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Terrorists on Trial: A Performative Perspective

On 30 March 2011, ICCT – The Hague organised an Expert Meeting entitled ‘Terrorism Trials as Theatre: A Performative Perspective’. The Expert Meeting applied a performative perspective to three well known and recent trials in different parts of the world: the trials against the Dutch Hofstad Group, the Mumbai 2008 Terrorist Attack Trial and the Guantanamo Military Tribunals. As such, the Expert Meeting did not concentrate solely on the immediate judicial performance of the magistrates and/or the defence; instead, the trials were put in their wider sociological context, adopting notions of social drama and communication sciences. This Expert Meeting Paper is a further adaptation of the Discussion Paper that was used as basis for debate during the Meeting.

Introduction

On May 8, *Washington Post*-journalist Jeff Greenfeld drew up a vivid picture of what would have happened had operation Geronimo resulted in capturing Osama bin Laden alive. After the initial applause, the victory soon would have turned sour. Putting bin Laden on trial for mass murder in a New York federal court – putting aside the fact that it is very unlikely that Congress would allow this in the first place – would have provided major headaches:

‘What if information about his location had been obtained through “enhanced interrogation techniques” and was ruled inadmissible? What if bin Laden acted as his own lawyer, turning the trial into a months long denunciation of America? What if one holdout resulted in a hung jury? [...] A military commission at Guantanamo Bay, then? The process was agonizingly slow (only five cases concluded in nine years), and a death sentence for bin Laden would mean years of appeals.’¹

Moreover, legal questions would be ‘nothing next to the security consequences of taken bin Laden alive’. What if any terrorist organisation worldwide would seize an elementary school, threatening to kill all children unless bin Laden would be released?

Utilising criminal law and ultimately making use of civilian courts to try, sentence, and lock terrorists away, is not an undisputed approach within counter-terrorism. We do not need alternative history to prove this point. Former Vice President Dick Cheney voiced strong opposition against organising civilian terrorism trials in the United States (US). In a reaction to Attorney General Eric Holder’s decision to prosecute Khalid Sheikh Mohammed (KSM) before a civilian court in 2009, he lamented: ‘I can’t for the life of me figure out what Holder’s intent here is in having Khalid Sheikh Mohammed tried in civilian court other than to have some kind of show trial’.² Cheney objected to this decision, arguing that giving KSM and the other suspected terrorists a civilian trial in New York would be a major security failure and strategic disaster: ‘they’ll simply use it as a platform to argue

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¹ Jeff Greenfield, ‘What if we’d taken him alive?’, *Washington Post*, 8 May 2011.

² Andrew Ramonas, ‘Cheney Says Holder Wants “Show Trials” for KSM’, 23 November 2009, available at: <http://www.mainjustice.com/2009/11/23/cheney-says-holder-wants-show-trial-for-ksm>. Quoted in: Awol Kassim Allo, ‘The ‘Show’ in the ‘Show Trial’. Contextualizing the Politicization of the Courtroom’, in: *Barry Law Review*, Vol. 15, Fall 2010, pp. 41-72, here: 44.



their cases – they don't have a defence to speak of – it'll be a place for them to stand up and spread the terrible ideology that they adhere to'.³

Indeed, even with legality intact, terrorism trials are highly likely to turn into a show, a spectacle. This insight was corroborated with the outcome of the first trial against a Guantanamo 'ghost prisoner', Ahmed Khalfan Ghailani, which sparked off a heated political debate. The defendant was convicted in the federal court in Manhattan for his role in the 1998 embassy bombings in Kenya and Tanzania, which earned him a 20-years' sentence. Republican critics objected the fact that the jury acquitted Ghailani on all other charges, 280 in total, including every murder count. This in turn was used as proof that terrorism detainees should solely be prosecuted before a military commission.⁴ Not the final verdict as such, but the use of civilian courts in combating terrorism became heavily contested.

Notwithstanding this criticism, terrorism trials are an exceptional opportunity for understanding and countering terrorism, since it is the only place where all actors involved meet: terrorists, state's representatives, the judiciary, the audience, surviving victims, terrorist's sympathisers, etc. The media will moreover report and broadcast their performance. As a nexus of terrorism violence, law enforcement and public opinion, terrorism trials thus offer an ideal opportunity to showcase justice in progress and demonstrate how terrorist suspects are dealt with by the laws of the land. However, governments and security officials more often than not are reluctant to put terrorist suspects before civilian courts. This reluctance can be explained by considering terrorism trials as a type of theatre, where the show develops its own unforeseeable and autonomous dynamics, out of control for the executive power. Terrorism trials almost inevitably produce political disputes. The whole crime of terrorism is a political concept and an essentially contested one as well.⁵ Terrorism trials essentially deal with suspects that challenge the existing rule – or are at least perceived as posing a political threat. Government's unease pertains to the fact that it has to hand over control over this threat to the judiciary, with its own criteria in dealing with offences rather than purely looking at it as a security threat. Governments also face national and international public opinion,

which might turn the trial into a media circus with its own uncontrollable dynamics, probably even causing new security risks.

This paper will examine the way in which a terrorism trial in modern day democracies – where the state's monopoly of violence is limited by an established set of rules and criminal law procedures and controlled through parliamentary oversight and mass media coverage – serves multiple ends, depending on the various actors involved, who are all busy trying to mobilise their respective target audiences around their narratives and (in)justice frames. A *performative perspective* on terrorism trials is introduced, meaning that trials are the stage where the different actors adopt and act out strategies with the aim of convincing their target audience(s) in and outside the courtroom of their narrative of (in)justice.

In the words of the president of the Special Tribunal for Lebanon Antonio Cassese, terrorism has a profound negative impact on the national and international community because it subverts both national law and the international rules of the game. Not only do terrorists create havoc, kill and slaughter people whom they are not legally at war with; terrorism also disturbs social and international peace as it provokes states to commit breaches of their own legal standards, to breach treaties and violate the law itself in reaction to the initial terrorist attack or threat.⁶ Democratic states have a lot to lose in the battle against terrorism; the rule of law, legitimacy and justice are not the most insignificant casualties. To protect these 'victims', to effectuate a better understanding and a better use of legal tools in the battle against terrorism, closer attention needs to be paid to the judicial and social-political mechanism and effects of terrorism trials, especially with regard to their performativity, which may create new legends of justice and/or injustice.⁷

Research into the character and impact of political trials in contemporary history has matured over the last decades, but research into terrorism trials as a political and/or show trial is rather new. Awol Kassim Allo did groundwork in analysing the show element in political trials.⁸ This paper aims to gauge the performative element in *terrorism trials* in particular. Three principal questions will be addressed: Why are governments often at unease

³ Ibid.

⁴ Charlie Savage, 'Ghailani Verdict Reignites Debate Over the Proper Court for Terrorism Trials', *New York Times*, 18 November 2010.

⁵ William E. Conolly, *The terms of political discourse* (Princeton University Press, 1993 [3rd edition]), p. 10; See also Alex Schmid, 'Terrorism. The definitional problem', in: *Journal of International Law*, Vol. 36 (2004), No. 1, pp. 375-420.

⁶ Antonio Cassese, *Terrorism, Politics and Law. The Achille Lauro Affair* (Princeton: Princeton University Press, 1989), pp. 139-140.

⁷ For a theoretical and historical analysis of this concept see: Beatrix de Graaf, *Evaluating Counterterrorism Performance. A Comparative Study* (London/New York: Routledge, 2011).

⁸ Awol Kassim Allo, 'The 'Show' in the 'Show Trial'. Contextualizing the Politicization of the Courtroom', in: *Barry Law Review*, Vol. 15, Fall 2010, pp. 41-72.



with putting terrorists on trial? What does the 'show' element in terrorism trials mean? What kind of performative strategies are adopted in court, to what end and with what result? A typology of the show element in terrorism trials is developed, to gain a better insight into how terrorism trials matter socially and politically, apart from the legal questions raised. This paper is not intended as a contribution to legal theory, but written as a historic-political perspective on the phenomenon of terrorism trials in modern day democracies.

