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The German *Rechtsstaat*¹ in a Time of Right-Wing Terror

Right-Wing Terrorism Unrecognized

On 4 November 2011, the perpetrators of a bank robbery in the German town of Eisenach fled from pursuing police to a camper van, where, shortly afterwards, they set fire to the vehicle and committed suicide. In the camper van, the police found not only the bodies of two members of the National Socialist Underground (NSU), who the police had been searching for since they went into hiding on 26 January 1998, but also a CZ 83 7.65 mm pistol that had been used in a series of nine murders. This weapon had been used to kill nine small business people from immigrant communities. The first known murder was committed on 9 September 2000, the last on 6 April 2006. Several other weapons were also found in the camper van, including the service pistols of a police woman who had been murdered in Heilbronn in 2007 and of her colleague, who had been wounded in the same incident. On the same day as the robbery, there was an explosion and a fire in a house in the town of Zwickau, in which the two bank robbers had lived with a woman. This woman gave herself up to the police in Jena on 8 November 2011. On 13 November, the Federal Court of Justice (*Bundesgerichtshof*) ordered that she be remanded in custody on strong suspicion of founding and being a member of a terrorist organization and of first-degree arson.²

It very quickly became clear, following these events, that the three NSU members, who had been apprehended more or less by accident, had been responsible for an unprecedented series of far-right terrorist acts. As well as the murders of small business people, eight of whom had Turkish roots, the ninth being of Greek origin, they could also be linked with certainty to a nail-bomb

1 Translator's note: The term *Rechtsstaat* – literally the “rights state”, more idiomatically, the “state of rights” or the “constitutional state” – poses a particular problem for translators. In the context of international relations, and the work of international institutions including the OSCE, the abstract noun “*Rechtsstaatlichkeit*”, derived from the adjectival form “*rechtsstaatlich*”, is generally translated as “rule of law”, to the extent that they can be considered virtual synonyms. Yet there is no adequate translation of the original German noun “*der Rechtsstaat*”. The translation as “state under the rule of law” is ugly and potentially misleading when applied strictly to the German state. It is for this reason that we have followed the not unprecedented path here of using the German term as a loan word, despite the inconvenience this may cause the reader.

2 Cf. Federal Prosecutor General at the Federal Court of Justice, *Haftbefehl gegen die Brandstifterin von Zwickau wegen mutmaßlicher Mitgliedschaft in der terroristischen Vereinigung “Nationalsozialistischer Untergrund (NSU)”* [Zwickau Arsonist Remanded in Custody on Suspicion of Membership of Terrorist Organization “National Socialist Underground (NSU)”], press release, 13 November 2011 – 37/2011, at: <http://www.generalbundesanwalt.de/de/showpress.php?newsid=419>.

attack in Cologne in 2004 and to the murder of the policewoman in Heilbronn in 2007. In the nail-bomb attack, which had apparently targeted Turkish shops, twenty-two people had been injured, some of them critically. The bomb also caused a great deal of material damage. The policewoman murdered in Heilbronn was a 22-year-old officer from Thuringia. Her colleague, who was also shot in the head, survived with serious injuries. The NSU also carried out a number of bank robberies to fund its existence in hiding. The public prosecutor and police are currently examining whether there is a connection between the group and twelve robberies of post offices and banks in the states of Saxony, Thuringia, and Mecklenburg-Western Pomerania.

Germany suddenly found itself confronted with a radical right-wing terror campaign, whose existence no one had been aware of up to that point. Historically, the democratic *Rechtsstaat* has always faced a double predicament when dealing with terrorist attacks. In the first instance, the security agencies of the state are required to explain why they had not recognized and dealt with the threat at an earlier stage. This has frequently caused domestic security structures – and their need for reform – to become a political hot topic. In the second place, such events result in calls for security organs to be granted new powers to aid them in tracking down and punishing the terrorists. Frequently, such new powers curtail fundamental rights and procedural safeguards aimed at ensuring the rule of law in order to facilitate more effective prosecution of (alleged) terrorists. This leads to a dismantling of constitutional standards, which are only sometimes restored once the terrorist threat has passed. Frequently, these enhanced powers remain as long-term constraints on fundamental freedoms. This was most recently demonstrated in the international reaction to the 9/11 attacks, but was also evident in West Germany in 1977, during efforts to combat the terror campaign of the Red Army Faction (RAF). In the case of the NSU's far-right terror campaign, the predicaments that the *Rechtsstaat* faces are compounded by the fact that neither the authorities nor the public acknowledged that the NSU's crimes constituted a campaign of right-wing terrorism. The German *Rechtsstaat* and German society knew nothing of any right-wing terrorist attacks until the NSU's cover was accidentally blown. Consequently, we have to ask why the German authorities were blind to the dangers of right-wing extremism.

