitung*, March 17, 2004.

³⁴ This "principle of clarity" is derived from art. 20, III of the Basic Law (Germany's constitution): The legislative branch is bound by the constitutional order while the executive and judicial branches are bound by law and statutes.

³⁵ Art. 2, sec. 1 together with art. 1, sec. 1 of the Basic Law. Fundamental in this context: the Federal Constitutional Court's ruling on the census of December 15, 1983 (Decisions of the German Federal Constitutional Court=BVerfGE 65,1).

³⁶ Art. 4, sec. 1 (b) of Regulation (EC) No. 45/2001 of December 18, 2000 stipulates that personal data can only be collected for specified, explicit and legitimate purposes. However, according to art. 20, sec. 1 (a), this provision can be restricted in order to prevent, investigate, detect and prosecute criminal acts. Possibly, the processing of data would, according to art. 7 (e) of directive 95/46/EC, have to be necessary for the performance of a task carried out in the public interest. Besides, the data could not, according to art. 8, sec. 1 of the directive, contain any information on, for instance, a person's ethnic origin or religious convictions (Official Journal of the EU, No. L 281 of November 23, 1995, p. 31, and No. L 8 of January 12, 2001, pp. 1 and 12).

tative suggestions for creating a Europe-wide database of crimes, fingerprints and DNA samples.

The registration of biometric data is extremely problematic from the view of data privacy. This is all the more true in connection with the surveillance of public spaces by closed-circuit television that had already been decided by the EU earlier. Thus, it would be possible, for example, to identify individuals recorded on video by their facial geometry, and so to trace their movements in public spaces.

At the same time, the reliability of biometric identification systems is very questionable. Some systems produce margins of error of up to 20 percent and can be easily outsmarted with the help of simple tricks. On the other hand, it is possible to retrieve information about various, and highly sensitive, areas of life from one and the same signature card. This possibility might be abused to put together personality profiles.³⁷

On May 17, 2004, the EU commission and the European Council approved a treaty with the USA that requires airlines from EU Member States to pass on their passenger data to the U.S. Customs Service from 2005 on.³⁸ The 34 passenger data include name, date and place of birth, home and office telephone numbers, e-mail addresses, credit-card numbers, information on travel insurance, frequent-flier mileage, the dates of arrival and return trip, seat number, and number of pieces of luggage.³⁹ Data on eating habits that might give a clue to a person's religion, ethnicity or health condition have been removed from the list. As a matter of principle, all data are kept on file for three and a half years at least. Data that arouse the interest of investigators are stored for another eight and a half years. Information used in an actual investigation can even be kept for the full duration of the proceedings. EUROPOL is to monitor the recording and subsequent erasure of the data.

Most airlines, for example Lufthansa, have been passing on passenger data for quite some time, because U.S. authorities had previously threatened to charge them high landing fees, or even to revoke their landing rights if they refused to make the required data available.⁴⁰

The EU parliament is against the passing on of personal passenger data for transatlantic flights, because it sees it as a violation of the EU directive on data privacy as well as of nearly all national data-protection laws (resolution of the parliament of March 31, 2004). Thus, the EC data protection directive's art. 25, sec. 1 stipulates that personal data may only be passed on to a non-member country if that country guarantees an adequate level of data protection.⁴¹ The type of data, as well as the purpose and the expected duration of their use, are to be considered in determining the adequacy of data security (art. 25, sec. 2). The EU parliament was of the opinion that the U.S. Department of Homeland Security, which is to receive the data, did not offer adequate data privacy.⁴²

Further, the EU parliament suspects that the data might be passed on to third countries. For this reason, it requested an opinion from the European Court of Justice (ECJ) on the compatibility of the treaty with EU law.⁴³

Another problem is that passengers who end up as subjects of a U.S. investigation do not receive any information about the way their data are used and the time when their data are erased again. Besides, there is no effective legal protection.⁴⁴

Financial resources of terrorism

In order to implement U.N. Security Council resolutions 1267 and 1373, the EU adopted a regulation "on specific restrictive measures directed against certain persons

37 "Umtriebige Datenhamster" ("Busy data hamsters"), *Frankfurter Rundschau*, April 6, 2004.

38 "EU gibt Flugdaten weiter" ("EU passes on flight data"), *Frankfurter Allgemeine Zeitung*, May 18, 2004; "Das ist eine ganz gefährliche Entwicklung" ("This is a very dangerous development"), *Süddeutsche Zeitung*, May 17, 2004. See http://europa.eu.int/comm/external_relations/us/intro/pnr.htm [July 7, 2004], and on the treaty itself: http://europa.eu.int/comm/external_relations/us/intro/pnr_agreement0504.pdf [July 27, 2004].

39 "Das ist eine ganz gefährliche Entwicklung" ("This is a very dangerous development"), *Süddeutsche Zeitung*, May 17, 2004.

40 "Washington besteht auf europäischen Fluggastdaten" ("Washington insists on European flight-passenger data"), *Frankfurter Rundschau*, April 27, 2004.

41 Directive 95/46/EC of October 24, 1995.

42 Commission Decision of 14 May 2004, OJ (2004) L 235/11.

43 "USA sollen Passagierdaten erhalten" ("USA to receive passenger data"), *Frankfurter Rundschau*, May 18, 2004.

44 "Es gibt keinen Rechtsschutz" ("There is no legal protection"), *Frankfurter Rundschau*, April 24, 2004. "Das ist eine ganz gefährliche Entwicklung" ("This is a very dangerous development"), *Süddeutsche Zeitung*, May 17, 2004.

and entities with a view to combating terrorism".⁴⁵ It requires the various EU countries to freeze the financial assets of certain organizations listed in an appendix, and to impose sanctions on the violation of this regulation.⁴⁶ Not only is this step meant to undermine the financial foundations of terrorism. It also determines who is to be considered an international terrorist, and which organization is to be regarded as an international terrorist group ("terror list"). Anybody on this list is, in fact, unable to draw on their assets. In connection with resolution 1373, individual countries can get anybody listed merely by "open outcry", that is, by suggesting their names out loud. Other countries have the right to object to this suggestion within 48 hours. So far, no criteria have been established for such listings. Given the short time limit for objections, it would seem to be impossible for other countries to examine any suggestion for a listing seriously. According to resolution 1526 of the U.N. Security Council, affected persons or groups are to be informed of their listing. However, this happens on a voluntary basis. Besides, it is not clear whether the affected party's country of residence or the country that made the suggestion is to be responsible for giving them this information.

The freezing of assets, which has been implemented by 173 U.N. member states since September 11, 2001, encroaches substantially upon individual rights guaranteed by national constitutions, EU fundamental rights, the Universal Declaration of Human Rights (UDHR), and the two human rights covenants (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), according to Silke Albin of the German Ministry

of Finance.⁴⁷ Of course, the Charter of Fundamental Rights of the European Union has not yet become law. Finally, the Universal Declaration of Human Rights has no legal force.

In Albin's view, a particularly serious problem is the lack of a formalized procedure to remove somebody from the "terror list". Currently, only the home countries of those affected can initiate removal proceedings. But often these countries do not have the information that caused the listing in the first place. Practically, it is therefore impossible to examine, from a legal point of view, the charges that caused the listing. Further, there is no provision for compensation in the case of unjustified listings. Moreover, it is impossible to sue the United Nations directly, because for individuals there is no recourse to the International Court of Justice.

It is doubtful whether persons or organizations affected can have the legality of their listing reviewed by the European Court of Justice or by national courts. At least, the chances of success of any legal action against member states or the Union, including those for compensation, are in doubt, because of the binding character of U.N. Security Council resolutions (art. 25 of U.N. Charter), which means that such damages cannot be attributed to EU and national agencies.⁴⁸

However, the decisions of the European Court of Human Rights must also be taken into consideration. According to these, signatory countries cannot evade their obligations under the European Convention for the Protection of Human Rights by transferring certain sovereign rights and powers to international organizations (in this case

⁴⁵ Regulation amended by Commission regulation (EC) No. 745/2003 of 28 April 2003 amending Council regulation (EC) 2580/2001 of December 27, 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ (2003) L 106/22. For new lists, see COUNCIL COMMON POSITION 2005/220/CFSP of 14 March 2005 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2004/500/CFSP (OJ (2005) L 69/59) and COUNCIL DECISION 2005/221/CFSP of 14 March 2005 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2004/306/EC (OJ (2005) L 69/64).

⁴⁶ Council Decision of 2 April 2004 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2003/902/EC, OJ (2004) L 99/28.

⁴⁷ Albin 2004, p. 72.

⁴⁸ For the European level see Court of First Instance, *Dorsch Consult Ingenieurgesellschaft mbH v. Council and Commission* (case T-184/95), judgment of April 28, 1998, item 73: "In any event, even if it were appropriate to consider that Law No 57 was a foreseeable consequence of the adoption of Regulation No 2340/90 and/or that, despite the repeal of that Law, it was still by way of retaliation for the maintenance of the Community embargo that the Iraqi authorities were refusing to pay the applicant's claims, the Court considers that the alleged damage cannot, in the final analysis, be attributed to Regulation No 2340/90 but must, as the Council has in fact contended, be attributed to United Nations Security Council Resolution No 661 (1990) which imposed the embargo on trade with Iraq."

the United Nations and the EC/EU).⁴⁹ Rather, even after such a transfer, signatory countries are still responsible for upholding the continuing guarantee of rights according to the principles of the European Convention.⁵⁰

Thus, the signatories of the European Convention for the Protection of Human Rights (and the Covenant on Civil and Political Rights respectively) should work, within the U.N. and the EU, for the respect of, and compliance with, pertinent human rights norms while combating terrorism, and in particular, for ensuring effective legal protection against possibly unjustified listings.⁵¹

As far as human rights are concerned, it would ultimately be very important to develop binding criteria for listings and to afford listed parties effective legal protection. This point is also stressed by Albin as well as others. In the case of unjustified listings, financial compensation should be provided for, as well as the possibility to restore the personal integrity and the ability of those affected to do business.⁵²

With regard to the implementation of effective controls on money laundering, the Financial Action Task Force set up by the Organization for Economic Cooperation and Development (OECD) plays an important role. Its job is to come up with workable standards for checking the laundering of money, to evaluate these standards, and to monitor their implementation in international legislation. The Financial Action Task Force (FATF) strongly proposes to define the financing of terrorism as another form of crimi-

nal money laundering, and to prosecute it accordingly.⁵³ In June 2004 the European Commission proposed a directive for the further improvement of EU measures to counter money laundering and the financing of terrorism.⁵⁴

The European arrest warrant

Already in June 2002 the so-called European arrest warrant was decided on.⁵⁵ It is to replace the extradition procedures currently used between Member States. This arrest warrant is supposed to make it easier and faster to extradite suspected criminals, including terrorists, from one member country to another.

