BUCHBESPRECHUNGEN

Security, Populism, Human Rights and the underestimated Role of AI and Big Data

A review of "Security and Human Rights", edited by *Benjamin J Goold and Liora Lazarus* 2nd ed., 2019

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Bloomsbury Publishing, Extent 536 p., 2019, ISBN 978 1849 467 308, £ 40,00.

I. For years, right-wing and national populist governments and groups have tended to instrumentalize an extensive law and order security policy for their own purposes. By doing so, they aim at materializing their idiology dominated by xenophobia or a general hate towards specific social groups or minorities. Over the last 10 years this has become a central challenge to liberal democratic norms and cause for stoking racial and religious division.

Benjamin Goold and *Liora Lazarus* place this depressing summary of the last twelve years since the publication of the first edition at the beginning of the just published second edition of their already highly esteemed anthology "Security and Human Rights".

In 2007, it was not foreseeable that in many Western democracies an essentially anti-democratic, in various forms nationalistic and xenophobic, not only sexually and religiously discriminating, racist and anti-Semitic program could become capable of gaining majority support. While at that time in some Eastern European countries and Russia corresponding currents were only just beginning to become visible, it took just ten years for them to become central contents of newly elected or programmatically changed governments – in a formally democratic way. Where such content is not supported by the majority, it is suitable for forming a strong and potentially majority-capable opposition. Certainly, the United States under President Trump and the post-Brexit United Kingdom under Boris Johnson cannot be compared with some other, e.g. Eastern European states or the Russia of President Putin. In fact, in some of the latter, these ideas seem to have a unifying effect, whereas in the United States and the United Kingdom, for example, they tend to divide the population. In both situations, however, human rights come under pressure. The rights of minorities become the plaything of divergent interests or their violation through exclusion becomes the unifying momentum of the majority.

In the introductory and many other contributions to the book, however, it is worked out from various perspectives that these developments are substantially promoted in all countries by existential fear of terrorist attacks (and organized crime) and at least are only made possible in many areas by such ideas. The curtailment of rights and the associated threat to human rights are often crucial parts of successful political programs that promise one thing in the first place: security.[1]

This security is offered in two ways: First, prerequisites – not least the corresponding language usage – and the instruments have to be created to prevent threats to public safety. Dangers appearing as potential perpetrators / terrorists should be discovered and rendered harmless before they become active. Criminal prosecution should also be initiated as early as possible in order to prosecute the organization rather than the execution of the corresponding acts. Security and criminal prosecution should therefore be particularly effective because they substantially overlap in an area that could previously only be dealt with by both sides to a limited extent.

As the editors make clear, this creates a precarious situation for the protection of individual rights. This applies in particular to the right to privacy, to informational self-determination and the integrity of information infrastructures. Of course, free speech is getting under serious pressure too (mentioned in IV/15 "Indirectly Inciting Terrorism? Crimes of Expression and the Limits of the Law" by *Helen Duffy and Kate Pitcher*). However, to the extent that monitoring, investigation and further intervention are directed against specific population groups without any objective reason, a specific threat to human rights always arises.

The second strand of security policy measures has an externally oriented reference, i.e. measures to combat terrorism are carried out abroad. Insofar as combat operations

[1] The Center for International Human Rights (CIHR) at John Jay College of Criminal Justice, CUNY, CIHR report 2020: "The Closing of Civic Space in the Philippines, https://www.jjay.cuny.edu/sites/default/files/contentgroups/center_international_human_rights/philippinesreport_1.pdf.

are concerned, these also present specific threats to the human rights of the people in the affected areas. Their preparation, however, also requires extensive domestic reconnaissance measures, effectively and increasingly surveilling parts of the population unrelated to concrete suspects. Last but not least, the safeguarding of human rights requires a fair and independent judiciary, prosecution and police force, which does not focus on individuals or population groups without substantial suspicion and not arbitrarily. Why, as many of the contributions in this book ask in addition to the introduction, can democratically legitimate governments implement such measures that objectively reduce the civil liberties of the majority of the population more and more? The answer lies in the increasingly widespread fear of a permanent threat to their existence from terror and crime. Despite the fact that the contradicting empirical data is repeatedly confirmed, populist methods have succeeded in creating a corresponding mood in the population, which wants to buy more and more security with less and less freedom. The fact that this is accompanied by ever greater discretion on the part of the relevant authorities and an increasingly lower density of controls is sacrificed on the altar of effectiveness.

