Terrorists on Trial

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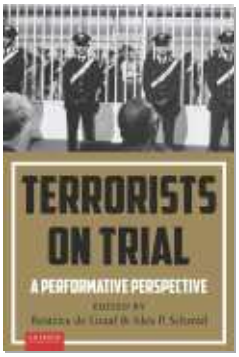

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7. National Security on Trial: The Case of Zacarias Moussaoui, 2001–2006

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7.1. Introduction

Criminal prosecutions of terrorism suspects are perhaps the most controversial trials within (international) criminal law. The juxtaposition between the nature of the charges and the level of fair trial rights bestowed upon terrorist suspects raises a recurring question in public debate: should such rights also be granted to terrorist suspects? A derivative question pertains to which judicial forum should be most competent to hear terrorism cases—a military commission or federal (civilian) court? The choice of forum is contingent upon security concerns as well as on the political strategies to be performed by the government and the defendants. The Moussaoui trial is perhaps the most illustrative example of this juxtaposition; it serves as a good example of showcasing how national security threats are sentenced in ordinary district courts.

The federal trial before the United States (US) District Court for the Eastern District of Virginia, which took place in the period from August 2001 to May 2006, against Zacarias Moussaoui illustrated both the advantages and deficiencies of the criminal law system in dealing with terrorism. Despite the US government's political preference for subjecting prominent terrorist suspects, such as Salim Hamdan (Osama Bin Laden's driver) and Khalid Sheikh Mohammed and his four co-defendants (the alleged organisers of 9/11), to the US Military Commission's proceedings at Guantánamo Bay, Zacarias Moussaoui's trial was held before a federal (civilian) court.

Whilst the US government, evidenced by Moussaoui's conviction and sentencing to life imprisonment on 4 May 2006, demonstrated its capacity to prosecute terrorist suspects before US federal courts, it almost simultaneously pursued similar prosecutions before military commissions. What rationale underlays this duality?

This article covers the performance of the terrorist suspects and their opponents, but relates this performance predominantly to the fundamental question, why Zacarias Moussaoui—contrary to other 9/11 terror suspects—was brought before a US federal (civilian) court instead of before a military commission. Did this choice

pertain to a genuine belief that the federal justice system was more suitable to try terrorism cases? Secondly, it examines whether and how this type of trial was—either procedurally or politically—more legitimate from the perspective of the accused as opposed to military commission proceedings (sections 2 and 6). Section 3 delves into the particulars of the Moussaoui case: the events preceding and during the trial. Section 4 examines the prosecutorial theory underlying the Moussaoui case. Section 5 addresses the performative strategies pursued by the prosecution and especially by Moussaoui, as well as their effects on the fairness of the trial.

7.2. The 9/11 Legacy

7.2.1. Ever-expanding Anti-terrorism Legislation

It has been said that the terrorist attacks of 9/11, 2001, when two planes crashed into the World Trade Center, another hit the US Pentagon and one crashed in the fields of Pennsylvania, changed the international legal order.[1] Significantly, after 9/11 a series of new US laws expanding the possibilities of investigating (terrorist) crimes entered into force. Just over a week after the attacks, on 18 September 2001 President George W. Bush signed into law the 'Authorization for Use of Military Force Against Terrorists' (AUMF) Bill; an Act allowing for the use of military force against those held responsible for the 9/11 attacks.[2] Two days thereafter, President Bush announced the 'War on Terror', stating that 'loosely affiliated terrorist organisations' operating under the name of Al Qaeda were responsible for the 9/11 attacks.[3] Al Qaeda is a terrorist organisation that was established around 1989 under the leadership of Osama Bin Laden.[4] Al Qaeda—a terrorist group with connections across the world—violently opposed non-Islamic governments. The roots of this group can be traced back to Afghanistan and Pakistan, particularly Peshawar; subsequently Al Qaeda was headquartered in Sudan from 1991 until 1996, before moving back to Afghanistan.[5]

President Bush claimed that Al Qaeda had a great deal of influence in Afghanistan through its support for the Taliban regime; a regime that he accused of repressing its own people and of housing, supplying and sponsoring terrorists.[6] Bush demanded that the Taliban hand over Al Qaeda operatives who were hiding in Afghanistan and close all terrorist training camps; yet to no avail.[7] On 7 October 2001, Operation Enduring Freedom was launched and the first bombs were dropped on Afghan soil.[8] On 26 October 2001, the so-called US Patriot Act was signed into law. With the advent and expansion of US anti-terrorism legislation, the powers of law enforcement agencies

to gather intelligence, to detain and deport immigrants suspected of terrorism and the penalties for those committing and supporting terrorist crimes all increased.[9] These developments impacted on the international legal order in a manner that is still evident today.

Less than three weeks after the enactment of the US Patriot Act, President George W. Bush signed an executive order establishing the Military Commissions.[10] This order was heavily criticised by the media, fuelling a debate on the legitimacy of the military commissions promulgated by Bush without authorisation of the US Congress. The last time that military commissions of this nature became operative within the United States dated back to the Second World War; they had been established to prosecute illegal immigrants from Nazi Germany;[11] at that time the United States was engaged in an officially declared conventional war. The 9/11 events did not trigger a traditional war but rather a 'war on terror' against non-state parties like Al Qaeda.[12]

7.2.2. Prosecuting 9/11 Suspects: Realpolitik Effects

The ramifications of the 9/11 events on the legal order were not limited to a spate of security laws; they also affected the way terrorism trials were to be conducted. In the aftermath of 9/11 the US Administration expanded the boundaries of law enforcement and international (criminal) law principles. The criminal case against Zacarias Moussaoui, who was tried before a US federal court, illustrates this phenomenon. Moussaoui, whose case will be described below, was arrested *before* the 9/11 attacks for violating US immigration laws and was subsequently charged with not disclosing to federal agents information on the impending 9/11 attacks which could have prevented them happening. As a result Moussaoui was given a life sentence.