The NSU's Path to Terror

The fact that the entire German public had absolutely no idea that the NSU's crimes had been committed in the name of right-wing ideology, and the largely accidental discovery of this link, raises the question of what the German authorities knew about the NSU before they went into hiding, and what they could or should have deduced from that.

The NSU, frequently referred to in the media as the Zwickau terror cell, arose out of the 1990s neo-Nazi scene in the city of Jena. It consisted of Beate Zschäpe (born 2 January 1975, neé Apel), Uwe Mundlos (born 11 August 1973; died 4 November 2011), and Uwe Böhnhardt (born 1 October 1977; died 4 November 2011). Before they went underground, the three were already known to the authorities as active neo-Nazis.³ All three belonged to the Anti-Anti-Fascist group formed in Thuringia in the autumn of 1994, which later became the *Thüringer Heimatschutz* [Thuringian Homeland Protection]. The *Thüringer Heimatschutz* was largely established by Tino Brandt, the deputy leader of the regional association of the National Democratic Party of Germany (NPD) in Thuringia, who was in fact an informant for the Thuringian Office for the Protection of the Constitution (*Thüringer Landesamt für Verfassungsschutz*, TLfV from 1994 until his exposure in 2001). In 1998, the Thuringian State Criminal Police Office (*Thüringer Landeskriminalamt*, TLKA) described the three as belonging to “the hard core of the Blood & Honour movement” in Jena.

Until the time of the trio’s disappearance, the following neo-Nazi activities were recorded in the files of the state authorities: In 1993, Mundlos and Böhnhardt paraded through the Jena district of Winzerla, which neo-Nazis had declared a “*national befreite Zone*” [literally, a “nationally liberated zone”, a term coined by neo-Nazis to describe areas where their dominance had led to the elimination from public sight and life of what they considered undesirables (foreigners, gays, punks, etc.)] wearing replica SS uniforms.⁴ In February 1995, Zschäpe attempted to register a demonstration by the “*Interessengemeinschaft Thüringer Heimatschutz*” (“Friends of Thuringian Homeland Protection”) with the motto “For the Protection of Thuringian Identity, against Internationalization by the EU”, which was refused permission by the Jena authorities.⁵ On 25 March 1995, Mundlos was detained at a skinhead meeting in Triptis.⁶ On 3 May 1995, the trio put up posters with the slogan “8 May 1945 – 8 May 1995. We’re not celebrating! End the Liberation Lie! Young National Democrats – Brockenberg 5a 52223 Stollberg”.⁷ On 17 August 1996, Böhnhardt and Mundlos journeyed to Worms to take

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- 3 In the following, most of the facts cited as part of the official record are taken from: *Gutachten zum Verhalten der Thüringer Behörden und Staatsanwaltschaften bei der Verfolgung des „Zwickauer Trios“*, erstattet von Dr. Gerhard Schäfer, Vorsitzender Richter am Bundesgerichtshof a.D., Volkhard Wache, Bundesanwalt beim Bundesgerichtshof, a.D., Gerhard Meiborg, Leiter der Abteilung Strafvollzug im Ministerium der Justiz und für Verbraucherschutz Rheinland-Pfalz, im Auftrag des Freistaats Thüringen, vertreten durch den Thüringer Innenminister [Report on the Behaviour of the Thuringian Authorities and Public Prosecutors in the Prosecution of the “Zwickau Trio”], Erfurt 14 May 2012 (referred to hereafter as the *Schäfer Report*). For personal details of the trio, see *ibid.* pp. 26-38, for details of the activities they carried out together, see *ibid.* pp. 38-54.
- 4 Cf. Frank Döbert, Erinnerung an 90er-Jahre [Remembering the 90s], in: *Ostthüringer Zeitung*, 17 December 2011.
- 5 Cf. *Schäfer Report*, cited above (Note 3), p. 43.
- 6 Cf. *ibid.*, pp. 43-44.
- 7 Cf. *ibid.*, p. 44.