Why the Unease?

In the US, after President Barack Obama emphasised his preference for trials in federal civilian courts and promised to close down the Guantanamo military tribunals in 2009, congressional interference caused the president to retreat from this decision. Early March 2011, the White House announced that it will resume military trials for detainees at Guantanamo Bay, Cuba. 'I strongly believe that the American system of justice is a key part of our arsenal in the war against al-Qaida and its affiliates, and we will continue to draw on all aspects of our justice system – including (federal) courts – to ensure that our security and our values are strengthened,' Obama stated.⁹ Yet, congressional concern relating to the security risks involved in these terrorism trials, given that detainees will have to be transferred to and tried in the 'homeland', prevailed.¹⁰ Cheney's objection to such trials has already been mentioned above. In the *Wall Street Journal*, columnist James Taranto also invoked the association of a 'show trial', although he was more nuanced: 'These trials will differ from an ordinary show trial in that the process will be fair even though the verdict is predetermined.' However, even if it would be a fair trial with just proceedings, it would nevertheless contain an element of show: 'The answer seems to be that the administration is conducting a limited number of civilian trials of high-profile terrorists for show, so as to win "credibility" with the international left.'¹¹

Taranto hit the spot: even with legality intact, terrorism trials are highly likely to turn into a show, a spectacle, because the prosecution and/or the defendants will adopt performative strategies.

As indicated above, the outcome of the first trial against Guantanamo 'ghost prisoner' Ahmed Khalifan Ghailani sparked off a similar debate. Not the final verdict as such, but the use of civilian courts in combating terrorism became heavily contested. The opposition argued that terrorists should never be given civilian trials, but should be treated and detained as military prisoners. The administration, on the contrary, claimed that the system had shown that a terrorist could be convicted even after a judge excluded evidence tainted by coercive interrogations during the Bush administration and by acquitting the defendant from numerous other charges. The sentence meted out – 20 years – was probably even stiffer than a military court could have given.

In response to this case, Jack Goldsmith, a high ranking Justice Department official during the Bush administration, argued that the verdict showed that terrorism suspects should be held without any trial at all, not even a military one. Indefinite military detention, he said, 'is a tradition-sanctioned, Congressionally authorised, court-blessed, resource-saving, security-preserving, easier-than-trial option for long-term terrorist incapacitation. And this morning it looks more appealing than ever'.¹² Since the attacks of 9/11, this new line of thinking became dominant amongst executives and was reinvigorated after every new attack and through military campaigns in Afghanistan and Iraq.¹³

This tendency to resort to other measures rather than criminal law is not solely reserved for US officials. In the Netherlands, for instance, the government also arranged for other measures in dealing with terrorism than through criminal law alone. Dutch government officials may pick and choose whether they apply intelligence measures (observation, hindering), immigration law, control orders and other administrative law instruments (or a combination thereof), before deciding if a criminal investigation should be pursued.¹⁴

The explanation for this unease regarding civilian terrorism trials is twofold. First of all, one has to consider the element of risk in relation to the outcome of the trial. From the executive's

⁹ 'New Military Trials at Guantanamo Bay Could Include 9/11 Suspects', *Fox News*, 8 March 2011; 'Obama billigt neue Militärverfahren in Guantánamo', *dpa*, 16 March 2011.

¹⁰ *Ibid.*

¹¹ James Taranto, 'Obama's Show Trials', *The Wall Street Journal*, 13 November 2009, available at: <http://online.wsj.com/article/SB10001424052748703683804574533833220552624.html>.

¹² Charlie Savage, 'Ghailani Verdict Reignites Debate Over the Proper Court for Terrorism Trials', *New York Times*, 18 November 2010.

¹³ Committee on the Evaluation of Counterterrorism Policy (Suyver Committee), *Naar een integrale evaluatie van antiterrorisme maatregelen [Towards an Integrated Evaluation of Counterterrorism Policies]*. Report no. IBIS-13174. (The Hague: Dutch Government, May 2009), pp. 16-23.

¹⁴ Dutch Government, *Antiterrorisme Maatregelen in Nederland in het Eerste Decennium de 21e Eeuw [Counterterrorism Measures in the Netherlands in the First Decade of the 21st Century]*. Report no. 04126-6359. (The Hague: Dutch Government, January 2011), pp. 87/91.



perspective – often dominated by national security considerations – adjudication is a risky business. Terrorist suspects can be acquitted, sometimes not because they are innocent, but because certain crucial evidence is deemed inadmissible, as was the case in the Ghailani trial. This risk cannot be excluded, at least not at the cost of turning the trial into a huge farce for the government. This element of uncertainty runs against the grain of the principal goal of counter-terrorism actors: eliminating the terrorist threat. Thus, the executive's rationale behind an *a la carte* treatment of terrorists lies not in contempt for criminal law, but in the priority given to other (legal) obligations, such as protecting the right to life and security of the citizens. This weighing of rights is known as the balance or proportionality response thesis; notable politicians and scholars such as Michael Ignatieff assume that in order to protect security, public interest must be weighed against human rights. If this means that the rights of terror suspects are suspended or restricted, then this is an unfortunate side-effect of protecting national security.¹⁵ Critics such as the 2009 Eminent Jurists Panel in its report on Terrorism, Counter-terrorism and Human Rights, however contend that this suspension of terrorists' rights normalises the state of exception – thus one-dimensionally enhancing executive competence – and pleaded for reasserting the value of the criminal justice system, especially in the case of citizens.¹⁶

A second explanation for a government's difficulty with relying on criminal law in dealing with terrorists, is the fact that prosecution of terrorist tends to end in court and may turn into a 'political show'. The main functions of criminal law are exerting social control, settling disputes and confirming society's norms.¹⁷ Counter-terrorism verdicts, however, do not necessarily reflect such an impartial truth, nor do they affirm society's shared values. Many terror suspects stem from minority groups that oppose an oppressive government and fight exclusion; they surely will not perceive criminal law or its implementation by the judiciary as neutral or legitimate at all. Their (perception of) truth cannot simply be 'tried away'. Take for example the trial against Nelson Mandela.

During the Apartheid regime in South-Africa, Nelson Mandela, who publicly supported violent political struggle, was labelled a terrorist partly due to his conviction in 1964 for conspiracy. Although the trial ended in a legal victory for the prosecution, it brought political disaster to the regime. This is exactly what governments fear: Although criminal law might serve immediate political ends (detaining political opponents by sentencing them as terrorists), the intermediate and long term political effects can be unforeseeable and potentially devastating. This way, the element of risk once again enters the courtroom. The trial against Mandela became a show of injustice; its reverberations undermined the political credibility and legitimacy of the Apartheid regime.¹⁸

The recent events ending in the killing of Osama bin Laden underscore the salience of these two points. Indeed, governments are in most cases at unease with staging major terrorism trials, both because of the security risks and the show element involved. At the same time, this show element is sometimes consciously used by the prosecuting authorities themselves as an opportunity for staging a performance of rule of law, of retribution, of demonstrating to the world what justice means and how it is performed. Under the right conditions of legality and the right performative strategies, terrorism trials (like any other trial) can result in a triumph of justice. The next paragraphs will discuss how the actors involved in a trial might adopt performative strategies, aimed at convincing the audience(s) of their story of (in)justice and thereby achieving their end. But first, it is necessary to explore what the show element in terrorism trials entails and how this element relates to the concept of 'show trials', a category loaded with heavy historical associations.

