Terrorists on Trial

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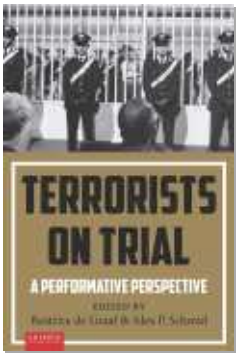

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1. Introduction: A Performative Perspective on Terrorism Trials

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1.1. Introduction[2]

On 6 May 2011, *Washington Post* journalist Jeff Greenfield painted a vivid picture of what would have happened had operation *Geronimo* (which resulted in the killing of Osama Bin Laden) resulted in capturing the leader of Al Qaeda alive. After the initial congratulations, the consequences might soon have created problems. Putting Bin Laden on trial for mass murder in a New York federal court—aside from the fact that it is very unlikely that Congress would allow this in the first place—would have caused 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 Guantánamo 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.[3]

Moreover, legal questions would, according to Greenfield, have been 'nothing next to the security consequences of taking Bin Laden alive'. What if any terrorist organisation worldwide seized an elementary school, threatening to kill all of the children unless Bin Laden were released?

Utilising criminal law and ultimately making use of civilian courts to try, sentence and imprison terrorists has often been criticised as a viable option in countering terrorism. Former Vice President Dick Cheney vehemently opposed organising terrorism trials in civilian courts 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.'[4] Cheney objected to this decision, arguing that giving

KSM and other suspected terrorists a civilian trial in New York would be strategic disaster: 'they'll simply use it as a platform to argue 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'.[5]

Indeed, even when the rule of law is strictly observed, terrorism trials can easily turn into a show, a spectacle, run by the terrorist suspects in order to further their cause by communicative means. Or trials may lead to a (partial) acquittal, legally flawless but from a security perspective potentially disasterous. This concern, as voiced by many executive professionals, has been corroborated by the outcome of the first trial against a Guantánamo 'ghost prisoner', Ahmed Khalfan Ghailani, which sparked off a heated political debate. The defendant was convicted in a federal court in Manhattan for his role in the 1998 embassy bombings in Kenya and Tanzania, which earned him a 20-year sentence. Republican critics objected to the fact that the jury acquitted Ghailani of all other charges, more than 280 in total, including every single count of murder. This outcome was used as proof that terrorism detainees should be prosecuted solely by a military commission.[6] It was not so much the final verdict that was contested but the use of civilian courts—with all the unpredictability and risks involved for combating terrorism.

Notwithstanding such criticism, terrorism trials can be an exceptional opportunity better to understand and, hence, counter terrorism, since they are the only place where most, if not all, of the actors in a terrorist incident meet again: terrorists, state representatives, the judiciary, the audience, surviving victims, terrorist sympathisers, etc. The media will report and broadcast their respective performances. Forming a nexus between terrorist violence, law enforcement and public opinion, terrorism trials thus offer the prospect of showcasing justice in progress, and in so doing of demonstrating to the world how terrorist suspects are dealt with under the laws of the land. Ideally, criminal investigation and prosecution result in bringing terrorist suspects to court, where by solely legal and constitutional means, their purported crimes are adjudicated and justice is restored. However, governments and security officials are more often than not reluctant to put terrorist suspects in front of civilian courts. This reluctance can be explained if we view terrorism trials as a form of theatre, where the 'show' can develop its own, often unexpected, dynamics, which at times might inconvenience the government, most notably when terrorist suspects appropriate the trial to continue their struggle by communicative means. Terrorism trials almost inevitably give rise to political controversies. The crime of terrorism (not its direct effects—e.g. murder and hostage-taking) is a political construct and an essentially contested one as well.[7] Terrorism trials deal with suspects who are

being charged with challenging the existing political system—or, at the very least, are seen as posing a political threat. The government's unease is owing to the fact that it has to hand over control to the judiciary, which has its own criteria for dealing with criminal offences (rather than viewing an act of terrorism primarily as a security threat). Governments also face the reaction of national and international public opinion, which might, in the worst case, even create new security threats.