The influx of *realpolitik*, exacerbated by the 9/11 events, was manifest in a second high-profile case, namely the case against Khalid Sheikh Mohammed (KSM), the alleged mastermind of the 9/11 attacks whose evidence played an essential role in the case of Moussaoui. KSM was captured in 2002 in Pakistan by CIA and Pakistani intelligence forces. He was detained at various CIA 'black sites' before he was transferred to the Guantánamo Bay detention camp in 2006.[13] The case of KSM is particularly controversial since it turned out that he had been repeatedly subjected to waterboarding at Guantánamo Bay, where he—in 2013—has been held for six years and eleven months.[14] Due to security considerations the KSM case was ultimately referred from the federal court system to the military commission system. Initially the Obama Administration intended to prosecute KSM and his four co-defendants before a federal court in New York City. If this were to happen, evidence obtained

from torture would probably be barred while the security costs would be exceedingly high.[15] This led to opposition on the part of the US Congress and ultimately to a bill in December 2010 prohibiting Obama from using government funds to transfer Guantánamo Bay detainees to US courts.[16]

Military commissions are said to be designed specifically for wartime situations; differences with federal courts include the admissibility of hearsay evidence, the use of protective orders that may require disclosure of attorney–client communications and broad classified information rules that obstruct verifying the prosecution's sources for some information.[17] Furthermore, evidence obtained outside the US is not barred even if it is obtained without a preceding search warrant; similarly, use of statements made by the defendant without a preceding Miranda warning is permissible.[18] According to the US government, these differences between military commissions and civilian courts are justified since military commissions take into account 'the reality of the battlefield'.[19]

The legal basis for military commissions' trials after 9/11 can be found in the Military Order of 13 November 2001, signed into law by President Bush.[20] This order provided for prosecuting a non-US citizen before military commissions if there was 'reason to believe' that the person was a member of Al Qaeda or had engaged in terrorist activities harming the US.[21] This Order was replaced by the Military Commissions Act of 2006 after the US Supreme Court ruled in *Hamdan v. Rumsfeld* that the Commissions violated the Geneva Conventions and the Uniform Code of Military Justice (UMCJ).[22]

7.2.3. Prosecuting 9/11 Suspects: Legal Effects

The criteria promulgated by the US Administration in order for the military commission to assume jurisdiction are indicative of its political purpose. Military commission trials can only be initiated when the suspects are:

- non-US citizens;
- affiliated with Al Qaeda; and
- persons ('unlawful enemy combatants') who have engaged in hostilities against the US or its coalition partners or persons who have purposefully and materially supported such hostilities.[23]

Next to the limitation regarding whom to prosecute, only certain types of offences can be brought to these commissions: the alleged crimes should qualify as 'violations of

the laws of war'. The US government has pursued a broad interpretation of what can be subsumed under 'violating laws of war'; e.g. throwing one grenade at a US soldier in Afghanistan was deemed to meet this definition. That particular act was at the heart of the Omar Khadr case, that of a Canadian boy who was captured by US Special Forces at the age of 15 and tried before the Military Commission at Guantánamo Bay. No-one actually saw whether or not Khadr threw the grenade.[24] Omar Khadr ultimately entered into a plea agreement with the prosecution.[25]

These limitations are yet balanced by a quite extensive prosecutorial tool under US law, namely the insertion of the concept of conspiracy into penal law. Unlike several jurisdictions in civil-continental law systems, common law accepts that a simple 'meeting of minds' without any crime actually taking place can constitute a criminal offence, i.e. that of conspiracy. One can prosecute a person on the basis of this liability concept simply when there is proof of an agreement between two or more persons to commit a crime, irrespective of whether it subsequently materialises. The agreement itself constitutes the crime. Mere knowledge of the agreement, however, does not suffice; the intent should be materialised in acts which reveal the criminal objective, inferred from sufficiently significant circumstances.[26] Or, as put by the South Carolina Court:

> It is sufficient that the minds of the parties meet understandingly, so as to bring about an intelligent and deliberate agreement, to do the act and commit the offense charged, although such agreement be not manifested by any formal words.[27]

The conspiracy concept may perhaps have been one of the decisive factors in determining why Zacarias Moussaoui was not tried before a military commission. Under the laws of war, conspiracy is not deemed to be a separate crime—which deserves some elucidation at this stage. As far as prosecutions for violations of the laws of war are concerned, the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber in the *Tadic* case differentiated between the concept of Joint Criminal Enterprise (JCE) and conspiracy, the latter not being a violation of the laws of war.[28] The *Tadic* judgment emphasised the proper nature of criminal liability: that of individual participation and responsibility. The ICTY Appeals Chamber held that 'nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated'.[29] These words must not be interpreted as creating a means of international collective responsibility—comprising the act of conspiracy—as opposed to the classic individual responsibility. The Appeals Chamber specified which type of scenario JCE refers to. Actually the Chamber referred

to a scenario of JCE in which 'the participation and the contribution of the other members of the group is often vital in facilitating the commission of the offence in question'.[30] The participation has of course to be voluntary and intentional, and must be made in full knowledge both of the gravity of the acts planned to be committed and of their foreseeable consequences. On its face this seems similar to the definition of the offence of conspiracy; yet, JCE can be distinguished by the nature of the 'participation' in the commission of the crime. Within this concept, the Appeals Chamber held that 'participation' need 'not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose'.[31] There is no such requirement in the crime of conspiracy, which relies more on the intent of the conspirator than his or her effective participation in the commission of the crime.

This differentiation was affirmed by the US Supreme Court in *Hamdan v. Rumsfeld*.[32] The Court endorsed the argument that 'international sources confirm that the crime charged here [i.e. conspiracy; GJK] is not a recognized violation of the law of war'.[33] Thus, in hindsight it might have been a prudent choice to have the Moussaoui case referred to a federal court, since the conspiracy charge would most likely have been quashed, as happened in the *Hamdan* case. However, the US Supreme Court's decision in *Hamdan v. Rumsfeld* has been superseded by the Military Commissions Acts (MCA) of 2006 and 2009 which do include conspiracy.[34]

Unlike the KSM case, which was barred from the Federal Court system, Moussaoui was put on trial before a federal court, which case commenced in January 2002 and lasted until his conviction in May 2006. Following an analysis of Moussaoui's history and the particulars of his case, this chapter focusses on the political and defence strategies of his trial.

7.3. Zacarias Moussaoui: A Personal History

For defence barristers, probably one of the most problematic clients is a defendant who is uncooperative, especially one who challenges the competence of the court to hear his case. Zacarias Moussaoui turned out to be such a defendant. The reasons for his (strategic) position in court had probably much to do with his personal history.

Zacarias Moussaoui was born on 30 May 1968. His mother was only 14 years old when she married. Five years later she and her husband moved from Morocco to France where Moussaoui was born and brought up without much of a religious

education. Moussaoui's parents divorced in 1972. During his childhood Moussaoui was confronted with violence, particularly by his father, and racism; he grew up partly with his family and partly in different orphanages.[35]

Zacarias Moussaoui and his family followed different religious paths. Whereas he and his brother were both believers in Islam, though in different forms, his sister found her faith in Judaism and his mother did not practise her religion in public, although she did identify with Islam.[36] The Moussaoui household thus turned out to be a synthesis of different religions, underlining the freedom of choice of the family members.[37] Surprisingly, unlike his brother and sister (having more or less the same socio-cultural background) Zacarias Moussaoui radicalised. Apparently, a shared socio-cultural background does not fully account for the choices an individual makes, as the example of the Moussaoui family shows.[38] Moussaoui's radicalisation process must thus have had a different cause.