In this correctly described development, only one aspect could be more focused. Many citizens themselves create the basis of the restrictions on their freedom by uncritically and massively disclosing personal data to social media in particular. In addition, the data collection and analysis necessary for all measures merge private economic, political and official interests. The interaction of Big Data, AI and predictive policing would have deserved a part of its own in this extremely readable volume, which has been further improved in the second edition.[2]

However, this aspect plays a role in various of the contributions. Most of all it´s mentioned in part III – Privacy, Anonymity and Dissent, especially in “Privacy versus Security: Regulating Data Collection and Retention in Europe” by *Arianna Vedaschi*.

In addition to this short introduction, the following text gives an overview of the contents of the volume before we then analyse two contributions in more detail. The two contributions were chosen not only because they seemed particularly interesting to us, but also because they represent the wide range of analyses collected here.

II. *Benjamin Goold* and *Liora Lazarus* again collect various outstanding experts on a broad range of topics. From different perspectives they all focus challenges for human rights under the flag of security. The editors are starting with:

(1.) “Security and Human Rights: Finding a Language of Resilience and Inclusion”.
Part I - Religion, Identity, and Citizenship – includes:
(2.) Torture and Othering by *Natasa Mavronicola*, (3.) Their Bodies, Ourselves: Muslim Women's Clothing at the Intersection of Rights, Security, and Extremism by *Rumee Ahmed* and *Ayesha S Chaudhry*, (4). The Uses of Religious Identity, Practice, and Dogma in 'Soft' and 'Hard' Counterterrorism by *Aziz Z Huq*, (5.) Curtailing Citizenship Rights as Counterterrorism by *Lucia Zedner* and (6.) Trusted Travellers and Trojan Horses: Security, Privacy, and Privilege at the Border by *Benjamin J Goold*.

Part II - Rights, Accountability and the State – starts with:

(7.) Secrecy as a Meta-paradigmatic Challenge by *Liora Lazarus*, (8.) Accountability Mechanisms for Transnational Counterterrorism by *Kent Roach*, (9.) Security and Human Rights after the Nationalist Backlash by *Victor V Ramraj*, (10.) The Demise of Rights as Trumps by *Robert Diab* and (11.) Violence, Human Rights, and Security by *Chetan Bhatt*.

Part III – Privacy, Anonymity and Dissent begins with the already mentioned:

(12.) Privacy versus Security: Regulating Data Collection and Retention in Europe by *Arianna Vedaschi* followed by (13.) Anonymity for Victims at the Special Tribunal for Lebanon: Security and Human Rights at Work in International Criminal Justice by *Juan-Pablo Pérez-León-Acevedo*, (14.) The Legal Death of Rebellion: Counterterrorism Laws and the Shrinking Legal Freedom of Violent Political Resistance by *Ben Saul* and (15.) Indirectly Inciting Terrorism? Crimes of Expression and the Limits of the Law by *Helen Duffy* and *Kate Pitcher*.

The final Part IV – Exceptionalism, Risk and Prevention includes (16.):

Oversight of the State of Emergency in France by *Marc-Antoine Granger*, (17.) Bounded Factuality: The Targeted Killing of Salah Shehadeh and the Legal Epistemology of Risk by *Shiri Krebs*, (18.) Countering Terrorism and Violent Extremism: The Security–Prevention Complex by *Andreas Armborst* and (19.) Security and Human Rights in the Context of Forced Migration by *David Irvine* and *Travers McLeod*.