part in an unregistered demonstration on the anniversary of the death of Rudolf Hess.⁸ Mundlos and Böhnhardt, dressed in bomber jackets and combat boots and accompanied by a group of supporters, attended a court hearing of convicted right-wing terrorist and holocaust denier Manfred Roeder at the district court of Erfurt.⁹ In the court building, they unfurled a banner reading “Our Grandfathers Were Not Criminals”.¹⁰ In November 1996, Mundlos and Böhnhardt were banned from the former Buchenwald Concentration Camp, which they had visited dressed in clothing that resembled SA uniforms.¹¹ On 24 January 1998, the three members of the NSU took part in an NPD demonstration against an exhibition in Dresden highlighting the crimes of the *Wehrmacht*, where they were photographed with a banner reading “Nationalism – An Idea Looking for Practitioners”.¹² Hence, there could be no doubt on the part of the authorities that these three individuals had a deeply rooted far-right sensibility; they had demonstrated it often enough.

Even before going underground, and at the same time as they were publicly asserting their Nazi ideology, they also committed several ideologically motivated crimes, which were recorded by the police and were the subject of criminal prosecution.¹³ On 29 June 1995, Mundlos was convicted of the manufacture and possession of insignias belonging to organizations forbidden by the constitution. He had been arrested in possession of the forbidden items on 13 August 1994.

On 13 April 1996, Böhnhardt hung the torso of a mannequin decorated with a yellow “Jewish star” badge on a bridge over an *Autobahn* near Jena, placing a fake bomb nearby. For this, and for incitement to racial hatred, he was sentenced to two years and three months juvenile detention by a juvenile court on 21 April 1997, taking account of several previous convictions since 1993, including numerous counts of theft, several counts of driving without a valid licence, endangering road safety, license plate fraud, and extortion in combination with assault. On 10 December 1997, the conviction was confirmed. On 23 January 1998, the file was lodged with the responsible juvenile court judge, whose task it was to decide on a date for the start of the custodial sentence. Three days later, Böhnhardt and the others went into hiding.

As their criminality escalated, the NSU armed themselves and began to build bombs with which to carry out attacks. This, too, was known to the authorities and recorded in official files.¹⁴ On 16 October 1997, Böhnhardt was

8 Cf. *ibid.*, p. 50.

9 Cf. Solveig Bach, *Freunde wurden Mörder-Bande* [From Friends to Murder Gang], in: *n-tv.de*, at: <http://www.n-tv.de/politik/Freunde-wurden-Moerder-Bande-article4773146.html>.

10 Cf. Wolf Schmidt/Andreas Speit, *Der Staat, der Terror und die Partei* [State, Terror, Party], *taz.de*, 17 November 2011, at: <http://www.taz.de/!82127>.

11 Cf. *Schäfer Report*, cited above (Note 3), p. 47.

12 Cf. Wolf Schmidt, *NPD und NSU: Apfels brauner Kern* [NPD and NSU: Apfel's Brown Core], *taz.de*, 12 December 2011, at: <http://www.taz.de/NPD-und-NSU/!83602>.

13 For the following, cf. *Schäfer Report*, cited above (Note 3), pp. 26-38.

14 For the following, cf. *ibid.*, pp. 28-29, 38-54, and 55-62.

ordered to pay a fine of 50 days' pay for a firearms offence (committed on 16 April 1997). On 30 September 1996, a bomb decorated with swastikas was placed in Jena's Ernst-Abbe Stadium, though this was not linked to the trio until 1998. Zschäpe, Böhnhardt, and Mundlos, however, came to the attention of the police in 1997, when letter bombs were sent to a newspaper, a police station, and local government offices in Jena. They were also suspected of having placed a bomb in a suitcase decorated with a swastika in front of Jena's *Theaterhaus*, on 2 September 1997, although it lacked a detonator. Following investigations into more than a dozen members of the *Thüringer Heimatschutz*, Zschäpe, Böhnhardt, and Mundlos were also questioned, but not detained. A police search on 26 January 1998 led to the discovery of explosives in a lock-up rented by Zschäpe, at which point the NSU went into hiding.