A Brief Excursion to the 'Show Element' in Criminal Trials

Law is broader than a mere summary of legal norms and principles; it incorporates amongst other things social norms, values, power relations and social processes. Moreover, by applying law, one sets in motion a communicative process. 'Law cannot any more be correctly understood within a paradigm of one-dimensional rationality. [...] The dramatic rise of complexity, both of law and of society, has made such a scheme obsolete',

¹⁵ Ignatieff, M. *The Lesser Evil: Political ethics in an age of terror* (Princeton, Princeton University Press, 2004), p. 46; Cf. also Asworth, Andrew, 'Security, Terrorism and the Value of Human Rights' in: Goold, B.J. and Lazarus, L. (Eds). *Security and Human Rights* (Hart Publishing, Oxford and Portland, Oregon, 2007), pp. 207-209/224.

¹⁶ ICJ, *Assessing Damage, Urging Action*, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, (International Commission of Jurists, Geneva, 2009), pp.156-157/165-167.

¹⁷ Vago, S. *Law & Society*. London: Inc., Upper Saddle River, New Jersey, Pearson Education. 2009, p. 19-21.

¹⁸ Linder, O.D. 'The Nelson Mandela (Rivonia) Trial: An account', website <http://law2.umkc.edu/faculty/projects/ftrials/mandela/mandelaaccount.html> (accessed 18 March 2011).



according to legal scholar Mark Van Hoecke.¹⁹ Legal theorists of the twentieth century held that facts and norms could be separated, but this positivist view of the law has been under attack from all sides now.²⁰ Modern times with its modern, multi-layered, complex and vulnerable societies have made apparent the weak points of a pure positivist approach to the law.²¹ Law is not (solely) about sifting facts from opinions or about establishing objective truth, but about social control, communication and perception of social norms. Trials are the instances in which law can be seen in action by the broader public. Trials communicate that law is not just in the books but is implemented in practice. From a narrow perspective, courts interpret and apply legal rules. Yet by doing so, they contribute to concepts of justice and socialisation of the general public and by enforcing the law they are linked to the state's legitimacy as well as the elaboration of policy goals.²² Trials thus communicate publically and ceremonially to society what it wants its norms and principles to be.²³

The law in action *is* a communicative process, but at the same time also *offers* a framework to interpret human actions and communication. Trials are the medium through which this communication takes place: 'communication between legislators and citizens, between courts and litigants, between the legislator and the judiciary, communication between contracting parties, communication within a trial'.²⁴ More importantly, exactly this communicational aspect, within the confines of the court and amongst the legal actors involved, serves as the 'ultimate safeguard for a "correct" interpretation and adjudication of the law', and thus legitimises it.²⁵

Since this communicational process is the principal foundation underlying the legitimacy of the justice applied, a trial is heavily protected against political interference and manipulation. A fair trial is a basic human right, not only protected by criminal law, but also by international and constitutional law. The principle of fair trial is recognised in numerous international treaties, such as the Universal Declaration of Human Rights (Article 10 UDHR), the

International Covenant on Civil and Political Rights (Article 14 ICCPR) and European Convention on Human Rights (Article 6 ECHR). Among others, the fair trial principle ensures the right of an individual to be informed of the measures taken, to be informed about the case against him or her, the right to be heard within a reasonable amount of time, the right to a fair and public hearing by a competent and independent review mechanism, the right to counsel with respect to all proceedings and the right to have his or her conviction and sentence reviewed by a higher tribunal according to the law. International law does recognise adaptations in criminal justice for reasons of national security.²⁶ However, deviations from the ordinary practice of adjudication must always be temporary and meet legality, necessity and proportionality standards.²⁷ The right to a fair trial ensures individuals both protection against each other – trespassers should be brought to justice and should receive a trial – and against the state, since the trial should also be fair. In short, citizens require protection against both state and non-state actors.²⁸

The relevance of this normative framework that guards the right to a fair trial can only be understood against the context of its mirror image: the historical reminiscence of the Stalinist (and to a lesser extent national-socialist) show trials that are considered the exact opposite of fair trials. 'Show trials' and 'political trials' are often mixed up in public discourse. The overriding characteristic of a classical show trial in the Stalinist sense is 1) the total exclusion of the element of chance and/or risk from the trial and 2) the predominant function of the trial as a tool in educating the population and confirming ideological rule. Sometimes, trials are not strictly Stalinist, in the sense that they do not primarily serve to demonstrate, invoke, create and confirm totalitarian rule. However, we do call them *political* as soon as the executive powers use criminal law predominantly to further their political agenda. Otto Kirchheimer's *Political Justice* defines political trials as attempts by regimes to control opponents by using legal procedure for political ends.²⁹ The authorities deploy criminal law to maintain the balance of power; they eliminate

¹⁹ Mark van Hoecke, *Law as Communication* (Oxford/Portland Oregon: Hart Publishing, 2002), p. 10.

²⁰ *Ibid.*, p. 8.

²¹ *Ibid.*, p. 10.

²² H. Bredemeier quoted in Cotterrell, R., *The Sociology of Law: An Introduction*, London: Butterworths, 1992, p. 89-92.

²³ Edward A. Ross quoted in Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition*, Cambridge, Cambridge University Press, p. 102.

²⁴ Van Hoecke, *Law as Communication*, p. 7.

²⁵ *Ibid.*

²⁶ See for example Article 6 ECHR.

²⁷ OHCHR (Office of the High Commissioner for Human Rights) (2008), *Human Rights, Terrorism and Counter-Terrorism*. Factsheet No.32, GE.08-41872, July 2008, Geneva/ New York: Office of the United Nations High Commissioner for Human Rights/ United Nations, pp.28-29.

²⁸ Turner, B.S., 'Outline on a Theory of Human Rights', *Sociology*, Vol.27. No.3, 1993, pp. 489-512.

²⁹ Otto Kirchheimer, *Political justice. The Use of Legal Procedure for Political Ends* (Princeton University Press: Princeton, 1961).



political opponents by reducing their oppositional voice to a legal/illegal dichotomy. Here, justice only serves political powers, not its own ends.

However, this type of state-controlled show trial, is not the association that was invoked by the American comments on the Ghailani case; the show element in the trial they referred to was the danger that the terrorists suspects would dominate the courtroom with their narratives of injustice, thereby turning the trial into a ‘terrorist show’ once again – the first time being the attack they perpetrated. Additionally, there is even a third type of show imaginable: a show in which the authorities demonstrate, through the way in which sentences are meted out, that modern democracies are fully capable of demonstrating a show of justice in a positive sense. The Nuremberg trials may be regarded as a modern model for how a trial can be a performance of justice, since these trials revealed the evil of the holocaust, established a historical narrative that exists today and is accepted by the public and the world; they created a collective memory, fixed responsibility in Germany and set standards for future conduct of states and people. Indeed, the Nuremberg trial was *the* example of a convincing performance by democratic societies in using criminal law – rather than war or brutal force – to deal with war criminals and terrorists. Hence, the concept of show trial could refer to totally different types of politicised trials, normatively charged in completely different ways. In the words of legal scholar Awol Kassim Allo, ‘[w]hat counts is not that a trial is labelled a ‘show trial’, it is, rather the end that the ‘show’ serves.³⁰ This is at the core this paper: what performative strategies are used by the actors in court to convince an audience of a specific narrative of (in)justice.

Performative Strategies in Court: What Kind of Show Have Terrorism Trials to Offer?