7.3.1. Moussaoui's Radicalisation Process

The Moussaoui family, being first generation immigrants from Morocco, was often confronted with racism in France, as was also testified to by a witness for the defence during the sentencing phase of the Moussaoui trial.[39] In France, Moussaoui and his brother were discriminated against because of their Arab descent, had fights at nightclubs for the same reason and did not meet the approval of the parents of Moussaoui's girlfriend.[40] In 1992 Zacarias Moussaoui moved to London to learn English where he obtained a Master's degree in international business from Southbank University in London in 1995.[41] While in London, Moussaoui's family started noticing Moussaoui's transformation. He started wearing a beard and made comments on his sister's clothing, calling her a whore because she was too Western.[42] As a student Moussaoui started to attend prayers at different mosques, among which were the Brixton Mosque and later the more radical Finsbury Mosque. The imam of the Brixton Mosque noticed that Moussaoui was growing more militant.[43] After showing up in military fatigues, wearing a backpack and demanding information about joining the jihad, Moussaoui was suspended from the Brixton Mosque.[44] In the meantime he was approached by more extremist groups, such as Al Muhajiroun ('the emigrants').[45] According to some, perhaps due to his experiences with racism in France and his inability to find a proper job despite his Master's degree, he was drawn into this militant branch of Islamism.[46] As of 1996, the French authorities became interested in him after Moussaoui was seen with Islamic extremists in London. The French authorities noticed his growing affinity with Islamic radicalism and they started

monitoring him.[47] Moussaoui had already started to sever ties with his family, returning to France only once, in 1997. In 1998, he went to the Khalden training camp in Afghanistan, a training camp tied to Al Qaeda, at the same time as Mohamed Atta.[48] Atta hijacked and piloted American Airlines Flight 11, the first plane that flew into the World Trade Center on 9/11.[49] In 2002 Moussaoui saw his mother again, when she appeared at his trial hearings in Alexandria, Virginia.[50] At trial, Moussaoui's defence team presented evidence outlining his ongoing mental health problems, indicating that Moussaoui was suffering from paranoid schizophrenia.[51] Furthermore, the vulnerable relationship with his French girlfriend, and more particularly the rejection of Moussaoui by her parents, was put before the jury in an effort to obtain a reduced sentence.[52]

7.3.2. Moussaoui's Arrest

Moussaoui returned to London after he attended the Khalden training camp. Clearly, this strengthened his opposition to non-Islamic governments and his desire to fight for the jihad, since he continued and intensified his activities for Al Qaeda.[53] In 2000 he was sent to Malaysia by Khalid Sheikh Mohammed, the alleged mastermind of the 9/11 attacks, to take flying lessons.[54] Moussaoui, who could not find a flying school of his choice in Malaysia, started with other terrorist activities, such as buying materials to produce bombs. When Khalid Sheikh Mohammed found out about this, he ordered Moussaoui to take flying lessons in the US.[55] He started at the Airman Flight School in Norman, Oklahoma, in February 2001.[56] After a break from late May onwards, he made inquiries about taking Boeing 747 lessons at the Pan Am International Flight Academy in Eagan, Minnesota. On 10 July 2001, Moussaoui deposited US$ 1,500 for training at that flight academy, after which he received a training schedule for 13–20 August.[57] It was never revealed how Moussaoui had obtained the large sums of money that were in his possession during his time in the US. No explanation was found for the US$ 32,000 that Moussaoui had deposited in a bank account in Norman upon his arrival in the US, and it was not believed that Moussaoui's self-declared job as a freelance telemarketer brought in enough money to pay US$ 8,300 for flying lessons. Mohamed Atta, a friend of Moussaoui, who was also allegedly involved in the 9/11 complot, indicated that Moussaoui received money from overseas; yet he was unable to say how he knew this.[58]

Moussaoui's flight instructor, Clarence Prevost, became suspicious because Moussaoui had paid his tuition fee in cash and, unlike the other students, he focused his training specifically on piloting a Boeing 747 in mid-air. He was not interested in

learning to take off and land the plane.[59] The flight school warned the FBI. On 16 August 2001, the FBI arrested Moussaoui because his visa had expired, just a month before the 9/11 attacks.[60] After Moussaoui was arrested, the FBI had difficulty researching Moussaoui's assets; the FBI headquarters in Washington were reluctant to issue either a criminal warrant or a Foreign Intelligence Surveillance Act warrant, because they believed there were insufficient grounds to justify the warrants.[61] Prior to 9/11, the US government was limited in its ability to collect and share intelligence inside the US. This legislative situation within the US changed dramatically after the 9/11 attacks, as outlined in the preceding section.

Although Moussaoui's activities subsequently raised the suspicion that he might have been selected to be one of the 9/11 hijackers, were it not that he was detained at that time, Khalid Sheikh Mohammed revealed in one of his interviews with the US intelligence services that Moussaoui was not part of this plot.[62] Another important question raised was whether the attacks could have been prevented if Moussaoui had told the FBI in August 2001 everything he knew. The prosecution argued that this was indeed the case, whilst the defence argued that Moussaoui had no specific knowledge of the 9/11 attacks.[63]

Few contested that Moussaoui was linked to Al Qaeda. He had attended Al Qaeda training camps, he could be linked to several other Al Qaeda members and when FBI officials searched Moussaoui's house after 9/11 a note was found with the mobile phone number of an Al Qaeda cell member in Germany. This person turned out to have dealt with the financial arrangements for all nineteen 9/11 hijackers. It was established that Moussaoui's flying lessons were paid for with money wired by this German cell of jihadist comrades.[64]

From a legal perspective, it was questionable whether this link was sufficient to sustain the conviction of Moussaoui for conspiring in the 9/11 attacks. When taking into account the evidence that was released during the trial, one could well ask why Moussaoui entered a guilty plea. From KSM's written evidence previously obtained by the US—Moussaoui's defence was not allowed to call this witness at trial—it could be derived that Moussaoui was not involved in the 9/11 attacks. According to KSM, Moussaoui was supposed to participate in a second follow-up attack.[65] Moreover, because 'Moussaoui was supposed to be in flight school and was not supposed to be in contact with him or anyone until after graduating',[66] KSM was reportedly unaware that he was captured before the 9/11 attacks. Later, at the sentencing stage, Moussaoui testified that he was supposed to fly a plane into the White House on 9/11 together with shoe bomber Richard Reid. But no evidentiary link was ever established between Reid and Moussaoui in relation to a White House attack on 9/11.[67] It seems that—aware of

the evidentiary weakness of the prosecution's case—Moussaoui deliberately entered a guilty plea as part of an overall trial strategy, which included his tactic to die as a martyr (see below).