In this volume, we are introducing a *performative perspective* on terrorism trials: these are viewed as a site of ongoing communicative struggle. The court room is a stage, not of warfare, but *lawfare* where legal instruments are used (and abused) by prosecution and defence and all kinds of performative acts are executed and (communicative) strategies are adopted to convince the court and audiences outside the courtroom of the validity of their respective narratives of (in)justice. In and outside the courtroom democratic states have much to lose when combating terrorism; respect for the rule of law, legitimacy and justice can become casualties. Therefore closer attention needs to be paid to the communicative aspects, judicial and socio-political mechanisms and effects of terrorism trials, especially with regard to their performative power which, in turn, may create and bolster new narratives of justice and/or injustice.[8]

In this introductory chapter, by combining the notion of *lawfare* with that of *performance*, we will present a new framework for analysing terrorism trials as sites of communicative contestation of political, ideological, religious ánd legal aims, pivoting around the concepts of (in)justice and legitimacy. At the end, we will briefly explain the place of individual chapters in this volume.

1.2. Terrorism Trials as a Places of Lawfare

Research on *political trials* in contemporary history has matured over recent decades. For instance, Awol Kassim Allo has analysed the show element in several political trials.[9] However, a specific focus on *terrorism trials* is still rare. As mentioned above, in the present volume we use the concepts of lawfare and performance as general frameworks for analysis.

The Prussian military strategist Carl von Clausewitz described war as 'merely a continuation of politics by other means'.[10] In the same way, terrorism trials can be viewed as the continuation of political violence by other—legal and non-legal, communicative means—in the courtroom.[11] In such trials, both terrorists and their defence lawyers on the one side and the government and its judiciary on the other hand operate within the framework of the law and legal procedures, engage with this

communicatively, and either uphold and confirm or attempt to break and replace it with other sources of legitimacy to justify their actions. This process of waging war through law—or 'the art of managing law and war altogether' is what David Kennedy called *lawfare*.[12] 'Lawfare' has been used in more senses than one. The concept can be traced back to Charles Dunlap, a US Major General, who used the term as a 'bumper sticker' to describe how law had altered warfare.[13] In his view, lawfare denotes 'the use of the law as a weapon of war' that can be used both for the greater good as well as to do harm. Another aspect of lawfare has to do with the public support needed for armed conflict and the dependence of that support on upholding the rule of law. Legal scholar William Eckhardt, well-known for having prosecuted the My Lai cases during his service as Judge Advocate, observed that 'Knowing that our society so respects the rule of law that it demands compliance with it, our enemies carefully attack our military plans as illegal and immoral and our execution of those plans as contrary to the laws of war. Our vulnerability here is what philosopher of war Carl von Clausewitz would term our "center of gravity".'[14] From this perspective, lawfare can be seen as a means to claim legitimacy through the use (and abuse) of law and legal systems. Thus, lawfare is a tool where legality and legitimacy (two concepts that do not always overlap) can be used by either side, depending on political support, public opinion and the constellation of forces in a given social context.

In our view, terrorism trials can indeed also be analysed with the help of the concept of *lawfare*. Such trials constitute political arenas where the struggle for justification and legitimation continues by means of certain performative and communciative strategies. Here, in adaptation of Wouter Werner (who in turn refers to The Lawfare Project), we use the concept of *lawfare* as referring to the (ab)use of the law and legal systems for communicative and strategic ends.[15] It opens up a novel perspective on terrorism trials, viewing these as a continuation of a political struggle by other—both communicative and performative—means, namely competing narratives on the justice of a cause. Terrorist trials can remain firmly squared within the existing framework of law and legality, reinforce the authority of the state and communicate to the public at large that terrorist crimes are not acceptable, even if the grievances underlying them are real. Both the legal foundations and the communicative strategies adopted remain attached to status quo principles and paradigms. However, problems may arise when executive authorities try to divert from the aim of carrying out an open, transparent and legally grounded process of truth finding and adjudication, and instead put national security or protecting political order up front. The open, communicative space of the courtroom becomes restricted when governments put pressure on the judges, when populist politicians try to exert influence on court decisions and when