III. *Rumee Ahmed and Ayesha S. Chaudhry*, Their Bodies, Ourselves: Muslim Women´s Clothing at the Intersection of Rights, Security, and Extremism

The first part of the text collection of Goold and Lazarus deals with questions of religion, identity and citizenship from the perspective of security and human rights.

In a sense, this first part of the book is perhaps the one that evades clear legal classifications the most. This applies not least to this contribution "Their Bodies, Ourselves: Muslim Women's Clothing at the Intersection of Rights, Security, and Extremism" which, from an almost anthropological perspective, shows the connection between veiling and Muslim discrimination. The special nature of this perspective leads to insights that are often closed to legal

[2] *Cäcilia Rennert and Carsten Momsen*, Predictive Policing, Big Data, and the Changing Nature of Criminal Justice, in this issue.

analysis. However, if one tries to protect human rights by legal means against violations through legally regulated procedures, be it predictive policing or prosecution, such an approach is not differentiated enough. The following critical analysis takes place precisely from this legal perspective.

In a bigger picture the authors *Rumee Ahmed* and *Ayesha S. Chaudhry* deal with the relationship between secularism and religion. This is done using the example of the so-called "Burkinis", a wide swimsuit invented in 2004 by a Muslim-believing Australian woman, which completely covers the body except for hands and feet and is optionally available with a headgear that covers the body except for the face.

The authors ask themselves how the burkini, which in their view is the epitome of pluralism, feminism, human rights and multiculturalism, could become a symbol of misogyny, anti-assimilation, anti-pluralism, racism, xenophobia and Islamophobia and what could be the reason for this. It is denounced that Muslim women are marginalized as "burkini-wearers" and therefore feel vulnerable and insecure ("Their security was jeopardized in the name of security" [p. 56]). The bodies of Muslim women would be instrumentalized as a threat to security. And fear for their own security or that of the state leads to a deep concern and a feeling of threat (p. 59). This game with the fear for security would be at the expense of women who (want to) conceal themselves and is adopted by Islamic scholars as well as Secular legal scholars.

The authors equate extreme secularism and extreme religiosity and blame both as they appear in extreme shape, preferring to see these approaches working together in a moderate appearance and also recognizing a variety of connections here.

In their own words, the central concern of the two authors can be summarized very briefly as follows:

"The burkini bans result from the failures of secular extremism, a failure of its imagination, a failure to meet its own ideals of liberty, freedom, and human dignity as goods in and of themselves, apart from the religious. Instead, in this discourse, human rights language is weaponised against the most marginalised citizens of the state, and rather than protecting them, it is used to police them. And this is the result of seeing secularism and religion as binaries, when far more unites them than divides them." (p. 71)

The ban on (complete body veils and) facial veils, which is often justified on the grounds of protecting women from oppression, but on the other hand also protects Europe from too strong influences by Islam, leads to the fact that Muslim women are accused of a threat to "the purity of secularism" and the reproach is made that, for example, religiousness is always in the foreground when bringing up children, instead of justifying a cultural rooting in the country of birth.

The argumentation approaches of Islamic legal scholars and Secular legal scholars are compared, whereby the latter referred to human rights in their arguments against a veiling (p. 64). So, the authors write:

"Though often unacknowledged, human rights language is itself rooted in religious concepts and accords people rights and responsibilities that, in an ideal world, all human beings should possess. These rights are described as intrinsic and inevitable, using technical terms and ideas that make 'human rights' an area of inquiry unto itself. This discourse is always aspirational, in that it describes how humans should be treated in order to achieve security. (p. 64 f.)

(...)
To that end, the UDHR begins with the premise that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' and warns that 'disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind'. These statements have all the hallmarks of an ideal, secure world seen earlier in Islamic legal discourse. The UN also aims at an impossible goal: international peace and security". (p. 65)

According to the authors, bans on veiling are based both on the protection of human rights and the maintenance of security. Muslim women who veil themselves would thus be portrayed and abused either as victims of human rights violations or even as those who violate the human rights of others.