7.4. The Prosecution's Theory as regards the Moussaoui Case

As mentioned, Zacarias Moussaoui was initially arrested on immigration charges in August 2001; yet ultimately he was prosecuted on the basis of conspiring in the 9/11 attacks, particularly for not disclosing the impending attacks. Notably, at the time of the attacks, Moussaoui was already detained and had been interrogated on the basis of these immigration charges. The 'conspiracy' element was based on the assumption that in August 2001, at the time of his arrest, Zacarias Moussaoui was already aware of the impending twin tower attacks, whilst withholding this information from US federal officials. This conspiracy charge arose from suspicious acts surrounding Moussaoui's flying lessons, his connections to other Al Qaeda members who were allegedly involved in the plot and the fact that he had attended an Al Qaeda training camp. The notion that Moussaoui was aware of the 9/11 plot might also have been fuelled by his personal history, as illustrated above.

Yet, no conclusive evidence existed in August 2001 that Moussaoui materially contributed to the 9/11 attacks other than lying to federal authorities about his contacts and flying lessons, with the apparent aim of preventing the attacks from being revealed. It might even have been the case that in the absence of a guilty plea on Moussaoui's part (which he entered in 2002, but which was refused by the court, yet successfully re-entered on 22 April 2005),[68] he could have been acquitted.[69]

On 11 December 2001, the French-Moroccan was charged by a Federal Grand Jury in the US District Court for the Eastern District of Virginia with six conspiracy counts: conspiracy to commit acts of extra-territorial terrorism, conspiracy to commit aircraft piracy, conspiracy to destroy aircraft, conspiracy to use weapons of mass destruction, conspiracy to murder US employees and conspiracy to destroy property.[70] The indictment included overt acts such as providing guesthouses and training camps for Al Qaeda, providing military and intelligence training and attempting to obtain nuclear weapons.[71] Many acts did not explicitly refer to Moussaoui, but were targeted more broadly by naming 'Usama Bin Laden, and others known and unknown' or 'unindicted co-conspirators, known and unknown'.[72] Furthermore, the time-frame included in the indictment was rather extensive, using terminology such as 'at various times from at least as early as 1989'.[73] The acts leading up to

the 'conspiracy to commit terrorism' charge that did explicitly refer to Moussaoui consisted of his alleged attendance at an Al Qaeda training camp in 1998, his inquiries about flying training (i.e. an e-mail to the Norman Flight School in Oklahoma and letters from his employer indicating that he would earn a monthly income of US$ 2,500 as a marketing consultant), flight logs that indicated that Moussaoui flew from London to Pakistan, from Pakistan to London, from London to Chicago—where he declared at least US$ 35,000 cash at customs—and from Chicago to Oklahoma. In Norman, Oklahoma, Moussaoui opened a bank account where he deposited US$ 32,000 in cash. Moussaoui took flying lessons in Norman from February 2001 until he stopped his classes early in May 2001.[74] Curiously, Moussaoui's membership of a gym in Oklahoma was also brought up as one of the acts in the indictment.[75] With regard to the allegation that Moussaoui withheld vital information about the impending 9/11 attacks, the prosecution alleged that Moussaoui 'while being interviewed by federal agents in Minneapolis, attempted to explain his presence in the United States by falsely stating that he was simply interested in learning to fly'.[76] The five other conspiracy counts in the indictment all made reference to the acts mentioned in the first count (i.e. conspiracy to commit terrorism). Taken together, the acts were meant to demonstrate that Moussaoui used the same preparatory *modus operandi* as the nineteen co-conspirators who conducted the 9/11 hijackings.[77]

7.5. Prosecution and Defence Trial Strategies within the Moussaoui Case

7.5.1. Introduction

The Moussaoui case illustrates the level of legal randomness involved, inasmuch as it concerns the places where the 9/11 and other major terrorism suspects were prosecuted. Moussaoui and Ahmed Ghailani were tried before a federal (civilian court). Ghailani was indicted before a federal court in New York in 2010 for conspiring in the 1998 bomb attacks on the US embassies in Kenya and Tanzania.[78] Yet other terrorist suspects such as KSM and his four co-defendants were subjected to the military commissions system, created through the aforementioned Military Order.[79]

In general, terrorism trials may serve as legal mechanisms both for governments and defendants to pursue (political) strategies. The legal arena, in which the government, the terrorist suspects, possible witnesses, victims and the media all have a role to play, may encourage such strategies.[80] Unlike military commissions, whose proceedings are held in closed session, public federal trials enable terrorist suspects to

elevate them into 'show trials', i.e. using the public trial to advocate the ideological message of their terrorist organisation. Similarly, the public nature of a federal trial can serve the political agenda of the government, i.e. the message conveyed by the US government that it endorses the rule of law by showing the world the fairness of the US criminal law system.

In what follows we will discuss how both the US government and Moussaoui tried to instrumentalise the trial in pursuit of their respective political strategies.

7.5.2. Trial Strategy of the US Government

Security considerations were increasingly factored in when dealing with legal-procedural questions. Section 2 touched on some of the differences between federal courts and military commissions relating to jurisdictional and evidentiary issues. Once such differences exist, a government can anticipate them by opting for either the civil court system or the military commission's system. In a military commission context the defence does not have the same access to witnesses or other evidence as it has in a federal court; hearsay evidence is more easily admissible before military commissions and there are few options available to challenge its source; and rules protecting the use of classified information transform military commissions trials into proceedings entrenched in secrecy.[81] Proponents of military commissions point to the security and disclosure risks accompanying a federal trial, arguing that a federal trial could (more easily) result in acquittals of guilty persons.[82] On the other hand, federal trials are generally seen as able to produce fair verdicts; an important perception factor within the US and abroad.[83] The possibility of undue delay may also be part of a prosecution strategy to opt for federal trials which are, time-wise, most often conducted more efficiently. Federal courts have not only processed a far greater number of terrorism cases than military commissions, but also concluded them more swiftly.[84] Whereas military commissions had completed seven cases in the ten years after the 9/11 attacks, federal courts had completed 578 terrorism-related cases in the same timeframe.[85] Yet, at the time Moussaoui was tried in a US federal court, the prosecution could not have foreseen this.

It is instructive to ascertain why the US Administration made the legal-political choices that it did between a federal court trial and that of a military commission. In a public speech at Northwestern University near Chicago in 2012, US Attorney General Eric Holder set out the policy and preference of the Obama Administration for prosecuting terrorism suspects before federal criminal courts. Holder proffered the view that there '[is] no inherent contradiction between using military commissions

in appropriate cases while still prosecuting other terrorists in civilian courts'.[86] The US Attorney General advocated that the 'reformed commissions' (in 2009—under the Obama Administration—the Military Commissions' rules were amended supposedly in favour of the defendant) guaranteed the same fair trial rights as within the civil court system; for example, that 'statements obtained through torture, inhuman or degrading treatment' are prohibited, suspects have the right to legal counsel, and that these commissions too 'provide a presumption of innocence and require proof of guilt beyond a reasonable doubt'. Yet the US Attorney General acknowledged that there is one fundamental difference between these two types of trials; some of the evidentiary rules at the military commission level do reflect the 'reality of the battlefield', in that statements obtained from suspects and witnesses 'may be admissible even in the absence of Miranda warnings, because we cannot expect military personnel to administer warnings to an enemy captured in battle'.[87]