Following the disappearance of the trio after the discovery of explosives in Zschäpe's lock-up, at the very latest, it should have been possible to conclude that the NSU was becoming involved in terrorist activities. The possibility that the trio would carry out a right-wing terror campaign from hiding should not have been too distant from people's minds.

The Failure of Law Enforcement and Security Agencies

Before the causes of the failure of the security agencies and the consequences that should be drawn from it can be debated, it is necessary to determine where and how the security agencies failed in their attempts to combat the NSU. The following sections detail the four most obvious areas of failure documented so far.

The NSU Was Able to Disappear for Thirteen Years

Despite ongoing police investigations, the trio was able to disappear and remain undetected for 13 years.

After explosives were found in Zschäpe's lock-up on 26 January 1998, there was strong suspicion that a crime had been committed and that the suspects posed a flight risk. The NSU's ability to fall off the radar at this point – according to the Schäfer Report – was a consequence of technical errors made by the police while conducting their investigations.¹⁵ The police failed to search the various premises simultaneously. Böhnhardt learned that Zschäpe's lock-up was being searched and was able to evade the police and warn the others. If the searches had been carried out simultaneously, this would not have been possible.

15 See also the short summary of the Schäfer Report printed for the press conference on 15 May 2012, p. 2.

After their disappearance, and the issue of an arrest warrant on 28 January 1998, both the TLKA and the TLfV, joined shortly afterwards by the authorities in Saxony, began an extensive manhunt for the three suspects, without, however, effectively communicating or co-ordinating their actions. The TLKA alone initiated 37 phone taps, public appeals for information, and surveillance operations. The key reason for the failure to apprehend the NSU was the TLKA's decision to entrust the operation to a dedicated fugitive unit.¹⁶ Up to this point in time, the case had been dealt with by the *Ermittlungsgruppe Terrorismus/Extremismus* (Terrorism/Extremism Investigation Group, known as "EG TEX"), a unit specializing in right-wing extremism. In contrast, the new investigative team had no knowledge of the right-wing structures in which the trio was involved and from which it drew its support. These problems were acknowledged in part by the investigators themselves, yet despite their failure to achieve results over years, the TLKA senior management did nothing to change things.¹⁷ Nor did the public prosecutor intervene, thus failing to fully discharge its responsibility to lead the investigation.¹⁸ The suspicions, voiced several times by the police, that Beate Zschäpe was providing information to the TLfV, and even that the TLfV and its Saxon equivalent (*Sächsisches Landesamt für Verfassungsschutz*, SLfV) assisted the trio in their disappearance and later on have not so far been proven.¹⁹

Failure to Recognize Right-Wing Terrorism

No link was ever drawn between the trio and either the murder of the nine small business owners from immigrant communities or the shooting of the two police officers in Heilbronn. Equally, the three were never connected to or investigated with regard to the nail bomb attack in Cologne or the various bank robberies. The day after the nail bomb attack, the German Interior Minister, Otto Schily, and his counterpart in the state of North-Rhine Westphalia, Fritz Behrens, denied publicly that the attack had terrorist motives.²⁰ While the theory was occasionally proposed that there may have been right-wing extremist involvement in the murder spree, it had no chance of guiding the work of the investigative organs. This became particularly evident in the in-

16 Cf. *Schäfer Report*, cited above (Note 3), p. 131, pp. 136-140, and the conclusion, pp. 262-263.

17 Cf. *ibid.*, p. 139; see also the short summary of the Schäfer Report, cited above (Note 15), pp. 3-4.

18 Cf. *Schäfer Report*, cited above (Note 3), pp. 237-238; see also the short summary of the Schäfer Report, cited above (Note 15), p. 4.

19 For Thuringia, see *ibid.*, pp. 247-261, p. 263. For Saxony, see *Sächsischer Landtag, Vorläufiger Abschlussbericht der PKK* [Preliminary Final Report of the Parliamentary Control Commission], 22 June 2012, p. 4.