"That is to say that Muslim women, when they wear something on their head or face, are presumed to be either victims of human rights violations or violating others' human rights, and they are thought to undermine the notion of an ideal, secure state". (p. 66)

The authors pursue in particular a social-anthropological and gender-specific approach.

The article introduces the invention of the Burkini as a story of success that is supposed to offer women the possibility to cover their bodies when taking public baths - for whatever reason, apart from religion, it is also pointed out several times that the Burkini is also worn by many non-Muslim women who for other reasons do not feel comfortable exposing their bodies in public or, to put it negatively, displaying them.

Already in the presentation of the reasons for the invention of the Burkini it is only briefly mentioned that the niece of the inventor felt uncomfortable in the available swimwear and tried to reconcile her "national, cultural and religious identities". However, it remains unclear on what this discomfort is individually based, how old the niece is, whether she is exposed to pressure from her family or others with regard to questions of veiling or whether she wants to cover her body for purely altruistic reasons.

The authors explain in this respect:

"The burkini is, at its best, a bridge, a language, a passageway that makes it possible to embrace and hold several values at once: the right of women to wear what they want, the right of women to occupy public spaces, the right of women to engage in leisurely public activities, the right of women to have agency in the kind of femininity they perform." (p. 55)

"This, despite the fact that many Muslim women claim that the hijab actually facilitates desegregation by allowing them to be in public spaces while maintaining their religious beliefs about modesty (p. 66f.)"

Here it is not mentioned that the wearing of the headscarf and other veiling clothes in Islam – at least according to the local understanding – has the background to hide the female sexuality – as soon as a man is near, this is mandatory in order not to signal to him that the woman is sexually available. In the discussion about which basic rights are affected by the prohibition of veiling, the right to sexual integrity (regardless of the clothing worn) and self-determination of women is largely ignored.

On the contrary, the authors point out that the burkini enables women, among other things, to wear what they want. Hardly any thought is given to the question of whether the burkini is really what a woman would like to wear if she could decide for herself without any influences and constraints, although this very question would be of great interest.

There is particular criticism of the fact that the wearing of headscarves is widely portrayed as a threat to the human rights of others and as a threat to peace and security (here in particular using the example of schools in France [p. 67]), instead of seeing these women as victims of exclusion, as they are appearing in the view of the authors.

Breaking down the role of Muslim women to the term "headscarf wearer" is discriminatory and exclusionary, the authors rightly state. Presenting the wearing of veiling clothing as a threat to security is one of the main problems the authors see in this discussion. (p. 68) Not every Muslim woman who veils herself should automatically be understood as a threat by equating it with 'political Islam', 'salafisation', 'extremism' (p. 68), which the authors rightly point out. In contrast, the bans in countries such as Afghanistan and Saudi Arabia, in which women who do not wear a headscarf are seen as a threat to public morality, introducing 'modern corruption' and 'western cultural influence' into society (p. 69). Both directions of these prohibitions made women subjects, because they were degraded to non-ideal citizens, who threaten the ideal society and also the ideal, male citizens by their behaviour (p. 69).

Although it is briefly mentioned in the text that women in Islamic countries such as Saudi Arabia, Iran or Afghanistan are forced to wear a veil - under threat of the death penalty, incidentally - the authors nevertheless consistently argue that the veil is a symbol of freedom, feminism, pluralism and emancipation and by no means a symbol of the oppression of women.

"Tolerance, pluralism, and multiculturalism threaten extremism by threatening the security of extremist views, and so the language of security is deployed to criminalize them. It is logically consistent then that the burkini, an expression of pluralism, is seen as a threat to extreme secularism and that extreme secularists therefore seek its criminalization. (p. 71)".

In the opinion of the authors, the burkini opens up many possibilities for women, while its rejection "decreases women's agency and choices, prevents women from enjoying the beach (...)" (p. 55f.) The authors unfortunately do not deal with the question of why the women addressed do not feel comfortable on the beach without wearing this garment, as already mentioned above.