Holder's statement regarding the fair trial equality between the two types of trial does not, however, hold for when the Moussaoui case was first dealt with in court in January 2002. At that time military commissions proceedings did allow evidence obtained through coercion. A slightly augmented Military Commissions Act (MCA) was enacted by the US Congress and signed into law by the Bush Administration following the US Supreme Court's ruling of 29 June 2006 in *Hamdan v. Rumsfeld*.[88] In this five-to three majority judgment, the justices ruled that the military commissions established without congressional approval by President Bush in November 2001 were unconstitutional because the executive branch of government did not have the power to create judicial organs with special jurisdiction. They also deemed that such military proceedings violated Common Article 3 of the Geneva Conventions. In particular, the admission of evidence at trial in the absence of the defendant was ruled out of order by the US Supreme Court. In 2009, under the Obama Administration, the MCA was revised, amending some of the 2006 rules. And yet, as of this writing, the defence lawyers for KSM and his four co-defendants still face court hearings at Guantánamo Bay in which the defendants are not allowed to participate, the reason given being that they may not share the results of these hearings with them.[89]

While balancing these arguments pro and contra military commission proceedings, it may have been the case that the US government under the Bush Administration was willing to put Moussaoui on trial before a federal court in order to test the resilience of the federal criminal law system in prosecuting terrorism suspects. After all, Moussaoui did not have an active part in the 9/11 attacks; from this point of view, he

was only 'a small fish'. The US government was able to demonstrate 'good faith' to the international community by subjecting terrorism suspects to a swift and expedient federal trial. Clearly, the objective that the US government pursued in the Moussaoui case was to show the world the transparency of its system, a 'strategy' that the trial judge Ms. Leonie Brinkema was eager to implement. Her intention was to admit all of the victims into the courtroom and to organise simultaneous video casts in other places in order to provide extensive live coverage of the proceedings. Furthermore she had these screenings set up in other courtrooms akin to the 'real' one.[90] Therefore, the choice to try Moussaoui before a federal court had direct consequences for the families of the victims, offering them a forum to ease their pain and to seek justice. Despite the fact that many members of the victims' families were willing to testify in court (relatively soon after the attacks), the Moussaoui trial ultimately did not turn into a public forum for the victims. Only some of the family members of the victims testified at trial, and these appearances did not turn into a media circus as was feared.[91]

One could say that the success of the prosecution's strategy was evidenced by the jury convicting Moussaoui and sentencing him to six consecutive life sentences, without the possibility of parole.[92] On the other hand, the prosecution had sought the death penalty, which Judge Brinkema tried to prevent.[93] Be this as it may, in the Moussaoui trial the US government was able to demonstrate that it could produce guilty verdicts against 9/11 suspects through its federal court system while upholding fair trial guarantees as provided for in the US constitution. This observation does not negate the criticism that revolved around the Moussaoui trial; namely that it offered a 'stage' for Moussaoui to express his radical ideas. This performative perspective is addressed in the next section.

7.5.3. Moussaoui's Performative Trial Strategies

The Plea Agreement 'Battle'

At the start of the trial, Moussaoui proclaimed, 'In the name of Allah, I do not have anything to plead, and I enter no plea'.[94] From the outset of the trial—which began on 2 January 2002—Zacarias Moussaoui intended to steer the proceedings in his own direction by refusing legal counsel and insisting on representing himself, by refusing to plead to the charges (as a result of which federal judge Ms. Brinkema entered a not guilty plea 'on his behalf') and to petition to hear several detained Al Qaeda leaders as potential witnesses, including Khalid Sheikh Mohammed. At the outset, Moussaoui staged more aggressive tactics, in that he challenged the court's competence to try him

and indeed the very competence of the US court system as a whole. His refusal to accept any legal assistance from court-appointed lawyers is illustrative of this. In response, on 22 April 2002, a hearing was held to assess Moussaoui's demand to represent himself without counsel. To clarify his reasons for declining court-appointed counsel and to underpin his view that he was subjected to a 'corrupted' legal system, Moussaoui recited several surahs of the Koran.[95] On 13 June 2002—after a mental evaluation by experts—the federal judge considered him competent to represent himself whilst at the same time ordering the previously court-appointed counsel to stay on as a standby.[96]

Moussaoui changed his legal defence strategy several times. When the trial began in January 2002, Moussaoui refused to enter a plea.[97] As mentioned above, in April 2002 Moussaoui asked to represent himself, occasioning Judge Brinkema's request that he be mentally evaluated.[98] On 13 June 2002, Moussaoui, once he had been permitted to represent himself, pleaded not guilty. On 18 July 2002, after the indictment was amended by the prosecution to strengthen its case for the death penalty, Moussaoui announced his intention to plead guilty. He then told the court, 'I have knowledge and I participated in Al Qaeda. [...] I am a member of Al Qaeda [...] I pledge *bayat* to Osama Bin Laden'.[99] On 25 July 2002, Judge Brinkema—after giving Moussaoui one week to reconsider—rejected his plea as disingenuous and equivocal, not being convinced that Moussaoui fully understood the consequences of his actions. On 14 November 2003, Judge Brinkema terminated Moussaoui's self-representation due to his repeated unprofessional and dishonourable interventions.[100] Between 2002 and 2004 several important procedural aspects were litigated at trial, such as access to certain Al Qaeda witnesses (including KSM) and the admissibility of the death penalty. In April 2005 Moussaoui again expressed his intention to plead guilty, a plea Judge Brinkema accepted on 22 April 2005 for all six conspiracy charges. Hence, the trial entered the sentencing stage.[101] Opening statements were delivered on 6 March 2006. On 3 April 2006 the twelve-person jury ruled that Moussaoui was eligible for the death penalty since his lying to federal agents implicated him in the 9/11 attacks.[102] After a month of deliberations the jury—unable to reach unanimity on the death penalty—recommended a sentence of life imprisonment on 3 May 2006. This recommendation was formally accepted by Judge Brinkema on 4 May 2006.[103] One day after Moussaoui was sentenced to life imprisonment, he announced to his lawyers his intention to withdraw his guilty plea; on 6 May 2006 a motion was filed to that effect.[104] Judge Brinkema denied Moussaoui's motion on 8 May 2006, ruling that federal law does not provide for withdrawing a guilty plea after sentencing.[105]

Moussaoui's Main Strategy: Putting the Trial 'on Trial'

Moussaoui's changing attitude during the trial makes it difficult to detect his exact strategy. The most likely strategy he pursued was to disrupt the actual trial and question the legitimacy of the trial itself, an explicit strategy of rupture. From this perspective, it might have been a deliberate choice to switch tactics (such as his inconsistent approach vis-à-vis pleading to the charges) in order to discredit the US criminal justice system. It is unlikely that Moussaoui was unconscious of the implications of his strategy due to his mental state. On the one hand, Moussaoui's lawyers argued that Moussaoui's actions—e.g. firing his lawyers—showed his disturbed state of mind, while he invented conspiracy theories.[106] Judge Brinkema had Moussaoui mentally examined during the trial phase.[107] Moussaoui's mother, Aicha el-Wafi, stated in an interview on 21 June 2002—when she was in the US to visit her son in jail—that Moussaoui had made a mistake by firing his lawyers. In her view, her son did this due to the fact that he had been 'shut up and closed away from the world for the past nine months, that he doesn't eat well. He is not sleeping well. He has light above his head 24 hours a day. He doesn't see anyone.'[108] Yet, these factors do not support the notion that Moussaoui was insane.

