

The following text may be printed, copy/pasted, or downloaded and emailed.

Legal cases in Germany and the US show how authorities with interests that often diverge are inching towards greater co-operation in prosecuting suspects, write Hugh Williamson and Edward Alden

By EDWARD ALDEN, NIKKI TAIT and HUGH WILLIAMSON

Financial Times (London, England)

October 7, 2004 Thursday

London Edition 1

More than three years after September 11, 2001, no one allegedly involved in planning the world's worst terrorist attacks has been convicted despite investigations across the globe and dozens of arrests of al-Qaeda leaders.

In the US, the trial of Zacarias Moussaoui, alleged by US authorities to have trained as the intended "20th hijacker", has been repeatedly delayed by legal battles over permissible evidence. In Hamburg, where three of the hijackers lived, two men who allegedly helped plan the attacks, Abdelghani Mzoudi and Mounir al-Motassadeq, are free after German courts this year dismissed the charges against them. Those rulings were triggered by the US refusal, on security grounds, to allow lawyers for the men to question high-level al-Qaeda detainees.

In dozens of other cases the US and its allies have not attempted criminal trials. Two men identified by the US commission that investigated September 11 as the masterminds behind the attacks - Ramzi bin al-Shibh and Khalid Sheikh Mohammed - remain in US detention at undisclosed locations. The US has yet to complete any military trials of detainees at Guantanamo Bay in the face of repeated legal challenges by lawyers for the detainees. In the UK, 11 terrorist suspects are being detained without trial at Belmarsh prison, sometimes tagged "Britain's Guantanamo": judges are this week considering a legal challenge to their internment.

The reasons behind the prosecution failures strike at the heart of a much wider dilemma preoccupying politicians, intelligence agents and legal officials. How can the competing, even contradictory, demands of secret services and civilian courts be balanced in a way that aids security and terrorism prevention while meeting Western courtroom standards of access to witnesses and evidence? Ultimately, is it possible to pursue successful prosecutions of alleged terrorists without jeopardising the war on terrorism?

The dilemma is made more acute by the frequent need for international co-operation between authorities whose interests often collide. There are now indications that Germany and the US are feeling their way towards collaborating more closely, after being sharply at odds. Bernd-Rudiger Sonnen, a law professor and criminologist at Hamburg University, says: "The new terror threat means new types of international legal co-operation are needed. The problem is that we are really only at the beginning of this process."

At one extreme, the administration of President George W. Bush has treated the "war on terror" as a clandestine, global struggle in which neither the rules of warfare nor the rules of civil justice apply. But the US has also pursued conventional criminal prosecutions of Mr Moussaoui and dozens of others suspected of aiding al-Qaeda or other terrorist groups.

For US allies determined to maintain the old rules, Washington's stance has been befuddling. Under ordinary rules of civil justice, an accused has the right to call witnesses in his defence. The sixth amendment to the US constitution states that the defendant in a criminal trial shall enjoy the right "to have compulsory process for obtaining witnesses in his favour". In Germany, a court's ability to undertake "unrestricted evaluation of evidence" is central to legal proceedings.

Mr Mzoudi was acquitted in February after US authorities rejected requests from his defence lawyers to allow Mr bin al-Shibh to appear as a witness at the trial. Agreeing to such a request,

the US feared, would interfere with an ongoing interrogation that could help round up other al-Qaeda leaders and thwart terrorist attacks. But the US refusal made a conviction "extremely difficult", according to Klaus Ruhle, the presiding judge. An appeals court has yet to rule on a prosecution motion to overturn the verdict.

In March a German federal appeals court overruled a 2003 conviction against Mr Motassadeq, ruling that judges in the original trial had given insufficient weight to the US decision to deny defence requests to call Mr bin al-Shibh as a witness (see below).

Those twin rulings marked a low point in US-German co-operation in the anti-terrorism battle. John Ashcroft, the US attorney-general, said he was disappointed by Mr Mzoudi's release, adding that the US legal system would have handled the case differently. Stephen Push, spokesman for the "Families of September 11", which represents the families of many of those killed in the attacks, said: "Someone has dropped the ball here."

Roger Kusch, the justice minister for Hamburg, fired back that the US would have to live with a court ruling it did not like if witnesses were withheld for security reasons. Mr Nehm said after Mr Mzoudi's acquittal that he hoped the ruling would encourage "a change of thinking" in the US.

In the last several months that appears to have happened. On the opening day of Mr Motassadeq's retrial in August the US Justice department confirmed for the first time its willingness to comply with the German court's 27-page request for evidence from the al Qaeda detainees. A six-page fax gave detailed summaries of the interrogations of Mr bin al-Shibh and Mr Mohammed.

More evidence is on its way. "We will definitely get more information wanted to know, based on the 27-page questionnaire," Mr Nehm says.