20 Cf. Schily gibt schweren Irrtum zu, in: *Tagesspiegel*, 19 April 2012, at: <http://www.tagesspiegel.de/politik/nsu-terror-schily-gibt-schweren-irrtum-zu/6531284.html>.

quiry undertaken into the work of the Bavarian “Bosporus” task force, which had been set up to examine five of the murders.²¹

The Victims Come under Suspicion

Instead, the victims were suspected of being involved in organized crime. They and their friends and families were treated as though they were suspected of criminality, and they were thoroughly investigated. This made them victims twice over, once as the result of serious crimes, then again as the objects of false accusations.²²

Furthermore, these groundless suspicions were discussed for days in the media, where it was speculated that the crimes had been committed in connection with drug dealing, the Turkish mafia, illegal gambling, cyber-criminality, or plant smuggling. When the head of the Federal Criminal Police Office (*Bundeskriminalamt, BKA*) announced publicly that the murdered policewoman may have known the three and that the murder could have been the result of a falling out, the victim’s entire family was subject to ostracism.

Barbara John, the ombudswoman appointed by the government on behalf of the victims, is convinced that, as a result of their initial victimhood, and then of being suspected of involvement in the crimes, the families have had their lives ruined. Family members have abandoned each other, fallen out, or accused each other.²³

Destruction of Files

Even after the connection between the NSU and their crimes became known, the law enforcement and security agencies continued to make mistakes. At the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz, BfV*), files relating to the use of informants within the *Thüringer Heimatschutz* from 1996 to 2003 under the name of “*Operation Rennsteig*” were destroyed. This operation was conducted jointly by the BfV, the TLfV, and Germany’s Military Counterintelligence Service, the *Amt für den militärischen Abschirmdienst (MAD)*.²⁴ As a result of the debate that followed, Heinz Fromm, the head of the BfV, stepped down. Even the Federal

21 See Deutscher Bundestag, 2. Untersuchungsausschuss (“Terrorgruppe nationalsozialistischer Untergrund”) [Second *Bundestag* Committee of Inquiry (“National Socialist Underground Terrorist Group”)], hearing of witness Günther Beckstein of 24 May 2012.

22 This was stated by Sebastian Edathy (SPD), the chair of the *Bundestag* committee charged with investigating the NSU terror group, and his deputy Stephan Stracke (CDU) at the headquarters of Cologne police on Friday, 31 August 2012.

23 Cf. Deutscher Bundestag, 2. Untersuchungsausschuss (“Terrorgruppe nationalsozialistischer Untergrund”) [Second *Bundestag* Committee of Inquiry (“National Socialist Underground Terrorist Group”)], hearing of witnesses of 19 April 2012.

24 Cf. Deutscher Bundestag, 2. Untersuchungsausschuss (“Terrorgruppe nationalsozialistischer Untergrund”) [Second *Bundestag* Committee of Inquiry (“National Socialist Underground Terrorist Group”)], hearing of witness Heinz Fromm of 5 July 2012.

Ministry of the Interior now assumes that the files were destroyed “deliberately and systematically”. Yet the Ministry of the Interior had itself, in November 2011, ordered the destruction of files belonging to the BfV. According to the Ministry of the Interior, however, these files had nothing to do with the NSU, but were merely records of phone taps carried out on right-wing extremists, which should have been destroyed years earlier in line with regulations on the retention period of stored data. The data was belatedly deleted in November 2011 without a further check of its content being carried out.²⁵

The Causes of the German State’s Failure to Combat Extreme Right-Wing Terrorism

Competition and Mutual Hindrance between the Office for the Protection of the Constitution and the Police

The case of the TLfV shows in exemplary fashion what structural problems there were in the work of the offices for the protection of the constitution on the NSU. Thanks to information from its sources, the TLfV had good knowledge of the trio. Yet mistakes were made in how that information was used in two regards.²⁶ The information provided by informants was not analysed in line with the principles of an intelligence agency. As a result, the relevance of many pieces of information was not recognized and key insights were not passed on to the police. The causes of this were the TLfV’s tendency to think of itself as in competition with the TLKA and its dislike of law enforcement responsibilities.²⁷ At the same time, the critical attitude of many TLKA officers towards the TLfV came about as a result of the use of the informant Tino Brandt. Before the trio disappeared, the TLfV had warned Brandt on several occasions that the TLKA was planning to carry out searches. Furthermore, after the NSU trio went underground, TLfV agents informed Mundlos’s parents that their telephone was being tapped by the TLKA. There was thus no co-ordination between the agencies involved in the case. Both of these problems were identified clearly by the Schäfer Commission and the evidence documented in its report. To dismiss this as an internal Thuringian problem ignores the underlying structural issue. We have to assume that while the powers of the offices for the protection of the constitution to carry out surveillance have grown steadily, their ability to evaluate the resulting data, and to train personnel for this task have not expanded concomitantly, particularly with regard to right-wing extremism and far-right groups. Furthermore, be-

25 Cf. Deutscher Bundestag, *NSU-Ausschuss fordert Stopp der Aktenvernichtung* [NSU Committee Demands End to Destruction of Documents], at: http://www.bundestag.de/dokumente/textarchiv/2012/39895729_kw29_pa_2ua_nsu.

