The Hamburg Terror Trials – American Political Poker and German Legal Procedure: An Unlikely Combination to Fight International Terrorism

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A. Introduction

Recent German court decisions in the cases of Mzoudi and Motassadeq illustrate the dilemma of dealing with international terrorism in legal terms when politicians and intelligence services believe themselves to be above or beyond the law. These cases have already been discussed in a special edition of the *German Law Journal*.[1] The focus in this article is to contextualise the outcome of these cases in the "war on terror" and to analyse legal retribution, vengeance and torture on a scale of possible ways to address mass violence. The escalation of Islamist fundamentalism has the potential to rock Western democracies in their very foundations. Counter terrorism-measures in stepping up security legislation is not dealt with as such here,[2] neither is this a fully-fledged discussion of the law of peacekeeping and armed conflict with reference to "new terrorism".[3] The aim here is much more modest. It is a search for truth and ways out of a dead-lock.

B. Background

Within 10 days after the World Trade Centre and Pentagon suicide-bombings on 11 September 2001, President Bush presented far-reaching allegations to the House of

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[1] *See* 5 GERMAN LAW JOURANL No. 5 (1 May 2004), at http://www.germanlawjournal.com.

[2] *Cf.* the extensive discussion of V. Zöller, *Liberty dies by Inches: German Counter-Terrorism Measures and Human Rights,* 5 GERMAN L.J. No. 5 (1 May 2004), at http://www.germanlawjournal.com.

[3] *See* here the many contributions at the conference on terrorism organised by the Max Planck Institute for Comparative Foreign and Public International Law, Heidelberg: http//edoc.mpil.de/conference-on-terror/index.cfm. The Institute for International Law of Peace and Armed Conflict, Ruhr-University of Bochum also organised two conferences on this in the Hague – the first dealt with "*Reflections on the War in Iraq*," held on 27-28 July 2003; the second was on "*The Information Requirements for the Exercise of the Right to Self-Defence in International Law*," held on 28-29 November 2003.

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Congress about global terrorism.[4] Since Al Qaida was a known terror group with an effective network in more than 60 countries and Bin Laden had repeatedly targeted the United States as an evil power to be destroyed, he was suspected to be the mastermind behind the attacks that were carried out by a couple of Hamburg students and some Saudi-Arabians. The Saudi-Arabian multi-millionaire has found refuge in Afghanistan since 1996. Only a few days after the September 11 attacks the Bush administration came to the conclusion that these were armed attacks aggressively launched from Afghan territory. On 1 October 2001 the US declared that it was making use of its right to self-defence (in terms of article 51 of the UN Charter) and that it intended to launch an attack against Afghanistan,[5] arguing that it found itself in "a state of anti-terror warfare."

On 29 January 2002 President Bush pressed forward and labelled Iran, North Korea and Iraq as an "axis of evil" in his State of the Union speech. The phrase is derived from that of the rogue state, but the term itself is reminiscent of the Axis powers of World War II and of President Reagan's evil empire designation of the Soviet Union.[6] President Bush's apparent comparison to the Axis Pact of Germany, Italy and Japan in the 1940s was criticised as being exaggerated. The speech, however, gave rise to fears that Washington was about to unleash a major military assault on one of the three rogue states, most likely Iraq. A confrontation escalated as many European nations – including Germany and France – preferred a unified stand on the issue of fighting international terrorism and monitoring Iraq's compliance with Resolution 1441 on the issue of weapons of mass destruction.[7] But America, under

[4] *Cf*. President Bush's speech to the House of Congress on 21 September 2001 – full text translated and reprinted in the FRANKFURTER ALLGEMEINE ZEITUNG (abbr. FAZ), 22 September 2001 at 8. The tenor of the speech was that everybody who was not for the Americans was regarded to be against them.

[5] A State that has been attacked by an armed terrorist group harboured by a host state is justified to exercise its right of self-defence in terms of art. 51 of the United Nations Charter (SC Res.1368). For a more details see the discussion at D.III *infra*.

[6] The full text of the address under www.whitehouse.gov/news/releases/2002/01/20020129-11.html. Former Bush speechwriter, David Frum explained his rationale for creating the phrase "axis of evil" in his book, *see* DAVID FRUMM, THE RIGHT MAN: THE SURPRISE PRESIDENCY OF GEORGE W. BUSH (2003). Due to an email circulated by his wife, bragging about the phrase coined by her husband, the speechwriter subsequently resigned (or had to). The phrase indeed caused quite a stir. The ECONOMIST 2 Frebruary 2002 at 13 referred to it as a "brave but hazardous course for American foreign policy.. That Frum is a Canadian Jew need not be of further interest, were it not for the fact that the coining of this phrase probably stems from the trauma caused to Jews by the holocaust. Healing from such trauma has to be respected. It cannot be rushed and may transcend generations. What makes it difficult to deal with in legal terms is the instrumentalisation of such trauma in a new crisis to get back at an old enemy. *See also* note 7 *infra*.

[7] During the heated phase whether to attack or not to attack Iraq, US Defence Secretary Rumsfeld referred France and Germany as "old Europe" and testified to congress that "three or four countries" have indicated they wouldn't participate in military action in Iraq or post-war rebuilding thereof. "I believe

the Bush administration, flexed its muscles and showed the rest of the world that it has the power to ignore the UN Security Council, the very organs the US created after World War II to defend a free world order and to secure international peace. In the course of events, three arguments have been presented to justify the invasion of Iraq.[8] The initial argument that Iraq also harboured Al Qaida terrorists was soon dropped as it was far too flimsy. But eventually the US, along with the UK and a couple of other states in their hind wind,[9] decided to invade Iraq and to take pre-emptive action to destroy weapons of mass destruction. A year later, and after intensive search by at least three groups, no weapons of mass destruction have been found. Somewhere along the road, a third argument has been presented for the war, viz. to install a human rights-based, free democratic order in Iraq by toppling Saddam Hussein. After the torture of prisoners of war at Abu Ghraib by American soldiers/military police came to light, this argument has a rather hollow ring to it too.

Doing-their-own thing seems to permeate American action more pervasively, though. The German Federal Criminal Investigation Office (*Bundeskriminalamt*, abbr. BKA), the German equivalent of the FBI, already had the Hamburg group under close observation for a long time. In March 1999 they warned the CIA that terrorist attacks were being planned and forwarded the information to the CIA. The BKA passed on the name and telephone number of Marwan al Shehi who lived in/visited the Arab Emirates, together with information that he was apparently recruiting pilots. The Germans picked up the connection during their surveillance of another member of the Hamburg group, Mohammed Hayder Zammar. The information appeared to be of vital interest to the Germans, but as it turned out, the Americans did not follow up the hint with the necessary care.[10] Al Shehi eventually

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Libya, Cuba and Germany are ones that have indicated they won't help in any respect," he said. Coupling Germany with Libya and Cuba was regarded to go beyond a mere breach of good manners, especially as the reference to the Axis powers seemed to have been dug out again to bully Germany into toeing the line.

[8] *See, e.g.*, *The Case for War*, ECONOMIST 3 August 2002 at 11, 20-22; *Vulnerable but pre-emptive America*, ECONOMIST 1 July 2002 at 23; *Wielders of mass deception?* ECONOMIST 4 October 2003 at 13, 24-26; also *Der endlose Blitzkrieg . Wie die USA die Welt belogen, einen Tyrannen besiegten und nun in einem Guerilla-Krieg stecken*, DER SPIEGEL 21 July 2003 at 102-138.

[9] As Sir Jeremy Greenstock, Britain's permanent representative at the UN from 1998-2003, and its special representative for Iraq from 2003-2004 recently explained so poignantly, the UK joined forces with the USA "because the damage to world diplomacy if America went solo was too awful to contemplate". *Cf. What must be done now*, ECONOMIST 8 May 2004 at 24.

[10] For more details, *see CIA hatte Hinweis auf Attentäter des 11. September*", FAZ 25 February 2004 at 1 and 7. In the mean time, the US Congress has launched an inquiry into the matter. A former FBI translator for Persian and Turkish, Sibel Edmonds, has given evidence to the effect that she translated documents during the first part of 2001 (spring and summer) from which it was transparent that Al Qaida soon

turned out to be one of the September 11 suicide hijackers. The attacks shocked the world and made Americans face the reality that even such a powerful superpower is vulnerable. In the cases under discussion, however, America has shown again that it is doing its own thing.

It seems fair to conclude that there appears to be a growing tendency in America to revel in their ostentatious powerfulness, often at the cost of diplomacy and the rules of international law.[11] Americans these days seem to have a more bellicose approach to international affairs[12] than do Europeans and are more prone to think in terms of quick and violent fixes. Europe, including Germany, is derided for its respect of the rule of law and international law. Yet, the balance of the scales seems to tip towards Europe when it comes to fighting international terrorism effectively with legal means at this stage.

C. The Cases

I. The Facts at Issue

In a nutshell, the facts are that two Moroccans, Motassadeq and Mzoudi, who were studying electrical engineering in Hamburg, who sympathised with the goals of Al Qaida, and who also underwent training in Afghan camps, were accused of assisting the September 11 hijackers. They shared with them not only religious fervour and support of the jihad but also an intense aversion to both America and Zionism. The attack was planned to hit the most exponential symbol of Western capitalism in the city where most Jews live outside of Israel. Both had close contacts with members of the Hamburg group who were involved in executing the suicide attacks.

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planned an attack on prominent US targets with aeroplanes. The Bush Administration apparently tried to obtain an interdict against the 33 year old translator to prevent her testimony to be considered by Congress in terms of the inquiry it launched. Cf. *C.I.A. Chief Defends Handling of Hijacker Data*, NEW YORK TIMES, 25 February 2004. NAFEEZ AHMED, GEHEIMSACHE 09/11 – HINTERGRÜNDE ÜBER DEN 11. SEPTEMBER UND DIE LOGIK AMERIKANISCHER MACHTPOLITIK, 204 ff. (2003) analyses the role of the US secret services under the theme of structural incompetence or political blockade.

[11] *See, e.g.*, Robert Kagan, *Power and Weakness*, 113 POLICY REVIEW June 2002 *available at* www.policyreview.org/JUN02/kagan.html). Kagan, a senior associate at the Carnegie Endowment for International Peace, tirelessly publishes books and articles on the theme of America's "power" – in clear text: military power – and Europe's "weakness". Consequently, the role of Europeans has been reduced to that of "peace-keeping forces" after the US has "stabilized" a region decisively with military force. In short, the US is "making the dinner" and the Europeans are "doing the dishes."

[12] A recent Pew Research Centre poll indicates that 80% of Germans believe that a country needs UN approval first before using force, whereas only 41% of Americans believed this to be necessary. Cf. A YEAR AFTER IRAQ WAR – MISTRUST OF AMERICA IN EUROPE EVEN HIGHER, MUSLIM ANGER PERSISTS, Report released by the Centre on 16.3.04 in Washington, *available at* http://people-press.org/reports.

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The crux of the matter was whether the circumstantial evidence presented to the courts was sufficient for a conviction. At issue was whether the conducting of affairs on behalf of three of the suicide pilots during their sporadic absences, could be attributed to the two accused to the extent that it proved beyond reasonable doubt[13] that they were co-conspirators in the attacks. Furthermore, it was of pivotal importance whether the Hamburg group plotted the hijacks and suicide bombing of their own accord or whether they executed plans made at the highest level of Al Qaida. Prior to September 11 it was only an offence to belong to an "inland" terrorist organisation in terms of German law.[14] The Penal Code was only subsequently amended to close this loophole.[15] In other words, if the attacks were planned outside Germany by Al Qaida and only executed on their behalf by the Hamburg students that were hand-picked for the job, the legal basis for convicting Mottassadeq and Mzoudi for belonging to an "inland" terrorist group becomes more flimsy, especially in the light thereof that they might not have known any details of the plot.