In spite of all justified criticism of the regulation or prohibition of wearing a burqa, the authors do not mention essential aspects that play a role here. In particular with the example of France, which is mentioned several times in the text as a particularly negative example, it is essential for understanding to mention that France has been a laicist state since the beginning of the 20th century and, among other things, does not allow religious instruction in public schools. Furthermore, the wearing of religious symbols and clothing is forbidden in schools there altogether; this applies to all religions, not only Islam.

It is also necessary to mention that France has been the target of a large number of Islamic-based terrorist attacks with hundreds of fatalities for decades, when considering why the feeling of security in a society could be disturbed by wearing appropriate clothing. These points must not, of course, lead to the generalization and demonization of Muslim women's clothing, nor must they be used to justify the unspeakable incident described by the authors, in which, on a French beach, police officers forced a Muslim woman to remove her veiling clothes in front of everyone. Nevertheless, these points must be mentioned when the authors look for explanations. Unfortunately, despite the consideration that wearing a burka or burkinis could negatively influence the feeling of security in a society, the authors do not pursue the approach of what other form of discrimination this could lead to.

Finally, and that raises again the question of perspective, by equating extreme secularism und extreme religiosity, the authors seem to misjudge that it is religious intolerance not secularism that is actually responsible for innumerable human rights violations. Religiously constituted regimes probably outnumber secular states, being responsible for a vast percentage of human rights violations worldwide.

It would be quite interesting to further investigate the use of algorithms to filter women who order or search for appropriate clothing online and the use of these results to

substantiate suspicions, especially in the prevention and prosecution of terrorist crimes. If such online orders would be surveilled and categorized as predictors for terrorist offenses, that definitively would discriminatory.

All in all, the contribution by *Rumee Ahmed* and *Ayesha S. Chaudhry* is a text well worth reading, which raises many questions about the interaction of religion, security and human rights, but as a result does not discuss many open questions further. The text thus encourages further reflection and makes clear how important it is not to ignore questions of religion or the practice of religion and identity in the discourse on questions of security or the increasing need for it, but to place a special focus on them. However, a sensitive handling of religion-related human rights is requested for any kind of security policy.

IV. *Juan Pablo Pérez-León-Acevedo,* Anonymity for Victims at the Special Tribunal for Lebanon

One issue in which the conflict between ensuring security and safeguarding human rights is particularly acute is the legal position of the accused in criminal proceedings. In general, the fundamental rights of the accused come under particular pressure when they are weighed against sometimes serious accusations. This is especially true when the subject of the criminal proceeding are accusation relating to "terrorist" crimes. It has long been the subject of scientific discussion, to which extent a certain "special treatment" can be identified both in substantive criminal law[3] and criminal procedural law[4], when accusations of that kind are in question.[5] And indeed, from a purely factual perspective it can be said, that these criminal proceedings are characterized by a higher level of risk for all parties to the proceedings and also the general public. Nevertheless it remains to be considered, that these proceedings continue to be guided by the principles of the rule of law. For it is especially these principles that are set in place to serve and protect the human rights of the accused.

In his article *Juan Pablo Pérez-León-Avecedo* exemplifies this very conflict using the example of the United Nation's Special Tribunal for Lebanon (STL). He thoroughly analyses to what extent the anonymous participation of victims and witness testimonies are admissible in the proceedings conducted at the STL on the grounds of its procedural statute and its application by the different chambers of the STL. By doing so he examines to what extent these requirements reflect and balance the position of the accused and his or her interests in a fair and just trial. He then presents the specific measures adopted by the STL that provide for a "structured consideration" of the accused's rights in contrast to an "individually balancing approach".