judicial decisions run counter to government policies or when the general public does not accept the judicial verdict as just. While the ultimate verdict of the court might be considered as satisfactory by part of the public, another part may see it as another instance of injustice—contributing to further conflict escalation. The executive branch of the government may view an acquittal by a court as a reason to ask parliament to pass harsher laws. The terrorist's constituencies may consider a conviction as a reason to rally even more strongly behind those who have taken up arms against the government.[16]

As Alex P. Schmid will further elaborate in chapter two, terrorism trials might be turned into *political trials*, intended to evict (by legal, or illegal means) a political foe from the scene. Politicisation of trials may occur when court proceedings are deliberately manipulated for political reasons. The defendants can, however, also try to politicise the trial by directly challenging the authority of the court or the laws on the basis of which they are to be tried, to deny legitimacy to the court or disrepute the authorities.[17] In such cases, whether 'equality of arms' is involved or not, trials can divide audiences and conflict parties and intensify the conflict—hence the idea of 'lawfare'. Compared to the notion of political trials and political justice, where the power of the executive dominates the scene, 'lawfare' enables us to bring into focus the continuation of the struggle by communicative, legal and performative means of *all* parties involved, including the defendants.

Ideally, even with the possibility of protracted 'lawfare' involved, terrorism trials should be seen as the most fitting response of democratic states to terrorist attacks or threats thereof in a framework of rule of law.[18] Terrorist trials can be utilised to address core issues such as the need for retribution and the need to restore trust and stability and respect for the rule of law in society.[19] Trials are cornerstones of the criminal justice system in democratic societies that pride themselves on a tradition of 'fair' trials.[20] This vital demonstrative, and communicative function of terrorism trials is, however, often overlooked.

The existing body of research focusing on terrorism trials is limited and fragmented.[21] A great deal of research has been conducted into the goals of public trials,[22] and on changing attitudes with regard to accepting a system of global justice.[23] Less attention has been given to the role and place of terrorist trials in the framework of global justice,[24] or to the communicative, performative strategies and narratives used in court[25] and societal responses to terrorist trials.[26] De Graaf and De Goede have introduced a novel approach to terrorism trials, as sites where the precautionary turn (a tendency in criminal law to revert to risk justice, and to apply the law as precautionary measure rather than as a response to material evidence of terrorist

attacks that have occurred) in criminal law manifests itself.[27] But more workneeds to be done. Research on radicalisation, the nature and effect of terrorism and ways and means to counter terrorism has generally overlooked the function of criminal trials in terrorism.[28] A well-conducted trial cannot only bring closure for surviving victims and their families, but can also bring some of those charged with terrorism to their senses and re-direct the life paths of some who previously identified with the terrorist cause.[29] When the performance in the courtroom is over, some lessons may have been learned by some audiences, if not the terrorists themselves. In a terrorism trial the main stakeholders accept or reject the legal system, but in either case they have to communicatively engage with the law in order to express their vision of what is just and unjust, legal or illegal, legitimate or not in the given political context.[30] Given these high stakes in the effect and impact of terrorism trials, this volume argues for adopting a new perspective on terrorism trials: The concept of *lawfare* allows us to bring into focus both the *strategies*, *performative acts* and the *rhetoric by means of which* the *main stakeholders* in a trial use the law and legal procedures to achieve an important objective: convincing their *target audiences* of their *political vision of justice/injustice*.