Although the facts of these cases are largely convergent, the Courts came to very divergent judgments. In one case the maximum penalty was meted out, in the other the accused was acquitted for a lack of evidence. At first glance, this appears highly unusual but, in fact, it just underscores the importance of clarifying the facts surrounding the September 11 suicide attacks. Usually a legal discussion would focus more on the legal arguments of a judgment and less on the facts of the case. However, in this instance, it seems that just the opposite is required. Although the judgment of the Federal Supreme Court (*Bundesgerichtshof*, abbr. BGH) in Mottasadeq's case is remarkable from a legal point of view and deserves the attention it receives, this discussion will also focus on the facts of the cases extensively. First, the Motassadeq case before the court of first instance showed how the judges were trying to arrive at a plausible scenario of what happened in order to clarify the degree of involvement of the accused in the plot. The Mzoudi case almost resembles a 007-plot with events taking ever new turns.[16] The purpose here is to illustrate the dilemma faced by the courts to deliver justice when they have an insufficient basis of information to do so. The main reason, it seems, why the courts in both cases

[13] § 261 *Strafprozeßordnung* (abbr. StPO) or Criminal Procedure Act determines that: "The court comes to a verdict, taking into consideration all evidence put before the court." The Commentary of Meyer-Goßner on criminal law interprets the standard of evidence in § 261 StPO to mean "keine vernünftige Zweifel", which for all practical purposes corresponds to the Anglo-Saxon standard of "beyond reasonable doubt".

[14] § 129a *Strafgesetzbuch* (abbr. StGB) or Penal Code.

[15] § 129b StGB.

[16] *See, e.g.*, note 34 *infra*.

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were unable to do so, was due to a refusal by US authorities to make a key witness available, who is held in their custody. The US refused co-operation "for security reasons." Yet, how can the courts balance the security interests of the state and the rights of an individual to due process of law if they do not have a proper basis of information to clarify the facts of a case?

II. The Course of Proceedings

1. The First Trial of Motassadeq

On 19 February 2003 Mounir el Motassadeq was sentenced to 15 years in prison for abetting the murder of more than 3066 people[17] and being a member of a terrorist organisation[18] by the Upper Regional Court of Hamburg (*Oberlandesgericht,* abbr. OLG).[19] The verdict in Hamburg was the first anywhere against anyone involved in the September 11 plot.

The prosecution submitted the following evidence to the Court: During the spring of 1999 the Hamburg group conceived of the plan to attack the World Trade Centre in New York and the Pentagon in Washington D.C. The strategy to attack by piloting planes into these buildings was attractive because it would not only demonstrate the power and supremacy of Islamism but also reveal the vulnerability of the superpower America. More than one target had to be hit simultaneously to increase both the impact of the attack on the American people and to avoid the disadvantage of increased surveillance and control which would obviously have to be countered in the event of successive targets. The surprise element of the attacks would increase the effect because many people were certain to die an agonising death. In order to carry out their plan, they knew they could count on support from radical Islamist groups. The prosecution offered evidence that in November 1999 five of them (Atta, Al Shehi, Jarrah, Binalshibh and Essabar) – neither Motassadeq nor Mzoudi, though – left for Afghanistan via Pakistan to train at one of Bin Laden's camps, apparently also to raise funds for the mission and to recruit trustworthy men to assist with the hijacks. As expected, they were received with open arms.

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[17] The accused had been charged in terms of § 211 (murder) and § 224(1) no. 2-5 (serious injury) read with § 22 (attempt); § 27(1) and (2) (aiding and abetting), § 49 (mitigating factors) and § 52 (unity of act, coincidence) of the Penal Code or *Strafgesetzbuch* (abbr. StGB).

[18] In terms of § 129a No. 1 and 3 StGB.

[19] OLG Hamburg, Case 2 BJs 88/01 2St E 4/02-5 of the 3rd Penal Senate, *available at* http://www.jurawelt.de/gerichtsurteile/8919.

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The prosecution asserted that Motassadeq was responsible for logistical support to cover up the absence of Al Shehi and the others while they were away. Al Shehi had conferred power of attorney to him in terms of a legal document attested by a notary a year before – in July 1998. The accused paid Al Shehi's bills, registration fees at the university and cancelled rental, medical insurance and cell phone contracts. Bahaji took charge of the other three (Atta, Jarrah and Binalshibh) during their training in Afghanistan. Essabar joined them at a later stage for training, and remained there much longer. The Hamburg group's training in Afghanistan was kept absolutely secret to avoid the German Intelligence getting wind of it because close surveillance could have endangered the plot.

Various witnesses testified that members of the group around Atta became religiously fanatical and more radical in their anti-American and anti-Zionist views during 1999. Not all of them can be discussed in detail here, though. Some of the circumstantial evidence that lead to his conviction was based on the following testimonies: The witness L, now a qualified engineer, told the court that during the first half of 1999 the accused and his friends introduced him to a person when L popped into the accused's room with the words, "This is our pilot." He inquired whether the specified person was a pilot flying planes and received a positive answer. Atta was part of the group. The witness M, a roommate of the accused, told the court that he overheard a clandestine conversation between the accused and a third person. The accused confided in his friend: "They are planning something really big. Afterwards we'll be dancing on the graves of Jews." The witness D, a librarian at the Technical University of Hamburg where they all studied, testified about an incident that happened at the library's computers (with internet access) that were often used by members of the group around Atta during the spring of 1999. On that particular day, shortly before the library closed, they were quite loud and she went over to them. Al Shehi was very upset about the Americans and said, "Children are dying," and then to her "You'll see, there will be thousands of victims. Mark my words!" She testified that he also mentioned the World Trade Centre. At that stage she thought he was referring to the explosion at the WTC of 1993 and only put two and two together after the September 11 attacks. She then made notes about the incident to refresh her memory and reported it to the police. These notes did not contain any reference to the World Trade Centre, though. She explained the deficiency, stating that she rather concentrated on details that were less impregnated into her mind. Her friend who fetched her on that day and stood directly next to her had no recollection of the incident.

The prosecution presented evidence that four of the plotters – Atta, Al Shehi, Jarrah and Binalshibh – returned one after the other from Afghanistan between January and March 2000. Essabar only came back in August. Shortly after their return, they decided to train as pilots in the USA. To enter the US without drawing attention to

them, all four applied for new passports in their respective countries in order to cover up their travel to Pakistan from whence they headed for Afghanistan. Jarrah concluded a training contract with the Florida Flight Training Centre. Atta and Al Shehi travelled on a different route to the USA, started their training in Florida in July and qualified for private pilot licences. On 19 December 2000 they obtained their licences as professional pilots from the Federal Aviation Administration. Jarrah completed his training at another flying school at about the same time. Subsequently they remained a little longer in the US to gain experience in flying jets. Binalshibh applied four times for a visa to enter the US at different consulates but it was declined so that he was unable to enter the US legally and to train there as a pilot. Essabar, who returned much later from Afghanistan, and who was then supposed to take Binalshibh's place as the fourth pilot, also did not succeed in obtaining a visa. A fourth person, a Saudi Arabian, then apparently been recruited as a pilot. During the trial it could not be clarified who this person was.

Atta, Al Shehi and Jarrah kept contact with Binalshibh, who co-ordinated the plot. The prosecution contended that through Binalshibh they also kept contact to the accused. During their training, when their funds were running low Binalshibh asked the accused to transfer DM 5.000 from the Al Shehi' account to his own account in Hamburg. Binalshibh then forwarded a total of DM 10.000 to Al Shehi. Although the sums that were paid into Atta and Al Shehi's US account were generally much higher (about a US $ 150.000 all in all) and the DM 5.000 played a rather insignificant role, the Court concluded from this money transfer that the accused must have known about the plot and the whereabouts of Al Shehi during his training as a pilot. The Court regarded this transfer as particularly important, since their funds were drying up because another sum of US $ 25.000 that they were awaiting from the United Arab Emirates was delayed. Testimony was presented to the Court that Binalshibh, who was in Yemen at that stage, sent him a fax on 4 September 2000 with the request to do the transfer since Al Shehi needed money. The defence conceded that the accused transferred the money, but maintained that he was not aware of the fact that Al Shehi was in the US, nor that the money was forwarded to another account in the US. The Court argued that this money might in fact have bridged them over during a phase when they were tight and therefore indicated that the accused was involved in the plot.

The Court held the fact that he went for training at an Al Qaida camp further demonstrated his involvement in the conspiracy. Despite the fact that his wife was pregnant and that he had to sit for exams, he left for Afghanistan on 22 May 2000 shortly after he got married. The accused confirmed that he met Essabar at the camp. He testified that it appeared that Essabar enjoyed Bin Laden's confidence because he enjoyed certain privileges in the camp. Like all others he had to hand over his passport for the whole time that he was there and had to adopt another

name for security reasons. The accused returned Hamburg on 1 August 2000. Asked why he stayed there that long, the accused told the Court that he went for training because he supported the idea of the jihad. The accused explained to the Court Al Qaida's strict scrutinising procedures of all who came to train there. Anybody coming just for a brief period may have been considered a spy. The Court found that this explanation was not convincing and that the purpose of his visit was to inform Al Qaida about the progress the others made, viz. that Al Shehi already obtained a visa, that Atta and Jarrah applied for visas, and that Jarrah concluded a contract to absolve training as a pilot in the USA. The others had just obtained new passports in order to enter the US inconspicuously and a single border-control stamp of Pakistan or Afghanistan in their passports would have jeopardised the plot. They could hardly hope to get new passports so soon again. Therefore the accused had to act as their messenger, informing Bin Laden that they had accomplished their objectives and awaited the promised money. The Court contended that his involvement in the conspiracy and the clandestine nature of his mission was underscored by the fact that concealed his real whereabouts during that time, not only to his wife and parents but also to friends whom he told that he was in Southern Germany. However, the prosecution could not prove that the accused was involved in doing anything on behalf of the hijackers after his return.

To keep the conspiracy secret, the group plotting the attack never met again in Hamburg after the three pilots started their training. Atta and Binalshibh met each other in Berlin on 6 January 2001 and once again in Tarragona, Spain on 16 July 2001. The Court concluded that the date of the attack was clearly set at the latest by 22 August 2001. From 26 August 2001 Atta, Al Shehi and Jarrah individually acquired tickets for travelling to the US and for different domestic flights on September 11. On the morning of September 11, the three pilots from Hamburg and 15 men from Saudi Arabia, realised their cautiously planned plot. The rest of the Hamburg group all left Germany shortly before the attacks and obviously must have been tipped off. Essabar left for Karachi on 31 August 2001; Bahaji left for Instanbul on 3 September 2001; and Binalshibh left Germany on 5 September 2001. The accused, however, had either not been warned or took the risk of staying, hoping not to be discovered. The prosecution argued that the fact that he had a baby daughter and that his wife was about to give birth to a second child probably tipped the scales towards staying with his family despite the risk.

Binalshibh was arrested in September 2002 in Pakistan and extradited to the USA, where he is being held at a secret location. The legal representative of the accused tried to subpoena him as a witness to present evidence to the Court that the accused was not let into the plans of the conspiracy, despite his links to the Hamburg group and his stay in Afghanistan. This was not possible because the American

authorities refused to make Binalshibh available as a witness.[20] The US provided judicial assistance insofar as they allowed W, an FBI agent to give evidence on the September 11 attacks. However, W was not allowed to make any statement about Binalshibh or the interrogation transcripts. Selective parts of these transcripts were made available to the German Federal Office for the Protection of the Constitution (*Bundesverfassungsschutz*, abbr. BfV), as Germany's secret service is called, and the BKA but they had to agree in terms of § 96 of the Criminal Procedure Act (*Strafprozeßordnung*, abbr. StPO) not to use them in a prosecution.[21]

In concluding its judgement, the Court held that the accused made a good impression on the Court. He was well informed, competent and gave evidence in a scrupulous manner. There was no reason to doubt his evidence as intentionally untruthful and misleading. The Court held, however, that everything indicated that the accused was involved in plotting the September 11 attacks. For its judgement the Court relied heavily on circumstantial evidence. Mainly based on the testimony of the librarian D – and to a lesser degree the other witnesses – the Court argued that they had already plotted the suicide bombings during the spring of 1999, before the hard core of the group set out to train at the Al Qaida camp in Afghanistan. This was clear from the evidence given by D, recording what Al Shehi said in the library in connection with the World Trade Centre and many victims. The accused's roommate also told the Court about the conversation he overheard, which made clear that something big was being planned and that the accused knew about it. The Court referred to the evidence of L who told the Court that he was introduced to a friend of the accused at that time who was said to be a pilot. Given the fact that the group around Atta became more fanatical from 1999 on, the Court concluded that the Hamburg group around Atta planned and executed the plot from Germany. Therefore, the group legally qualified as an inland terror organisation in terms of § 129a (1) no. 1 and 3 of the Penal Code. Since the accused supported the others logistically to execute the plot, he was also found guilty of being an accomplice to murder in 3,066 cases and being a member of an inland terror organisation.