It has been stated by various experts that terrorism is communication.³¹ Terrorism expert Brian Jenkins argued, as early as 1975, that ‘terrorism is theatre’.³² Peter Waldmann added to these observations the statement that most terrorists explicitly want theatre, since they are bent on

provoking state power.³³ With their deeds, terrorists communicate visions of justice and injustice, visions on the rearrangement of power relations and attempts to rebalance them. However, counter-terrorism is communication too.³⁴ The office of the prosecutor has a story to tell as well. After an attack, or an attempted one, perpetrators are often brought to trial. In the courtroom, all parties involved in the drama are brought together. Within the narrow confinements of this stage, injustices are addressed, retribution is demanded and justice is carried out – at least in theory. Sometimes, terrorists are tried behind the scenes, in closed courts; in some cases, trials are so heavily politicised or even tampered with that they resemble more the classic show trial in the Stalinist sense than an actual display of justice.³⁵

The question that hence has to be answered is: What strategies are the agents in this drama following and what legal, political and social consequences do these strategies have? Does politicising the trial, putting on a show, ruling out the risky elements in it or inciting the masses help to convince the target audience of your mission, your sense of justice? Does it placate the population, restore social peace, prevent further radicalisation? Is that what a terrorism trial is all about? Or could it also involve the blocking of an audience for the sake of security? This would make it a non-performative trial from the public’s perspective, but a very performative one from the terrorists’ point of view. Following the provocation-repression theory,³⁶ a trial ruled by the prosecution without much oversight could provide terrorists with new proof of state oppression, with injustice frames to recruit new members and start new rounds of violence. Given these comments on the relevance of the show element in terrorism trials, a definition of performativity will now be introduced, understood as discursive efforts, actions etc. to construct social realities,³⁷ as applied to terrorism trials:

³³ Cf. P. Waldmann, *Terrorismus: Provokation der Macht* (Hamburg: Murrmann Verlag, 2005); Richardson, *What terrorists want* (New York 2006).

³⁴ Cf. Beatrice de Graaf, *Evaluating Counterterrorism Performance. A Comparative Study* (London/Routledge 2011), pp. 8-10.

³⁵ *Ibid*, chapter 9, ‘Terrorists on trial: the courtroom as a stage’.


³⁶ ‘By attacking the establishment and the security forces, the insurgents provoke the state into mass repression which alienates the general public, and increases support for the rebels’, as Hewitt defines it. Christopher Hewitt, *Consequences of Political Violence* (Aldershot et al.: Dartmouth, 1993), p. 61.

³⁷ J.L. Austin, *How To Do Things with Words* (Cambridge, MA: Harvard UP, 1962); Malcolm Coulthard, *An Introduction to Discourse Analysis* (2nd edition), New York: Longman, 1985; Judith Butler, *Excitable Speech: A Politics of the Performative* (New York: Routledge, 1997). Cf. also De Graaf, *Evaluating Counterterrorism Performance*, p. 11-13.

³⁰ Allo, ‘The ‘Show’ in the ‘Show Trial’’, p. 72.

³¹ Alex P. Schmid and Janny de Graaf, *Violence as Communication. Insurgent Terrorism and the Western News Media* (London: SAGE, 1982), p. 175.

³² Brian M. Jenkins, ‘International Terrorism: A New Mode of Conflict’, in: David Carlton and Carlo Schaerf (eds.), *International Terrorism and World Security* (London: Croom Helm, 1975), p. 16.



Performativity in terrorism trials concerns acts or strategies adopted by the parties with a stake in the trial to try to convince their target audience(s) in (and outside) the courtroom of their narrative(s) of (in)justice.³⁸

Performance is an act, a process and a product at the same time; it provides consolidation of norms, re-enactment of identity and the transformation of these norms and identities. Performances are role plays, in which not only the individual but the community at large is involved. Interestingly, in courtrooms, performance takes place in a direct manner, in the art and form of an Aristotelian drama: unity of time, place, and action. But it also transcends this place. The performances of the actors have a bearing on a broader audience, on the political context, on our culture and legal system as a whole, in three ways. First, theatre produces *mimesis*: a re-enactment of the offence, in the hope of uncovering what actually happened. However, the courtroom play should not only be conceived as *mimesis*, but as *poiesis* as well, e.g. *making* not *faking*. Performances, like a driving test, a wedding, an examination or a defence in court, create identities, assert claims to selfhood and are part and parcel of confirming and producing social relations. The truth is not out there to uncover, but has to be created in the courtroom. Moreover, apart from *faking* and *making*, performances also amount to *breaking* and *remaking*. Some narratives are upheld, others are disputed. And in the end, a new one emerges. This is called *kinesis*: movement, motion, fluidity. Performance can transgress existing boundaries, break structures and remake social and political rule. They intervene and make anew.³⁹

Through a trial, the members of the community participate in talk that is incessant, escalating and divisive. People will be induced, seduced to take sides, are with or against the rule breaker. Only then is redress possible, employing procedures to repair or remedy the breach. Legal, judicial machinery often plays this role. This is the most reflexive or self-conscious part of the social drama unfolding in the courtroom. Trials not only involve re-establishment of the truth or stock taking of the harm done; they also contain moments of liminality, a 'betwixt and between'⁴⁰ of suspended

knowledge about the outcome of the social drama. Courtroom verdicts – guilty or not guilty – are exemplary of liminal moments in the redress-phase of social drama. If the repair works, the rule breaker is removed, or reintegrated into the community. However, life has changed. Every social drama alters society to a certain extent. These alterations might not be permanent, but merely temporary mutual accommodation of interests. If this does not work, community splits or breaks apart into factions. This could be defined as a schism. In large scale complex communities, continuous failure of regressive institutions may develop into a revolutionary situation, in which one of the contending parties generates a program of societal change.⁴¹

The outcome of the trial depends on the performative strategies adopted in court and their relative dominance. These strategies could be portrayed on a gliding scale. On the one end of the axis, the terrorists try to run the show, they attempt to politicise the trial, try to introduce their concept of justice and narrative of injustice and attempt to overrule or put to their own use the existing legal order. On the other end of the axis, the prosecution and the authorities try to rule out the element of risk and of acquittal, try to turn the trial into a display of political power and a way of educating the masses, try to intimidate the terrorist constituencies and try to use the trial as an instrument for wielding security politics. In between, defendants, their lawyers and the state have to share persuasive power, are dependent on the role of the victims, their constituencies. Right in the middle of this partisan axis, the judge or jury sits and applies the legal rules in an objective manner. The agents involved can enhance their performativity by setting the stage, altering the legal script, play the media, manipulate the news, issue statements and declarations of their own. Authorities can issue new laws, provisions or build in more security measures.

This definition does not imply a measure of success. The difficulty with performativity is that it is a strategy, an attempt to convince. The actual outcome of this performance, the way it actually mobilises or incites the masses or target audiences is hard to measure. The outcome depends, for example, on a number of other factors. One major element of uncertainty in establishing the effect of a performative strategy is the level of media coverage, of national public attention devoted to

³⁸ Historically, this definition should only be applied to the modern period of the late 19th century and onwards, when the modern state developed a monopoly of violence, a modern criminal law system and penal code came into existence and mass media emerged.

³⁹ Elizabeth Bell, *Theories of Performance* (Los Angeles: SAGE Publication, 2008), p. 12-15.

⁴⁰ Bell, p. 108.

⁴¹ Bell, p. 108-109.



the trial.⁴² This can be invoked by the agents directly involved in the trial, but media attention is an autonomous factor in its own right. Distal and proximate context, historical experiences, media logics of that specific time and place, other hypes or trends on the political agenda, influence the way a trial is covered and reported about. The communicative aspect in terrorism and counterterrorism also pertains to terrorism trials, but media coverage is an essential condition for that. Although the media of course can have an independent agenda or independent interests, they are not considered an autonomous factor, as they are no actors in the court. They are mainly channels of communication which, however, are not only passively used by actors.

Like other political trials or mediated ordinary criminal trials (for example the OJ Simpson trial), terrorism trials can thus also be considered a show, or, to put it more accurate, as a dramaturgical play. This is not to say that terrorism trials are in all regards fundamentally different from other politicised trials, media trials or dramatic criminal trials. However, for terrorists and counter-terrorists, the contest over and presentation of narratives of justice and injustice are especially important. Compared to ordinary criminals, terrorists challenge the political rule or present contentious and violent views of justice and repression. Before the performative strategies of the actors involved are discussed, however, it must be emphasised that they can only be acted out within a given set of dramaturgical conditions.