Terrorist trials are the sites where the process of lawfare reaches its climax. Witnessing audiences recognise, accept or reject the statements and the underlying strategies employed by key players. The stakeholders' visions of justice/injustice are more or less openly presented, debated and re-negotiated. The conduct or outcome of a trial can cause rupture (the rejection, obstruction or undermining of the legal system),[31] but it can also produce some forms of closure (solving a contentious issue one way or the other in the public debate[32]) in the eyes of some of the stakeholders and more distant audiences. Not infrequently, however, the outcome is an open-ended process of ongoing social feuds with unmet demands that foster resentment which, in turn, provides further ammunition for escalation. Given this situation, it is both relevant and timely to develop a better understanding of the communicative and performative aspects of terrorism trials.

Given our comments on the relevance of the performative element in terrorism trials, a definition of the concept of performativity needs to be presented here, a definition that refers to discursive efforts and actions to construct social realities,[33] as applied to terrorism trials:

> Performativity in terrorism trials refers to acts or strategies (stated or more incoherent) adopted by parties with a stake in the trial to try to persuade their target audience (s) in (and outside) the courtroom of the justice of their narrative(s) and the injustice of the one on the opposite side of the bar.[34]

The importance of studying communicative strategies and performative acts has been argued before.[35] Performative acts, according to Erika Fischer-Lichte, involve unpredictable and often (but not always) spontaneous interactions and exchanges between actors, spectators and others involved in the terrorism trial and do not leave them unchanged.[36] These transformative acts in the court room are based on explicit or implicit, stated or more incoherent strategies that have the potential to mobilise certain sectors of society, or certain groups outside it, by means of verbal statements or non-verbal behaviour in and outside the courtroom, e.g. in the form of hunger strikes. Their target audiences range from formal players within the legal system, such as judges and juries, to various publics outside the courtroom.[37]

Performance is an act, a process and a product at the same time; it provides consolidation of norms, re-enactment of identity and can also involve 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 form of an Aristotelian drama: there is unity of time, place and action. Yet it also transcends the courtroom. The performances of the actors have a bearing on a broader audience, on the political context, on a society's culture and legal system as a whole, and this in three ways. First, there is *mimesis*: a (mostly verbal) re-enactment of the offence, performed in the hope of uncovering what actually happened. In addition to *mimesis*, there is *poiesis* as well, i.e. *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 (re)created in the courtroom. Moreover, apart from *faking* and *making*, performances also amount to *breaking* and *remaking*. Some narratives are upheld, others are disputed. In the end, often a new one emerges. This is called *kinesis*: movement, motion, fluidity. Performance can transgress existing boundaries, break structures and remake social and political rule. It intervenes and makes things anew.[38]

Through a trial, the members of the community participate in a possibly escalating and divisive debate: not only on the question of culpability and adjudication, but possibly also with respect to the communicative framework (the criminal law paradigm, rule of law, and justice) as such. Paraphrasing Bell's work on performative theories: during trials audiences will be induced to take sides; they will be inclined to be for or against the (alleged) rule breaker. Redress may be possible, when procedures to repair or remedy the breach are employed—a role the judicial machinery itself often plays. 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'[39] 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, and later reintegrated into the community. Every major social drama alters society to a certain extent. These alterations may not be permanent, but merely reflect a 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 repressive institutions may lead to a revolutionary situation in which at least one of the contending parties generates a programme of societal change, and the whole framework of the law is transformed.[40]

One critical note needs to be made, however. A performative act is not the same as a calculated strategy. And even if these two conflate, the exchange between actors and spectators remains unpredictable. The actual outcome of the trial and the question whose performance manages to mobilise or immobilise the public or more specific target audiences, is hard to assess conclusively. The outcome depends on a number of factors and may vary throughout the course of the trial. One major element of uncertainty in establishing the likely effect of a communicative strategy is the level of media coverage, and the degree of national public attention devoted to the trial.[41] This can be invoked by the agents directly involved in the trial, but media attention is—in some countries more than others—an autonomous factor in its own right. Distal and proximate context, historical experiences, media logistics at a specific time and place, other hypes on the political agenda, these all influence the way a trial is covered and reported. While mass media can have an independent agenda and independent interests, they are usually not just passive witnesses and conduits of factual information. In fact, sometimes the media have tried the suspects long before a case goes to court.