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[20] *See* the Guidelines Regulating Letters Rogatory in Criminal Matters between the USA and Germany – http://www.justiz.nrw.de/RB/justizverwaltungsv/ir_online/index.html. The document also lists diverse bilateral treaties. The new bilateral treaty concluded on 14.10.2003 has not yet been promulgated by Parliament.

[21] In short, § 96 StPO stipulates that the presentation of documents or other official written material by authorities may not be required for court proceedings, when such an authority declares that the publicising of the contents of such material is not in the interest of the Federal Republic or would cause harm to a German Land.

The decision of the Court was widely praised for Al Qaida was now officially labelled a "terror organisation" by a Court, and mere training at an Al Qaida camp would in future suffice to take harsher steps against suspects in the anti-terror campaign. The US government was obviously pleased by the conviction even though the penalty did not seem tough enough. (In Germany the death sentence had been abolished and the highest possible penalty is a life-long sentence, amounting to 15 years' imprisonment in practice.)

The accused's legal representative applied for the case to be revised by the Federal Supreme Court (*Bundesgerichtshof*, abbr. BGH) on the basis that specific legal principles received insufficient consideration.[22] The defence also challenged the fact that the US acted in breach of two Conventions, which they ratified, in that they refused to make a key witness available to the Court.

2. The Mzoudi Trial

a) The facts

The Moroccan student Abdelghani Mzoudi's (31) charge sheet was similar to Motassadeq's. MZoudi was also accused of being an accomplice to murder in 3,066 cases, logistically assisting the hijackers of September 11, and of being a member of a terrorist organisation that is forbidden in terms of § 129a of the Penal Code. In contrast to Motassadeq, Mzoudi refrained from giving any evidence. He remained silent throughout his trial.

Mzoudi first came to Germany in 1993 and studied electrical engineering at the Technical University of Hamburg. There he became acquainted with the group around Atta. Like Motassadeq, he did not belong to the hard-core of the group although he also went for training in Afghanistan. Whilst Atta, Al Sheni and Jarrah trained as pilots, some of them forwarded their mail to his address, even though he was not there at all times. He also conducted affairs on their behalf during their absence. Like Motassadeq, he too have either not been tipped off to leave Germany in time before the September 11 attacks or he decided to take the risk of not being discovered. The defence conceded that Mzoudi conducted the hijackers' affairs during their absence and that he was their friend, but maintained that he was unaware of the plot. To be found guilty of being an accomplice to murder, the defence argued, it must be demonstrated that he was involved in planning the September 11 suicide-bombings and acted intentionally to further the plot. They ar-

[22] *E.g. in dubio pro reo* – § 244 StPO.

gued that the support Mzoudi provided was a series of "neutral actions," which did not per se imply that he was aware of the conspiracy.

Like in Motassadeq's case, Binalshibh turned out to be a key witness, who could have shed more light on the accused's actual involvement in the plot. The interrogation transcripts that were passed on to German authorities were still barred from Court proceedings and in this case too the US authorities refused that Binalshibh could give evidence.[23] The lawyers for the co-plaintiffs, representing relatives of September 11 victims, also unsuccessfully tried to convince the US government that the interrogation transcripts should be made available to the Court.

During Mzoudi's extended trial, the prosecution kept introducing new secret service information on a piecemeal basis, resulting in the case taking ever-new turns. The Court admonished the prosecution for prosecuting in a matter that had not been properly investigated. The trial took a fateful turn when the President of the German Secret Service, Heinz Fromm, gave testimony on the September 11 plot that exonerated Mzoudi. Under German law, authorities who become aware of potentially exculpatory evidence are required to report it to the Court.[24] He reported secret service information, according to which the attacks in the US were not planned "by a handful of Muslim students living in Hamburg," but at the highest level by the Al Qaida leadership in Afghanistan. Apparently Atta, Al Shehi and Jarrah were ear-marked for the plot only during their training at the Al Qaida camp by the end of 1999.

The judges were particularly piqued by the fact that the weekly news magazine *Der Spiegel*[25] splashed detailed information on the planning of the plot whilst the American Department of Justice refused the Court access to these documents, clarifying the involvement of the accused. Apparently Khalid Sheik Mohammed, who studied at a Baptist College in North Carolina in 1983, was the mastermind behind the idea to use kamikaze pilots instead of bombs.[26] Like Binalshibh he is also detained at a secret location by the US. In 1993 he financed and his cousin planned and executed a car bomb attack on the World Trade Centre, detonating 600 kg of highly explosive nitro-glycerine in a parking garage. In 1995 he hatched another

[23] *Cf.* note 20 *supra*.

[24] § 54 and § 161 StPO read with § 96 StPO (dealing with legitimate state interests to keep specific information secret).

[25] Cf. *Operation Heiliger Dienstag*, DER SPIEGEL, 27 October 2003 at 120-135.

[26] This has been broadcasted in an interview given by the two of them to the TV station Al Dschasira shortly before they were arrested. *See* DER SPIEGEL 27 October 2003 at 121; *also* YOSRI FOUDA & NICK FIELDING, MASTERMINDS OF TERROR (2003).

plot from Manila to detonate time bombs on 12 airplanes simultaneously in America but it was discovered in time. He then went underground in Afghanistan and joined Al Qaida where he convinced Bin Laden of his plan.[27] When the four Hamburg students turned up, blinded by religious fervour and willing to offer their lives as martyrs for the noble cause of the jihad the plan could finally be put into operation. The group had been recruited for Al Qaida and inspired for the jihad by Zammar in Hamburg. They were all fluent in English and technically well trained to execute such a complicated conspiracy. The plot thus seems only to have materialised during their training in Afghanistan, most probably in the first weeks of 2000, and not during the spring of 1999 as the Court assumed in the case of Motassadeq.

The interrogation transcript of Binalshibh stirred up further controversy. According to the transcript that was leaked to the press, the four Hamburg students originally set out to fight in the Chechnyan war. It was a time when the atrocities committed by the Russians were constantly discussed in German mosques. Many Muslims volunteered to fight on the side of Muslims in Grosny. The safest way to get there was via Pakistan and the Hindukush. It is therefore unclear in how far the Hamburg students had a similar idea as that of Sheik Mohammed with regard to the kamikaze bombings before they got to Afghanistan. Some of the witness statements in Motassadeq's case do sound fishy. Not to be disregarded is the fact that the prosecution presented evidence that Mzoudi downloaded a flight simulation programme on to his computer.

The significance of Binalshibh as a witness is marked by the fact that he is said to have co-ordinated the plot together with Sheik Mohammed. Apparently he was the connecting link between Al Qaida and the Hamburg group. After he failed to get a visa for entering the US in order to train as a pilot, he resumed the duty of acting as Bin Laden personal courier. According to *Der Spiegel*, he personally travelled to Afghanistan on 31 January 2001 to report on the progress made by the group. During this meeting, Bin Laden informed him about the four selected targets. Apart from the two World Trade Centre buildings and the Pentagon that were hit, the fourth target envisaged was the Capitol, not the White House as the secret services thought until then. According to the transcript, Bin Laden also personally selected the fourth pilot as well as the Saudi Arabians that assisted them. After the visit, he had to wait for further instructions. Insofar the hypothesis of the OLG Hamburg in Motassadeq's case that the latter assumed the role of a courier has to be re-evaluated.

[27] Originally they conceived of the idea to hijack 10 planes, five on the east coast and five on the west coast of America, flying them all into major targets. The co-ordination of such a gigantic project proved a bit too risky. Finally they settled for four hijacks.

b) Arrest Warrant Lifted – Appeal to the BGH

Soon thereafter the judges lifted the arrest warrant against Mzoudi. A BKA document presented to the Court reduced the probable criminal liability of the accused to such an extent that the Court no longer reckoned with an indictment. An anonymous three-page fax was received at the Court just a few hours before the hearing of evidence came to an end. In it, the BKA claimed that an "unidentified informer" had provided credible evidence that, apart from Atta and the two other terrorist pilots, only Binalshibh was involved in the preparation and execution of the attacks. The four had "excluded other persons as accessories." The fax stated that the three pilots and Binalshibh "did not speak with others at any time about 'actual operations or creating a terrorist cell' for furthering the jihad." The faxed statement cautioned that the witness had provided contradictory information in the past and that those who went to Al Qaida training camps were taught how to behave if arrested and interrogated. The Court assumed that the "unidentified informer" referred to had to be Binalshibh himself, and lifted the arrest warrant against Mzoudi. US officials have only turned over selected summaries of Binalshibh's interrogation to the Germans. Because the summaries themselves have not been provided to the court, just a brief communication about them, the German government has kept its side of the bargain. Both sides in the trial have been pressing for access to the full material. Two weeks before that court session, German prosecutors asked the court for a delay before ending the evidentiary part of the trial to see if they could produce some of the transcripts, but US officials continued to refuse such access for the court, citing "national security concerns." It still remains a matter of speculation as to why the BKA sent this exculpatory fax and who was responsible for its dispatch. The US Attorney General Ashcroft apparently reacted furiously to the handing over of this information. He added glibly that fortunately the United States has a judicial system that protects national security as well as the rights of the accused.[28] The prosecution appealed to the BGH to set the order aside but the BGH confirmed the lifting of the arrest warrant. The BGH held that the accused could only be kept in further detention if the Hamburg Court is of the opinion that there is a strong suspicion (*dringender Tatverdacht*) that he committed the crimes of which he had been accused. In the opinion of the Court, this was not the case.[29]

[28] It appears that newly the Attorney-General has refused to submit three memoranda to Congress, which apparently sanctioned interrogation methods that are forbidden in terms of US law and international law as falling within the scope of torture. *Cf. Sanchez billigte 32 Verhörmethoden*, FAZ 14 October 2004 at 6.

[29] § 112(I) 1 StPO. For more details with regard to the BGH's argument on criminal procedure, see its decision of 19.12.2003, StB 21/03 (2St E 5/03-5) – the text of the decision is available under www.bundesgerichtshof.de.

c) OLG Judgement

Mzoudi's acquittal was generally expected until the BKA produced a last-minute witness. The anonymous witness is said to have assured two BKA officials that Mzoudi was directly involved in the preparation of the September 11 attacks by providing "logistics." The witness turned out to be an Iranian, Hamid Reza Zakeri, whose evidence contributed little to clarify the facts. He apparently acted as a double agent for the Iranian secret service and the CIA and is regarded to be a rather dubious person.[30]

The lawyer representing relatives of September 11 victims sought a stay of the verdict in order to present new evidence. He argued that the US government would be more willing to allow the testimony of Binalshibh to be put before the Court, should the Court agree to an *in camera* procedure and keeping the information secret according to the regulations prescribed by the American Classified Information Procedures Act (abbr. CIPA). After deliberations, the panel of judges concluded that there was no concrete evidence that indicated that the USA was willing to change its stance on the issue.[31] Both parties had already sought to obtain access to the evidence to no avail. The Court further cautioned that untested evidence obtained with secret service methods should be treated with the greatest restraint. The value of such testimony is open to question because the court had no opportunity to question Binalshibh or review transcripts of his interrogations. The Court was therefore unable to determine the credibility of his testimony.[32]

The Court acquitted the accused for a lack of evidence, but made it clear that the accused was not acquitted because the Court had been convinced of his innocence.[33] The evidence presented to the Court did not prove beyond reasonable doubt that he was an accomplice in the planning of the September 11 attacks though. The Court sharply criticised the secret service and the BKA for withhold-

[30] U. Rippert, *Verdict due in German terror trial - Justice at the behest of the secret services,* 5 February 2004, *available at* http://www.wsws.org/articles/2004/feb2004/mazo-f05.shtml.