The first element in a stage play is the script, which should provide for a plot and for the different narratives and story lines to be heard. The initial script is triggered by the suspect's crime, and drafted by the charge(s) brought against the accused. Criminal law functions as the set of guiding principles, dictating how this script should be written. Are intelligence reports accepted as evidence in court? Can witnesses give testimony behind closed doors? The script, or the 'director's clues', provide for these legal rules of the game. Through altering these rules, the authorities can affect the outcome of the trial. At the same time, such manipulations with the rules of adjudication during the trial 'spoil' the game and turn it into a show of risk justice, undermining confidence in the law.

Secondly, an important question with regard to this dramaturgical element is the nature of the

script: is it a script within a civil law or within a common law system? In other words, is the trial inquisitorial in nature, or adversarial? Does the defence need to convince a jury, or is it the judge who composes and weighs the material? Another structural element that matters is the amount of evidence needed to be presented in court, which impacts on the length of the trial. In the Netherlands, for example, the charges, evidence, and defence reactions are mainly exchanged and worked out on paper before the actual trial starts.

Third, the way the stage is set also affects the unfolding of the drama. Does a trial take place in the normal court building, or are the defendants transported to a fortified location, where the visitors have to go through heavy security? Are the defendants placed in regular benches or locked in cages, as was the usage in the Italian criminal trials? The courtroom/building can thus enhance or mitigate the dramatic nature of the trial as well.

Fourthly, the play itself is performed by actors, who adopt different strategies, which will be discussed below. Actors are the prosecution, defence, judges, witnesses and sometimes the victims. The play will develop through a contest between the prosecution and defence over the writing of the script. Each will offer their own script as the truth and arrange their performance to advance this truth. Judges may both be the directors and audience, depending on the type of criminal justice system a country has adopted.

Lastly, every play needs an audience. In terrorism trials, like in other trials, the audience is constituted by the judge (in a civil law system) or jury (in a common law system), but also by the public in the courtroom and the public outside these confines. What the public sees and hears is however filtered or controlled by the media's reporting of the trial, which gives the media an important mediating part in the play as well.

Within these dramaturgical frames, the terrorism trial will unfold, resulting in different types of a show, depending on the relative success of the performative strategies adopted by the various actors.

A Typology of Terrorism Trials

Based on the definition of performative strategies in terrorism trials, a horizontal axis of politicisation may be drawn: from the left pole of terrorist domination to the right pole of state influence on the trial. The vertical axis, starting in the zero middle point of not much politicisation from either the terrorists or the prosecution/authorities, depicts the level of media attention generated by the trial.

⁴² Media in this sense covers all communicative media, including the media of the "terrorists" or their constituency (pamphlets, grey literature, internet etc.).



Based on a number of cases researched, this could produce the following typology:

- A *not-so-dramatic show* where everyone complies with the existing rule of law, such as in the Dutch Piranha and Hofstad group cases. This trial would be positioned in the centre of the horizontal axis and low on the vertical axis. The actors refrain from adopting performative strategies.
- A *show, run by the terrorists and their lawyers*, which generates a lot of media attention and inspires new rounds of violence by terrorist sympathisers. The Stammheim trial in the final stage would be an example of such a performative attempt by the defendants.
- A *show, run by the executive and the prosecution*, on the extreme right pole exemplified by the classical Stalinist show trials. Here, the prosecution dominates the show, sometimes even hand-in-glove with the judge or jury. This show can also be a non-show like trial, closed from the public or the media, but organised by the state to serve security as a priority (but with a great performative power in a negative sense in the perception of the defendants and their sympathisers). The trial might however also be staged as a virtual show: the trial serves as a tool of risk justice, the crimes under consideration deal with conspiracies and preparations rather than constitute concrete attacks.
- A trial may turn into a *media show* – not run so much by the terrorists or the prosecution, but dramatised in the media, often through resonance with public feelings of vengeance and outrage – often helped by *side shows* staged by audiences and groups outside the courtroom (victims, sympathisers, etc.).
- A *performance of justice*: a show where the trial reveals injustice, where the verdict educates the public about the importance of the rule of law in a democratic society, creates a collective memory and sets standards for future conduct of states and people. This show is run by the judge/jury, but the performative strategy is based on a (perceived) neutral application of the law, not on partisan politicisation or risk justice.

Before turning into a veritable media show, within all other types, variation is of course possible as to the level of politicisation, the level of media coverage, the level of public attention and the extent of side shows being organised during the trials.

First Type: The Not-so-dramatic Show

On The first type of trial is not that dramatic at all. A terrorist trial does not always have to be a social drama. It can be a show trial in the positive sense of the word: a quiet demonstration of justice, where law in action serves to communicate grievances and retribution and where a catharsis and mutual understanding is reached in the end. There are indeed instances when terrorism trials created only little spectacle. In the Netherlands, the trial against the Moluccan activists who raided and occupied the Indonesian Ambassador's residence in 1970 in order to further their separatist cause, killing a police officer in this process, proceeded as smoothly as possible. The defendants pleaded guilty, complied with the court and raised only one moral question: they wanted their plight to be heard. They wanted to tell their story of expulsion from the Moluccan islands, the perceived promise made by the Dutch authorities to lobby for their independence from Indonesia and underline the discrimination they suffered in Dutch postcolonial society.⁴³ In this instance, the terrorists did address a social grievance, but both the judge and the general audience were receptive to that narrative and acknowledged it in their reactions. The judge, a former colonial officer, paid homage to the fate of the Moluccans, their plight after 1950 and their loss of homeland. This in turn appeased the defendants and made them compliant with the Dutch rule of law. They accepted their sentence without protests – a sentence that was considered lenient.⁴⁴ If there was a show at all, it demonstrated the Moluccans tragic faith and society's feelings of guilt towards it. The law was violated, yes; a person was even killed. Nevertheless, there was no clash of moralities. On the contrary, the Moluccan activists appealed to the shared history with the Dutch population, invoked their parents' loyal duties to the Queen and demanded the government to live up to its own standards and promises.⁴⁵

Another example of remarkable little theatre was offered by the latest hearings in the Hofstad group case, staged late 2010. When the trial started, following the murder of Theo van Gogh in

⁴³ P. Bootsma, *De Molukse acties. Treinkapingen en gijzelingen 1970-1978* (Amsterdam: Boom, 2000).

⁴⁴ Interview with Henk Droessen, the lawyer of the South Moluccan youngsters who were tried for their actions in 1970 and 1975, Roermond, 14 March 2008; 11 May 2011, Utrecht; M. Rasser, 'The Dutch Response to Moluccan Terrorism, 1970-1978', in: *Studies in Conflict and Terrorism*, Vol. 28 (2005), No. 6, p. 481-492.

⁴⁵ A.P. Schmid, J.F.A. de Graaf, F. Bovenkerk, L.M. Bovenkerk-Teerink, L. Brunt: *Zuidmoluks terrorisme, de media en de publieke opinie* (Amsterdam: Uitgeverij Intermediair, 1982); See also Beatrice de Graaf and Froukje Demant, 'How to Counter Radical Narratives: Dutch Deradicalization Policy in the Case of Moluccan and Islamic Radicals', in: *Studies in Conflict & Terrorism*, Vol. 33 (2010), No. 5, p. 408-428.