On the other hand, Moussaoui appeared to have deliberately targeted the US legal system and the person of the presiding judge, Ms. Brinkema, transforming the courtroom into an arena of open lawfare (see Introduction), with the intention of undermining the integrity of the judge. On 11 June 2002, Moussaoui submitted a self-written motion, entitled 'Motion for pre-contempt of Leonie Brinkema order to declare Zacarias Moussaoui crazy'. Clearly this action attacked the impartiality of the federal judge since she had earlier ordered the psychiatric assessment of the defendant. Moussaoui's strategyto undermine the legitimacy of the trial as such was illustrated in his 'own' psychological analysis of the federal judge, embedded in that motion, reading:

> *Mental Status Examination*
> Axis 1: Acute symptom of Islamaphobia with complex of gender inferiority.
>
> *Diagnostic Impression*
> Legal pathological killer instinct with ego boosting dementia to become Supreme.
>
> *Conclusion and Recommendations*
> Immediate psychiatric hospitalization to specialist unit. (Propose unit. UBL Treatment Center, of course UBL stand for Unique Best Location)[109]

Another example was Moussaoui's motion filed on 22 February 2003 entitled:

> In the Name of Allah: Censured by the United Sodom of America
>
> Slave of Allah v. Slave of Satan
> Zacarias Moussaoui John Ashcroft[110]

John Ashcroft, the US Attorney General at the time of the Moussaoui case, is thus referred to as 'Slave of Satan', while Judge Leonie Brinkema is referred therein as 'Death Judge Leonie'. The power struggle between the court and the defendant continued until 14 November 2003, when Judge Brinkema's tolerance was exhausted; citing the continued recurrence of several inflammatory briefs from the defendant, she annulled Moussaoui's right to self-representation and appointed counsel.[111]

Moussaoui's strategy of rupture to discredit the US legal system was also visible during the battle at the trial when it came to disclosing evidence. Moussaoui must have been aware that under the US criminal legal system the prosecution bears the absolute obligation to disclose to the defence upon request all exculpatory evidence in its possession and other discovery materials. This obligation originates from a US Supreme Court ruling in *Brady v. Maryland*: 'Suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution',[112] as well as from Rule 16 of the Federal Rules of Criminal Procedure. This provision obligates the government to disclose to a defendant copies of relevant statements made by the defendant as well as of photographs, documents, books, etc., relevant to the trial when these are within the government's possession, custody or control.[113]

As a result, in the Moussaoui case, due to these strict disclosure obligations, the prosecution—assisted by experts from the Counter-Terrorism Section of the Criminal Division of the Justice Department—was forced to invest 'hundreds of hours in reviewing thousands of documents' in the possession of the US intelligence services.[114] Subsequently, in July 2003, Moussaoui asked the court for access to Al Qaeda detainees, including KSM, in order to interview them. Moussaoui and his appointed lawyers also relied on the Fifth Amendment (due process protections) and the Sixth Amendment (fair trial rights).[115] Moussaoui's actions triggered an intense and fundamental legal debate and opinions, revealing a dichotomy between the judiciary and executive branch within the US as to the scope of fair trial rights that terrorism suspects should have. The disclosure battle also resulted in a debate on the admissibility of the death

penalty, which the prosecution sought. On 2 October 2003, Judge Brinkema barred the US government from seeking the death penalty because Moussaoui was denied access to certain Al Qaeda witnesses.[116] This decision was overturned by a federal court of appeals on 22 April 2004; the government was allowed to seek the death penalty. It was also argued that national security provided satisfactory grounds for refusing the right to interview certain witnesses prior to or during the trial, and that Moussaoui would have to manage with government-prepared summaries of the statements by the Al Qaeda witnesses that were requested.[117]

All of these actions by Moussaoui indicate that he had deliberately chosen to put the trial and the judge 'on trial', and as such they also contradict the suggestion that he was insane. In addition, more tacit indications confirm that Moussaoui's strategy was intentional. These include his legal battle to represent himself without counsel as well as his filing of all sorts of motions in an effort to discredit, delegitimise and delay the trial; providing a catalyst for journalists to refer to the case as *Moussaoui v. the United States* instead of the other way around.[118] It is thus fair to say that, given Moussaoui's legal performances, his approach was indeed defined by a well-chosen strategy of rupture, which turned the courtroom in a theatre of lawfare.

Moussaoui's Secondary Strategy: Putting the Western World on Trial

It is also likely that a secondary goal of his strategy of putting western civilisation as such 'on trial' was to become a martyr within the Islamic society. Several examples illustrate this aim.

First, from the outset of the trial, the French-Moroccan prayed for the annihilation of several states, including Israel, Russia, Canada, the United Kingdom, Australia and the US, as well as for the liberation of Palestine, Chechnya and Afghanistan.

Second, two specific tactics can be disentangled from Moussaoui's 2002 guilty plea. Moussaoui made it known at the trial in no uncertain terms that he wanted to die as a martyr in his fight for the jihad.[119] Two days before Moussaoui announced his decision to plead guilty, the government had strengthened its case in order to support the request for the death penalty.[120] If Moussaoui wanted to die as a martyr, he had to act accordingly at trial in order to 'convince' the jury to impose the death penalty. Yet, he was unsuccessful in pursuing this strategy; in the end the death penalty was not imposed. Three weeks after Moussaoui was sentenced to life imprisonment, Osama Bin Laden released a video denying Moussaoui's involvement in the 9/11 attacks.[121] Analysts concluded that Al Qaeda was probably trying to distance itself from 'a lunatic', for many considered Moussaoui to be erratic during his trial. This message from Osama Bin Laden must have been a setback in Moussaoui's 'martyrdom strategy'.[122]

Still, some analysts have argued that Bin Laden's video was released to demonstrate the flaws of the US criminal justice system; one that was willing to convict someone for conspiracy in a plot in which, according to high-ranking Al Qaeda leaders, the defendant was not even involved.[123]

Moussaoui's Sentencing Strategy: The Battle for the Death Penalty

The opening statement of Moussaoui's defence attorney, Edward MacMahon, at the sentencing stage raised the question whether the trial could have produced a guilty verdict had Moussaoui not entered this plea. On 6 March 2006 MacMahon proclaimed that Moussaoui had not admitted involvement in the 9/11 attacks, while those attacks formed 'the heart of this case'.[124] MacMahon contended that:

> What the Statement of Facts contains is mostly historical admissions of a general nature about al Qaeda and its training and other plans that Moussaoui, as an admitted al Qaeda member, was in a position to know, including, yes, the existence of a plane's operation. The reason Mr. Spencer [lead prosecutor, GJK] declines to tell you that he is going to prove what role Moussaoui played in the 9/11 attacks is because there is no evidence to support it. There is no evidence as to what he did in these attacks, and the government would surely come forward with that evidence if it existed.[125]

The defence statement contended that Moussaoui did not lie to federal agents, since he simply did not know about the impending 9/11 attacks.