[31] The attorney for the co-plaintiffs, Schulz afterwards scathingly remarked that "Germany is a country with full comprehensive insurance for terrorists". This remark appears to be rather misplaced and directed at the wrong address. The Counter Terrorism Committee established by the Security Council after September 11 did not criticise Germany of not satisfactorily fulfilling any of its core obligations in terms of international counter-terrorism measures to be taken. Cf. Zöller note 2 *supra*, at part 1, par. [15].

[32] § 136a StPO prohibits "mistreatment, exhaustion, physical intervention, administration of substances, torture, deception or hypnosis'" of witnesses. The United States have acknowledged more than once they were using stress and duress techniques for questioning Al Qaida suspects.

[33] A brief synopsis of the judgement has been posted by two lawyers, who attended the hearing on the website of Jurawelt,*available at* www.jurawelt.com/anwaelte/8812.

ing relevant information to the Court, which the Court would have been unaware of if the information had not been leaked to the press. The court reminded them of the statutory duty on all branches of government not to withhold exculpatory evidence purposely from the court.[34]

With regard to the allegation that the accused was a member of a terrorist group in terms of § 129a of the Penal Code (StGB), the Court held that a definite distinction should be made between Islamist fanaticism and criteria that legally typify a terrorist group. Verbal attacks on the US and Zionism by the accused do not suffice to convict him of being a member of a terrorist group. Although it initially appeared that the attacks were planned both in Hamburg and by Al Qaida in Afghanistan, this assumption had been refuted during the course of the proceedings and it appears that in fact they were not planned in Hamburg. Being a member of a foreign terrorist group in terms of §129b of the Penal Code, however, only became a criminal act after the attacks of September 11. Since sanctions do not apply retroactively, the accused cannot be convicted in terms of this section.

In general the witnesses' evidence remained unclear in a number of instances and did not prove beyond reasonable doubt that the accused actually did have knowledge of the conspiracy and belonged to the hard core of the group around Atta that planned details in executing the attacks. This might be due to the fact that the witnesses only testified two years after the event. The Court referred to the internet website on flight simulation that was downloaded on Mzoudi's computer and found that this was circumstantial evidence, which did not necessarily prove that he was an accessory to murder by taking care of logistics to execute the hijacks.

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[34] It has not been clarified who sent the anonymous BKA fax to the Court. It is possible that Attorney-General Ashcroft and the German Minister of the Interior, Schily, who were in constant close contact during the trial, were no longer interested in securing Mzoudi's conviction. This would mean Mzoudi disappearing for years inside the German prison system, outside the reach of the American security apparatus. Just before the planned judgment was pronounced, the press reported plans to immediately deport Mzoudi to Morocco in a lightening action following his acquittal. There it would have been easy for the CIA to lay their hands on him, since his extradition to the US following an acquittal would not have been possible under German law. Apparently Schily had previously reached an agreement with the interior senator of Hamburg about what should happen to Mzoudi. A lawyer, who represented victims of the September 11 attacks, had already procured the plane tickets. It would not be the first time that Schily collaborated with Ashcroft via "expedited official channels" in order to hand over terrorist suspects – against whom the German justice system was unable to prove any punishable offence – to the American security apparatus. Zammar, a Syrian with a German passport living in Hamburg, is a case in point. Zammar was suspected of being Atta's contact man to Bin Laden. Legally, however, nothing could be proved against him. When he requested a new German passport in November 2001, in order to travel to Syria, German authorities are believed to have informed the CIA. Zammar was arrested at the airport when he arrived. Since then, he has been held at Far-Falastin prison near Damascus, where he has been interrogated and tortured. Mzoudi's lawyers reacted with an application for asylum, which should make a rush deportation more difficult. *Cf.* U. Rippert, note 30 *supra*.

The Court held that the evidence of the last witness, Zakeri was not plausible and had to be treated with scepticism because he traded information and had a personal interest in it. Moreover, the Court held that it had not been proved that the errands the accused ran on behalf of the hijackers during their absence stood in direct connection with the planning of the attacks. Insofar, an important criterion for a criminal conviction had not been satisfied, viz. that he acted intentionally (*vorsätzlich)*.

3. BGH Review of Motassadeq's Case

The Motassadeq case was reviewed shortly afterwards by the BGH.[35] The BGH ruled that the conviction was flawed because the OLG Hamburg failed to properly consider the effect of the missing evidence from a key witness in US custody.[36] The Court held that the state's interest to keep information secret for national security concerns may not be to the disadvantage of an accused. If it is not possible to present such evidence to the Court, which the state otherwise would have been under an obligation to present to the court,[37] and such evidence could have exonerated the accused, then the court must take that into consideration in order to guarantee a fair trial.[38] If the submission of such information to the Court is blocked by a foreign government, the same rules apply in adjudicating the matter.

The BGH held that even if the assessment of circumstantial evidence by the Court *a quo* is plausible, the decision is legally flawed in so far as the Court did not sufficiently consider that evidence by a key witness that was barred by the executive of a foreign government, which might have exonerated the accused. US officials refused to grant the Court access to the witness or to make the interrogation transcripts available to the court due to national security concerns. The FBI witness W, testifying before the Court had no permission to make any statement with regard to Binalshibh. Consequently, efforts by the Court *a quo* to gain access to the witness or his testimony was fruitless due to an agreement under § 96 StPO in terms of which German authorities agreed to keep the US secret service material confidential. The OLG Hamburg should therefore not only have dealt with the matter in a procedural sense, but should also have considered the consequences of it with regard to

[35] §§ 337, 338 StPO regulate the review powers of the Court.

[36] BGH decision of 4.3.2004, 3 StR 218/03, *available at* www.recht-in.de/urteile/master.php; a synopsis was published in 17 NJW at 1259-1263 (2004), cited as NJW. *See also* the discussion of C. Safferling, *Terror and Law – Is the German Legal System able to deal with Terrorism? – The BGH decision in the Case against El Motassadeq*, GERMAN L.J. Vol. 5 No. 5 – 1 May 2004.

[37] § 244(3)-(5) StPO.

[38] §§ 54, 96 and 261 StPO read with art. 6 (1) and (3) (d) of the European Convention on Human Rights – NJW at 1259.

the degree of fault required for criminal liability under these circumstances.[39] The Court should have restrained its assessment of the circumstantial evidence to balance out this deficit in order to guarantee a fair trial.[40] Moreover, the Court should take utmost care that the withholding of significant evidence for national security reasons does not lead to gaps in the ascertainment of truth. Due to the fact that the defence had no opportunity to present evidence from the barred witness to the court, the accused's right to a fair legal hearing[41] could have been unduly restricted.[42] A refusal by the executive[43] to make evidence available to the Court or an agreement in terms of § 96 StPO (like in the matter under consideration) that barred evidence from the Court, falls under this category.

The BGH held that even if the withholding of evidence in this case came about in a procedurally correct manner, it nevertheless could have severely limited the defence's opportunity in stating its case. The evidence before the Court that should enable it to come to a fair verdict is difficult to evaluate properly if a key witness is absent altogether. This should be properly taken into account by the Court before delivering judgement. If necessary, the Court should rather avert to the principle *in dubio pro reo*[44] in determining the merits of the case when delivering judgement. This is not a rule of evidence but a principle guiding the court to arrive at a fair verdict. Therefore it can only be invoked by the Court once the hearing of evidence has been concluded and judgement is delivered.

The Court *a quo* only took procedural notice of fact that a key witness was barred by the executive of a foreign country and that German authorities could not present the interrogation transcripts to the court due to an agreement with that country. If a key witness, who is detained by a foreign country is barred from giving evidence in a matter, the witness is presumed to be "unavailable" in terms of § 244 (3) no. 2 of the Criminal Procedure Act. As a general rule, a Court is not obliged to take notice of the fact that a witness had been unavailable. However, there is an exception to the rule: When the foreign state has a direct interest in the conviction and German courts quasi function as a substitute legal instance to serve their ends of

[39] NJW at 1260.

[40] Art. 20(3) *Grundgesetz* (abbr. GG) read with art. 2 (1) GG; *also* art. 6 (1) of the European Convention on Human Rights – see NJW at 1261.

[41] Art. 103 (1) GG.

[42] BVerfGE 57, 250 at 274f.

[43] In terms of § 54 StPO.

[44] BGH, NJW 2000 at 1661; BVerfGE 101, 106, *reprinted* in NJW 200, 1175; *also* BVerGE 74, 358 at 360.

justice, the general rule has to be restricted. This is even more so when that foreign state made a witness like the FBI agent W available, who had expressly been prohibited from giving any evidence on the barred witness or the interrogation transcripts that possibly could have exonerated the accused. The selective manner in which the US provided judicial assistance in the matter of Motassadeq does not preclude its own interests. It therefore cannot be excluded that the US tried to manipulate German legal proceedings for its own advantage by barring a witness and withholding evidence, which is to its own advantage but not necessarily benefiting justice. As a result the accused hardly had the opportunity to make a fair case.[45] Apart from that, the Court held that it should be examined whether that foreign state acted in breach of international Conventions that it ratified by barring witnesses or withholding evidence. The US ratified both the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and the UN Convention for the Suppression of Terrorist Bombings.

To conclude, the BGH held that the evidence that Binalshibh could have given, weighs much heavier than circumstantial evidence about statements made by Al Shehi in the university library in 1999 or by others at that time, because it has a direct bearing on the events. The court *a quo*, however, turned its attention predominantly to evidence that could also be interpreted in a different way. Therefore the matter was returned to the Court *a quo* for a retrial by another panel of judges.[46]

4. Motassadeq's Detention Order Reversed by the OLG Hamburg

On 7 April 2004 the OLG Hamburg ruled that a strong suspicion (*dringender Tatverdacht*) that Motassadeq was an accomplice to murder in 3,066 cases of which he had been convicted by the Court no longer existed and set him free.[47] A letter of Bahaji to his mother in Morocco exonerating Motassadeq was presented as evidence before the Court.[48] The retrial has been scheduled to start on 16 June 2004.

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[45] NJW at 1262.

[46] NJW at 1263.

[47] OLG decision of 7 April 2004, Case No. 2 BJs 88/01-5 2 StE 4/02-5, *available at* www.jurion.de/index_frame.html?/de/right/Rechtsprechung/040407_motassadeq.html.

[48] The prosecution presented a letter to the Court, which Bahaji wrote to his mother, dated 26 April 2002. Bahaji explained the background to the September 11 attacks and stated that Motassadeq was not involved. In a telephone conversation with his wife, who lives in Hamburg, Bahaji said that he was also definitely not involved in the plot. He himself decided to lie low since an international warrant of arrest has been issued for him. It is possible that he wrote the letter to exonerate not only himself but also Motassadeq, who was convicted shortly before. *Cf.* FAZ 6 April 2004 at 2; and *Nachrichten aus dem Untergrund*, DER SPIEGEL, 5 April 2004 at 21.

It might well be that the facts of the case in the retrial turn out to still be different from the conclusions, which the Courts arrived at thus far. In Motassadeq's first trial the court believed that the attacks were planned by a handful of Hamburg students during the spring and summer of 1999. Then it turned out in Mzoudi's case that they were actually recruited for Al Qaida by Zammar and that the attacks were planned at the highest level of the terror organisation only at a later stage when they trained at Al Qaida camps in Afghanistan. This does not correlate with more recent evidence that the BKA warned the CIA in March 1999 that terrorist attacks were being planned and that Al Sheni recruited pilots during a visit in the Arab Emirates.[49] The facts seem even more complex than anticipated. As has been demonstrated, a slight shift of the facts may have extensive legal implications.