November 2004, the defendants, who all belonged to a group around Van Gogh's murderer Mohammed Bouyeri and who were charged with participation in a terrorist organisation and inciting hatred, refused every form of cooperation with the court. They argued that, first of all, the man-made Dutch judicial system was not in line with the divine rule of law and violated *hakimiyat Allah* (the sovereignty of God). Secondly, they claimed that public and political pressure prevented them from getting a fair hearing in any case. In the heated and anxious climate of the months following November 2004, this second complaint had some merit. Government officials proclaimed a 'war' against Dutch terrorists, public vigilance campaigns against terrorist attacks were launched, radicalised Muslims were spotted everywhere and revenge-fuelled attacks were committed against mosques and other Muslim sites.⁴⁶ The seven suspects were arrested and charged with being part of a terrorist and criminal organisation, engaging in inciting hatred and preparing for terrorist attacks. In 2006, they were convicted on the counts of attempting to murder police officers, on the possession of hand grenades and on membership of a terrorist organisation. One suspect, Jason W., who threw the hand grenade, was sentenced to 15 years in prison.⁴⁷

However, years passed without any jihadist attack, and the Dutch political and social climate changed. In 2008, the Court of Appeal in The Hague acquitted the Hofstad group members on the count of membership of a criminal terrorist organisation.⁴⁸ The hearings in 2010 went ahead almost unnoticed, until Jason Walters stood up to announce his faith in the Dutch democratic system and the rule of law. He demonstrated his abandonment of extremist behaviour by conforming to the norms in court, wearing ordinary clothes and sporting a modern haircut. 'I am certain that I will receive a fair trial', he stated at the end of the pre-trial hearing in the High-Security Court in Amsterdam on 16 July 2010.⁴⁹ Although this story is only one instance of a terrorist's public conversion, it provides a valuable insight: a change

of times, demonstration of reflective justice and a terrorist conversion caused the trial to normalise. The charge of membership of a terrorist organisation was reconfirmed, but the trial hardly presented a show anymore: no party involved tried to turn it into a drama of conflicting moralities.

Another example of a rather non-dramatic case is the trial against the first and only Dutch female terrorism suspect, Soumaya S. On 15 March 2011, the Dutch Attorney-General submitted an advisory opinion to the Supreme Court that stated that the verdict against Soumaya S., who in 2005 had been arrested and convicted for participating in a terrorist organisation, had to be annulled. Soumaya S. had already been sentenced for carrying an Agram 2000 machine gun, but had been put on trial a second time for being a member of a terrorist group. This last ruling is likely to be overturned – erasing the only convicted female terrorist from Dutch history.⁵⁰ Strangely enough, almost no attention has been paid to all of this. No front page newspaper heading, interviews with disgruntled politicians or disappointed public prosecutor were seen nor heard in the national media. No audience outside or inside the courtroom applauded nor rallied against this verdict. No public outrage was discernable. This terrorism trial thus ended with a sizzle, rather than with a bang.

As has been stated above, the non-dramatic character of this trial can partly be explained by the brevity of the trial, the inquisitorial nature of the criminal law system, and the lack of historical examples. There is no repertoire of contentious terrorism trials in Dutch history. Nor were there enough sympathisers willing to stage side shows, probably due to the lack of organisation of and support for home grown jihadist terrorism in the years after 2004 within the Dutch Muslim community.

Second Type: The Terrorists Are Running the Show

Such instances like the Moluccan trials in the 1970s, where terrorists remain within the boundaries set by the court proceedings and share society's moral values and principles, where the magistrates and general public act subdued and are receptive to the terrorists' story, are rare. They mostly depend on the lethality of the attacks, the duration of the terrorism campaign and on the historical context in which the terrorists operate. Irenic exchanges in court are an exception, rather

⁴⁶ 'Zalm: we zijn in oorlog! Regering: terrorisme met wortel en tak uitroeien', *Algemeen Dagblad*, 6 November 2004; 'Terroristen met dubbele nationaliteit raken Nederlands paspoort kwijt. Kabinet verklaart de oorlog aan terreur', *Het Parool*, 6 November 2004; 'Overheid wil meer armslag: anti-terreurmaatregelen', *Trouw*, 6 November 2004.

⁴⁷ The Hague Court, verdict, 10 March 2006.

⁴⁸ Court of Appeal in the Hague, verdict, 23 January 2008, LJN: BC2576. Gerechtshof 's-Gravenhage, 2200189706. http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BC2576&u_ljn=BC2576

⁴⁹ The author was attended the hearing; cf. also 'Jason werkt nu wel mee aan proces', *De Volkskrant*, 17 July 2010.

⁵⁰Hoge Raad (High Council), 'Conclusie advocaat-generaal in terrorismezaken', The Hague, 15 March 2011.



than the rule. More often than not, terrorists challenge and contest society's moral principles in court. This is the second type of terrorism trial: the show as staged by the terrorist suspects, where the *suspects and their lawyers* play their version of events. Of course, they already made the first hit. With the terrorist attack – given they are not arrested for preparatory actions *post facto* – they moved to centre stage and forced themselves in the limelight of public opinion already. With this attack, they conditioned the behaviour of states, tried to dictate terms to them and carried out their own primitive form of justice first. Now, they are confined to the narrow boundaries of the courtroom, but stand once more on the stage to be tried themselves.

A major example of an intended show trial staged by terrorists can be found in the history of the Red Army Faction (RAF) in Germany. One of the largest successes of the founders of the RAF – Andreas Baader, Gudrun Ensslin, Ulrike Meinhof and Jan-Carl Raspe – was that, together with their lawyers, they succeeded in presenting their trial, that lasted from May 1975 until April 1977, as a political one, conjuring up an image of political justice in Germany, portraying themselves as political warriors – and in the end – as the ultimate martyrs for the revolution's cause. As such, a terrorist show trial departs from the classical Stalinist show trial: not the authorities, but the terrorists made a show out of it. As Jacco Pekelder and Klaus Weinbauer stipulated, lawyers sought the direct confrontation with the other parties involved in the justice system and carried out a 'political defence': 'More than attacking the actual accusations against their clients these *Linksanwälte* seemed to aim at undermining the legitimacy of the trial and the justice system that had produced it'.⁵¹ Although in a strict sense justice prevailed, the West-German judiciary damaged its own image of impartiality by reacting so nervously during the trial. The RAF-suspects used the court to stage their own play, which served their own (violent) political aims. They used the long drawn out period in which the Stammheim trial unravelled to mobilise a second and third tier of eager recruits, who initiated a second round of violence aimed at liberating their leaders from jail. When this backfired, climaxing in the raid on the Landshut airplane in Mogadishu in October 1977, the Stammheim prisoners opted for their final act: they committed suicide, but staged it as politicicide by the

⁵¹ Jacco Pekelder and Klaus Weinbauer, 'Terrorists on Trial at Stammheim: the 'Theatre of Political Justice' in the working, draft paper on behalf of the NIAS Research Theme Group 'Terrorists on Trial', Wassenaar/The Netherlands, 2011.

German authorities. With this final act of vengeance, they wrote their own ending to the state's judicial script and turned it upside down. Subsequently, in the eye of (international) public opinion, not the terrorists, but the West-German authorities were put on trial. Hence, with the indispensable use of the media, they were able to fully appropriate the trial for their own ends and turn it into a veritable show – one with a presence that lasts until today.⁵²

Third Type: The State Is Running the Show

Nevertheless, in a lot of other cases, terrorism trials are an instrument of the state's performance, the third type of terrorist show trial. Authorities bring terrorists to justice in order to show that the threat is under control. Terrorism trials are a show in the sense that the executive strives to placate society that the perpetrators are caught, that law and order are secured and that there is no need for terror anymore. Sometimes, the substantive and procedural law is amended to suit security preferences. The executive selects a particular legal tool to ensure that the risk of acquittal is minimal. Hence, the authorities might resort to rewriting the script as well: they wait until the curtain of the criminal law trial falls and stage their final act behind the scenes. The acquitted suspect is either expelled from the country or made subject to permanent surveillance and control orders once he or she leaves the court building.⁵³ One could argue that the Guantanamo tribunals were a type of trial where the government one-sidedly ran and ruled the show, without much media present.