The Council's framework decision on the European arrest warrant contains a catalogue of 32 criminal acts,⁵⁶ including terrorism, that require the perpetrator to be surrendered without checking whether the alleged act is punishable in both countries. With all other crimes, the extradition can be made conditional on the question whether the act is a crime according to the laws of the respective member country.

This framework decision, however, has not yet been implemented as national law in all EU Member States⁵⁷. In Germany the necessary national legislation was passed in July 2004. The European arrest warrant is based on the principle that EU Member States mutually recognize the decisions of their national courts in the area of criminal law. According to the new German

⁴⁹ The U.N. Charter was, in fact, passed before the European Convention for the Protection of Human Rights and the U.N. International Covenant on Civil and Political Rights. Also, art. 103 of the Charter concerning its precedence over other obligations needs to be taken into consideration. However, the U.N. Security Council "shall act in accordance with the Purposes and Principles of the United Nations" (art. 24, sec. 2, sentence 1, U.N. Charter), which includes the promotion and strengthening of the respect for human rights and fundamental freedoms (art. 1, item 3, Charter of the U.N.).

⁵⁰ See European Court of Human Rights, *Matthews v. United Kingdom* (no. 24833/94) and *Waite and Kennedy v. Germany* (no. 26083/94), decisions of February 18, 1999.

⁵¹ If the issue is a domestic act of implementation by governmental authority, one might consider letting listed parties take legal action in the relevant national courts. In this way the country concerned might be instructed by the court to work within the U.N. or EU to get the plaintiff's name removed from the list again. Yet, such actions will also have little chance of success, because it will be difficult, or even impossible, to get an accordingly enforceable judgment formulated. — Thank you to Bernhard Schäfer for research and assistance with the wording concerning this point.

⁵² Albin 2004, p. 73.

⁵³ See <http://www1.oecd.org/fatf/>.

⁵⁴ Proposal for a directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering, including terrorist financing, COM (2004) 448 final.

⁵⁵ The Council's framework decision 2002/584/JHA of June 13, 2002 on the European arrest warrant and the surrender procedures between member states — statements made by certain member states on the adoption of the framework decision, OJ (2002) L 190.

⁵⁶ The listed crimes are rather vague. The positive list includes, for instance, cybercrimes and sabotage.

⁵⁷ "EU ministers tie aid to antiterror effort, plan punishes uncooperative nations", *International Herald Tribune*, March 23, 2004. According to the EU's framework decision of June 13, 2002 (2002/584/JHA), the European arrest warrant should have been implemented as national law by January 31, 2004 at the latest.

bill,⁵⁸ the extradition of German citizens and foreigners with an ordinary permit of residence (so-called *Ausländer mit gewöhnlichem Aufenthalt in Deutschland*) is only permissible if it is certain that extradited persons can serve their prison terms in Germany even though they were sentenced in other EU countries. Thus, if Germans or foreigners falling under the law are sentenced to prison by a final court decision in another European country they must be sent back to Germany on their request. This stipulation is motivated by the principle of social rehabilitation, because the preparation for life after the release from prison can usually succeed only in a country where the person concerned enjoys sufficient social contacts.⁵⁹

One problem with the European arrest warrant is the fact that for those criminal acts it will no longer be checked if a particular act is a punishable offense in both countries involved. Germans, for instance, can be extradited if an act they committed qualifies as "cyber-crime" in another country.⁶⁰

Objections to the framework decision are also justified because there is no complete guarantee that the conditions for issuing an arrest warrant stipulated by the German law of criminal procedure must also be met according to the foreign country's laws. In Germany, for example, section 114 of the law of criminal procedure

reserves the right to issue arrest warrants for judges. The EU framework decision, on the other hand, only requires the decision of one of the judicial authorities, including the prosecutor's office.⁶¹ Yet, at the very least, the judicial review of the reasons for detention must be guaranteed (cf., for example, art. 9, sec. 3 and 4 of the Covenant on Civil and Political Rights). Another critical point is the fact that the potential application of the European arrest warrant is not limited to crimes as defined by section 12 of the German Criminal Code (the distinction between crimes and offenses in German criminal law). Instead, the warrant might be applied to misdemeanors, even if a conviction has already occurred.⁶²

Yet another question concerns the possibilities of accused persons to avoid pretrial detention, as they will often be foreigners without a permanent address. In such cases detention could be more easily justified with the danger that they might run (section 112, German Code of Criminal Procedure).⁶³

Very recently, the national Constitutional Court considered the German bill on transforming the framework as a violation of national fundamental rights (Decision of 18 July 2005, BVerfG, 2 BvR 2236/04). As a result, the German bill is no longer in force and has to be replaced by the German Parliament in accordance with fundamental rights standards.

⁵⁸ Europäisches Haftbefehlsgesetz, BGBl 2004 I, S. 1748.

⁵⁹ <http://www.bmj.bund.de/enid/ka.html>.

⁶⁰ "Raum der Sicherheit und des Rechts?" ("A sphere of security and law?"), *Frankfurter Allgemeine Zeitung*, March 22, 2004.

⁶¹ Introductory regard no. 8, art. 3ff., 9ff., 15ff., 22ff., 26, 29 of the framework decision.

⁶² Art. 2, sec. 1 of the EU framework decision, for example, stipulates that a European arrest warrant can be issued if someone has been sentenced to four months in prison.

⁶³ Comment by the German Chamber of Lawyers on the European arrest warrant (<http://www.brak.de/seiten/02-05-20>) [July 27, 2004].

2 Security Policy and Human Rights

2.1 Concepts of Security Policy and the Mandates for International Missions of Germany's Armed Forces (*Bundeswehr*)

Since September 11, 2001 there has been a new development insofar as a country's right to defend itself against armed attacks (art. 51 of the U.N. Charter) has been applied to a non-state actor, namely al-Qaeda. The USA declared a "War on Terror", as it had done earlier with regard to poverty, crime and drugs. In the war on terrorism in Afghanistan it is doubtful whether the Bush administration intends to comply with the measures of protection stipulated by international law for armed conflict, in particular, the Third Geneva Convention on the treatment of prisoners of war.⁶⁴ According to the available documents made public by the Bush administration, the USA had intended all along not to apply the Third Geneva Convention to Taliban and al-Qaeda fighters, because it saw them as "terrorists" rather than combatants. Thus, the government planned the deliberate and selective noncompliance with obligations under Geneva (and Hague) international law. This raises the question whether it will be politically possible to take the same approach in the future, and which legal norms will be applied to such operations.

Mandating: The international political and legal context

In this context, the first question that needs to be addressed concerns the precise nature of the international mandate, the decision of the German Federal Parliament (*Bundestag*) and the rules of engagement (ROE) for military personnel participating in military operations abroad.⁶⁵ In particular, it must be decided whether future

international missions shall invariably require a prior resolution of the U.N. Security Council, or whether in some cases decisions by the USA, NATO or the EU shall be considered to provide sufficient legitimacy for military intervention, if a decision by the Security Council cannot be obtained.

In "The Alliance's Strategic Concept" of April 24, 1999, NATO assigns to the U.N. Security Council "the primary responsibility for the maintenance of international peace and security". However, it does not assign exclusive jurisdiction. In this capacity, it is said to play a (!) "crucial role in contributing to security and stability in the Euro-Atlantic area." However, there is no binding commitment to make NATO interventions in third countries dependent on a decision by the U.N. Security Council. Interventions are envisioned as global, without any regional limitations. A NATO response force of about 20000 men and women is set up.

Similarly to the U.S. security strategy of September 2002, the new European Security Strategy, based on a proposal submitted in June 2003 by Javier Solana, the European Union's High Representative for the Common Foreign and Security Policy (CFSP), anticipates the following main threats: terrorism, proliferation of weapons of mass destruction, regional conflicts, state failure, and organized crime. According to this strategy paper, a combination of such threats could pose a very serious danger to Europe. Among other things, the paper calls for the build-up of military capabilities. Although interventions are not explicitly linked to decisions by the U.N. Security Council, the U.N. charter is indeed seen as the basic framework for international relations, with the U.N. Security Council bearing the main responsibility for international peace. Unlike its U.S. counterpart, EU

⁶⁴ Cf. the four Geneva conventions of 1949 and the two additional protocols of 1977 (the USA has never ratified the supplemental protocols though). See footnote 14.

⁶⁵ On the U.S. armed forces see the detailed treatment in Martins 1994.

strategy does not speak of preemptive action. It does, however, mention the necessity of preventive engagement, which might be misunderstood as signaling an inclination for early military intervention. The phrase is meant to cover a wide range of missions, such as those that follow from so-called Petersberg tasks,⁶⁶ but also joint disarmament measures, assistance to third countries in their fight against terrorism, as well as support for security-sector reform in third countries.⁶⁷

The defense-policy guidelines for the German armed forces (*Bundeswehr*) do not include any criteria for international missions, yet they assume that defense can no longer be defined in purely geographical terms, for Germany's security is, according to the guidelines, also being defended in other places on this planet. National oases of peace are said not to exist anymore. The guidelines see international law, and the U.N. charter in particular, as the basis for conducting the fight against terrorism.⁶⁸ Yet, the boundaries between various types of missions of the *Bundeswehr* are not rigidly defined as the rapid escalation of conflicts can never be ruled out. A peacekeeping mission might therefore turn into a higher-intensity operation.