It also has to be considered how far the interrogation transcripts withheld by the secret service in terms of an agreement with US authorities can still be withheld in the retrial. § 96 StPO, read with § 54 StPO, stipulates that the presentation of documents or other official written material by authorities may not be required for court proceedings, when such an authority declares that the publicising of the contents of such material is not "in the interest of the Federal Republic" or would cause harm to a German Land. As it will be pointed out later, the justification for withholding such information might have to be reconsidered in the light of the fact that detainees have been tortured by the USA in breach of the Geneva Conventions. It cannot be excluded that these interrogation transcripts were also obtained that way. If that is the case, the question arises whose interests are protected by withholding the transcripts – Germany's or the USA's? To put it differently, are there still legitimate arguments for withholding the transcripts from the courts? Although the value of information obtained under torture cannot be used as evidence against the accused, it might be interesting to have a look at them. On the other hand, it underscores the importance of the key witness giving testimony himself in Motassadeq's retrial.

Excursus: Who is this mysterious key witness?

Binalshib's family comes from the same region as Osama bin Laden. His family members had already taken of Al Qaida's "Bayat" oath, subscribing to the goals of the holy war and swearing absolute allegiance to their "Emir" Osama Bin Laden.[50] Some of them are said to have been involved in the bombing attacks on US embassies in East Africa before Binalshibh came to Germany. In 1995 he tried to gain

[49] *Cf.* note 10 *supra*.

[50] *See* the evaluation of the BKA Meckenheim in the matter of *USA vs Zacarias Moussaoui*, cited by OLIVER SCHRÖM, AL QAIDA – AKTEURE, STRUKTUREN, ATTENTATE, 134 f. and note 7 at 199 (2003), cited as *Schröm*.

residence by applying for asylum under the name of Ramzi Mohammed Abdullah Omar, pretending to be a victim of political persecution in Sudan.[51] The application was refused and he went underground. While the police were still searching for him, he again took on his real identity with a passport from Yemen. To obtain a visa he pretended that he wanted to study in Germany and presented a sponsor for his studies. The Aliens' Registration Office did not pick up that the sponsor was convicted for illegal weapon deals with Iran. Unlike the other members of the Hamburg group, he never seriously studied and was regularly thrown out at various universities. It appears that he came to Germany with the sole objective to further Islamist goals. In Hamburg he initiated a "Muslim Workshop" (*Islam AG*) at the university. A speciality of the workshop was to indulge in Islamist videos with hate sermons and theological interpretations of the Koran favoured by jihadists. They studied Azzam's "World Wide Conspiracy" and got hooked on the ideas of the political mentor of Bin Laden. This work is regarded to be Al Qaida's bible for the holy war.[52] If reports on how Al Qaida's international network works are correct, everyone partaking in training in their camps first has to take that oath.

D. Methods of Addressing Mass Violence and "New Terrorism"

I. State Security Interests and Due Process of Law

The acquittal of Mzoudi and retrial of Motassadeq are recent examples of a growing dilemma faced by Western states in their efforts to prosecute suspected terrorists: how to gain access to intelligence for criminal proceedings without compromising the sources of that information – or, more seriously, how to evaluate the credibility of such information. In spite of the gravity of the accusations and strong political pressure, the Courts have upheld rules of due process and the presumption of innocence. This is the positive side from a human rights perspective. More grave are the problems faced with regard to a serious challenges of the free democratic order of the state by Islamist groups that have been escalating at an alarming rate.[53] The case of Metin Kaplan, a "hate-preacher" that called out a Khalifat state in Cologne is just the latest of a series of other Islamist cases that the Courts have had to deal with.[54] Many countries across Europe are facing the thorny issue of how to meet

[51] He applied for asylum on 27.9.1995 in Schleswig-Holstein, saying he came by ship – *cf.* Schröm 131.

[52] Schröm 96 ff.; P. BERGEN, HOLY WAR INC. (2001).

[53] *See* the Report of the Minister of the Interior for 2003 on terrorist advances in Germany, available at http://www.verfassungsschutz.de/de/publikationen/verfassungsschutzbericht/vsbericht_2003; also *Bin Ladens Glaubenskrieger in Deutschland*, DER SPIEGEL 22. March 2004 at 24-38.

[54] *Gericht: Kaplan darf abgeschoben werden*, FAZ 27 May 2004 at 1; *Güle, Güle*, FAZ 27 May 2004 at 1.

the needs of their growing Muslim populations[55] and to protect traditional civil liberties, while trying to curb the spread of extremist Islamist thought. Certainly not all Muslims are fundamentalists supporting Al Qaida. However, the growing presence of global jihadist groups operating from Europe is symptomatic of recent radical Islamist advances throughout Europe and elsewhere.[56] Mzoudi's acquittal by the OLG Hamburg and the BGH's review of Motassadeq's case highlighted Germany's attempt to balance containment of the Islamist terrorist threat with the need to respect the legal rights of suspects by upholding the rule of law and rules of international law. The matter is highly volatile, though.

II. Conventions Combating International Terrorism and Selective Legal Assistance

The selectivity with which the US authorities provided legal assistance is a cause for concern for two reasons. First, it runs the risk of blocking justice where it could have provided some form of legal redress to the relatives – the co-plaintiffs – of people who died in the WTC. Justice is a process – also of healing and coming to terms with trauma, not an end in itself. To respond to mass violence with legal prosecutions embraces the rule of law by applying pre-existing legal norms aimed at redressing injury, yet being committed to fairness. It offers individuals the opportunity to be heard both in accusation and defence. The presumption of innocence until proven guilty is central to the rule of law. Germany developed a particularly rigorous form of rule of law - the *Rechtsstaat*.[57] As a "neutral ground" for both the plaintiffs and the accused, situated outside of the territory of the US, a chance for legal redress and arriving at the truth was hashed up.

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[55] Europe has substantial Muslim minorities, numbering around 17 million. France has the biggest Muslim minority but even in Germany there are some 3 million Muslims.

[56] Part of the problem with regard to the spread of radical Islamist fundamentalism is a shortage of domestically trained clerics to lead congregations of European-born Muslims. A substantial number of foreign imams do not have any knowledge of the country where they go to preach and often do not speak the language of the land. The issue has become more pressing as the fundamentalist clerics provided inspiration and support for Islamists returning from Afghanistan and Eastern Europe jihads. They have also helped prepare fresh recruits from among Europe's frustrated, disenfranchised second-generation immigrant youths now rediscovering their religious roots. A solution might be to support programmes to train clerics locally, but as various Muslim Councils have pointed out, they need state aid. However, in France any government support of such a programme faces huge obstacles because of laws strictly prohibiting the state from meddling in religion. Cf. *France Struggles to Curb Extremist Muslim Clerics*, NEW YORK TIMES, 30 April 2004. Germany, again, faces the tricky balance of its own anti-Semitic history and keeping the trust of Jews. Currently Germany has the fastest growing Jewish community in the world - *see* FAZ 29 April 2004 at 1. At the same time Islamist hate-preachers are fanning anti-Semitism in an unacceptable manner. How to curb the effects of this to safeguard the democratic order is no easy balancing act.

[57] For a comparison, *see* L. Blaauw, *The Rechtsstaat idea compared with the rule of law as a paradigm for protecting rights*, SOUTH AFRICAN L. J. at 76 ff. (1990); *generally* P. KUNIG, DAS RECHTSSTAATPRINZIP (1986).

Secondly, it puts a question mark behind the way in which the US administration tries to combat international terrorism in legal terms. The BGH suggested that it should be considered whether the US acted in breach of the International Conventions it ratified by barring a witness or withholding evidence. The US ratified both the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation[58] and the UN Convention for the Suppression of Terrorist Bombings.[59] Although this argument was not further pursued by the Court, it may be worth looking at the obligations of signatories to these Conventions. In terms of article 8(1) of the first Convention the offences it lists "shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States." In other words, they automatically become part of the extradition treaty between Germany and the USA. In terms of article 10(1) of the Convention for the Suppression of Terrorist Bombings, State Parties "shall afford one another *the greatest measure of assistance* in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in article 2, including assistance in obtaining evidence at their disposal necessary for the proceedings" (emphasis added).

Binalshibh was very much involved with planning and co-ordinating details of the plot and was sure to have intimate knowledge on how much Motassadeq or Mzoudi knew about it. In barring him from giving evidence in Germany, the US authorities appear to have acted in breach of this Convention. This was not taken into consideration by the Court *a quo* and might have lead to a different outcome with regard to judging the merits of the case. Furthermore, this Convention stipulates in article 8(1) that a State Party in the territory of which the "alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, *without exception whatsoever* and whether or not the offence was committed in its territory, *to submit the case without undue delay to its competent authorities for the purpose of prosecution*, through proceedings in accordance with the laws of that State" (emphasis added). In other words, if Binalshib is not extradited to Germany as a witness and/or to stand trial there, the USA is obliged to grant him due process of law. This has not occurred. He has been in detention without trial since September 2002. The argument for refusing his extradition was "state security reasons." This is a catch-all argument, which is hard to refute, but it looks as if the refusal is based on political and not legal reasons.

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[58] Montreal 23.9.1971, 10 ILM (1971) 1151 – the USA ratified this Convention and it entered into force on 26.1.1973.

[59] New York15.12.1997 (another source states: 9.1.1998), 37 ILM (1998) 249. The USA ratified this Convention on 26.6.2002 and it entered into force on 26.7.2002.

III. The Attacks of September 11, Anti-Terror Warfare and "New Terrorism"

Harvard Professor Martha Minow has skilfully analysed the choices facing societies, which emerge from periods of mass violence. Her analysis covers a scale of possible ways in addressing mass violence that varies between the extreme parameters of forgiveness and vengeance.[60] A middle field of other options is also available, particularly within the more neutral area of law. If one applies this scale to the September 11 attacks, forgiveness is an unrealistic option for the many thousands of people who burnt to death or suffocated in the smoke of the WTC and the Pentagon. That the Bush administration reacted to the attacks with the metaphor of war can be understood, but it was not particularly clever from a long-term perspective of dealing effectively with international terrorism.[61] The hard line taken by Defence Secretary Rumsfeld in particular can only be explained by the fact that Al Qaida not only succeeded to plan the attacks under their noses without being discovered, but that they actually attacked the CIA's stronghold, the Pentagon.[62]

In order to justify a military attack, first in Afghanistan and then in Iraq, the US and the UK set out right from the start to collect information, documentation and proof to substantiate an "act of aggression" or the preparation of such an act of aggression. Until now important aspects giving rise to the postulation of such an aggression are still unclear. In significant respects, much of what was regarded as "proof" of an aggression has been exposed as false and simply mislead the US and UK populations and the public world-wide.[63] The global "anti-terror warfare" of the USA and its allies is not a war in the conventional sense, nor is sufficient evidence at hand to conclude that the September 11 attacks were "armed attacks" on the USA launched from Afghanistan. In terms of article 51 UN Charter, an attack in self-defence can only be justified if it is possible to attribute the attack to an international-law subject. A targeted state may also exercise its right of self-defence

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[60] MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS – FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998).

[61] Romano Prodi, President of the EU Commission, has been severely criticized by Americans for his view that the use of force is not the way to resolve a conflict with terrorists: *Bush: Wir lassen uns nicht einschüchtern*, report in FAZ 17 March 2004 at 8.

[62] According to Anne-Marie Slaughter, President of the American Society for International Law, a major deficit of anti-terror initiatives was that they often lack well orchestrated co-ordination and transparency. This has been illustrated well by the hearings before the US Congress: The CIA and FBI did not join forces effectively and information passed on by foreign secret services has been brushed over – *Cf.* FAZ 23 February 2004 at 8. *See* also note 10 *supra* with regard to data collected by the FBI preceding the attacks.

[63] *Cf. The Wielders of Mass Deception*, ECONOMIST 4 October 2003 at 13 f.

against a state harbouring a terrorist organisation that attacked the retaliating state, provided the host state was aware of such attacks being planned.[64]

The problem with al Qaida is twofold. First, because its network is spread over so many countries is difficult to prove in a concrete sense that an attack was launched from a specific country. Soon after the US launched its attack against Afghanistan, it came out that three of the students who were involved in the attacks were foreigners studying in Hamburg and that their assistants were from Saudi-Arabia. This illustrates the dilemma.