In his introductory remarks *Pérez-León-Avecedo* briefly presents the special features of the STL that distinguish it from other tribunals found in international criminal justice. From the perspective of substantive criminal law the STL is unique to the extend, that it not only holds jurisdiction over terrorist offences but while doing so it is also applying substantive Lebanese criminal law. From a procedural point of view it has been the subject of broad and prominent discussion, that the trials before the STL are conducted *in absentia*.[6] But *Pérez-León-Avecedo* rightly emphasises that at the same time the STLs institutions and procedural provisions have also been designed in a way that is aimed at providing a high standard concerning the preservation of the rights of the accused. He especially points to the STLs Defence Office (see Section 7 Rules of Evidence and Procedure) that has been set in place in order to provide the infrastructure that is necessary to guarantee the effectiveness of the defence. Moreover *Pérez-León-Avecedo* notes that according to Rule 55 Subsect. 2 Rules of Evidence and Procedure it is the explicit duty of the prosecutor to take part in the finding of the truth and the preservation of the rights of the defendant. One can add that this aspect appears to be suitable to shape the proceedings in front of the STL in a less adversarial way than it can normally be identified with other tribunals in international criminal justice.

After having presented these structural peculiarities of the STL *Pérez-León-Avecedo* continues to examine the general participative rights of the (alleged) victims. He presents their position in the proceedings both as general participants and as witnesses. Right from the beginning *Pérez-León-Avecedo* emphasizes, that the requirements imposed by the Rules of Evidence and Procedure and their application by the various judicial bodies of the STL hold the tendency to restrict the general participation of (alleged) victims. He rightly states, that even though that tendency potentially limits the restorative effect connected to

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3 Usually including a substantially widened scope of criminalization and/or an increase in maximum sentences see e.g. § 129a German Penal Code, the provisions of Chapter 1 of the UK Counter Terrorism and Border Security Act 2019 or 18 U.S.C. §§ 2331 et seq.

4 See e.g. §§ 31 et seq. German EGGVG or certain provisions historically related to proceedings with regards to terrorism such as § 137 I 2 German Code of Criminal Procedure.

5 In the German discussion referred to as the so called „Feindstrafrecht": *Jakobs,* ZStW 97 (1985), 751; ibid. Staatliche Strafe: Bedeutung und Zweck 2004, p. 40 et seq.; ibid. HRRS 2004, 88; ibid. ZStW 117 (2005), 839 ff.; from a more critical perspective: *Cancio Meliá,* ZStW 117 (2005), 267; *Greco,* GA 2006, 96; *Hawickhorst,* § 129a StGB – Ein feindstrafrechtlicher Irrweg zur Terrorismusbekämpfung, 2011; *Hefendehl,* StV 2005, 156; *Heinrich,* ZStW 121 (2009), 94; *Sinn,* ZIS 2006, 107.

6 See for further reference: *Gaeta,* Journal of International Criminal Justice 5 (2007), 1165; *Gardner,* George Washington International Law Review 91 (2011), 91 (99); *Jordash/Parker,* Journal of International Criminal Justice 8 (2010), 487 *Pons,* Journal of International Criminal Justice 8 (2010), 1307; *Riachy,* Journal of International Criminal Justice 8 (2010), 129.

the participation of victims in the proceedings[7], a more restrictive approach was in fact necessary in order to protect the interests and rights of the defendant.

According to *Pérez-León-Avecedo* that is in particularly the case when participatory rights and the possibility to give testimony as a witness are granted while still maintaining anonymity. *Pérez-León-Avecedo* shows that under Rule 93 lit. a) Rules of Evidence and Procedure at least anonymous witness evidence is explicitly admissible at the STL in every stage of the proceedings. He then briefly presents the procedure that is applied in order to conduct anonymous witness hearings.