The national security strategy of the United States of September 2002 leaves no room for doubt that a decision by the Security Council is not a prerequisite for U.S. intervention.⁶⁹

The U.N. High Level Panel on Threats, Challenges and Change suggested in its report to U.N. Secretary-General Kofi Annan:

"202. The Security Council so far has been neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly or not at all. But step by step, the Council and the wider international community have come to accept that, under Chapter VII and in pursuit of the emerging norm of a collective international responsibility to protect, it can always authorize military action to redress catastrophic internal wrongs if it is prepared

to declare that the situation is a 'threat to international peace and security', not especially difficult when breaches of international law are involved.

203. We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent."⁷⁰

Obviously, there is a growing trend towards giving political reasons for unilateral action by groups of countries without authorization by the U.N. Security Council. This is particularly true when countries that cannot get their proposals accepted consider this to be a blockade by the U.N. Security Council, and therefore regard unilateral action as justified. With regard to Germany, this raises the question as to which policy the German government will pursue in the future.

2.2 German Defense Policy and International Missions of Germany's Armed Forces (*Bundeswehr*)⁷¹

The number of international missions of the *Bundeswehr* as part of U.N. peacekeeping operations has already increased significantly since the beginning of the 1990s. By contrast, the deployment of the *Bundeswehr* to fight terrorism is a new issue.⁷² The first missions were carried out in Afghanistan as part of the anti-terror coalition (Operation Enduring Freedom) with the deployment of about 100 members of the Special Forces Command (*Kommando Spezialkräfte*) (KSK), as well as in Kuwait and at the Horn of Africa. In the medium term, German forces will probably be deployed more frequently in order to combat terrorism abroad. So far, their share has been rather small when compared to the international missions of other countries.

⁶⁶ Art. 17, sec. 2 of the Treaty on European Union (EU treaty) mentions humanitarian activities and rescue missions, peacekeeping missions as well as combat missions in order to deal with crises, including measures designed to bring about peace.

⁶⁷ European Union 2003. See also the proposal by Javier Solana <http://ue.eu.int/pressdata/EN/Reports/76257.pdf> [July 27, 2004], for a comment see Schwarz 2003.

⁶⁸ German Ministry of Defense 2003.

⁶⁹ The White House 2002.

⁷⁰ U.N. 2004a, para 202 and 203.

⁷¹ This section is based on Heinz 2004. Generally, see Fleck 2004 on the legal aspects of using the *Bundeswehr* to combat terrorism, a volume that includes recommendations in German and English.

⁷² On the role of the *Bundeswehr* in German society see von Bredow 2000, on U.N. international missions see Goebel 2000, on the *Bundeswehr's* fight against terrorism see Weller 2002 and Leggemann 2003.

German forces deployed abroad (as of June 3, 2005)

ISAF (International Security Assistance Force), Afghanistan, Uzbekistan: **approx. 2100 soldiers** (including 78 women)

KFOR (Kosovo Force), Kosovo: **approx. 2650** (including 96 women)

EUFOR (European Union Force in Bosnia and Herzegovina), Bosnia and Herzegovina: **approx. 1180** (including 45 women)

UNOMIG (United Nations Mission in Georgia), Georgia: **12**

EF ("Enduring Freedom") Horn of Africa: **approx. 250** (including 13 women)

OAE Mediterranean: **215**

UNMEE (United Missions in Ethiopia and Eritrea), Ethiopia, Eritrea: **2**

In addition, 67 soldiers are on standby in Germany in case any evacuations for medical reasons should become necessary. Also, about 650 soldiers participate in counter-terrorism operations in the Mediterranean ("Active Endeavour"). Thus, about 7640 German soldiers are directly involved in international missions.⁷³

The general political and legal framework of international missions also entails the following questions: What kind of international mandate does exist? How exactly does the federal parliament implement this mandate in its decisions? And finally, what are to be the rules of engagement?⁷⁴

The experience of the Bundeswehr to date

What kind of practical lessons has the *Bundeswehr* learned from its international missions so far? There are

only a few points that can be used as illustrative examples here. To be sure, there are some publications on this issue.⁷⁵ Yet, some rather critical points have received too little attention, at least in the public debate. The lack of access to data on alleged human rights violations must probably be seen as one of the reasons for this. It should, however, be a legitimate concern of the German public to know whether any transgressions have occurred so far, and if so, of what kind they were; whether there have been any inquiries, formal complaints, indictments, convictions or acquittals, and what kind of conclusions the ministry has drawn from potentially worrisome developments. Unfortunately, these kinds of data are not available to the public. In the German parliament, the Armed Services Committee (*Verteidigungsausschuss*) is in charge of such matters. The defense commissioner of parliament (*Wehrbeauftragter*) submits an annual report on occurrences and developments in the *Bundeswehr*, including comments on international missions.⁷⁶

When the German Institute for Human Rights (GIHR) requested information regarding this issue, the German Ministry of Defense replied that there have been no criminal prosecutions of members of Germany's armed forces for the violation of human rights so far.⁷⁷

Voices

"A German soldier does not torture"
Federal Minister of Defense Peter Struck⁷⁸

"Let's not fool ourselves: German troops have not yet had to face the kind of tough situations that the Americans have encountered. So far, the Bundeswehr has been in charge of military operations neither in connection with warfare on the ground nor with occupation regimes, neither in connection with preventive detention by the military nor with the pursuit of terrorists (apart from the special forces deployed in Afghanistan). There is no need to regret this. Yet, a certain restraint with regard to judgments about future developments would seem to be in order."

Klaus Naumann, Hamburg Institute for Social Research⁷⁹

⁷³ Source: <http://www.bundeswehr.de>, current operations.

⁷⁴ For the U.S. army see the detailed discussion in Martins 1994.

⁷⁵ See Goebel 2000 and Kluss 2000.

⁷⁶ See <http://www.iwif.de/wf103-26.htm>.

⁷⁷ Letter from Dr. Fleck (German Ministry of Defense) to GIHR (January 20, 2004). This is important, given the fact that in December 2000 the media reported about visits by *Bundeswehr* personnel to brothels with underage prostitutes. See amnesty international 2004c and reports by the *Weltspiegel* (a TV program on Germany's channel 1) of December 17, 2000; *Der Spiegel*, December 17, 2000.

⁷⁸ "Ein deutscher Soldat foltert nicht" ("A German soldier does not torture"), *Frankfurter Allgemeine Zeitung*, May 12, 2005.

⁷⁹ Translation of the German text; http://www.fr-aktuell.de/ressorts/kultur_und_medien/feuilleton/?cnt=443153 [June 3, 2004].

In May 2004 the federal government reported to the U.N. Committee against Torture that the military courts had dealt with 13 cases of abuse, 17 degrading acts and two cases of misuse of orders between 1998 and 2002.⁸⁰

Concerning the training and further capacity-building devoted by the *Bundeswehr* to the question of human rights the German Ministry of Defense submitted the following statement to the German Institute for Human Rights: "Human-rights education is an integral part of the so-called concept of 'innere Führung' (literally, 'internal leadership'). It represents the *Bundeswehr's* philosophy of leadership, and as such it tries to combine civil education, command and leadership."⁸¹ It ranks very highly in the German armed forces, and it is provided by superiors as well as law teachers qualified to hold judicial office. Very many of the curricula used in the educational programs offered at the *Bundeswehr's* approximately 70 schools and academies contain subjects that can be described by the term human rights education. They cover the International Covenant on Civil and Political Rights, as well as the European Convention for the Protection of Human Rights. This kind of education aims to ease the tensions that might exist between a citizen's individual rights on the one hand, and military duties on the other. Legal education accounts for a substantial share of the education and training curricula for *Bundeswehr* personnel designated to be sent on an international mission. It is largely provided by the Leadership Development and Civic Education Centre (*Zentrum Innere Führung*).⁸²

Regardless of any local laws in the country where operations take place, German criminal law also applies to acts committed by soldiers during their tours of duty abroad or in connection with their posting abroad (German Military Criminal Code, section 1a, subsection 2 in the version of December 20, 2001). Superiors that fail to cooperate with criminal proceedings concerning their subordinates are to be punished (section 40).⁸³

The German Code of Crimes against International Law stipulates: "A military commander or a civilian superior who omits immediately to draw the attention of the agency responsible for the investigation or prosecution

of any offence pursuant to this Act, to such an offence committed by a subordinate, shall be punished with imprisonment for not more than five years" (art. 14, sec. 1).⁸⁴

Rules of Engagement (ROE)

Apart from an international mandate, it is mainly the Rules of Engagement that are of central importance for the way that military personnel act in concrete situations in the field, and for the kinds of mistake that they make and that might adversely affect the whole mission. How do they behave towards the civilian population, for example, when there are demonstrations, or when they have to deal with suspects? Who do they surrender their prisoners to, and on the basis of which legal rules?

It is hard to exaggerate the significance of ROE as a factor in addition to international mandates and national resolutions, because they usually contain explicit instructions for the use of force, violence, or even deadly force, against enemies, lawbreakers, and the civilian population. Thus, they define the "threshold" for the legitimate use of force in self-defense, as well as the legal norms applicable to such situations.

In summary, ROE are, as Weber puts it, "a code of conduct for military forces (including their individual members) that stipulate the circumstances and conditions, as well as the degree and manner of the permissible use of force."⁸⁵

At the same time, ROE are almost always secret. This is also true for Germany. A political or scholarly debate on these rules is therefore impossible. However, somewhat more is known about American ROE.⁸⁶

Example: Excerpt from the Rules of Engagement for U.S. forces in Panama in 1990

Operation rules for military personnel in the theater of operations in the town of Colon:⁸⁷

⁸⁰ United Nations press release, Committee against Torture hears response of Germany to its questions, <http://www.unhchr.ch/hurricane/hurricane.nsf/0/DA6E59DDCFF1DF5C1256E90007B96A3?opendocument> [May 10, 2004].