Secondly, as it has been set out above, newspaper reports stated that Binalshibh personally travelled to Afghanistan on 31 January 2001 to report to Bin Laden and that he was apparently informed about the targets selected for the attack but not the date of the attack. This information has not been proved before an independent court, since Binalshib could not give evidence. Even if this constellation of facts should be correct, this still does not per se create liability for the state of Afghanistan for the September 11 attacks. International law attribution of the attack requires that the Taliban regime should at least have known about the planning of the plot. This has not been proved either.

The concept of "terrorism" is difficult to define in law.[65] Al Qaida's crusade is based on the medieval concept of the jihad or "holy war" of times gone by, yet they stage their acts of terror using modern technology, combining efficiency, worldwide networks and relative low-budgeting.[66] "New terrorism," as it is called, therefore differs from older forms of terrorism in that it is internationally organised and inspired by religious fanaticism – violence for symbolic and not political reasons, which deliberately calculates on intensive media coverage. Much of this "war on terrorism" was therefore also fought in the form of psychological warfare.[67]

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[64] On attribution of and liability for international terrorism see JOACHIM WOLF, DIE HAFTUNG DER STAATEN FÜR PRIVATPERSONEN NACH VÖLKERRECHT, 428-454 (1997); and Noelle Quenivet, *The Attribution of Activities of Networks of Terrorists*, address delivered at the conference on "The Information Requirements for the Exercise of the Right to Self-Defence in International Law" organised by the Institute for International Law of Peace and Armed Conflict, 28-29 November 2003, The Haque (forthcoming).

[65] *But see* the excellent discussion of C. Walter, *Defining Terrorism in National and International Law*, *at* http//edoc.mpil.de/conference-on-terrorism/index.cfm.

[66] P. Bergen, note 52 *supra*.

[67] *See, e.g.* the War Manuals of the US on psychological warfare and how this was invoked – *available at* www.fortliberty.org/militarylibrary/information-warfare.shtml; also Joachim Wolf, *Media Sponsored Violence*, address delivered at the conference on "The Information Requirements for the Exercise of the Right to Self-Defence in International Law", organised by the Institute for International Law of Peace and Armed Conflict, 28-29 November 2003, The Haque (forthcoming) where he explores the consequences of the role played by the mass media in psychological warfare for international law.

The reasons for the radicalisation of Islamists are manifold and complex as has been pointed out by the terror expert, Walter Laqueur. The inability of many rulers of Muslim states to address urgent problems of poverty and democratic representation in the face of globalisation and a technological explosion certainly also play a role.[68] What should not be passed over too lightly though, is the fact that Al Qaida's crusade against Western nations, particularly the US, and Zionism also has deep-rooted historic foundations.[69] The unresolved Palestinian conflict explains the crusade against Zionism to an extent. Reasons for the anti-Americanism in particular should also be considered.

Excursus:

Why has Al Qaida turned to such extreme forms of setting things right? Bin Laden became radical after the Americans supported the Mudschaheddin in Pakistan to train guerrillas to fight the Russians in the first Afghanistan war from 1979 to 1989. President Bush Sr.'s administration made ample funds available, of course not directly, to the leaders of the Mudschaheddin – Azzam and Bin Laden in Peschawar, Pakistan.[70] When the war was over, the Americans dropped them not only financially, but they also crossed through their aspirations to create a Muslim state. Instead the US conveniently supported an all party transitional government under UN supervision and also put pressure on Saudi-Arabia to stop its financial support of the Mudschaheddin. Ten years of Bin Laden's life were wasted and he swore revenge for America's manipulative foreign policy. The volunteers that were fighting the war against the Russians on the side of Muslims, who have been listed in a

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[68] *Cf.* WALTER LAQUEUR, KRIEG DEM WESTEN, TERRORISMUS IM 21. JAHRHUNDERT (2003).

[69] *See* TARIQ ALI, FUNDAMENTALISMUS IM KAMPF UM DIE WELTORDNUNG – DIE KRISENHERDE UNSERER ZEIT UND IHRE HISTORISCHEN WURZELN (2002).

[70] The US provided them with weapons and logistics. Through a network of about 150 NGOs for development aid and taking care of political refugees, money was channelled from Saudi-Arabia, Kuweit and the US into backing the Mudschaheddin. They even founded and a university – Dawa al-Jihad (Assembly of the Holy War) – where volunteers for the war were trained in "engineering" (i.e. how to construct and assemble landmines and explosives). For more details, see Schröm 82 ff.; see also JEAN-CHARLES BRISARD & GUILLAUME DASQUIÉ, THE FORBIDDEN TRUTH: U.S.-TALIBAN SECRET OIL DIPLOMACY, SAUDI ARABIA AND THE FAILED SEARCH FOR BIN LADEN (2001) 23 ff, 31 f, 35, 41, 94-109 (cited as *Brisard*) where he discusses the US's financial inputs that furthered bin Laden, but first and foremost was the result of their own ambitions in that region. Brisard is a leading French intelligence expert and investigative journalist, who has presented well-researched evidence, contextualising the US energy-based foreign policy and the Bush administration's fighting of international terrorism. Much of the research is based on information presented by John O'Neill, formerly in charge of the FBI's counter-terrorism work who left the FBI in August 2001 because he was frustrated by the laxness of the current administration to award a high priority to fighting international terrorism. He became the chief of security for the WTC and died nine days later.

basis-register, became volunteers for another cause. Al Qaida is the short for "the basis."[71] This was the beginning of a series of terror attacks on American targets in various countries, e.g. in East Africa. The hypocrisy of America's backing specific alliances in Afghanistan, depending on their usefulness for America's energy-based foreign policy, seems to have played no insignificant role in turning what previously was a guerrilla group into a terror organisation with an extensive international network.[72]

The Clinton administration tried to negotiate the extradition of Bin Laden along diplomatic channels as a result of the attacks on the American embassies in Nairobi and Daressalam in August 1998 with the Taliban.[73] At the same time, the US attempted to stabilize Afghanistan so that US energy companies could construct oil and gas pipelines from the Caspian Sea across Turkmenistan and Afghanistan through Pakistan to serve the rapidly expanding market in South East Asia.[74] However, when the US Minister of Foreign Affairs, Albright criticised the Taliban for the brutal massacres in northern Afghanistan, both deals fell through.[75]

As soon as the new Bush administration took over, the Executive, which included numerous members from the oil industry,[76] immediately made work of getting America's energy-based foreign policy back on track.[77] After Afghanistan was se-

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[71] *Cf.* Schröm at 84-87.

[72] Schröm at 88-90 discusses Bin Laden's time in Sudan where he took up connections with other Muslim extremist groups in order for them to join forces.

[73] The Deputy Minister of Foreign Affairs, Talbott travelled personally to Islamabad on 1 February 1999 to meet with the Taliban as de facto regime and to hand over the US extradition order for Bin Laden.

[74] There are three possible routes for these pipelines: through Iran – an illusion; otherwise through Afghanistan and Pakistan; or through Iraq and Turkey. Iraq itself has enormous oil reserves (an estimated 250 billion barrel) – a fact that gains in dimension considering the feeble reasons presented to justify the Iraq war. *Cf. Der Treibstoff des Krieges*, DER SPIEGEL, 13 January 2003, 95 at 96.

[75] *See* Brisard at 43-48.

[76] The current US Vice-President was running Halliburn, the world's biggest the oil services firm. Condoleeza Rice, now the national security advisor, served as an oil-company consultant on Central Asia as member on the board of directors of Unocal. She also served as the principal expert on Kazakhstan for the oil Corporation Chevron that holds the largest concession of any of the international oil companies there. Commerce Secretary Donald Evans and Cathleen Cooper, Under Secretary of Commerce for Economic Affairs also have oil connections. See Brisard at 60 f.

[77] Four days after the Bush administration took over Vice-President Cheney called together an informal organisation, the Energy Policy Task Force. The lack of transparency of the Task Force's goals prompted the General Accounting Office of Congress to rebuke them for it. See *Something of a Secret Society*, WASHINGTON POST, 4 April 2001; also Brisard 60 ff.

cured in the course of the USA's "anti-terror warfare" and the Taliban regime was ousted, arrangements for the construction of the pipelines went forward at a rapid pace, with a final deal being signed within a year. The oil industry connections of Bush, Cheney and Rice[78] are well known, but little has been said in the media about the prominent role being played in recent Afghan policy by officials who advised the oil industry on Central Asia.[79] Neither has it been clarified to what extent the anti-terror campaign has been impeded by a conflict of interests of the US Executive. The business interests of members of the current US administration, including central figures taking decisions at the highest level with regard to the anti-terror campaign need not be of interest here, were it not for the fact that the Northern Alliance, that the US administration is currently backing, was instrumental in brutally herding together hundreds of men – mostly from the Taliban –. This took place in context of the armed conflict launched in self-defence after September 11. After interrogating these men, many were then transferred to Guatanamo Bay together with Al Qaida detainees and, as it seems, were denied prisoner of war status in terms of the Geneva Conventions because they were "terrorists."[80]

The reason for American support of or resistance to specific regimes in the Muslim and/or Arabic world has been pretty apparent over the years. Support for the Shah of Persia was exchanged for support of Saddam Hussein after the Iranian revolution in the hope that he would be a menace to the Ajatollahs and would further American interests. When Saddam was firmly in the cushions and became too troublesome a dictator, two wars were waged to get rid of him again. The lack of action elsewhere in the world where other dictators rule countries hardly containing any exploitable natural resources is all too obvious.

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[78] That Unocal, a division of Chevron, of which Condoleeza Rice was the CEO for years, was the company wanting to build the pipeline, casts a different light on the foreign policy of the current US administration. In CRUDE POLITICS: HOW BUSH'S OIL CRONIES HIJACKED THE WAR ON TERRORISM (2003), Paul Sperry presents alarming evidence that the Bush administration resumed talks with Pakistani officials over gas and oil pipelines in Afghanistan while the United States was still reeling from the horror of September 11. With regard to the Iraq war, see also *Treibstoff des Krieges*, DER SPIEGEL, 13 January 2003 at 94-108

[79] P. Martin, *Unocal Advisor Named Representative to Afghanistan*, Centre for Globalisation, *available at* http://www.globalresearch.ca/articles/MAR201B.html, report from 29 February 2002. For an overview of top members of the US administration's involvement in the pipeline, *see* http://www.cooperativeresearch.org/timeline.jsp?timeline=complete_911_timeline&theme=oil.

[80] *See* the reports of the Guatanamo Bay Britons that has been released, notes 94 and 101 *infra*. NAFEEZ AHMED, GEHEIMSACHE 09/11 – HINTERGRÜNDE ÜBER DEN 11. SEPTEMBER UND DIE LOGIK AMERIKANISCHER MACHTPOLITIK, 269 ff. (2003) analyses reports by *The Wall Steet Journal* to the effect that the Carlyle Group, in which both Bush Sr. and the Saudi-Arabian family of bin Laden are major shareholders, has made a profit of about 1,3 billion US $ from the recent war in Afghanistan.

IV. Anti-Terror Warfare and its Pitfalls

The indiscriminate bombing of targets in Afghanistan, the naïve pretext of weapons of mass destruction in order to invade Iraq, the detention of prisoners of war in Guantanamo Bay and the torture of Iraqi detainees at Abu Ghraib prison have not exactly increased trust in so-called "Western democratic systems." They probably harmed faith in the rule of law, constitutionalism and the rules of international law beyond repair.[81] The snowball effect of this, however, has much more far-reaching consequences.