In general *Pérez-León-Avecedo* not only pragmatically states, that the sheer existence of anonymous witness evidence was a necessary institution with regards to the need to protect witnesses in the proceedings under the STLs jurisdiction. He also criticises, that the scope of Rule 93 lit. a) Rules of Evidence and Procedure is explicitly restricted to witnesses and does not include the general participation of (alleged) victims. He shows that in the practical application of the Rules of Evidence and Procedure especially by the Appeals Chamber a restrictive tendency concerning the anonymous participation of victims can be observed.[8] *Pérez-León-Avecedo* rightly points to both the Pre Trial Judge's and the Appeals Chamber's notion in *Ayyash et al.* according to which the anonymous participation of victims in a broader sense is only admissible during the pre-trial but not during the stage of the trial itself. He argues that granting anonymity during the pre-trial generally held a less harmful potential with regards to the rights of the accused than during the trial, as the question of guilt was not yet at stake. From a German perspective it may be added, that in contrast to the German criminal procedure, at the STL the pre-trial judge and the judges conducting the trial are not identical. Therefore adverse cognitive-psychological effects concerning the (unbiased) finding of the truth during the trial that have been empirically proven in German criminal proceedings[9] are abetted at the STL. Therefore *Pérez-León-Avecedo* is right in the context of the STL when he argues, that the question of guilt was not at stake in the course of the pre-trial. Still one has to consider, that even the conduction of the trial itself does hold the potential to infringe the human rights of the defendant. Nevertheless this aspect is not of great practical relevance in the specific case of the STL as the trial is conducted *in absentia*.

But more importantly for the general topic of his article *Pérez-León-Avecedo* criticizes that the aforementioned restrictions imposed by the Appeals Chamber only based on the argument, that witnesses in contrast to general participants may be forced to give testimony in trial were logically inconsistent. As he sees it, the impact of anonymous witness testimony on the rights of the defendant and the overall fairness of the trial was far more severe than the impact of a general participation of victims i.e. by giving statements or opinions concerning the proceedings. Therefore *Pérez-León-Avecedo* argues that by granting anonymous witness hearings the general anonymous participation of victims ought to be admissible *a fortiori.*

Pérez-León-Avecedo then elaborates his examination specifically with regards to the adverse impacts anonymous witness testimonies may have on the finding of the truth and how the Rules of Evidence and Procedure and its application by the chamber attempt to still maintain the overall fairness of the trial. He rightly states, that the defendant's ability to directly question and confront a witness was of crucial importance for the overall fairness of the trial. By thoroughly analysing a selection of previous decisions by different tribunals of international criminal justice concerning the admissibility of anonymously interrogating witnesses during the trial he comes to the conclusion, that the approach adopted by the STL and its Rules of Evidence and Procedure was characterised not by individually balancing the interests between the security of the witness and the rights of the defendant but rather by providing a "structured consideration". *Pérez-León-Avecedo* refers to Rule 159 lit. b) Rules of Evidence of Procedure according to which the conviction may not be based solely or at least to a decisive extent on the statement of a witness that testified anonymously. He shows that by that the STL especially adopted the approach of the ECtHR prominently developed in *Kostovski v. The Netherlands* in the 1980s.[10] In this decision the ECtHR stated that although anonymous testimonies may be necessary in the interest of witness protection, certain "judicial safeguards" were needed in order to counterbalance the inability of the defendant to directly confront the witness. The key "judicial safeguard" can then be found in

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7 It has been a long standing tradition among abolitionist theorists to focus the role of the (alleged) victim by proposing that the social conflict expressed in delinquency shall be resolved by the conflicting parties rather than by a criminal justice system operated by the state (see: *Christie,* The Journal of British Criminology, 17 (1977), pp. 1 et seq.). This approach reflects to a certain extent in the so called „restorative justice movement": *Bazemore/Walgrave,* Restorative Juvenile Justice: Repairing the Harm of Youth Crime, 1999; *Marshall,* European Journal of Criminal Policy and Research 1996, 21-43. Still one has to consider that providing a state operated criminal justice system is a major achievement of a modern and liberal state philosphy (see: *Momsen,* Die Zumutbarkeit als Begrenzung strafrechtlicher Pflichten, 2006, pp. 35 et. seq.) especially suitable to guarantee the rights of both the accused and the alleged victim in a procedural rather than an arbitrary manner only governed by the "right of the stronger". Still, then aspects such as the actual "access to justice" e.g. by means of legal aid are becoming increasingly important, see: *Lubitz,* NK 2019, 282.