Like other political trials or media-saturated ordinary criminal trials (for example, the O.J. Simpson trial in California), terrorism trials can thus also be considered to be shows or, to use more accurate terminology, a dramaturgical play. This is not to say that terrorism trials are in all respects fundamentally different from other politicised trials, media-saturated trials or dramatic criminal trials. However, for terrorists and counter-terrorists, the presentation of, and contest over, credible narratives of justice and injustice are especially important. Compared to ordinary criminals who prefer a low profile in public, terrorist suspects often challenge the existing communicative frames and political rule or present contentious and violent views of justice and repression, and do so for all to see.

While combining these two concepts—lawfare and performativity—the guiding question for analysing terrorism trials should, in our view, be this: How do the main stakeholders in a terrorist trial (however coherently or incoherently) use the law and legal systems to achieve their goal of convincing their target audiences of their particular vision of justice/injustice? This question can be broken down into a number of sub-questions:

- Who are the main stakeholders in a trial and what are their visions of justice/injustice? Main stakeholders include the opposite parties within the legal system of criminal justice: the prosecutors and the defendant/legal counsel.
- Which performative acts and/or communicative strategies do they engage in in court? Do they follow strategies of rupture, i.e. strategies that intend to reject, obstruct or undermine the legal system? Strategies are defined as the total sum of performative actions, including the legal language (charges, legal paragraphs), narrative (either as a coherent plot line or explanation or as disparate statements), non-verbal expressions, behaviour, self-portrayal, etc., used to advance the stakeholder's vision of justice/injustice. These strategies might be visible as explicit attempts, or only to be perceived as post hoc rationalisations or implicit articulations.
- Which target audiences (judge and/or jury, real or potential terrorist constituencies, defendants, specific groups or society at large) are addressed, and how do these respond? Target audiences are understood here as the audiences implicitly or explicitly addressed by the stakeholder in the trial.
- To what extent do the stakeholders and/or their target audiences affirm closure? What are their ideas of (in)justice, defined as the implicitly or explicitly formulated goal and visions of moral rightness (or absence thereof)[42] of the stakeholder in the trial and his/her claim to legitimacy.

1.3. Outline of This Volume

In this volume a series of terrorism trials—some famous, others less so—are revisited. While the main focus is on trials held since the Second World War, we also look at two classical trials from Czarist Russia and the Soviet Union respectively. This is due in part to the special Russian background of one of the editors but it can also be justified in terms of their place in history; one taking place at the very beginning of modern terrorism and arguably (co-)inspiring the first anarchist wave

of modern terrorism, the other, a classical Stalinist trial that was, in a way, the mother of all show trials. Somewhat closer to the present are the analysis of an ETA trial and the Stammheim trial of members from the German Red Army Faction. Altogether, the volume covers nine case studies, half of them taken from the post-9/11 period.

Following this introduction is a theoretical chapter by Alex P. Schmid, which focuses on the notions of political crime and political justice. Alex Schmid also authored the case study on the trial of Vera Zasulich in 1878 and offers a detailed account of the first of three Stalinist show trials in the mid-1930s, where alleged members of a 'Trotzkyite-Zinovievite Terrorist Centre' stood trial. The subsequent chapters deal with trials held in the 1970s. Joost Augusteijn analyses some of the more prominent IRA trials in the 1970s, while Jacco Pekelder and Klaus Weinhauer scrutinise the German Stammheim trial.