First, if one of the parties in a conflict resorts to acts of terror, the target remains the citizens of the "enemy country."[82] And the more manipulable they are, the greater the dangers for a free democratic order. The Madrid bombing was said to be an act of revenge for Spain's support of the 2003 Iraq war. It seems as if it was the intention of Al Qaida to manipulate the outcome of elections with a timely act of terror. The attack took place three days before the general elections. It is not quite clear in how far the bombings actually influenced the outcome of the elections. Until then Aznar was the favourite to win. However, the outcome could also have been influenced by the fact that the government of Aznar wrongly blamed the ETA for the bombings.[83] Moreover, a year before the Madrid bombing Fernando Reinares, a renowned political scientist and terror expert already alerted the public about the possibility of such an attack. The Madrid bombing of 11 March 2004 was exactly two and a half years after the WTC attacks.[84]

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[81] According to a recent study done by the Pew Research Centre, the credibility of America has been severely damaged as a result of the 2003 Iraq war and the way in which America has chosen to fight international terrorism. In predominantly Muslim nations surveyed, anger towards the US remains pervasive and a majority doubt the sincerity of the war on terrorism. *Cf. A Year After Iraq War – Mistrust of America in Europe even higher, Muslim Anger Persists*, Report released by the Centre on 16 March 2004 in Washington, *available at* http://people-press.org/reports.

[82] According to the latest information, Al Qaida is logistically still able to launch similar attacks like the one of September 11. The International Institute for Strategic Studies in London revealed that the Iraq war mobilised many young Muslims for the jihad again. The Institute estimates that Al Qaida not only still have a well-functioning top commanding structure but also potentially again some 18.000 recruits – FAZ 26 May 2004 at 1.

[83] *Cf. Der erste große Schlag in Europa?* FAZ 16 March 2004 at 3; *Neue Qualität des Terrors*, FAZ 15 March 2004 at 1-3; *Richtungwechsel in Spanien, also Die Wahl nach dem Terror*, FAZ 16 March 2004 at 1; *Die Folgen*, FAZ 17 March 2004 at 1.

[84] FERNANDO REINARES, TERRORISMO GLOBAL/GLOBAL TERRORISM (2003). Apparently he also looked at the Arabic mystical numerical system to make projections regarding future terrorist attacks by Al Qaida. *See* the FAZ 22 April 2004 at 31 in this regard.

The nuances underlying the fundamentalist terror scenario are increasingly blurred even if the tactics don't change. So, for instance, the more moderate Shiites in Iraq became victims of a most brutal act of terror when bombs exploded at one of their holiest cites at Kerbela during the first Ashura celebrations in many years, commemorating the martyrdom of the Imam Hussein and his 70 followers who were killed by fundamentalist Sunnites in 680 A.D. The reason for even striking out at fellow Muslims has apparently been to clearly signal that compromises with other linguistic and religious groups in Iraq's deeply divided society in order to strike a compromise for peace and democracy will not be tolerated. The Shiite majority were about to sign an agreement the next day on the future constitutional agenda for Iraq, declaring themselves willing to accommodate Kurds with a degree of autonomy.[85] So far they have had less success in blackmailing the Shiite majority in Iraq to not participate in drafting and signing the agreement on a transitional constitution. The moderate Shiites did what they thought to be the right thing despite the bloodbath of Kerbela.[86] Before no disheartening sign that Iraqi refused that Americans could dictate who should have key positions after the transfer of autonomy.

Second, a war fought on such a shaky basis as the Iraq war has consequences for the standing of the US internationally. Of the three justifications presented for the Iraq war, the one of freeing the Iraqi people of a dictator and bringing them democracy at least sounded noble, even though international law does not justify such action. It certainly also had its effect in a psychological sense of convincing Americans that the armed conflict in Iraq was justified.[87] However, the arrogance with which the US tries to "export" democracy has not been well received.[88] In light thereof, it would be wise of Western nations to refrain from expecting states with a

[85] One of the main proponents of Al Qaida, Abu Musab al Zarqawi shortly before warned the Iraqi Shiites that they will take revenge if they co-operate with the Americans. More than 140 Shiites were killed and many wounded in the attack of 2 March 2004. *Cf.* FAZ 3 March 2004 at 1 and 3.

[86] *Provisorische Verfassung für den Iraq unterzeichnet*, FAZ 9 March 2004 at 1.

[87] According to a recent opinion poll done by the Pew Research Centre, Americans at that stage had a far different view of the war's impact than do people in the other surveyed countries. Generally, Americans thought the war helped in the fight against terrorism, illustrated the power of the U.S. military, and revealed America to be trustworthy and supportive of democracy around the world – *Cf. A Year After Iraq War – Mistrust of America in Europe even higher, Muslim Anger Persists*, Report released by the Centre on 16 March 2004 in Washington, available at http://people-press.org/reports.

[88] This has been the gist of recent study by the *Centre de l'Homme* in Libanon, done under the auspices of Theodor Hanf, Professor at the University of Freiburg, Germany (sponsored by Unesco and the Libanese government). Cf. *Demokratie aus Notwendigkeit – Recherchen zur politischen Kultur in der arabischen Welt*, NEUE ZÜRICHER ZEITUNG, 29 January 2004 at 35. *See also* the in-depth analysis of reform forces to establish an Islamic democracy in Iran – *Die iranische Halbdiktatur*, FAZ 25 February 2004 at 1.

predominant Arabic-Islamic culture to transform instantly into the kind of democracy which took centuries in the Western world. Many of these states have very diverse populations, and during decolonisation little heed was taken to consider linguistic and cultural differences when new states were created.[89] It has also been suggested that Western nations should not regard democracy in Islamic nations from the perspective of its usefulness, e.g. to fight terrorism.[90]

Thirdly, an old saying goes that violence/force incites more violence. Western democracies have long upheld the international ban on torture, and have publicly criticised other governments that violate it. The Bush administration has lambasted the Iraqi regime under Saddam Hussein for torturing its opponents and has issued reports about similar abuses in other countries. But in its efforts to defeat Al Qaida, the American government eventually also resorted to such methods. At first, the ticking-time bomb scenario that Luhmann once hypothetically raised to show the absurdity of a little bit of torture under controlled circumstances in an extreme case was misunderstood and taken all too seriously in a public discussion on how a democratic government can best fight an enemy like Al Qaida.[91] Then it was revealed that America actually *used* torture as a method for extracting information from detainees, not only in Guatanamo Bay, but also in Iraq and Afghanistan.[92]

The Guantanamo Bay prison camp at the US naval base in Cuba, which holds hundreds of men mostly taken into custody in Afghanistan following the September 11 attacks, has come under strong criticism from human rights groups worldwide for holding these prisoners without charge and denying them fair trials. It transpires that insufficient distinction was made between civilians, enemy combatants and

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[89] The legacy of Iraq is typical for the solutions the peacemakers came up with in the aftermath of World War I after the Ottoman Empire's disintegration when they vainly carved up the Ottoman Empire and the colonies of the losers. *Cf.* MARGARET MACMILLAN, PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD (2003).

[90] R. Hermann, *Nicht der Islam allein – auch andere Faktoren bestimmen das Verhältnis der Muslime zur Demokratie*, FAZ 29 April 2004 at 10, reporting on the first congress on Islamic democracy held in Istanbul and sponsored by the UN Development Programme and National Democratic Institute for International Affairs.

[91] Cf. *Is torture ever justified*? ECONOMIST, 11 January 2003 at 11; and R. Poscher, *Menschenwürde als Tabu*, FAZ 2 June 2004 at 8. Both articles vigorously argued that torture is an absolute no go area and that the human dignity of others, and especially prisoners of war, has to be respected.

[92] *Cf.* FAZ 3 May 2004 at 1 and 5; also *Ends, Means and* Barbarity, ECONOMIST 11 January 2003 at 20 ff. Detainees in Afghanistan already reported that the temperature in cells were raised to a tropical 38°C and then suddenly dropped to -12°C for so long until they broke down and "confessed", DER SPIEGEL 27 October 2003 at 135.

actual terrorists[93] when these men were rounded up in Afghanistan.[94] The decision to detain combatants caught in Afghanistan for an indefinite period, with no access to lawyers or legal redress, might have been understandable as a short term response to the threat of terrorism. However, it is unacceptable that the prisoners of war were denied their rights under international law. By arguing that these men are "illegal combatants" (terrorists) the Bush administration has used this argument as leverage to deny them prisoner of war status in terms of the Geneva Conventions. Yet none of the detainees has been brought before a "competent tribunal" to determine their prisoner of war status as it is required in terms of article 5 of the Third Geneva Convention. The US government refused to clarify their status, despite calls from the International Committee of the Red Cross and Amnesty International to do so continually from May 2003 on.[95] The US Courts have ruled that they have no jurisdiction over the detainees since the US naval base at Guantanamo Bay in Cuba is not "US territory". Consequently, the detainees are faced by a legal black hole – they cannot claim any rights as prisoners of war and also have no access to ordinary courts.

Wolfrum recently analysed the legal status of Iraqi prisoners of war in international law and pointed out that not only soldiers ("combatants"), but also civilians enjoy protection of the Geneva Conventions.[96] With regard to the detainees at Gautanamo Bay, members of the Taliban as soldiers of a de facto regime should be af-

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[93] *See* http://web.amnesty.org/pages/usa-190803-action-eng - BBC TV NEWSNIGHT, 5 June 2003. Sayed Abbasin, arrested for being a taxi driver in the wrong place at the wrong time, is now attempting to rebuild his life in Afghanistan after a year in US custody. His friend and fellow taxi driver, Wazir Mohammed, remains in Camp Delta, having been transferred there more than a year ago, in effect, apparently, for having sought information on Sayed Abbasin's whereabouts.

[94] The troops of the Nothern Alliance forced prisoners into lorry containers and locked them in, so that people started to suffocate. British Guatanamo Bay prisoners that have been set free in the mean time, described how only 20 of 300 prisoners in each container lived, and then only because someone made holes in its side with a machine gun – an action which killed even more prisoners. *Cf. Revealed: the full story of the Guantanamo Britons*, THE OBSERVER (Sunday) 14 March 2004 (http://observer.guardian.co.uk/uk_news/story/0,6903,1168976,00.html).

[95] Secretary of Defence Rumsfeld has rejected concern about the Guantanamo Bay prisoners as "based on the shrill hyperventilation of a few people who didn't know what they were talking about" – Interview with Sunday Times (UK). DEPARTMENT OF DEFENCE NEWS TRANSCRIPT, 21 March 2002. For more details, *see* http://web.amnesty.org/library/Index/ENGAMR511642003. Only after the disgusting Abu Ghraib torture pictures have been released and spread over the front pages of all Western newspapers in May 2004, the Pentagon finally started to investigate the matter after Congress prompted them to do so – *Cf.* FAZ 11 May 2004 at 2 and 3.

[96] See the full page analysis of the Director of the Max Planck Institute for International Law in the FAZ – R. Wolfrum, *Genfer Recht und Bagdader Realität*, FAZ 28 May 2004 at 8.

forded prisoner of war status as "enemy combatants".[97] Their physical integrity and human dignity must be respected at all times and they may not be questioned under duress.[98] The Bush administration, however, has argued that they are not "enemy combatants" but "illegal combatants", i.e. terrorists. Civilians who are detained because they are suspected to be terrorists enjoy the protection of the Fourth Geneva Convention. They also have a right that their person, integrity and religion are respected. They may not be subject to physical injury or to psychological duress.[99] The stance of the Bush administration that members of Al Qaida (so-called "illegal combatants") caught in Afghanistan during the war are not entitled to any protection under the Geneva Conventions, and as it seems, made the way free for torturing them, is controversial. Double standards were also applied with regard to the prisoners of war. Some American citizens captured in Afghanistan were allowed to stand trial in courts the normal way, but such rights were denied to "mere" foreigners, every single one of whom was labelled as a "dangerous terrorist" by Defence Secretary Rumsfeld, regardless of evidence. The US administration insisted on trying these men by secret military tribunals after they had been interrogated for months on end. Such tribunals have the power to hand down death sentences, and there would be no right of appeal to any court against the decisions handed down by these executive bodies.[100]

The culture that this represented, with all prisoners considered guilty until proven innocent, with dubious interrogation methods widely considered to be condoned, could well have had an influence on the attitudes and behaviour of lower ranks in the torture controversy. Legitimate prisoners of war and civilians have been held in conditions that amount to cruel, inhuman and degrading treatment.[101] The sex-

[97] Art. 4A No. 1 of the Third Geneva Convention. Militia have to be treated like ordinary soldiers, affording them prisoner of war status too (art. 4A No. 2).

[98] Arts. 14, 17 of the Third Geneva Convention.