8 See *Ayyash et al.*, STL Appeal Decision on Protective Measures (above n. 71) para 36.

9 See for further reference especially from a comparative perspective *Momsen/Washington,* FS Eisenberg, 2019, 453.

10 *Kostovski v. The Netherlands* (1989), ECtHR no. 11454/85, paras 37-45.

the restriction that the conviction must not be entirely based on the evidence obtained in such manner.[11]

Although the ECtHR has by now furtherly developed these "judicial safeguards"[12] the aforementioned principle that addresses the evidence necessary for a conviction remains the core of the requirements stipulated by the ECtHR. It is interesting to note, that this very core of the "judicial safeguards" developed by the ECtHR and – as *Pérez-León-Avecedo* showed – not only accepted but explicitly adopted in international criminal justice in the case of the STL has only recently been highly criticised by the third division of the German federal court in criminal matters.[13] In this decision the German court is especially critical concerning the notion expressed by the ECtHR, that a testimony obtained without any confrontation of the defendant is not sufficient to present a basis for a conviction. The German federal court argues, that this notion substantially conflicted with the general procedural principle that under German law the judge is free to assess the probative value of the individual pieces of evidence (see § 261 German Code of Criminal Procedure). But one can rightly argue against this assumption applying the findings of *Pérez-León-Avecedo*. Indeed, he showed that the standard developed by the ECtHR and adopted by the STL does not provide for a "balancing approach"[14] but rather a "structured consideration". Therefore, the infringement of the defendant's right to confront the witness can only be counterbalanced by the "structured consideration", that there are pieces of evidence sufficient for the conviction that the defendant was in fact able to directly confront. Without such additional pieces of evidence, a counterbalancing mechanism is simply not available and there remains no room for a conviction without consequently infringing the defendant's right to a fair trial.

As we see it thanks to his thorough research *Pérez-León-Avecedo* is able to show two key aspects in his article:

- Although in certain criminal procedures – especially with reference to allegations of terrorist crimes – there is a need to protect the interests of the (alleged) victims and witnesses and their personal security, there is no room to "freely" relativize the right of the defendant to a fair trial.
- Still one can already find specific measures both in international and national criminal justice that provide for a structured approach that is suitable to prevent judicial decisions based on a "case to case"-balancing approach that may be influenced considerably by the seriousness of the allegations. Only by doing so, the rule of law can be upheld while still allowing the state to provide security for the people.

Based on *Pérez-León-Avecedo* findings, tendencies to move away from this principle should therefore provide reasons for criticism.

V. The editors presented again a highly important collection of very different approaches showing how human rights are getting under pressure when security and the war on terror are becoming implanted as the only solution to a common fear promoted by populist politics. But the collection as well is balanced showing necessary measures of prevention and law enforcement and how they can be conducted without inherently structurally damaging human rights. However, we can give our full recommendations to get a closer look at the thoughtfully composed collection edited by *Benjamin J Goold* and *Liora Lazarus.*

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11 *Kostovski v. The Netherlands* (1989), ECtHR no. 11454/85, paras 44; more explicitly in: *Doorson v. The Netherlands* (1996), ECtHR no. 20524/92, para 76.

12 See e.g. *Schatschawili v. Germany* (2015), ECtHR No. 9154/10, paras 103 et seq. with reference to the so called „Al-Khawaja-test" developed in: *Al-Khawaja & Tahery v. The United Kingdom,* ECtHR No. 26766/05, paras. 118-151.

13 *BGH*, NStZ 2018, 51 commented by *Arnoldi*.

14 The idea of balancing certain proceedural guarantees with the gravity of the accusations is indeed a distinctive feature of German criminal proceedural law e.g. with regards to the exclusion of improperly obtained evidence, see BGHSt 51, 285 with reference to *Rogall,* ZStW 91 (1979), 1 (31) et seq.; providing a critical assessment from a broader perspective: *Momsen,* ZStW 131 (2019), 1009 (1018).