⁸¹ See also German Ministry of Defense 1999.

⁸² Letter from the German Ministry of Defense to the German Institute for Human Rights (January 20, 2004).

⁸³ Federal Law Gazette (*Bundesgesetzblatt*), 1957 I, p. 298; latest change: Fed. Law Gaz. 2001 I, p. 4013.

⁸⁴ (German) Code of Crimes against International Law (*Völkerstrafgesetzbuch*), German text in: Fed. Law Gaz., 2002 I, p. 2254; English text at <http://www.iuscomp.org/gla/statutes/VoeStGB.pdf>.

⁸⁵ Weber 2001, p. 76 (translated from the German text).

⁸⁶ For a more detailed account see Heinz 2004.

⁸⁷ Quoted in Martins 1994, p. 54; for Somalia see p. 17.

1. Shoot all armed civilians.
2. Looters, if armed, will be killed.
3. Unarmed looters will be dealt with as follows:
 - a) Fire a warning shot over their head.
 - b) Fire a warning shot near the person(s).
 - c) Shoot to wound.

In Germany, international mandates for the *Bundeswehr* are determined by parliament, stipulations of the Basic Law (constitution), decisions of the Federal Constitutional Court (*Bundesverfassungsgericht*), and human-rights conventions ratified by Germany, two of which are meant to apply outside Germany as well.⁸⁸

For Germany's armed forces it is important that in 1999 NATO defined general ROE for all member forces when operating as an international contingent. However, they are also applicable to operations by national contingents. Diverging national positions are stated in NATO's plan of operations as footnotes or in an annex. A typical example of such an annex for Germany is the prohibition of the use of irritant substances by *Bundeswehr* personnel because of a stipulation to that effect in the German statute implementing the convention on chemical weapons⁸⁹ (A new law has now permitted use of these substances).

The most important rules are handed out to members of the *Bundeswehr* in form of a "national pocket card"

(*Taschenkarte*). The actual ROE, however, are much more comprehensive and classified according to (higher) military rank. The ROE contain the rules for (and constraints on) the way the mission is to be carried out, as well as the rules for self-defense and emergency assistance. More specifically, these rules concern self-protection, self-defense and emergency assistance, the setting up of protected areas, the use of military force without the use of firearms, the use of firearms and other weapons with or without prior warning, the rules for achieving the mission and the principle of proportionality.⁹⁰ ROE, as Weber points out, do not create new law. Rather, they are an expression of the primacy of politics, and "as it were, the control mechanism used for translating legal and political requirements into concrete military action."⁹¹ He makes a distinction between armed conflicts and U.N. peacekeeping operations: "In an armed conflict everything is permitted unless it is prohibited by international humanitarian law. On peacekeeping missions covered by ROE only those measures are permitted that are spelled out explicitly and affirmatively."⁹²

Unfortunately, a well-founded debate on ROE by scholars and the public is usually impossible, because ROE are, as mentioned above, kept secret during the operation itself, and are not published afterwards either. If at all, scholars are most likely to get a hold of them in countries like the USA in connection with criminal prosecutions under military or civilian law. In Germany, general in-

⁸⁸ On human rights stipulations relevant for the *Bundeswehr* see Schmidt-Radefeldt 2004. With regard to international law, the extraterritorial scope of human rights obligations can be assumed if the conditions defined in article 1 of the European Convention for the Protection of Human Rights and article 2 of the International Covenant on Civil and Political Rights hold true. Here, the debate revolves around the interpretation, or the scope, of the terms "subject to its jurisdiction" and, in the U.N. Covenant on Civil and Political Rights, "within its territory". On the European Convention see, for example, European Commission on Human Rights, *Cyprus ./ Turkey* (No. 6780/74 and 6950/75), decision of May 26, 1975, DR 2 (1975), pp. 125, 136 (item 8): "The Commission finds that this term ['within their jurisdiction' (in the French text: 'relevant de leur juridiction')] is not [...] equivalent to or limited to the national territory of the High Contracting Party concerned. It is clear from the language, in particular of the French text, and the object of this Article, and from the purpose of the Convention, as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad." See also, however, European Court of Human Rights, decision of December 12, 2001 on the admissibility of an application, *Banković et al. ./ Belgium et al.* (No. 52207/99). For a critique of this decision, see Schäfer 2002.

⁸⁹ Weber 2001, p. 77. This means that tear gas and pepper spray cannot be used. The use of such substances in armed international conflicts is already generally proscribed by article 23 a of the Hague Convention on War on Land and, above all, by the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and Bacteriological Methods of Warfare of June 17, 1925 (German text in Reich Law Gazette (*Reichsgesetzblatt*) 1929 II, p. 174). This covers the use of irritant substances for military purposes as well, although this is, or was, controversial. At least, this point was clarified by the Chemical Weapons Convention (CWC) of January 13, 1993 (German text in Federal Law Gazette (*Bundesgesetzblatt*) 1994 II, p. 807). On this whole issue, see also Oeter, in Fleck 1995, pp. 147-148. Other stipulations of this convention must also be taken into consideration, as well as the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons, commonly referred to as the Biological Weapons Convention (BWC), of April 10, 1972 (German text in Fed. Law Gaz. 1983 II, p. 133). In principle, the prohibition is binding on all countries that ratified the protocol and/or the conventions.

⁹⁰ Weber 2001, p. 78.

⁹¹ Ibid.

⁹² Ibid., p. 81.

structions given by the Federal Ministry of Defense, for example concerning the fight against terrorism, are not made available to the public. The same is true for ROE, as in Bosnia-Herzegovina, Kosovo, Macedonia or Afghanistan, no matter if for the KSK of ISAF (see below).⁹³ It is well known that internationally it was, above all, the operation in Somalia that sparked off debates within the military forces of various countries on the question as to which rules of engagement would have been appropriate and should be so in the future.⁹⁴

Afghanistan: Operation Enduring Freedom

For one, German soldiers in Afghanistan participated in Operation Enduring Freedom, which had been initiated and was being led by the USA. In addition, *Bundeswehr* units are also deployed under a U.N. mandate as part of the International Security Assistance Force (ISAF) in Kabul, Kunduz and Faisabad.

The preamble of the relevant Security Council resolution 1368 (2001) explicitly refers to the U.N. Charter ("Reaffirming the principles and purposes of the Charter ..."). According to the 3rd clause of article 1 of the U.N. Charter, one of these principles is the promotion and strengthening of human rights. Apart from this, the resolution makes no reference to human rights. It reiterates article 51 of the U.N. Charter verbatim in its nonoperational section.

After September 11, 2001, NATO invoked article 5 of the North Atlantic Treaty, declaring that the attack on the USA was an attack against all members calling for their collective self-defense.⁹⁵ Conforming to article 24, section 2 of the Basic Law, this is binding on Germany as a signatory party. Even so, according to article 5 of the North Atlantic Treaty, the decision on measures to

be taken subsequently still rests with individual member countries.

In a motion for resolution submitted in the debate on the government's proposal mentioned above, members of parliament (Bundestag) of both governing parties emphatically underline humanitarian principles that apply worldwide, as well as values shared across cultural boundaries (BT-Drs. 14/7513) (*Bundestagsdrucksache* – printed document of the *Bundestag*). This motion was also adopted on November 16, 2001 (see plenary protocol 14/202).

The government's "motion for continuation of mission" of September 6, 2002, does not refer to human rights either (BT-Drs. 15/37). The motion was adopted by parliament on November 15, 2002. Together with this proposal, however, a renewed motion for resolution submitted on September 13, 2002 by the *Bundestag* members of both governing parties was also adopted. It explicitly referred to human rights (BT-Drs. 15/68). According to the motion for resolution, the defense of the shared values and norms of civilization make it particularly important to respect human rights and all relevant international conventions.

The government's "motion for continuation" of November 5, 2003, states at least at its beginning that the fight against terrorism is not just a military challenge. Instead, it should be conducted, above all, by using political means as well as development policy and police methods (BT-Drs. 15/1880). The motion was adopted by the German parliament on November 14, 2003.

From December 2001 to 2003, a contingent of about 100 members of the Special Forces Command (*Kommando Spezialkräfte*) (KSK) was deployed in Afghanistan as part of Operation Enduring Freedom.⁹⁶ The KSK is a unique *Bundeswehr* unit established in 1996. Its

⁹³ The importance of ROE for U.N. peacekeeping missions is also stressed by German army general Manfred Eisele (2000, pp. 36–46). The letter from the German defense ministry to the GIHR mentioned already earlier states: "Rules of Engagement for international missions are not published. I can confirm, however, that the principle of proportionality figures quite prominently with regard to encroachments upon the rights of third parties. The conditions that must be in place before everyone's right to arrest suspected criminals can be exercised are also important in this context." (Letter from Dr. Fleck to German Institute for Human Rights, January 20, 2004).

⁹⁴ Cf., for example, Martins 1994.

⁹⁵ "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area." For the full text of the NATO treaty see: <http://www.nato.int/docu/basicxtxt/treaty.htm>.

⁹⁶ <http://www.das-parlament.de/2002/09/Titelseite/003.html> [July 27, 2004].

members are, according to its own self-presentation of November 2002, "as shy as deer" ("so scheu wie Rehe") This means that hardly anything is publicly known about their mandates and areas of operation.⁹⁷

Special Forces Command (KSK)⁹⁸

A unit of the army for carrying out military operations in connection with crisis prevention and management, and in connection with defending the nation or the alliance.

[...] The missions of special forces are often determined by military policy and therefore likely to be influenced by, and scrutinized at, the highest political and military levels. They require close cooperation with the air force, the navy and other government departments.

The sensitive tasks of the special forces, when deployed outside Germany, may also include the rescue and evacuation of German citizens and/or other persons from terrorist threats and special situations. The [command...] consists of about 1000 soldiers.