The next set of chapters deals with post-9/11 trials. First, Geert-Jan Knoops, international law scholar and practising lawyer, investigates the case of Zacarias Moussaoui, who—often referred to as the 20th hijacker of 9/11—was convicted of conspiring to kill US citizens. Knoops analyses the role of the theatre itself in setting the stage for the performative strategies of the parties involved. A federal trial, according to Knoops, is the best way to administer justice, and to conduct a fair trial. Next, Fred Borch considers the Guantánamo trials between 2003 and 2004. As a former US military prosecutor, he combines scholarly analysis with first-hand knowledge of some of the Guantánamo tribunals. Beatrice de Graaf then covers a number of trials against a group of jihadist terrorist suspects in the Netherlands. She notes that in the case of the Hofstad group in 2005–2006 it was not so much the thwarted attack, but the risk of such an attack, that was adjudicated upon—a new phenomenon in criminal justice. Carolijn Terwindt continues with an analysis of the support groups and sympathiser movement to the Gestoras pro Amnistía in Spain (who stood trial in 2008), a highly under-researched area.

The last trial discussed is the 2012 trial of Anders Behring Breivik, the perpetrator of a bomb plot and a massacre that cost the lives of 77 mostly young people in Oslo and Utøya. The authors of this last chapter, Tore Bjørgo, Beatrice de Graaf, Liesbeth van der Heide, Cato Hemmingby and Daan Weggemans take a broad look at the process timeline—from the time of Breivik's arrest to his sentencing—to assess the full impact of the trial on Norwegian society. They moreover carried out an investigation and inquiry during the Oslo trial and developed a methodology for assessing the quality of the trial in terms of closure or rupture for the different audiences involved and present in and around the courtroom.

In the conclusion, De Graaf will expand further on the insights drawn from these and other trials and propose a tentative typology of terrorism trials based on the two concepts of performativity and lawfare introduced briefly above, in order to prepare the ground for further research.

At the very end of the volume there is an extensive bibliography on terrorist trials and political justice which was prepared by Jaclyn Peterson, assisted by Susanne Keesman, Hannah Joosse, Jorrit Steehouder, Mike Spaans, Alex Schmid and Daan Weggemans.

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Notes

1 Liesbeth van der Heide contributed to this introduction by writing the first page of the 1.2 section on 'lawfare'.

2 The author wishes to thank Fred Borch, Quirine Eijkman and Alex Schmid for their comments on an earlier draft of this introduction. The first author of this chapter took part in the 'Terrorists on Trial' Research Theme Group, hosted by the Netherlands Institute for Advanced Studies, Wassenaar/The Netherlands during the year 2010/2011. Parts of this introduction have been posted as an International Centre for Counter-Terrorism research paper: Beatrice de Graaf, 'Terrorists on Trial: A Performative Perspective', ICCT-*Research Paper* (June 2011), pp. 1–15, http://www.icct.nl/download/file/ICCT-de-Graaf-EM-Paper-Terrorism-Trials-as-Theatre.pdf.

3 Jeff Greenfield, 'What if we'd taken him alive?', *Washington Post* (8 May 2011), http://www.washingtonpost.com/opinions/what-if-bin-laden-had-been-captured-not-killed-an-alternate-history/2011/05/05/AFl7EO8F_story.html. Retrieved 11 May 2015.

4 Andrew Ramonas, 'Cheney Says Holder Wants "Show Trial" for KSM' (23 November

2009), 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 Trials: Contextualizing the Politicization of the Courtroom', in: *Barry Law Review*, 15:1 (2010), pp. 41–72, here: p. 44.

5 Ramonas, 'Cheney Says Holder Wants "Show Trial" for KSM.'

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

7 William E. Connolly, *The Terms of Political Discourse*. 3rd ed. (Princeton: Princeton University Press, 1993), p. 10. See also Alex P. Schmid, 'Terrorism: The definitional problem', in: *Case Western Reserve Journal of International Law*, 36:2 and 3 (2004), pp. 375–420.