A variation within this type of state-dominated performance is the virtual show, where the prosecution turns terrorism trials into a virtual trial because they more and more often take place *before* an alleged terrorist attack has been carried out. Contrary to what Foucault stated, it is not the case that 'law recedes'.⁵⁴ In fact, as Louise Amoore stipulates, 'as risk advances [...] law itself authorizes a specific and particular mode of risk management' which entails that '[e]vidence, the judgement of the expert witness, and the legal subject as bearer of

⁵² Cf. Ulf G. Stuberger, *Die Tage von Stammheim. Als Augenzeuge beim RAF-Prozess* (München: F.A. Herbig Verlagsbuchhandlung, 2007); Christopher R. Tenfelde, *Die Rote Armee Fraktion und die Strafjustiz. Anti-Terror-Gesetze und ihre Umsetzung am Beispiel des Stammheim-Prozesses* (Osnabrück: Julius Jonscher Verlag, 2009); Pieter H. Bakker Schut, *Stammheim. Der Prozeß gegen die Rote Armee Fraktion* (Kiel: Neuer Malik Verlag, 1986).

⁵³ Cf. also Marieke De Goede, 'The Politics of Preemption and the War on Terror in Europe', in: *European Journal of International Relations*, Vol 14 (2008) No. 1, p. 161-185.

⁵⁴ M. Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-1978*. Translated by G. Burchell (New York: Palgrave Macmillan, 2007), p. 99.



rights are all reoriented in a risk regime that acts pre-emptively and authorizes with indefinite and indeterminate limits.⁵⁵ Competences, provisions and measures are adapted to make sure the judges (are likely to) render a conviction; either by using criminal law, or via administrative or immigration law (control orders, administrative rule or alien's rights).

Those trials that involve suspects arrested based on preparatory actions, on allegations, suspicions or intentions are *virtual* or 'what if' trials. An act is put under judicial scrutiny that may only exist in an imagined future – as (re-)constructed by the prosecuting authorities. Conspiracy trials, thought crime, inciting to hatred: such crimes divert from the *habeas corpus* principle and invoke possible deeds in the future, based on thoughts and/or allegations only. Depending on the assessment of preparatory evidence, the moment of culpability and the moment of the actual deed are severed. The relationship between offence and punishment becomes much more indirect. Pre-emption and pre-mediation replace retribution and *habeas corpus* inquiries, thereby challenging basic human rights standards. Rather than assessing different versions of the 'truth' about an incident, judges have to deal with techniques of imagining a possible future. Premediation and security imagination replace responsibility for concrete actions. Terrorism trials serve to placate virtual threats; they have become instruments in risk management. The sword of justice has been 'securitised'. Deterrence, retribution for present dangers or restoration of social peace – the main functions of criminal law – give way to a secondary function: meting out sentences to pre-empt future risks. The trial becomes a theatre of imagined terrorist futures.⁵⁶

Fourth Type: The Media Is Running the Show

Terrorism trials may turn into a show trial through the media and because the audience at large considers these trials a spectacle. Going back to the pre-modern age, trials always were very much theatre shows. The perpetrator was put on a scaffold, receiving bodily punished in full view of all the spectators. The aim of this performance was not carrying out worldly justice, but demonstrating the fate of sinners. A direct *memento mori* and a

demonstration of how the gates of hell would open for anyone that trespassed against divine and human rule. Trials were a theatre of horror. Since those days, trials lost at least some if not most of their dramatic quality. They became a theatre of common sense and civility. Trials became a theatre of objectivity, prudence and standardised procedures. However, terrorism and war criminal trials have the tendency to slip back into pre-modern theatres of terror. Hannah Arendt wrote about the trial of Eichmann and concluded that he was tried more for the suffering of the Jewish people than for his individual deeds.⁵⁷ In the public opinion, as voiced by the media, terrorists should be punished for the fear and shock they inflicted upon society. In this way, adjudication based on concrete acts, individually attributed, disappears behind the horizon of public outrage. The trial becomes a show of public vengeance and outrage and terrorists are in most cases already sentenced by the media, leaving the judges hardly any room to manoeuvre, let alone to issue milder verdicts or even acquittals in danger of being (virtually) lynched themselves.⁵⁸

A media show can also be created through side shows, as staged by groups outside the courtroom. The audience – including the victims – has to make sense of the competing narratives as well. They sit and listen; or, as a Greek *chorus*, they comment. They sometimes have their own agendas. Sympathisers to the defendants might stage side shows, organise picket lines outside the court building, submit petitions and protest in the media against their treatment. Victims might organise themselves and protest against perceived lenience. Prisoners may initiate hunger strikes and defendants might raise an (international) lobby to support their cause, like the IRA did in the Bobby Sands case. The defendants may inspire or even appeal to their comrades and followers outside the courtroom to act on their behalf and initiate new rounds of violence, directed at putting pressure on the state, blackmailing the authorities to release the suspects or taking vengeance on the judges, as happened in Germany and Italy in the 1970s where second and third generations terrorists 'punished' judicial representatives for the verdict being issued against their leaders.

⁵⁵ Louise Amoore, 'Risk before Justice: When the Law Contests Its Own Suspension', in: *Leiden Journal of International Law*, Vol. 21 (2008), pp. 847-861, here: p. 850.

⁵⁶ For an analysis of premediation as a new security technique, cf: Marieke de Goede, 'Beyond Risk: Premediation and the Post-9/11 Security Imagination', in: *Security Dialogue*, Vol. 39 (2008) No. 2-3, p. 155-176.

⁵⁷ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1963).

⁵⁸ Cf. for effects of media coverage about terrorism: Gabriel Weimann, 'The Theater of Terror: Effects of Press Coverage', in: *Journal of Communication* Vol. 33 (Winter 1983), No. 1, p. 38-45; Brigitte L. Nacos and Oscar Torres-Reyna, *Fuelling Our Fears. Stereotyping, Media Coverage, and Public Opinion of Muslim Americans* (Lanham et al.: Rowman and Littlefield, 2007).



Fifth Type: A Performance of Justice

The fifth type involves a show where the trial reveals injustice, where the verdict educates the public about the importance of the rule of law in a democratic society, creates a collective memory and sets standards for future conduct of authorities and people. This show is run by the judge/jury, whose performative strategy is based on a (perceived) neutral application of the law, in their refusal to accommodate to partisan politicisation or risk injustice. Amongst the competing narratives of (in)justice, the *judges* have to try to re-establish an accurate version of the facts and interpret and apply the law to it. They have to probe deep into different narratives, different testimonies and accounts to discover the various motives and intentions behind the terrorist actions. From this point of view, judges have first of all an obligation to establish a thorough, accurate and wide account of the facts pertaining to the incident before the court. Secondly, they have to reveal the underlying motives and strategies, and relate them to the context in which the incident happened. In carrying out such a penetrating inquiry, they can make a valuable contribution to the general understanding of the facts and the background. They more or less can write history. They may hear the victims, speak on behalf of a terrorised population and give them back their agency.

Of course, re-establishing the truth is an especially troublesome endeavour when it concerns a preventive arrest, based on preparatory actions only. Judges are not there to make up for the authorities' shortcoming or failures in gathering enough compelling evidence; they do not have to justify them. They have to settle the issue that falls under their jurisdiction, have to throw new light on the affair,⁵⁹ which is difficult when an offence only exists as a *possibility*. Carrying out justice in a situation of security risks, of allegations, presumptions and crime-by-association runs the danger of turning the trial into a virtual show. The judges will be damned by an enraged public opinion and security officials if they acquit the suspects, and damned by equally outraged religious or ethnic minorities if they sentence the terrorists based on political or religious convictions alone.

When the judges manage to keep the balance, a trial can become performative in itself. The verdict will not only be perceived as legally justified, the narrative of guilt and injustice writes history, changes existing norms and impacts values in society. As a nexus of terrorism violence, law

enforcement and public opinion, terrorism trials offer an ideal opportunity to showcase justice in progress and demonstrate how terrorist suspects are dealt with by the laws of the land.