The mandate of the KSK was to support the fight against terrorism under U.S. leadership. Here, it is necessary to recall that Operation Enduring Freedom is conducted under U.S. leadership outside the U.N., but with reference to Security Council resolution 1368. This resolution, as well as several follow-up resolutions, did not mention the compliance with human rights standards. Not until about a year later, in January 2003, did the U.N. Security Council point out that it was necessary to respect human rights in the fight against terrorism as well (resolution 1456 (2003)).

Although the activities of the KSK are kept secret, a sergeant of the 10th U.S. mountain division was quoted in a report of *Stern* magazine as saying: "German special forces have captured quite a few al-Qaeda fighters."⁹⁹ If this information is correct, the question is: On what basis, in terms of international law, did German KSK forces arrest suspected terrorists and turn them over

to other nations? Were the suspects taken to third countries or Guantánamo Bay? If so, were any representatives of the law (judges, prosecutors etc.) involved, either from the forces' home countries or the countries where the operations took place? What would be the potential legal consequences for German military personnel in such cases?

As this kind of information, including ROE, is kept secret, it is of course impossible for the public to arrive at an informed opinion on these questions.

Interview with Gernot Erler MdB (member of the German parliament) (excerpts)¹⁰⁰

Tobias Pflüger (T.P.): The KSK (Special Forces Command) operating as part of Operation Enduring Freedom was assigned its own sector of operations shortly before the extension of its mandate. As they have only operated in an early phase so far, this new development raises some political and legal questions. A while ago, the foreign, interior and justice ministries published an expert report saying that it would cause some serious legal problems if KSK soldiers were to hunt and arrest al-Qaeda fighters, and then turn them over to U.S. soldiers, because many of the detainees in U.S. custody are not treated as prisoners of war, which violates the international law of war. If German forces have a sector of their own the question of a German camp for prisoners of war will have to be addressed. Is this going to happen, and what exactly are the plans for this mission of the KSK?

Gernot Erler (G.E.): As everybody knows, the details of KSK missions must be kept secret for security reasons. It is well-known, however, that the German KSK unit in Afghanistan has not made any arrests. So, during the whole time of Operation Enduring Freedom there have been no arrests. Nor are there any plans for such actions in the future. The main task of these special forces has changed: We are now dealing with so-called residual activities of al-Qaeda units, and with certain efforts to reorganize on the part of Taliban-oriented groups. And this is all happening on virtually impassable terrain,

⁹⁷ "Spezialkräfte sind wie scheue Rehe" ("Special forces are like shy deer"), http://www.bundeswehr.de/forces/download/021112_ksk_presetag.txt. Cf. also anti-militarismus information 2002.

⁹⁸ <http://www.sondereinheiten.de/ksk/index.php> [July 27, 2004] (translation of German text).

⁹⁹ Uli Rauss, "Hier kämpfen die Deutschen" ("The Germans are fighting here"), in: *stern*, May 8, 2002, p. 34.

¹⁰⁰ Source: Wissenschaft und Frieden, <http://www.iwif.de/wf103-26.htm> [July 27, 2004].

mostly near the border between Pakistan and Afghanistan. It is the main job of the special forces remaining in this area – including those from other countries – to observe and analyze the movement of enemy forces. Throughout the hot phase of the fight against al-Qaeda, there was not a single case where the German KSK took any prisoners, and no decision had to be made on how to deal with them. It would therefore seem rather unlikely that this problem will arise during the current phase.

T.P.: According to statements made by Rudolf Scharping (when he was still defense minister, the editor), which were reported by the media, KSK soldiers also took part in front-line combat operations. Is this true?

G.E.: I cannot comment on this issue because of the need for secrecy mentioned above. So far, I have only passed on information that had already been released earlier.

Afghanistan: International Security Assistance Force (ISAF)

U.N. Security Council resolution 1386 provides the basis for the ISAF mandate. The only indirect reference to human rights in connection with the deployment of the international protection force is to be found in the preamble: "... in accordance with the Charter of the United Nations" (art. 1, 3). Apart from this, no reference is made to human rights with regard to the ISAF mission. Only Afghan troops are urged to observe human rights "strictly". The ISAF mandate was last extended for one year by Security Council resolution 1510 of October 13, 2003. This resolution confirmed the mandate of ISAF to support the transitional Afghan government, albeit only on security matters.

Based on art. 24, sec. 2 of the German Basic Law, the participation of German forces in ISAF was decided by the German parliament on December 22, 2001, in accordance with a motion submitted by the government on December 21, 2001 (BT-Drs. 14/7930). The issue of human rights was not mentioned.

The *Bundeswehr* mission as part of ISAF was extended by the German parliament on June 20, 2003. In response to a query of the German Institute for Human Rights of August 2002, the Federal Ministry of Defense outlined the rules of engagement (ROE) for the German ISAF contingent as follows:

"The ISAF peacekeeping mission was mandated by the Petersberg agreement [Bonn agreement] of December 5, 2001, as well as by Security Council resolutions 1386 (Dec. 20, 2001) and 1413 (May 23, 2002). [ISAF was] '... to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment. ... Members of ISAF will remain strictly impartial and will refrain from any action incompatible with the impartial and independent nature of their duties. ... The principle of impartiality does not interfere with the right of ISAF to act in self-defense, extended self-defence as well as force protection and mission enforcement'".¹⁰¹

In reference to the mandate of the German ISAF forces, the Department of Defense told the German Institute for Human Rights that neither the German contingent nor those from the other participating countries had been instructed specifically to investigate suspected violations of human rights. Should they gather any information in this regard in the course of their operations, they could pass it on to the Afghan authorities or else to the German government. So far, however, no human rights violations had been documented in this way, and no information had been passed on by ISAF forces.¹⁰²

As stipulated in the military-technical agreement between ISAF and the Afghan Interim Authority of January 4, 2002, all ISAF units enjoy the benefit of functional immunity. They are only subject to the courts of the sending countries, where criminal or disciplinary proceedings may be brought against them for any alleged offenses.¹⁰³ The agreement explicitly ruled out the possibility of surrendering anyone to the International Criminal Court.

¹⁰¹ Letter from Dr. Fleck to German Institute for Human Rights (August 16, 2002).

¹⁰² Conversation with Dr. Fleck (Berlin, November 21, 2002).

¹⁰³ Letter from Dr. Fleck to Wolfgang Heinz (August 16, 2002). On the question of immunity, see also BT-Drs. 14/9841 of August 1, 2002.

Questions from the point of view of international human rights protection

There are a number of questions that are important both politically and in terms of international law. As *Bundeswehr* forces are likely to be sent abroad to fight terrorism more often in the future, these questions require urgent attention:

- (1) When German soldiers, including KSK members, arrest suspected al-Qaeda fighters or other persons, the question is: Who will these prisoners be turned over to? And what kind of legal arrangement will be the basis for this? In case of a transfer to the USA, for instance, it might be necessary to consider the possibility of death sentences or proceedings that are incompatible with human rights, such as the prosecution by so-called military commissions, at Guantánamo.¹⁰⁴ The same is true for the practice of taking prisoners to detention centers that were deliberately chosen, because they are out of reach for representatives of the U.S. legal system (prosecutors, judges, etc.).
- (2) To what extent should the mission of German soldiers include the duty to report violations of human rights and international humanitarian law? The inclusion of such a duty is recommended by both the U.N. code of conduct for law-enforcement officials with police powers, which also covers military personnel in such a capacity, and the draft proposal for a module for peacekeepers by the U.N. High Commissioner for Human Rights.¹⁰⁵ Should such a situation arise, are German troops trained for this? Who would receive such reports and ensure a transparent follow-up? What do the rules of engagement provide for situations where German soldiers learn of violations of human rights or international humanitarian law, be it by their own comrades, by military personnel of other coalition forces, or by units of the Afghan government or other allies, such as General Dostum?
- (3) Some more fundamental questions: What is the extent of Germany's human rights obligations abroad?
 - Who informs and trains the soldiers regarding these issues? Who monitors and controls the compliance with human rights standards, and how exactly is this done? (This question concerns the role of the ministries and the German parliament, as well as the information given to the public.) For example, how does the parliamentary armed services committee use its oversight authority with regard to Operation Enduring Freedom, ISAF and similar missions? And an even more far-reaching question: To what extent are military operations subject to judicial review in general (consider references to the Military Criminal Code, Code of Crimes against International Law, and Criminal Code) (cf. pp. 24)?
 - (4) The following questions are important from the point of view of the local population, for example in Afghanistan: Where can they complain about alleged violations of human rights and humanitarian law by members of the anti-terror coalition, or about misdirected air raids? Are such complaints investigated in an objective and transparent manner, and, as the case may be, are there any criminal prosecutions? Who receives the reports, who conducts the investigations, and what is the follow-up like? Are there any statistics, or other kinds of information, on cases, indictments, acquittals or convictions?
 - (5) With regard to monitoring and criminal prosecution, what is the role of the Afghan system of justice that is being established, and of the national human rights commission in Afghanistan? And what is the role of international agencies, including the International Criminal Court and the justice systems of the sending countries?
 - (6) To what extent is it legitimate and legal to cooperate internationally with countries that practice so-called preventive killings, torture routinely, and commit other serious violations of human rights in their fight against terrorism? Where should such cooperation be limited and which safeguards are necessary? And what kind of protective measures should be taken in order to prevent future human rights violations?

¹⁰⁴ For recent decisions by the Human Rights Committee, see *Judge v. Canada* (No. 829/1998), U.N. Doc. CCPR/C/78/D/829/1998.

¹⁰⁵ See GA-Res. 34/169 (UN General Assembly) and the Standard Generic Training Module on Human Rights – Level I (UN OHCHR 2003).