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

9 Allo, 'The "Show" in the Show Trials', pp. 41–72. Parts of this introduction, and the conclusion, have also been used in a chapter in a German volume: Idem, 'Terroristen vor Gericht. Terrorismusprozesse als Fortsetzung des Kampfes um die Kommunikationshoheit. Eine Typologie', in: K. Weinhauer and J. Requate (ed.), *Terrorismus als Kommunikationsprozess. Eskalation und Deeskalation in historischer Perspektive* (Frankfurt/New York: Campus Verlag, 2012), pp. 281–298.

10 Actually, this is not what he said but that is how it is often quoted in English, a more correct translation of the German text is: 'the continuation of politics with a mixture of other means'. Carl von Clausewitz, *Vom Kriege: Hinterlassenes Werk des Generals Carl von Clausewitz* (Bonn: Dümmler Verlag, 1972), p. 12.

11 Martha Crenshaw, 'Current Research on Terrorism: The academic perspective', *Studies in Conflict & Terrorism*, 15:1 (1992), pp. 1–11.

12 David Kennedy, *Of War and Law* (Princeton: Princeton University Press, 2006), p. 5.

13 Charles Dunlap, 'Lawfare Today: A Perspective', *Yale Journal of International Affairs*, 3:1 (2008), p. 146.

14 William George Eckhardt, 'Lawyering for Uncle Sam When He Draws His Sword', *Chicago Journal of International Law*, 4:2 (2003), pp. 431–445.

15 Wouter Werner, 'The Curious Career of Lawfare', *Case Western Reserve Journal of International Law*, 43:1 and 2 (2010), p. 62. Whereas Werner and The Lawfare Project refer to the abuse, and negative manipulation of laws and judicial systems as a weapon of war, we take a broader view and apply a general notion of strategy to the uses and abuses of the law, while our main interest is in its strategic function.

16 Beatrice de Graaf, 'Terrorists on Trial: A Performative Perspective', ICCT *Expert Paper* (ICCT: The Hague, 2011), p. 11.

17 Roger Cotterrell, *The Sociology of Law: An Introduction* (London: Butterworths, 1992), pp. 231–232.

18 Council of Europe, ETS No. 005, *Convention for the Protection of Human Rights and Fundamental Freedoms*, http://conventions.coe.int/treaty/en/treaties/html/005.htm. Retrieved 13 May 2015.

19 Allan C. Hutchinson and Patrick J. Monahan, 'Law, Politics and the Critical Legal Scholars: The unfolding drama of American legal thought', *Stanford Law Review*, 36:1 and 2 (1984), p. 199. See also Constantijn Kelk, *Studieboek materieel strafrecht* (Deventer: Kluwer, 2005).

20 Jack Knight, 'Social Norms and the Rule of Law: Fostering Trust in a Socially Diverse Society', in: Karen S. Cook (ed.), *Trust in Society* (New York: Russell Sage Foundation, 2001), p. 355. See also: Harry C. Bredemeier, quoted in: Roger Cotterrell (ed.), *The Sociology of Law: An Introduction* (London: Butterworths, 1992), pp. 89–92.

21 Brian J. Ostrom, Charles W. Ostrom Jr., Roger A. Hanson and Matthew Kleiman, *Trial Courts as Organizations* (Philadelphia: Temple University Press, 2007). See also: Jacob Eisenstein and H. Jacob, *Felony Justice: An organizational analysis of criminal courts* (Boston: Little, Brown and Co., 1977).

22 Julian V. Roberts and Loretta J. Stalans, *Public Opinion, Crime, and Criminal Justice* (Boulder: Westview, 1997).

23 Thomas Nagel, 'The Problem of Global Justice', *Philosophy and Public Affairs*, 33:2 (2005), pp. 113–147.

24 Michael Freeman, 'Order, Rights, and Threats: Terrorism and Global Justice', in: Richard A. Wilson (ed.), *Human Rights in the 'War on Terror'* (New York: Cambridge University Press, 2005).