A performance of justice moreover could repair the information asymmetry that allowed terrorists to engage their terrorist constituencies and could undermine the narrative that armed groups utilise to attract support. Most importantly, terrorism trials are the platforms where victims may regain their voice and where their fate, as a consequence of the terrorist's offence, is put centre stage. In the words of Tom Parker, policy director for Terrorism, Counterterrorism and Human Rights at Amnesty International USA, it is time to redress the balance and to use victim narratives to confront the violence of armed groups. Parker specifically addresses human rights defenders and NGOs, but the same contention could be made pertaining to terrorism trials: such trials offer a powerful platform for revealing and challenging the terrorists' narratives by confronting them with the messages of horror, pain and destruction they inflicted upon their victims.⁶⁰

A Performance of Justice

When does a terrorism trial become a show of justice? Performativity depends on the interplay between strategies of actors and audiences' receptiveness, and is conditioned and facilitated by the proximate and distal context of the trial. When is an audience most receptive to these strategies, and whose idea of justice or whose injustice frames will prevail? We have demonstrated that terrorism trials in the majority of the types involve show elements. We would like to argue, however, that they have to be theatre as well – in the sense that they present a performance of justice. As stated above: 'What counts is not that a trial is labelled a 'show trial', it is, rather the end that the 'show' serves.⁶¹ The trial is the nexus where countervailing narratives meet, where moralities confront each other and where society addresses, confirms and possibly repairs a fundamental breach. A trial can demonstrate that trespassers will be convicted and that victims are heard. It may restore the balance of power and repairs the information asymmetry caused by the terrorist's hold over their constituents. The trial and the verdict can undermine the terrorist's claim to justice and reveal

⁵⁹ Cassese, *Terrorism*, p. 138.

⁶⁰ Cf. Tom Parker, 'Redressing the Balance: How human rights defenders can use victim narratives to confront the violence of armed groups', draft., 2011. Tom Parker is Policy Director for Terrorism, Counterterrorism and Human Rights at Amnesty International USA.

⁶¹ Allo, 'The 'Show' in the 'Show Trial'', p. 72.



the horror and destruction they inflicted upon their victims and upon society. In this sense, it is important that as many people as possible are able to watch the spectacle unfold.

The question thus is: when will a terrorism trial be considered a performance of justice in the eyes of the public, and according to the law? First of all, the authorities should stick to the script. In a structural sense, the script does of course depend on the nature of the criminal law system; whether it is an inquisitorial or an adversarial system, whether evidence should be presented in the courtroom in full length, or can be dealt with on paper, before the trial starts. Nevertheless, in both the civil law and common law systems, performative strategies matter. Judges in particular have the responsibility to take care that a trial does not end up in a 'Pirandello play', where each actor follows his own account of things, where the most powerful one decides upon the truth and where the spectator is left totally powerless to judge what the underlying narrative, let alone the truth about the plot is. Normality should be preserved as much as possible. The executive should refrain completely from tampering with legal rules during the trial; it should pay extraordinary heed not to be perceived as exerting political control over the proceedings.

Secondly, terrorism trials should not be based on premeditation, virtualities, or seen as a tool of risk management. Magistrates and prosecutors have to make sure the trial does not develop into a show of security and risk management, like the trial at Stammheim did, or as the military tribunals in Guantanamo have done. The insatiable desire for security should not dominate justice; underlying political conflicts cannot be solved through security measures alone. Judicial catharsis should not be sacrificed to risk management.

Thirdly, transparency counts. In the case of the Indonesian trial against Abu Bakar Ba'asyir, which is currently under way, the court decided to relocate the hearings from the South Jakarta district court to the larger Agriculture Ministry's compound in Central Jakarta, to provide more room for the expected swell of people. Against critics who feared that this decision would turn the trial into a media circus, the court contended that an open prosecution, visible to as many spectators as possible, demonstrated justice in progress, underscored confidence in the state's counter-terrorism efforts and showed how new laws were put in practice. Thus, the trial would support

Indonesia's rule of law *vis-à-vis* extremist challenges.⁶²

Fourthly, a trial should leave room for countervailing narratives of truth and injustice. Judges should make sure that the transformation of a political conflict into a legal dispute takes into account all the narratives. Amongst all these competing narratives of justice/injustice, the judges have to try to re-establish an accurate version of the facts and interpret and apply the appropriate law to it. They have to probe deep into different narratives, different testimonies and accounts to discover the various motives and intentions behind the terrorist actions. From this point of view, judges have first of all an obligation to establish a thorough, accurate and wide account of the facts pertaining to the incident before the court. Secondly, they have to reveal the underlying motives and strategies, and relate them to the context in which the incident happened. In carrying out such a penetrating inquiry, they can make a valuable contribution to our understanding of the facts and the background. They more or less can write history. They may hear the victims, speak on behalf of terrorised population and give them back their agency. Responding to this with unemotional adjudication subsequently provides the best meta-narrative of social and legal resilience thinkable. In this sense, the judges have to be aware of side shows too, were sympathisers, victims, other target audiences voice their version of justice.

Judge Cassese's reflections on the Achille Lauro Affair support this argument. In his seminal discussion of the lessons the international community of states could draw from this incident, Cassese points to the fact that there are long-term, mid-term and short-term policy objectives involved in dealing with terrorism. In the short run, governments might give preference to order and stability, viewing terrorism as an essential attack on that order and choosing to deal with this attack with repressive military or intelligence means only. However, he argues, terrorism might also reflect a 'desire for social change, innovation and the adaptation of international relations to changing needs, even when, alas, these are expressed in such perverted and destructive ways'.⁶³ In the mid-term and long-term, intransigence to or even denial of this political narrative might alienate the terrorists' broader constituencies from the political system they are operating in. This is not to say that the terrorists' narrative should be accepted or even

⁶² Sulastris Osman, 'Indonesia's trials and tribulations: The Case of Abu Bakar Ba'asyir', *RSIS Commentary*, nr. 15, 10 February 2011.

⁶³ Antonio Cassese, *Terrorism, Politics and Law. The Achille Lauro Affair* (Princeton: Princeton University Press, 1989), p. 131.



agreed upon, but it should be countered and responded to rather than silenced by repressive means only. Judges or juries can have a role in unveiling these minority narratives by paying attention to the deeper motives or social grievances; not to view these as legitimate or rightful 'root causes' for terrorism. On the contrary, revealing these motives might even serve to mete out life long sentences for engaging in acts of terrorism. But revealing these narratives of social change does justice to the political conflict at hand. Denying or *only* criminalising these narratives and reducing the trial to a mere dichotomy of legal/illegal narrows reality and could in the end both backfire against the 'order and stability' paradigm of the executive and undermine criminal law's legitimacy in the eyes of minorities.

When these conditions are met, a trial will offer a platform on which narratives of injustice confront each other. A trial metes out justice not only to the acts of terrorism suspects, but also to their intentions, their motives and their legitimations. It reveals what ideas terrorists have to offer on questions of rights and righteousness. If an attack has taken place, or if suspects are arrested in a context of heavy political conflicts, law

cannot fix this situation of political division. But glossing over the competing narratives, storing them away in indefinite detention does not serve to solve these conflicts either. Not bringing terrorists to justice out of short term security considerations might in fact further deepen the political antagonisms. If the terrorists only represent a tiny faction within a social movement, or even if they represent hardly anyone at all, letting them tell their story in court might just expose this narrative as the hysterical, nihilistic or illegitimate argument it is.

After shocking incidents of terror and destruction, society needs to regain balance. Terrorism trials can help to repair the damage, to prevent a schism to unfold and to assist the immediate victims of terrorism attacks and society at large to come to terms with loss, grievances and grieve. An open and transparent trial is crucial for re-establishing what happened and why, and serve to institutionalise the need for vengeance and retribution. Inevitably, terrorism trials are show trials, staging a social drama, revealing narratives of injustice and grievances, but they have a judicial catharsis to offer – to all actors and audiences involved. Only then the curtain can fall.

About the author

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