26 Cf. *Schäfer Report*, cited above (Note 3), p. 264, margin numbers 485,486 .

27 Cf. *Ibid.*, p. 246-247; see also the short summary of the *Schäfer Report*, cited above (Note 15), p. 9.

hind the police's constant and ubiquitous complaint that the intelligence agencies do not provide them with sufficient information there is also a structural conflict of operational interests.²⁸ If the offices for the protection of the constitution inform the police about criminal acts, their sources of information threaten to dry up. This tends to result in action being taken too late in criminal cases. To stop this, the use of informants needs to be severely curtailed or stopped altogether.

*Lack of Co-ordination and Centralization, "Limits to Federal Security Architecture"?*²⁹

Germany possesses a total of 59 security agencies at state and federal level.³⁰ As a result of the different tasks performed by the various agencies as well as vaguely worded laws, there are overlaps, multiple competencies, problems with information management, and constant co-ordination problems.³¹ The investigation of the NSU murders involved five public prosecutors, six state criminal police offices, the federal BKA, and the various offices for the protection of the constitution. Nevertheless, the only theory about motive for the murders that was pursued with any seriousness focused on organized crime. Furthermore, in May 2006, the conference of Germany's interior ministers (*Innenministerkonferenz*) decided not to give the BKA responsibility for investigating the nine murders that had been committed up to that point. Conflict between the states and the federal government, and among the states themselves, led to poor co-ordination of this major investigation. The BKA was given a "supporting role" and, over the many years of the investigation, carried out only "complementary structural investigations". There was "no unified investigation and search plan".³² The Federal Prosecutor General is also unable to take the initiative to determine whether he has authority in such cases.

28 This was the opinion presented by Christoph Gusy to a *Bundestag* expert hearing into the NSU, see Deutscher Bundestag, 2. Untersuchungsausschuss ("Terrorgruppe nationalsozialistischer Untergrund") [Second *Bundestag* Committee of Inquiry ("National Socialist Underground Terrorist Group")], expert hearing on the security architecture in Germany of 29 March 2012.

29 Deutscher Bundestag, NSU-Untersuchungsausschuss, Scharfe Kritik an polizeilicher Aufklärungsarbeit, [Strong Criticism of Police Investigation], at: http://www.bundestag.de/dokumente/textarchiv/2012/39320695_kw24_pa_2ua_nsu/index.html (author's translation).

30 These figures were given by Hans-Jürgen Lange at the *Bundestag* expert hearing on the security architecture in Germany, cited above (Note 28).

31 According to Christoph Gusy, see *ibid.*

32 Cf., in particular, the testimony of Bernhard Falk in: Deutscher Bundestag, 2. Untersuchungsausschuss ("Terrorgruppe nationalsozialistischer Untergrund") [Second *Bundestag* Committee of Inquiry ("National Socialist Underground Terrorist Group")], hearing of witness Bernhard Falk of 14 June 2012.

Blindness on the Right, Insensitivity to Victims

Despite the lack of a unified investigation plan, there was an agreement between the BKA and the police in the five affected states to concentrate on the search for evidence among organized criminal groups, where it was primarily believed that the perpetrators and their motives were likely to be found.³³ The hypothesis, developed by a Bavarian profiler, that the two men assumed to be the culprits had far-right views was destined to fail.