25 Philip L. Reichel, *Comparative Criminal Justice Systems: A topical approach* (Upper Saddle River: Prentice Hall, 2002). See also Mark A. Drumbl, 'Terrorist Crime, Taliban Guilt, Western Victims, and International Law', *Denver Journal of International Law and Policy*, 31:1 (2002), p. 69.

26 Ronald J. Sievert, 'War on Terrorism or Global Law Enforcement Operation?', *Notre Dame Law Review*, 78:2 (2002), pp. 308–349; cf. Herbert L. Packer, 'Two Models of the Criminal Process', *University of Pennsylvania Law Review*, 113:1 (1964), pp. 1–68.

27 Marieke de Goede and Beatrice de Graaf, 'Sentencing Risk: Temporality and precaution in terrorism trials', *International Political Sociology*, 7:3 (2013), pp. 313–331.

28 Wouter G. Werner, 'The Changing Face of Enmity: Carl Schmitt's international theory and the evolution of the legal concept of war', *International Theory*, 2:3 (2010), pp. 351–380; cf. Sarah Nouwen and Wouter Werner, 'Doing Justice to the Political: The ICC in Uganda and Sudan', *European Journal of International Law*, 11:4 (2010), pp. 941–965; Tim Meijers and Marlies Glasius, 'Expression of Justice or Political Trial? Discursive battles in the Karadžić case', *Human Rights Quarterly*, 35:3 (2013), pp. 720–752.

29 Daan Weggemans and Beatrice de Graaf, *Na de vrijlating. Een explorative studie naar recidive en re-integratie van jihadistische ex-gedetineerden* (Amsterdam: Stapel & De Koning, 2015).

30 Gunther Teubner, '"Global Bukowina": Legal pluralism in the world society', in: Gunther Teubner (ed.), *Global Law Without a State* (Dartmouth: Aldershot, 1997), pp. 3–28.

31 Martti Koskenniemi, 'Between Show Trials and Impunity', *Max Planck Yearbook of United Nations Law* (2002), p. 26.

32 Alan Keenan, *Democracy in Question: Democratic openness in a time of political closure* (Stanford: Stanford University Press, 2003), p. 12.

33 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*, pp. 11–13.

34 Historically, this definition should only be applied to the modern period of the late 19th century and onwards, when the modern state managed to claim for itself the monopoly of legitimate use of violence, when a criminal justice system based on a parliament-approved penal code came to maturity at the same time as modern mass media emerged.

35 De Graaf, 'Terrorists on Trial'.

36 Erika Fischer-Lichte, 'Notwendige Ergänzung des Tekst-Modells', *Frankfurter Rundschau* (23 November 1999), p. 20; Idem, *Theater als Modell für eine performative Kultur. Zum performative turn in der europäischen Kultur des 20. Jahrhunderts (Universitätsreden 46)* (Saarbrücken: Pressestelle der Universität des Saarlandes, 2000); Idem, 'Performance, Inszenierung, Ritual. Zur Klärung kulturwissenschaftlicher Schlüsselbegriffe', in: Jürgen Martschukat and Steffen Patzold (ed.), *Geschichtswissenschaft und 'performative turn'. Ritual, Inszenierung und Performance vom Mittelalter bis zur Neuzeit* (Cologne/Weimar/Vienna: Böhlau Verlag, 2003), pp. 34–54.

37 Judith Butler, *Excitable Speech: A politics of the performative* (New York: Routledge, 1997).

38 Elizabeth Bell, *Theories of Performance* (Los Angeles: SAGE, 2008), pp. 12–15.

39 Bell, *Theories of Performance*, p. 108.

40 Bell, *Theories of Performance*, pp. 108–109.

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

42 John Rawls, *A Theory of Justice.* Revised ed. (Oxford: Oxford University Press, 1999).