The US decision to release details from Mr bin al-Shibh and Mr Mohammed's interrogations came after legal wrangles and unprecedented lobbying by German government ministers and prosecutors in Washington, the Financial Times has learnt. The change of heart followed talks in April in the US between Mr Nehm and prosecutors preparing the case against Mr Moussaoui, and several visits to Washington by Germany's interior and justice ministers.

In July, the justice ministry in Berlin called in Washington's ambassador, and Germany's ambassador to the US visited the State department, to express concern that the Motassadeq retrial could fail unless Washington acted.

Referring to complaints during the Mzoudi trial that a "black hole" had opened up because of the missing evidence from the US, Mr Nehm says: "The black hole is becoming less black, as the US authorities are making available a range of information."

While Germany has struggled to reconcile its rules of evidence with Washington's security concerns, the issue has similarly plagued US criminal trials. Earlier this month, the conviction in a Detroit court of two men charged with material support of terrorism was thrown out after the Justice department admitted withholding evidence from defence lawyers and allowing government witnesses to mislead the jury.

In another case last year, US prosecutors were forced to accept a plea bargain from Enaam Arnaout, director of the Chicago-based charity Benevolence International, after the court rejected hundreds of pages of documents that appeared to show clearly that he was an important fundraiser for Osama bin Laden, the al-Qaeda leader. The documents, mostly seized in raids in Bosnia, were ruled by the court to be inadmissible hearsay.

But the case that has most clearly highlighted the legal quandaries of the war on terror is that of Mr Moussaoui, who was arrested several weeks before the attacks. His lawyers do not deny his

al-Qaeda connections but argue that he was never part of the September 11 plot and that Mr bin al-Shibh and other al-Qaeda leaders can prove it.

In a decision last month, a three-member panel of the fourth circuit court of appeals in Virginia - a conservative court that has mostly sided with the Bush administration in the war on terror - ruled that Mr Moussaoui had the right to gather information from "enemy combatant witnesses (who) could provide material, favourable testimony on Moussaoui's behalf".

The court acknowledged that each of three high-level al-Qaeda detainees - two of whom have been publicly identified as Mr bin al-Shibh and Mr Mohammed - have provided evidence to US interrogators consistent with Mr Moussaoui's claim that he was not part of the plot but was sent to carry out further attacks after September 11.

But the court sided with the government in finding that defence lawyers should not be allowed to take depositions from the men directly. Instead, it directed the lower court to fashion "substitutions" based on classified transcripts of military and intelligence interrogations of the detainees, even though it acknowledged those transcripts "were not prepared with this litigation in mind". The court ordered that these substitutions be as close as possible to what the witnesses would say if called to testify.

The information provided to the German court is "comparable to that afforded" to the US court in the Moussaoui case, according to the August US fax to the German courts. What remains to be seen is how courts in the two nations will deal with those disclosures. "Much now depends on how the courts in the US and Germany handle this new material," says one international legal expert. "We are entering unknown territory."

German prosecutors are confident that, even without direct access to the detainees, the US Justice department summaries will provide grounds to allow judges to return guilty verdicts in retrials of Mr Motassadeq and Mr Mzoudi.

US legal experts also think the transcripts should suffice in the Moussaoui case. Ruth Wedgwood, a law professor at Johns Hopkins University, says that, while the terrorist cases raise new issues, there have been many criminal cases where witnesses cannot give depositions directly. "It's a generic problem," she says. "Even in an old-fashioned bank robbery you might have a confidential informant testifying for the government. I'm sure every defence lawyer would rather talk to every informant directly."

Further, in trials involving classified national security information, the US established procedures more than two decades ago to allow such information to be introduced safely at trials. Under the 1980 Classified Information Procedures Act, the government is allowed to offer unclassified summaries or substitutions for classified documents. Judges have access to the classified material to ensure that the summaries accurately reflect the documents.

Similar procedures exist in Germany, the UK and elsewhere. According to a senior British official, "the most important date for the (UK) security service is 1992, when MI5 began giving evidence in criminal trials. Almost everything MI5 does has to be done in a form that will not mean it becomes unusable as evidence."

But lawyers for the accused terrorists may not prove so co-operative. Udo Jacob, one of Mr Motassadeq's lawyers, says that, if the court finds sufficient grounds to discredit the US evidence exonerating his client, he would revive demands directly to question the al-Qaeda detainees. He might also seek to determine whether the evidence produced by the US interrogations was obtained by torture. "We'll not make it easy for the court," he says.

Mr Moussaoui's lawyers have also said they would seek to appeal against the decision approving the use of the interrogation transcripts to the full fourth circuit court, further delaying a trial that

has already dragged on for more than two years. "Moussaoui has a constitutional right to compel attendance of witnesses," said Edward McMahon Jr, one of his lawyers.

Some critics argue that the courts in both countries have already bent too far to protect the rights of those charged with terrorist offences. Bruce Fein, a constitutional lawyer and international consultant in Washington, says that the standard being set by the German courts could make it all but impossible to convict any of the al-Qaeda suspects. "The idea that any government is obliged to search the globe for exculpatory evidence is absurd," he says.