While the offices for the protection of the constitution did acknowledge the danger that individuals or small groups from extremist right-wing circles could carry out attacks, no one imagined that a terrorist cell on the model of the RAF existed. That at least was the view given in the statement of Heinz Fromm, the head of the BfV who resigned over the affair.³⁴ As a result, the investigators of the crimes committed by the NSU after going into hiding never realized that they were motivated by far-right ideology. It is therefore worth asking whether the offices for the protection of the constitution would have been successful in their investigations if they had taken the right-wing threat seriously. Why this did not occur, even though the group was known to be armed and in possession of bomb-making equipment, remains incomprehensible. As a result of their ongoing radicalization and increasing use of criminal means, all three NSU members, whose far-right allegiances were obvious, were well known and a matter of record at the TLfV, the TLKA, in various police departments, and at the public prosecutor's office, as were their close links to each other. Their involvement in far-right activities was impossible to overlook. Given that they had begun building bombs, the failure to recognize that the group had adopted terrorist tactics can only be explained by mistakes in analysing and distributing the data acquired in Thuringia. For instance, the Bavarian "Bosporus" task force, set up to deal with five murders, had no firm information about the NSU trio.

At the same time, the focus of the investigation on organized crime caused great suffering to many friends and family of the victims, in part merely as a result of the interrogation methods used by the police. The affected families were right to complain of a lack of empathy for the bereaved among the investigators and officials. This does not show that the security agencies are blind towards the right in general, but does reveal evidence of a serious underestimation of right-wing extremism, and accompanying everyday racism.

33 Cf. Deutscher Bundestag, 2. Untersuchungsausschuss ("Terrorgruppe nationalsozialistischer Untergrund") [Second *Bundestag* Committee of Inquiry ("National Socialist Underground Terrorist Group")], hearing of witness Christian Hoppe of 11 May 2012.

34 Cf. hearing of witness Heinz Fromm, cited above (Note 24).

What Should the Democratic Rechtsstaat Learn from Its Failure?

Having failed entirely to recognize that the crimes of the so-called Zwickau terror cell were motivated by far-right ideology, the state initially had no call to demand restrictions of fundamental rights as a means to combat this threat. However, after the terror campaign had come to an end – no thanks to the state – the latter immediately began to expand its authority to act, at the cost of curtailing basic rights. A prominent example of this is the establishment of the so-called far-right database (*Rechtsextremistendatei*).³⁵ The debacle also led to the drawing of a number of different, and frequently contradictory conclusions. As expected, a fundamental discussion of Germany's security architecture developed. One side called for the number of state offices for the protection of the constitution to be reduced from the current 16. On the other side, there are those who oppose centralization, key among them being the representatives of the states.³⁶ They argued that centralization would not increase the efficiency of counter-terrorism activities, while it would contradict the principle of federalism. In the light of the most recent discussions, major changes in this area are not to be expected, apart from better data-sharing between agencies. However, the form in which the principle of separation between the police and intelligence services is applied is currently the subject of heated discussion. It is not yet possible to predict how this controversy will be resolved. Politicians have argued that the importance of this dividing line should "not be exaggerated".³⁷ Academic experts, on the other hand, a group that seldom speaks with one voice, call for the principle of separation to be maintained.³⁸ To master the structural problems that plague the German system for the protection of the constitution, there have been calls for parliamentary oversight to be strengthened, and the use of police informants to be brought to an end, or at least more strongly regulated. Likewise, there have been appeals for greater transparency in the management of informants. So far there has been no real progress in the discussion of how right-wing extremist violence can be recognized at an earlier stage by the security agencies, how victims should be treated, and how best to help them. Barbara John, the German government ombudswoman, and others have made concrete proposals of how this could be done. As well as the implementation of these proposals (requiring examination of potential far-right links in cases of crimes against foreigners and members of immigrant communities as standard, a legal requirement that victims be assigned legal counsel, and efforts to

35 Cf. Gesetz zur Verbesserung der Bekämpfung des Rechtsextremismus vom 20. August 2012 [Law to Improve the Combating of Right-Wing Extremism of 20 August 2012], in: *Bundesgesetzblatt* [Federal Law Gazette], 2012, volume I, No. 39, 30 August 2012, pp. 1798-1803.

36 Most recently, Federal Interior Minister Hans-Peter Friedrich's plan to centralize Germany's various offices for the protection of the constitution was quashed on 28 August 2012 by the Conference of Interior Ministers.

37 Hearing of witness Günther Beckstein, cited above (Note 21).

38 Cf. expert hearing on the security architecture in Germany, cited above (Note 28).

strengthen state assistance to victims of violence), key changes also need to be made to tackle everyday racism. The official ceremony to remember the victims of the NSU must not be seen as the end of efforts to deal with the failure to treat the victims properly.