At the end of the trial, Moussaoui's defence attorney concluded that a verdict would give Moussaoui exactly what he was longing for, namely, martyrdom. MacMahon stated, 'the only way he can achieve that dream and then live on as some smiling face on a recruiting poster for Usama Bin Laden is by your verdict. Please don't make him a hero.'[126] However, against the advice of his lawyers Moussaoui, on 27 March 2006, alleged that he was supposed to fly a fifth plane into the White House on 9/11, although—as said—no evidence of that was found.[127] On 13 April 2006 Moussaoui stated that he did not regret the 9/11 attacks. Five days later a psychologist on behalf of the defence testified that Moussaoui suffered from paranoid schizophrenia with delusions.[128] On 24 April the jury started its deliberations and on 3 May 2006 recommended a life sentence, which was accepted by Judge Brinkema on 4 May 2006.[129]

As mentioned, the appropriateness of imposing the death penalty was both legally and politically one of the most axiomatic issues. Provoking the death penalty most likely served as an additional trial strategy for both the prosecution and for Moussaoui in terms of his becoming a martyr.

The prosecution's adamantly seeking to impose the death penalty on Zacarias Moussaoui raised one of the most controversial issues of dispute. Ironically, by pursuing the death penalty the prosecution was obliged to meet a higher standard of proof, namely that Moussaoui 'intentionally participated in an act [...] and the victim died as a direct result of the act'.[130] Yet, Moussaoui only conceded that he knew about the plot and did not do anything to prevent it from taking place.

Why then did the prosecution ask for the death penalty? Radsan notes that 'the justice department's decision to seek the death penalty in the Moussaoui case was political', since 'the American public was outraged after the attacks on our soil'.[131] Here, as observed, one may find the reason why Judge Brinkema was relatively lenient in favour of the defendant in terms of the disclosure of exculpatory evidence, namely 'the looming threat of the death penalty over Moussaoui.'[132] Had the death penalty not been on the table, the prosecution would probably not have been put under legal pressure to disclose classified materials to the defence, or at the least would have been authorised extensively to redact such documents.[133]

On 3 May 2006, the federal jury—after having found Moussaoui guilty—sentenced him, not to death, but to life imprisonment without the possibility of parole. The irony lies in the fact that because, on one charge, a single juror voted against the death penalty, it was the US jury system itself that saved Moussaoui's life. Three of the six charges were punishable by the death penalty, yet required a unanimous jury. But, as the foreman of the 12-member jury revealed to the *Washington Post*, the jury was not unanimous; it voted 11–1, 10–2 and 10–2 in favour of the death penalty.[134]

Judge Brinkema, in her sentencing order, sentenced Moussaoui to six consecutive terms of life imprisonment which, as observed, deprived Moussaoui of 'martyrdom in a great big bang of glory'[135]—words chosen by Judge Brinkema. Needless to say, Mr. Moussaoui must have been surprised to receive life imprisonment instead of the death penalty. He apparently never anticipated that outcome.[136]

For the international community though, the fact that federal prosecutors were pursuing the death penalty could have endangered international cooperation in criminal matters, for example in extradition cases between the European Union and the US.[137]

In conclusion, Moussaoui's performance suggests a fourfold strategy:

1) Discredit the judge;
2) Discredit the US legal system
3) Put western society as such on trial;
4) Provoke the use of the death penalty and die as a martyr.

Unlike KSM and his four co-defendants who face the death penalty before the Military Commission, Moussaoui was not put on death row. It is doubtful whether this was due to this fourfold strategy. It seems more likely that his escaping death row was due to the functioning of the federal (jury) system.

7.6. Conclusion: Past and Future Legislative (Political) Lessons

7.6.1. The Aftermath

Aicha El-Wafi, Moussaoui's mother, responded after the trial by stating that her son was 'being judged for the things he says, the things he believes, the convictions he has that shock us all, but not for his involvement in the attacks'.[138] Indeed, as analysed before, the evidence was not persuasive as to the actual knowledge Moussaoui had before 9/11; what exactly did he know about the 9/11 plots? Both Khalid Sheikh Mohammed and Osama Bin Laden denied that Moussaoui was to be the 20th hijacker. Two other Al Qaeda operatives—detained at Guantánamo Bay—declared in their interviews conducted by US authorities that Moussaoui was not involved in the 9/11 conspiracy; rather, the government would come to suspect that the 20th hijacker was an Al Qaeda detainee at Guantánamo Bay.[139]

The question triggered by Mrs. El Wafi's remark is whether the outcome of the Moussaoui trial was justified from a legal and political perspective. From the perspective of law enforcement, the Moussaoui trial made clear that disclosure obligations in the federal court system put intelligence agencies at a disadvantage, whereas military commission proceedings provide the government with more mechanisms of secrecy to submit classified documents required for a conviction while securing its sources.[140] As John Radsan put it, Zacarias Moussaoui 'should have been dealt with as we are dealing with Khalid Sheikh Mohammed and other members of the Al Qaeda terrorist network; through non-criminal detention. [...] Placing him in a federal district court for a criminal trial was a mistake.'[141] Indeed, the criminal law paradigm in dealing with terrorist suspects (the tension between the secrecy of counter-terrorism operations and the defendants' fair trial rights) is at the heart of the political reluctance to prosecute terrorist suspects in civilian courts. Proponents of pursuing the line of military commissions, as being the appropriate forum to try terrorist suspects (affiliated with Al Qaeda), tend to rely on pragmatic arguments such as the costs, complications, risks to intelligence sources and agencies.[142] They will also point to trial performances akin to Moussaoui's tactics.

However true these arguments may be, they negate the fact that by submitting these cases to civilian courts the incentive for law enforcement and intelligence officers to comply with the law and fair trial standards is strong. In other words, they will be more inclined to abstain from illegal methods lest the federal judges hold such methods against them. Thus, the quality of their fact-finding and ultimately the quality of the criminal evidence submitted could be reinforced. Potential disruptive trial performances should not weigh against the advantages of allowing the rule of law to prevail.