[99] Arts. 27 and 31 of the Fourth Geneva Convention.

[100] *Cf.* http://web.amnesty.org/pages/guantanamobay-index-eng. Amnesty International has expressed concern about the tribunals that will lack independence and will restrict the right of defendants to choose their own counsel for an effective defence. The tribunals will also accept a lower standard of evidence than in ordinary courts. This could include evidence extracted under torture or coercion.

[101] *Cf.* http://web.amnesty.org/library/Index/ENGAMR511642003 for Amnesty International's Report. The first prisoners, transferred from Afghanistan on 20-hour flights in conditions of sensory deprivation and heavy use of restraints, arrived in Guantanamo Bay on 11 January 2002. A photograph released by the Pentagon at this time has become an icon of unacceptable US exceptionalism. It shows detainees in orange jumpsuits, kneeling before US soldiers, shackled, handcuffed, and wearing blacked-out goggles over their eyes and masks over their mouths and noses. The detainees face severe psychological distress and there have been numerous suicide attempts. The Guautanamo Britons that have been released after 26 months of interrogation because they were falsely identified by the Americans as having been pictured in a video tape of a meeting in Afghanistan between Bin Laden and Atta, reported that prisoners

ual humiliation of prisoners of war at the Abu Ghraib jail has been perceived to be particularly offensive by the Arab world, where Islam forbids homosexual acts and frowns on public nakedness.[102] By disregarding the human dignity of prisoners of war by brushing the Geneva Conventions aside,[103] the US has crossed a border of no return and has broken the absolute taboo with regard to torture that has been part of human rights law since the Magna Carta and which is forbidden by international conventions. America justified its rejection of the new International Criminal Court with the argument that its soldiers would be vulnerable to "unreasonable persecution," with "necessary military actions" defined as crimes.[104] The torture by American soldiers/military police puts the matter in a different light.[105] It is to be hoped that American Courts will address these violations of the Geneva Conventions properly.

Just how futile military force is as a paradigm to restrain terrorism has clearly been illustrated by the execution of the American civilian, Nick Berg, by al Qaida in Iraq. This was the answer to the torture and degrading of Iraqi prisoners of war. What is even more disheartening, though, is that Al Qaida was willing to exchange him for some of these "prisoners of war" but the Americans decided to stand firm and "not to negotiate with terrorists." This shows again that force/violence is not able to break through the continuing cycles of violence on both sides. It also unmasks the real motivation of both al Qaida's crusade and the Bush administration's "anti-terror war": vengeance.[106]

The key witness, Binalshibh that the US authorities refused to make available to German Courts is probably either held as an "illegal combatant" at the Guan-

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are held in tiny cells in solitary confinement 24-hours a day, with a military police officer permanently stationed outside each cell door at the secret super-maximum security facility outside the main part of Guantanamo's Camp Delta known as Camp Echo. Military officials have confirmed that they may be interrogated for up to 15 hours a day and that sleep deprivation was not uncommon. Some detainees were interrogated 200 times.

[102] For a detailed report see e.g. *Crime and Punishment*, ECONOMIST 8 May 2004 at 41 f.

[103] *Wolfowitz gesteht Verstöße gegen die Genfer Konvention ein*, FAZ 15 May 2004 at 1.

[104] *Cf. Resign Rumsfeld – Responsibility for Errors and Indiscipline needs to be taken at the Top*, ECONOMIST 8 May 2004 at 11.

[105] Even so, this is more of a psychological argument. In terms of article 17 of the Rome Statute of the International Criminal Court and the principle of subsidiarity, such cases should be investigated and prosecuted by a State, which has jurisdiction over it. The ICC only tries cases where a State is unwilling or genuinely unable to carry out the investigation or prosecution. *Cf. Rome Statute*, adopted 17 July 1998, 37 I.L.M. 999 (1998).

[106] *Amerikas Selbstanklage*, DIE ZEIT 13 May 2004 at 1.

tanamo Bay prison camp or at Diego Garcia – an island in the Indian Ocean that the US leases from Britain, putting it beyond the reach of American courts – or he is detained in the US under the terms of the Patriot Act. Nobody knows. When this notorious Act was passed, the "Economist" ran a telling article on it.[107] It had a picture of Nelson Mandela as a young man before he was sentenced for life. The gist of the article was that Nelson Mandela could at least have reckoned with a fair trial according to the principles of due process and that he had access to a lawyer, however bad the laws were in terms of which he was convicted. Accused who are detained under the American Patriot Act, do not even have this advantage.

As of 20 April 2004, the US Supreme Court agreed to hear three applications to decide whether this "wartime" legal strategy devised by the Bush administration went too far in restricting civil liberties.[108] The cases coming before the court involve two types of captives in the "war on terrorism," viz. foreigners who were caught on a foreign battlefield and who have been held for more than two years at Guantanamo Bay without being charged, and two US citizens who are being confined indefinitely in Charleston, South Carolina.[109] Various amicus curiae presented legal argument to the Supreme Court that "illegal combatants" should also have access to the oldest human rights guarantee in the Anglo-Saxon World – the *habeas corpus*.[110] As part of the first category, i.e. foreigners detained at the US naval base in Cuba, the Supreme Court *inter alia* heard argument presented on behalf of British citizens that were detained as "illegal combatants." They have been released in the mean time. To support their case, a petition to the US Supreme Court was drafted and signed by 200 members of the British Parliament in which they appealed to the Court to guard the rule of law against executive curtailment thereof. In a public address in London, Lord Steyn, a Law Lord and one of the most senior judges of the highest UK Court, openly criticized the US administration's disregard for the rule of law.[111] A similar case has been brought before the Court on behalf of 12

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[107] *Heading in the wrong direction*, ECONOMIST 8 March 2003 at 14.

[108] *Nur die Sonne war Zeuge*, FAZ 20 April 2004 at 33.

[109] The lawyer for *Padilla*, who has been detained in terms of the Patriot Act for over two years, has finally succeeded to lodge a *habeas corpus* petition before the Supreme Court on behalf of his client – see *Rumsfeld v Padilla,* details *available at* www.supremecourtus.gov (docket no. 03-1027). See also *Hamdi v. Rumsfeld*, *available at* www.supremecourtus.gov (docket no. 03-6696).

[110] *See* the brief synopsis by L Greenhouse, *The Imperial Presidency and the Constraints of the Law*, NEW YORK TIMES 18 April 2004 (www.nytimes.com/2004/04/18/weekinreview).

[111] Lord Steyn described the military tribunal for trying the detainees as a "kangaroo court". The term, he said, implied "a pre-ordained arbitrary rush to judgment by an irregular tribunal which makes a mockery of justice". Cf. *Law lord castigates US justice - Guantanamo Bay detainees facing trial by 'kangaroo court'*, report by Clare Dyer, legal correspondent, THE GUARDIAN 26 November 2003.

Kuwait citizens and 2 Australians that were also captured by the Americans in Afghanistan and then detained in Guantanamo Bay.[112] The cases do not involve the controversies over the military tribunals that are being devised to try foreign terrorism suspects or the Patriot Act, though.

In the mean time, the Supreme Court delivered its verdict. The Court held that the Bush administration illegitimately precluded Guatanomo Bay prisoners from access to the Courts. "Times of war" are no carte blanche for unrestrained powers of the Executive. Furthermore, the Court rejected the legal argument of the Bush administration that American Courts have no jurisdiction with regard to the prisoners held in Cuba. Decisive for determining jurisdiction is not that the naval base of Gautanoma lies in Cuba, but that the US has "exclusive jurisdiction" there since it is under its "exclusive control". Therefore, the prisoners should be awarded access to American Federal Courts. Furthermore, the Court also did not accept the allegation that all prisoners are "illegal combatants". The Court did not clarify whether these prisoners are also entitled to have access to legal representation or to contact their families. Rules of procedure have also not been addressed, although the Court indicated that in "wartime" it might be expedient to modify rules of procedure with regard to hearings of illegal combatants, especially as US is still "at war". The Court expressed the opinion that it would be in line with the Constitution to require that such prisoners, who are suspected terrorists, should refute allegations made by the administration, which should at least be supported by hearsay evidence. The Court concluded that a military tribunal would also suffice to deal with the matters, provided that the legal proceedings have a proper legal basis.[113]

In the matter of *Hamdi v. Rumsfeld* the Court was petitioned to decide whether the military can keep a United States citizen, who was seized overseas during military operations, in indefinite custody without the ability to challenge his designation as an enemy combatant in a federal court. The Court ruled that Hamdi is entitled to access to Federal Courts. The Court held that the Patriot Act allows the administration to detain suspected terrorists indefinitely but did not deny them access to the Courts. The Court rejected the argument that the national security would be endangered if such prisoners would be allowed to file law suits.[114]

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[112] *Rasul v. Bush* and *Al Odah v. United States*: The cases deal with whether federal courts have jurisdiction over the detention of non-citizens held at the naval base at Guantanamo Bay, Cuba. *Cf.* www.supremecourtus.gov (docket no. 03-334 and 03-343).

[113] *Häftlinge in Gautanamo dürfen vor Gerichten klagen*, FAZ 29 June 2004 at 1; *Anwälte und Opposition begrüßen Gautanamo-Urteil*, FAZ 30 June 2004 at 1 and 2.

[114] *See*, note 109 *supra; also* FAZ 29 June 2004 at 1.

That the US Congress launched an extensive inquiry into the events surrounding the September 11 attacks and the Executive's handling of the anti-terror campaign is a good sign. That they passed the Patriot Act with the sweeping powers it conferred on the Executive does not absolve them from all blame. A characteristic of most, though not all recent international crises is that they are simply not amenable to straightforward military solutions and also not by making inroads regarding the rule of law. The President of the American Society for International Law, Anne-Marie Slaughter, underscored this view and stated that the Bush Administration probably would have been able to counter terrorism more effectively had it resort to political co-operation instead of military force.[115]

E. Conclusionary Remarks

The matter is more dramatic for the standing of the US than meets the eye. Serious doubt arises as to whether the US can be regarded as a champion of the rule of law. This doubt will last as long as the Patriot Act is still in force and the power of the Executive is not curtailed with regard to lawlessly detaining foreign citizens and refusing them legal protection under the Geneva Conventions.

The international conventions on combating terrorism to which America is a signatory, requires that a State Party in the territory of which an alleged offender is present shall, if it does not extradite that person, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.[116] Binalshib has not been put on trial in the US after he was extradited to them by Pakistan for these purposes. Even if the US would put Binalshibh on trial, this ought to be well considered for it can well be that many people – especially those in predominantly Arabic-Muslim states – will regard such legal proceedings to be a farce in the face of justice. It can estrange many more moderate Muslims. The more elegant solution would therefore be to extradite Binalshibh to Germany for the retrial of Motassadeq and/or to stand trial for plotting the September 11 attacks. German courts have not only proved their independence but also their impartiality in balancing valid security interests of the state with the rights of an accused to due process of law. This may offer a way out of a deadlock and restore faith in the rule of law and constitutionalism.

[115] *Staatliche Netzwerke bilden*, FAZ 23 February 2004 at 8.

[116] *See* the discussion under D II.

Postscript

The lessons to be learnt from history are quite worthwhile at times. In 866 Pope Nicolas I urged the newly converted Bulgarians to refrain from torture in trying to convert others to Christianity.[117] In 1228 Frederick II, Emperor of the Holy Roman Empire undertook a crusade to the Holy Land as he vowed to do at his coronation. After having post-postponed it a number of times and then being excommunicated, he finally set off on this mission. His loyal Saracen bodyguard accompanied him and through complex negotiations, he obtained Jerusalem, Bethlehem and Nazareth from the Sultan al-Kåmal of Egypt. It was certainly the impact of Frederick's personality on the Arabic world, and not might, that made this treaty possible.[118] Only the Spanish Inquisition turned the cards around again – with appalling results.

[117] *Verdammenswert und gottlos – Beunruhigende Fragen: Kardinäle nehmen Stellung zur Folter*, FAZ 28 May 2004 at 12.

[118] EBERHARD HORST, FRIEDRICH DER STAUFER (1976).

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