3 Conclusions and Recommendations for the Federal Government and the German Parliament (*Deutscher Bundestag*)

In light of the considerable violations of human rights and international humanitarian law in connection with the "global war on terrorism" in Afghanistan and Iraq, urgent questions must be addressed concerning the observation and monitoring of counter-terrorism operations.¹⁰⁶

Western governments justify secrecy as a requirement of security in the war against terrorism, aimed at preventing the terrorist enemy from getting vital information. From the very start, the policy of secrecy led to constraints on the information given to the public, including the media and human rights NGOs. This policy thus severely undermined the possibilities of effectively holding those engaged in the war on terror accountable for their actions. Often, there has been a considerable lack of transparency. For two years, the U.S. government has rarely responded to critical reports by human rights organizations on, for example, Afghanistan and Iraq, nor to requests for access to the places of detention. Similarly, comments and suggestions by the U.N. High Commissioner for Human Rights have been largely ignored by most governments. What is required now is a serious information policy that will make sure that politicians and the public can monitor and assess counter-terrorism policy and bring about any corrections that might seem necessary.

Recent developments in Guantánamo, Afghanistan und Iraq point to a number of severe systematic deficits concerning the regard for human rights and international humanitarian law. These deficits have already done great and lasting harm to the fight against international terrorism, especially in Islamic countries. It is therefore important to abide by international legal norms that shall govern the fight against international terrorism in the future.¹⁰⁷

The German Institute for Human Rights is convinced that the steps outlined below can help substantially to reduce the danger of violations of human rights and international humanitarian law.

The Foreign Policy Dimension

"Global War on Terrorism"?

The Bush administration coined the phrase "global war on terrorism" as a name for the fight against terrorism. However, this metaphor of war is rather questionable in the context of international terror. It represents a non-legal concept of war that is probably meant to suggest "toughness" and "a crusade for years to come", but it is not a concept of war grounded in international law. In the case of the USA, events like those at Abu Ghraib have made it clear that the country's own obligations under international law as a belligerent have been selectively renounced. The question as to whether there will be any policy changes can only be answered if and when the U.S. Supreme Court's ruling of June 2004 is implemented.

To be sure, it is difficult to make a general recommendation either to support or reject the use of military force for fighting terrorism. As a matter of principle, however, the fight against terrorism should not be seen as a "war". Instead, it should be conducted by using the means already at the disposal of the police, intelligence services, and the representatives of the law (prosecutors, judges etc.), as well as by using those state instruments that are currently being strengthened. Because of the considerable dangers for the civilian population, war should only be resorted to in exceptional circumstances, and then be subject to strict

¹⁰⁶ The war in Afghanistan, where military operations were authorized by the U.N. Security Council, which, in turn, was accepted by a large majority of experts on international law, must be distinguished from the war in Iraq, which was considered illegal by a large majority of U.N. members.

¹⁰⁷ For a proposal for future rules under international law see Walter 2004.

monitoring (see below). Here one might say that the two military operations *Operation Enduring Freedom* in Afghanistan and *Operation Iraqi Freedom* in Iraq – did, as a matter of fact, represent such exceptions. Yet, statements by the U.S. government concerning a global war against terrorism that might go on indefinitely point in another direction, just like those U.S. strategic plans that have become publicly known.¹⁰⁸ This raises the question whether these plans will increasingly determine NATO strategy and thus also affect Germany's armed forces.

Recommendation 1: The government and parliament should view the fight against international terrorism primarily as the prevention of, and punishment for, international crime. They should not adopt the concept of war used by the U.S. government.

Participation in military operations, particularly combat missions

Though no official statistics have been published on civilian deaths in Iraq, according to private estimates probably several tens of thousands of civilians were killed in connection with military operations in Afghanistan and Iraq.¹⁰⁹ The U.S. government, its military leaders, and the war coalitions did not seriously follow up on suggestions of investigating human rights violations in such a way as to make its actions transparent to the public. It is not clear how many guilty persons were actually punished, much less whether any preventive measures were taken. In most cases there were no follow-up steps. In the few cases where inquiries were launched, members of the armed forces were always investigated only by the military itself. There were no independent observers or judges involved. Some serious war crimes continue to remain unsolved, while their extent can still not be estimated – how many prisoners were affected, and to what degree, and how many suspected perpetrators were involved, and so on.

The noncompliance with international as well as national law was openly discussed in various U.S. government departments. The discussions¹¹⁰ involved high-ranking lawyers from the White House, Justice

Department and Pentagon who submitted memoranda in which they called into question the application of international humanitarian law and the U.N. Convention against Torture (the State Department had been sidelined). Objections to this course of action were raised mainly by military lawyers who protested the non-compliance with the Geneva conventions.

Despite continuously forthcoming accusations in Guantánamo, Afghanistan and Iraq, few changes in the rules of engagement or conduct can be discerned as yet. The secret system of detention without indictment or trial is still in place, and access continues to be denied. Guantánamo is the only prison with any hope of improvement. Any admissions of problems by the U.S. government refer to, as they see it, a few isolated cases and some aberrations on the part of individual soldiers. A true acknowledgment of the problems and the levels of political and military responsibility is nowhere in sight. Without any fundamental reforms, however, countries taking part in coalition operations must also be held responsible if the structural deficits of joint military operations continue to exist in the future. This is true regardless of the question whether, in terms of international law, there were any legitimate reasons for the use of military force in Iraq.

Recommendation 2: In the future, the government and parliament should continue to respond very cautiously to invitations for joint military action in the fight against terrorism. They should examine such invitations very carefully, because, so far, military operations of this kind have led to substantial violations of human rights and international humanitarian law. These operations should be mandated by the U.N. Security Council and be subject to a clear commitment by the parties involved to comply with human rights and international humanitarian law.

Systematic monitoring of the compliance with human rights in the fight against terrorism

There is no systematic monitoring of the compliance with human rights in the practice of fighting international terrorism. Not only does the secrecy hide strategic and

¹⁰⁸ See The White House (2002) for the U.S. national security strategy of September 2002.

¹⁰⁹ See Iraq Body Count, <http://www.iraqbodycount.net/press.htm>, Les Roberts et al., Mortality before and after the 2003 invasion of Iraq: cluster sample survey, *The Lancet*, vol. 364, p. 94445, Oct. 30, 2004, <http://www.image.the.lancet.com/extras/04art10342web.pdf> and BBC reporting on public demands in Great Britain directed at prime minister Blair to account for civilian deaths in Iraq, http://news.bbc.co.uk/1/hi/uk_politics/4077031.stm; "Should we count dead Iraqi civilians?" http://news.bbc.co.uk/1/hi/uk_politics/4079059.stm, BBC news, 8.12.2004.

¹¹⁰ See Human Rights First 2004.

operational procedures. It apparently also covers up illegal measures. In view of these developments and the repeated assurances of the German Government that (for example, in the U.N. Commission on Human Rights) there shall be no "terrorism discount" for countries that violate human rights, it must be said that there is a fundamental lack of systematic and independent monitoring mechanisms to ensure that any counter-terrorism measures actually taken are compatible with human rights. Thus, there are many cases in Afghanistan, where the fate of civilians wounded or killed in the fight against terrorism has never been properly explained.¹¹¹ In Iraq, an even more serious picture has emerged during and after the war.¹¹²

Recommendation 3: The government and parliament should take the initiative in international organizations in order to promote the systematic monitoring of the observance of human rights. A good place to start would be the discussions and resolutions on this subject in the U.N. Commission on Human Rights, the Security Council and, particularly, the Counter-Terrorism Committee. The latter should be given a stronger human rights component in connection with its new administrative structure, the Counter-Terrorism Committee Executive Directorate. The so-called Al-Qaeda/Taliban Sanctions Committee (ATSC) would be another place for such an initiative.

Recommendation 4: Compliance with human rights standards should also be systematically monitored with regard to bilateral relations, because it has become increasingly clear that in some countries the charge of terrorism is leveled at opposition groups quite generally in order for the government to justify its own, and sometimes illegal, measures, and to elicit sympathy abroad.

There must be no use of results from the interrogation of prisoners held in legally dubious conditions

German officials visited the German-Syrian terrorist suspect Mohammed Haydar Zammar in a Syrian prison, as well as prisoners in Guantánamo, according to reports in the media. In Guantánamo, the officials in question allegedly were agents of the German Federal Intelligence Service (*Bundesnachrichtendienst*), the German foreign-intelligence agency, and the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*), the German domestic-intelligence agency. In the case of Zammar who is reportedly held in cruel and inhuman prison conditions, the officials were said to have been investigators. These reports were neither confirmed nor denied by the Ministry of the Interior.¹¹³

Torture and torture-like interrogation practices should not be ordered or tolerated by the anti-terror coalition under any circumstances. The same is true for the long-term detention of suspected terrorists without indictment, trial or even without any recognized legal status. Nor should the authorities take advantage of such practices indirectly.

As representatives of the state's authority, German members of federal agencies are bound by duty to protect the fundamental rights in dealing with Germans as well as foreigners if the officers' actions affect legal interests and guarantees protected by these rights (according to the Basic Law, the German constitution, article 20, para. 3).¹¹⁴ At the same time, the pertinent legal guarantees, particularly those of the European Convention for the Protection of Human Rights and the U.N. International Covenant on Civil and Political Rights, must not be circumvented by "escaping" abroad.¹¹⁵

¹¹¹ On Afghanistan, see Human Rights Watch 2004b, Amnesty International 2004c.

¹¹² On Iraq, see Human Rights Watch 2003a, b, 2004c, 2005 and Amnesty International 2004a, b.

¹¹³ "Reif für die Insel", *Der Spiegel* No. 48, 2003, p. 40; "Das Netz der Lager", *Spiegel-Online*, May 13, 2004, <http://www.spiegel.de/politik/ausland/0,1518,299640,00.html>.

¹¹⁴ On this issue and for a more detailed discussion of the necessary differentiations, see, for example, the articles of Josef Isensee, Wolfgang Rübner and Helmut Quaritsch respectively, in: Isensee/Kirchhof 2000, pp. 398ff. (401), 491 and 701ff.; Hans D. Jarass/Pieroth 2004, art. 1, para. 33; Philip Kunig, in: von Münch/Kunig 2000, art. 1 Rn. 53f.