7.6.2. Political Choices Revisited

Following the Moussaoui trial, several terrorism trials, such as the case against KSM, have been referred to a military commission. Was this due to Moussaoui's performances at his trial? The ten years since 9/11 have demonstrated that terrorism trials in federal courts seem a more viable option in terms of efficiency: quantitatively more trials can be concluded, and in a shorter period of time. Moreover, the judgments rendered by federal courts are likely to be more widely accepted because of adherence to international fair trial standards. Yet, at a federal trial the government faces more legal risks, and cannot satisfy all national security demands or meet all security risks involved.

In this regard, it is interesting to focus on post-Moussaoui trials held before the revised Military Commissions, specifically the Omar Khadr and the Ghailani trials which took place in 2010. Like Moussaoui, Ghailani was tried before a federal court and sentenced to life imprisonment. Yet, unlike the French-Moroccan Al Qaeda member, Ghailani cooperated with his counsel and pleaded not guilty, launching an effective defence. The question of Ghailani's right to a fair trial arose during the proceedings, as it appeared that he had been tortured by the CIA during his detention in Guantánamo Bay. The New York federal judge, Judge Kaplan, ruled in favour of Ghailani's right to a fair trial—as Judge Brinkema had done in the Moussaoui case. The US district Judge Lewis Kaplan admonished the US government for torturing Ghailani (which led to the disclosure of the name of the person who allegedly delivered the explosives to him). Hence, Judge Kaplan precluded the evidence of this witness.[143] Although both federal courts gave preference to the fair trial rights of the accused, Moussaoui was ultimately denied access to key witnesses at his trial, such as KSM. At the end of the day, the result was the same: both Moussaoui and Ghailani received a life term in prison.

Terrorism trials are lost or won on procedural and evidentiary issues. The US federal courts and actually the criminal justice system in its entirety are predominantly

created for ordinary crimes, not for crimes allegedly committed on the battlefield. The choice to try terrorists before a civilian court may inevitably lead to a distortion of common procedural mechanisms. The Moussaoui trial illustrated this tension: national security interests clashed with the defendant's fundamental rights, and no actor in the legal arena was able to unequivocally demonstrate the superiority of either of them. Hence, trying a national security threat in an ordinary district court remains a balancing act for the presiding judge and jury.

However, it seems that Moussaoui did benefit from a trial before a federal court. In the aftermath of the Moussaoui case, the policy pursued by the US government in countering terrorism through (criminal) trials remains ambiguous. Its policy for deciding between US civilian courts and military commissions seems arbitrary and subject to amendments (i.e. laws have been frequently amended to keep all options open for the US government). The 9/11 events were instrumental in transforming the international legal order, in terms of security policies but also as to the political choices to prosecute terrorism suspects before civil courts or military commissions. The trial strategies performed in the Moussaoui case may have exacerbated the current preference within US policy for bringing high-profile 9/11 suspects such as KSM to justice before military commissions and for allowing security considerations to prevail over open and fair trial standards.

Notes

1 See for example: Mathias Borgers and Elies van Sliedregt, 'The Meaning of the Precautionary Principle for the Assessment of Criminal Measures in the Fight against Terrorism', *Erasmus Law Review*, 2:2 (2009), pp. 171–195; Oliver Kessler, 'Is Risk Changing the Politics of Legal Argumentation?', *Leiden Journal of International Law*, 21:4 (2008), pp. 863–884; Jude McCulloch and Sharon Pickering. 'Precrime and Counter-terrorism: Imagining future crime in the "War on Terror"', *British Journal of Criminology*, 49:5 (2009), pp. 628–645; Marieke de Goede and Beatrice de Graaf, 'Sentencing Risk. Temporality and precaution in terrorism trials', *International Political Sociology*, 7:3 (2013), pp. 313–331.

2 Public Law 107-140—sept. 18, 2001, S.J. Res. 23; the Act authorises the President to 'use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorised, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons'.

3 'President Bush Declares "War on Terror"', *Speech to a Joint Session of Congress* (20 September 2001), http://middleeast.about.com/od/usmideastpolicy/a/bush-war-on-terror-speech.htm. Retrieved 2 July 2013.

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9 'Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001', *Public Law 107-156—Oct. 26, 2001*, http://www.gpo.gov/fdsys/pkg/PLAW-107publ56/pdf/PLAW-107publ56.pdf. Retrieved 2 July 2013.

10 'President Bush's Order on Trial of Terrorists by Military', *New York Times* (14 November 2001), http://www.nytimes.com/2001/11/14/national/14DTEX.html?pagewanted=all. Retrieved 22 August 2013; 'Military Order of 13 November 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism', *Federal Register*, 66:22 (2001).

11 Nada Mourtada, 'Les Tribunaux Militaires Aux Etats-Unis: Inter arma silent leges?', AFRI: *Annuaire Français de Relations Internationales*, 4 (2003), pp. 115–147, there p. 115.

12 At the time, the Taliban was the government of Afghanistan. However, it was recognised by only three countries.

13 Krishna Andavolu, 'Strange Things Are Happening at Khalid Sheikh Mohammed's Trial', *Vice* (3 February 2013), http://www.vice.com/read/strange-things-are-happening-at-khalid-sheikh-mohammeds-trial. Retrieved 2 July 2013.

14 'The Guantánamo Docket, Khalid Sheikh Mohammed', *New York Times* (22 August 2013), http://projects.nytimes.com/guantanamo/detainees/10024-khalid-shaikh-mohammed. Retrieved 23 August 2013.

15 The Military Commissions Act of 2009 in principle prohibits the use of statements elicited through torture, yet not 'against a person accused of torture or such treatment

[…]'. The MCA furthermore provides that 'No statement of the accused is admissible at trial unless the military judge finds that the statement is reliable and sufficiently probative; and that the statement was made "incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement" and the interests of justice would best be served by admission of the statement into evidence; or that the statement was voluntarily given, taking into consideration all relevant circumstances, including military and intelligence operations during hostilities; the accused's age, education level, military training; and the change in place or identity of interrogator between that statement and any prior questioning of the accused.' See Jennifer K. Elsea, 'Comparison of Rights in Military Commissions Trials and Trials in Federal Criminal Court', *Congressional Research Service* (28 February 2013), http://www.fas.org/sgp/crs/natsec/R40932.pdf. Retrieved 23 August 2013.

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21 Ibid; 'U.S. Court of Military Commissions Review (USCMCR) History', *Website of the Office of Military Commissions* (no date), http://www.mc.mil/ABOUTUS/USCMCRHistory.aspx. Retrieved 15 August 2013.

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American Civil Liberties Union (25 October 2010), https://www.aclu.org/blog/national-security/khadr-accepts-plea-deal-trial-averted. Retrieved 9 September 2013.

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29 Ibid., paragraph 186.

30 Ibid., par. 191.

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32 Knoops, 'The proliferation of the law of international criminal tribunals within terrorism and "unlawful" combatancy trials after Hamdan v. Rumsfeld', p. 625.

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