¹¹⁵ See, for example, Human Rights Committee, *Saldías de López ./. Uruguay* (No. 52/1979), U.N. doc. A/36/40 (1981), Annex XIX; European Commission on Human Rights, *Cyprus ./. Turkey* (No. 6780/74 and 6950/75), DR 2 (1975), p. 125 (136); more restrictively, however, the European Court of Human Rights, *Banković et al. ./. Belgium et al.* (No. 52207/99), *ECHR Reports* 2001-XII, p. 333; more generally, Meron 1995, p. 78ff.

It is therefore indisputable that German officials are not allowed to torture anyone abroad in order to extract information. The participation in such acts must not be allowed to happen, but if it does, it must, and will, be prosecuted in Germany, too. Consequently, it should be clear that no information must be obtained in such conditions. It is the responsibility of all representatives of the state authorities not only to respect human dignity but to protect it, too (art. 1, paragraph 1, Basic Law). In addition, information gathered as part of a criminal prosecution is, as a rule, prevented by law from being used if the statements were obtained by torture or other illegal methods of interrogation.¹¹⁶

Recommendation 5: In its investigations in connection with the fight against terrorism, the government must not use any results from the interrogation of prisoners detained in conditions that are questionable with regard to international law (Guantánamo). The same is true if there are any signs that the prisoners may have been abused.

Protection of human rights defenders

Persecution of human rights defenders has increased as a result of the fight against terrorism. In a substantial number of countries they face repression, particularly by the government. This is true for specific actions of executive agencies, as well as for legislation.¹¹⁷

Recommendation 6: Government and parliament should pay particular attention to the protection of human rights defenders in connection with the fight against terrorism. In addition, they should develop timely forms of response in order to protect the activists from political persecution.

The Defense Policy Dimension

In the future, Germany's armed forces may be increasingly involved in anti-terrorism operations as part of their international missions. The defense-policy guidelines for the armed forces of spring 2003 stress that the concept of defense can no longer be defined in terms of specific geographic boundaries. The dividing lines

between various kinds of missions of the armed forces are constantly shifting. The rapid escalation of conflicts can never be ruled out. Moreover, terrorism is one of the key security threats mentioned in EU and NATO concepts.

The first part of these recommendations already addressed the question of Germany's participation in military operations in general. The following paragraphs will deal with specific aspects of Germany's international military missions.

Comprehensive and transparent monitoring of military operations against terrorism

There is not even a semi-comprehensive system for monitoring the human rights situation in connection with military operations in Afghanistan as well as in Iraq, and there are no effective ways for the local civilian population to complain about abuses. Some democratic countries that have deployed their soldiers have neglected to investigate promptly and comprehensively violations committed by their military personnel. They must (re-)learn what it means to be accountable to the politicians and the society of their own country for the way they deal with mistakes and crimes of the soldiers sent abroad. This does not just concern a few individual cases but several thousands of them, including civilians killed and wounded during these wars, as well as suspected terrorists who became victims of torture, etc.

This problem definitely calls for setting up a U.N. mechanism, represented locally by its own staff (In April 2005, the U.N. Commission on Human Rights agreed to create the post of Special Rapporteur on terrorism and human rights.). Obviously, it might be a good idea to link this mechanism to the Office of the U.N. High Commissioner for Human Rights. It should also be of great value if this mechanism were to be continuously assisted by humanitarian as well as human rights and other organizations.

Recommendation 7: The Government should work for creating the conditions that would guarantee the comprehensive and transparent monitoring of the compliance with human rights and international

¹¹⁶ The use of illegally obtained information is ruled out either by the Code of Criminal Procedure (*Strafprozessordnung*) (especially section 136a, subsection 3, 2nd clause) or directly by the Basic Law. See, for example, Meyer-Goßner 2004, para. 55ff. and section 136a, para. 27ff., with additional citations.

¹¹⁷ See Observatory for the Protection of Human Rights Defenders 2004.

humanitarian law whenever Germany's armed forces participate in military operations. This might be achieved by appropriately influencing the phrasing of the specific mandate by the U.N. Security Council, and by supporting the U.N. High Commissioner for Human Rights in her efforts concerning the subject of terrorism and human rights.

Members of the armed forces should be required to report human rights violations

With regard to prevention, it will be important in the future to reduce the likelihood of such breaches of law as happened in Afghanistan and Iraq. Members of the armed forces should therefore be required to report presumable violations of human rights and international humanitarian law by members of the German armed forces themselves, as well as by military units from other countries of the anti-terror coalition. This obligation to report should also cover the acts of associated forces like the police and other types of military, as well as those of local allies like General Dostum in Afghanistan.

In addition, Germany should create a monitoring mechanism of its own to monitor the compliance of human rights and international humanitarian law in any country where German forces are sent on an international mission. This mechanism should then submit continuous reports to the government, the parliament and the public.

Recommendation 8: In future mandates for international missions of the German armed forces, parliament should include the explicit obligation of military personnel to report all violations of human rights and humanitarian law. Such a requirement could be modeled on similar ones tentatively set out in the Military Criminal Code (*Wehrstrafgesetz*) and the German Code of Crimes against international law. The specific stipulations should be clearly stated in the U.N. mandate, the corresponding resolution of the parliament, and especially in the rules of engagement. Furthermore, a separate and independent agency should be authorized to monitor the compliance with human rights and international humanitarian law in the country of deployment. This

agency should continuously report to the government, the parliament and the public.

Effective investigation of suspected violations of the law by military personnel

Complaints by human rights NGOs about violations of human rights and international humanitarian law, for example in Afghanistan and Iraq, were directed at members of the military coalitions. They went largely unheeded. To be sure, the U.S. Army conducted a number of investigations. Their results were often kept confidential. It was less clear whether, and to whom, the persons who lodged complaints might appeal if they did not agree with the result of the investigation. As a matter of fact, however, all the investigations in question except one had been conducted by the military. This raises the question whether such investigations are comprehensive, impartial and transparent.¹¹⁸ Doubts in this regard appear to be justified, according to the reports published by human rights NGOs on Afghanistan and Iraq. The procedures employed so far are highly unsatisfactory.

Recommendation 9: If there are any violations of the law in armed international conflicts, the criminal investigations of such acts must be conducted independently. The Government should therefore only send soldiers to participate in military operations, if, at the level of coalition forces, abuses and violations are investigated by independent prosecutors, suspects are tried in a court of law, and publicly accessible statistics are compiled concerning all relevant proceedings. The military leadership should try to put the lessons learned so far to good use in the training and further education of Germany's armed forces.

The oversight function of the parliamentary Armed Services Committee

In the parliament, the main responsibility for monitoring international missions lies with the Armed Services Committee (*Verteidigungsausschuss*). The Committee on Foreign Affairs and the Committee on Human Rights and Humanitarian Aid are also concerned with this function. Like the meetings of other committees, those

¹¹⁸ Much has been written on the difficulties of effective and impartial investigations in the military (and in many countries also by the military). For a contribution see, for example, Kelly 1999.

of the Armed Services Committee are closed to the public. For the committee's discussions of international missions to fight terrorism, for instance, continuous reporting by the Government would be particularly important. Reports by research institutes and NGOs that specialize in this area should also be considered. Above all, competent reports on the human rights situation are necessary (cf. recommendation 3). The observance of human rights should be regularly stipulated in the parliament's resolutions on mandating international military operations. The same is true for the mechanism recommended above for monitoring

the compliance with human rights norms in the country of deployment. It would also report to the public on important developments, whenever German forces are sent abroad.

Recommendation 10: The Parliament, and especially its Armed Services Committee and its Committee on Human Rights, should intensify their monitoring of international missions, draw more heavily on the expert knowledge of outside specialists, and inform the public more actively.

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Documents

1) U.N. Commission on Human Rights: Resolution 2004/87. Protection of Human Rights and Fundamental Freedoms while Countering Terrorism

The Commission on Human Rights,

Reaffirming the purposes and principles of the Charter of the United Nations,

Reaffirming also the fundamental importance, including in response to terrorism and the fear of terrorism, of respecting all human rights and fundamental freedoms and the rule of law,

Recalling that States are under the obligation to protect all human rights and fundamental freedoms of all persons,

Recognizing that the respect for human rights, democracy and the rule of law are interrelated and mutually reinforcing,

Recalling its resolution 2003/68 of 25 April 2003 as well as General Assembly resolution of 22 December 2003,

Taking note of the report of the Secretary-General (A/58/266) and welcoming the various initiatives to strengthen the promotion and protection of human rights in the context of counter-terrorism adopted by the United Nations and regional intergovernmental bodies, as well as by States;

Recalling General Assembly resolution 48/141 of 20 December 1993 and, inter alia, the responsibility of the United Nations High Commissioner for Human Rights to promote and protect the effective enjoyment of all human rights,

Reiterating paragraph 17 of section I of the Vienna Declaration and Programme of Action, adopted by the

World Conference on Human Rights on 25 June 1993, which states that acts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity and security of States and destabilizing legitimately constituted Governments, and that the international community should take the necessary steps to enhance cooperation to prevent and combat terrorism,

Taking note of General Assembly resolution 58/174 of 22 December 2003 and recalling Commission resolution 2003/37 of 23 April 2003 on human rights and terrorism,

Taking note also of the declaration on the issue of combating terrorism contained in the annex to Security Council resolution 1456 (2003) of 20 January 2003, in particular the statement that States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law,

Recalling the relevant resolutions of the General Assembly and the Security Council,

Noting the declarations, statements and recommendations by a number of human rights treaty monitoring bodies and special procedures on the question of the compatibility of counter-terrorism measures with human rights obligations,

Reaffirming its unequivocal condemnation of all acts, methods and practices of terrorism, in all their forms and manifestations, wherever and by whomsoever committed, regardless of their motivation, as criminal and unjustifiable, and renewing its commitment to strengthen international cooperation to prevent and combat terrorism,

Deploing the fact that the number of victims of terrorism has sharply increased worldwide and expressing its profound solidarity with the victims and their families,

Stressing that everyone is entitled to all the rights and freedoms recognized in the Universal Declaration of Human Rights without distinction of any kind, including on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in accordance with article 4 of the International Covenant on Civil and Political Rights, certain rights are recognized as non-derogable in any circumstances and that any measures derogating from the provisions of the Covenant must be in accordance with that article in all cases, and underlining the exceptional and temporary nature of any such derogations, as stated in general comment No. 29 on derogations during a state of emergency adopted by the Human Rights Committee on 24 July 2001,

1. *Reaffirms* that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law;
2. *Calls upon* States to raise awareness of the importance of these obligations among national authorities involved in combating terrorism;
3. *Takes note* of the report of the Secretary-General (E/CN.4/2004/91), in particular the conclusions and recommendations presented therein pending the conclusion of the study requested in General Assembly resolution 58/187 of 22 December 2003;
4. *Welcomes* the publication of the *Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism*, and requests the High Commissioner to update and publish it periodically, in accordance with the request of the General Assembly;
5. *Also welcomes* the ongoing dialogue established in the context of the fight against terrorism between the Security Council and its Counter-Terrorism Committee and the relevant bodies for the promotion and protection of human rights, and encourages the Security Council and its Counter-Terrorism Committee to continue to develop the cooperation with relevant human rights bodies, in particular with the Office of the United Nations High Commissioner for Human Rights, giving due regard to the promotion and protection of human rights in the ongoing work pursuant to relevant Security Council resolutions relating to terrorism;
6. *Requests* all relevant special procedures and mechanisms of the Commission, as well as the United Nations human rights treaty bodies, to consider, within their mandates, the protection of human rights and fundamental freedoms in the context of measures to combat terrorism and to coordinate their efforts where appropriate in order to promote a consistent approach on this subject;
7. *Encourages* States, while countering terrorism, to take into account relevant United Nations resolutions and decisions on human rights, and encourages them to consider the recommendations of the special procedures and mechanisms of the Commission and the relevant comments and views of treaty bodies;
8. *Requests* the High Commissioner for Human Rights, making use of existing mechanisms, to continue:
 - (a) To examine the question of the protection of human rights and fundamental freedoms while countering terrorism, taking into account reliable information from all sources;
 - (b) To make general recommendations concerning the obligation of States to promote and protect human rights and fundamental freedoms while taking actions to counter terrorism;
 - (c) To provide assistance and advice to States, upon their request, on the protection of human rights and fundamental freedoms while countering terrorism, as well as to relevant United Nations bodies;
9. *Also requests* the High Commissioner, taking into account the views of States, to complete the study requested in General Assembly resolution 58/187 concerning the extent to which the human rights special procedures and treaty monitoring bodies are able, within their existing mandates, to address the compatibility of national counter-terrorism measures with international human rights obligations in their work, for consideration by States in strengthening the promotion and protection of human rights and fundamental freedoms while countering terrorism, with regard to the international human rights institutional mechanisms;
10. *Decides* to designate, from within existing resources, for a period of one year, an independent expert to assist the High Commissioner in the fulfilment of the mandate described in paragraphs 8 and 9 of the present resolution and, taking fully into account the study requested in General Assembly resolution 58/187, as well as the discussions in the Assembly and the views of States thereon, to submit a report, through the High Commissioner, to

the Commission at its sixty-first session on ways and means of strengthening the promotion and protection of human rights and fundamental freedoms while countering terrorism;

11. *Requests* the High Commissioner to submit a report on the implementation of the present resolution to the General Assembly at its fifty-ninth session and to the Commission at its sixty-first session.

2) Resolution of the German Federal Parliament (*Deutscher Bundestag*): For the Respect of Essential Human Rights and Fundamental Freedoms in Guantánamo Bay (Adopted on March 25, 2004 Parliamentary Document 15/2756)

I. The *Bundestag* concludes: Over 600 persons from more than 40 countries have been detained at the U.S. base in Guantánamo Bay for quite some time, including some for more than two years. For the U.S. government the prisoners are "unlawful enemy combatants". According to the official American view, the rules of international law concerning the treatment of prisoners of war do not apply to such persons at all. The detainees do not have any contact with their families, lawyers, or international organizations. The only exception is the International Committee of the Red Cross (ICRC). They have not been brought before a judge. Nor has due process been afforded to them in any other way. Neither were they informed of the charges against them, nor were they told where they were being kept. So far, only the ICRC has been allowed to visit the prisoners — on condition of strict secrecy. After these visits the ICRC publicly expressed serious concern over the effects that, above all, the uncertainty about their fate might have on the detainees. The U.S. government, however, declared that the prisoners were being treated humanely. They were, for example, given medical care, and they were treated and looked after in accordance with their religious views. However, it has been reported that despite these concessions severe violations of minimum human rights standards have also occurred.

The treatment of prisoners in Guantánamo Bay is being fiercely criticized both internationally and domestically in the USA itself. The USA has signed the four Geneva conventions of 1949, which contain the fundamental rules of international humanitarian law. According to article 5, section 2 of the third Geneva convention, detainees must be treated as prisoners of

war until their status has been determined by a competent court of law. Those detainees that are not considered to be prisoners of war as defined by the third Geneva convention must at least be treated in accordance with the humanitarian minimum standard described in the identical article 3 of all four Geneva conventions, as well as in accordance with the rules established by international law for the protection of human rights. Detained persons must therefore be treated humanely. Encroachments on personal dignity, and degrading and humiliating acts in particular, must be avoided. Sentences must be passed by a proper court of law "affording all the judicial guarantees which are recognized as indispensable by civilized peoples". Article 45, section 3 and article 75 of the first Protocol Additional to the Geneva conventions explicitly grant persons who take part in hostilities but do not have the status of prisoners of war certain rights and standards of protection, especially the right to due process. Even though it is true that the USA have never signed this additional protocol, article 75 is now generally considered to be a part of customary international law.

In the meantime, more than a 100 detainees, including three minors, have been released or transferred to their home countries, where some of them will probably have to face criminal prosecution. After U.S. President George W. Bush had announced in July 2003 that the first six suspected terrorists would be tried before a U.S. military tribunal, the first two detainees, Ibrahim Ahmed Mahmoud al Qosi and Ali Hamza Ahmed Sulayman al Bahlul, have now been indicted by a military tribunal. The U.S. Department of Defense has assigned some military lawyers to defend them. Yet, it is still not clear when the proceedings will begin. As the defendants were not informed of the charges against them, and as they were denied access to a lawyer of their own choosing as well as to the evidence that was to be used against them, their ability to prepare their own defense was considerably curtailed. This shows the shortcomings of the planned trial before a U.S. military tribunal with its closed hearings. Various American courts have decided along the same lines of argument, as, for example, the U.S. Court of Appeals in San Francisco on December 18, 2003. Moreover, this procedure violates the International Covenant on Civil and Political Rights of 1966, which has been ratified by the USA, and in particular such provisions as, for example, the right to habeas corpus. Among other things, the Covenant stipulates that it must be possible for anyone convicted of a crime to have his conviction and his sentence reviewed by a higher tribunal. This is not the case when, according to current plans, the decisions of the military

tribunal can only be appealed to the American president himself or the defense secretary. Meanwhile there are cases pending before the U.S. Supreme Court that will decide the legality of the treatment and the criminal proceedings. Since September 11, 2001, at the latest, it has become clear that there are new kinds of threats and dangers for the security of individual countries and the international community that make it necessary to rethink the ways of dealing with these dangers. However, it constitutes a blatant contradiction when, of all people, those who justify the fight against terrorism with the need to protect rights and the security of the people undermine this protection by the very methods they choose for this fight. It is therefore not only by international law that the USA, as the largest and strongest democracy in the world, is bound to respect the fundamental rights of even the most dangerous terrorists. This is all the more true as the USA expects and demands strict compliance with these rights and principles from others. International legitimacy is an important resource in the fight against international terrorism. One of the sources of legitimacy is the transparency of proceedings. In this context, it is therefore absolutely necessary that the trials of the detainees in Guantánamo Bay will be open and fair. The strict adherence to due process in the conduct of criminal proceedings, which characterizes the American legal tradition, can be an important factor in the battle for the hearts and minds of the people of the world.

It is therefore precisely now that the international community, and Germany as a part of it, are called upon to see to the strict compliance with the minimum standards for the protection of the human rights and fundamental freedoms of each individual, and to promote them further. This is the only way to demonstrate the real political, social and legal strengths of democracy in the fight against terrorism. With this in mind, the German *Bundestag* supports the demands made in this regard by other national parliaments and international parliamentary assemblies.

II. The German *Bundestag* therefore calls upon the German government,

1. to call upon the U.S. government to honor its obligations under international law as specified in the Geneva convention;
2. to declare that the prisoners in Guantánamo Bay must, according to the opinion of the German government, be treated as prisoners of war, at least until their status under international law has been determined by a competent court;
3. to work towards improving the humanitarian situation of the detainees, and to urge the USA to treat them in accordance with the minimum standards of humanitarian and human rights norms;
4. to support the work of the ICRC and to see to it that other relief organizations are also given access to the prison camps;
5. to call on the USA to respect the right of each and every prisoner in Guantánamo Bay to a fair and independent trial in accordance with the fundamental guarantees granted by law;
6. to make sure, together with other countries, that the legal status of the detainees in Guantánamo Bay will be clarified by a competent court as soon as possible, in accordance with the relevant norms as stipulated by article 5 of the Geneva convention.

Berlin, March 24, 2004

Franz Müntefering and the parliamentary group of the Social Democrats (*SPD*)
 Katrin Göring-Eckardt, Krista Sager and the parliamentary group of the Greens (*Bündnis 90/Die Grünen*)



The German Institute for Human Rights

The German Institute for Human Rights, Berlin, informs about human rights issues in Germany and in other countries. Its intention is to contribute to the prevention of human rights violations and to the promotion and protection of human rights.

The various functions of the institute include information and documentation, research, policy advice und human rights education within Germany.

The Institute co-operates with international and national partners. In particular, it is concerned with the promotion of human rights treaties, with issues in the

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