



# Problems Encountered in Investigating and Prosecuting Conspiracies to Commit Terrorist Offences

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*Terror conspiracies are among the most problematic criminal offences to prosecute because of the difficulty of distinguishing between the mere expression of subversive thoughts and substantive plans to execute an outrage. The afore mentioned dilemma has critical consequences for law enforcement agencies carrying out surveillance of conspiratorial meetings whether by way of SIGINT or HUMINT<sup>2</sup>. To find the correct balance between a longer period of surveillance or a relatively short one is a refined technique. The task becomes more reliable when the intelligence base has infiltrated and become integrated in the suspect's community. On the prosecution process when two or more potential terrorists agree upon a plan for an act of terror, the legal elements of the offence of conspiracy may be made out even if the commission of the complete criminal enterprise is beyond their capability. In these circumstances the task of sentencing such individuals is often a conjectural exercise.*

O Conspiracy,  
Shamest thou to show thy dangerous brow by night,  
When evils are most free? O, then, by day  
Where wilt thou find a cavern dark enough  
To mask thy monstrous visage? Seek none, Conspiracy;  
Hide it in smiles and affability;  
For if thou path, thy native semblance on,  
Not Erebus itself were dim enough  
To hide thee from prevention.

- Julius Caesar Act II Scene I

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<sup>2</sup> SIGINT: stands for **S**IGnals **I**NTelligence; HUMINT: stands for **H**UMAn **I**NTelligence.



## I. Criminal Conspiracy at Common Law

Most common law jurisdictions define a criminal conspiracy as an agreement between two or more persons to commit an unlawful act with the intention of carrying it out<sup>3</sup>. Such a definition comprises both an objective factual element and a subjective mental element. The factual element necessitates, as a basic requirement, the actual formulation of an agreement by two or more persons acting interdependently of each other while pursuing the objectives of the conspiracy. An un-communicated or secret intention to join a criminal enterprise, therefore, will not be considered subject to the legal process. After all, most democratic societies do not punish a person for formulating and reflecting upon objectionable beliefs and desires, however fantastic they may be, so long as they are not expressed in an incendiary manner. Indeed, many societies, in which the freedom of speech is held to be a fundamental liberty, will permit the vociferous expression of reactionary opinions so long as they are not calculated to cause a breach of the peace or to subvert the organs of government. When two or more individuals meet, therefore, and merely discuss various methods of pursuing a holy war against Western civilization, no criminal liability will arise unless they arrive at a definite meeting of minds as to the proposed course of criminal conduct. The formulation of even the most preposterously bizarre of plans will not absolve the prosecution, however, of the need to consider the authenticity of the agreement and the feasibility of carrying out its objective. Legally speaking, therefore, a technically feasible, yet totally implausible, plot by two determined high-school boys to kidnap the president of the United States would, in certain common law jurisdictions, constitute a conspiracy. The public interest would not, perhaps, deem such a case worthy of litigation.

The concurrent mental prerequisite for the offence of conspiracy at common law comprises both an intention to commit a crime and an intention to further or to accomplish the ulterior objective of the conspiratorial agreement. It should be stressed that proving the necessary mental element of a conspiracy, in the absence of a confession, is not an easy task. More often than not, the prosecution will be compelled to prove the requisite criminal intent by relying on circumstantial evidence such as the fact that the suspect had a vested financial interest in the outcome of the scheme he was planning with his alleged co-conspirators.

## II. Criminal Conspiracy in Civil and International Law

Conspiracy, as an independent crime, is far less common in civil law systems and, often, reserved for agreements to commit offences considered to be of the utmost gravity such as state mutiny, insurrection and treason: „It was revealed at the Nuremberg Trial that the approach to the problem of conspiracy in common law and in civil law countries is different, Mr. Justice Jackson, who was in the United States counsel at Nuremberg, stated in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440 (1949), that the modern law of conspiracy, as understood in common law, "does not commend itself to jurists of civil law countries, despite universal recognition that an organized criminal society must have legal weapons for combating organized criminality. ",,“<sup>4</sup>

Furthermore, in so far as the criminal code of civil law countries provides for an offence of conspiratorial association, there is often an additional requirement to show “material acts” committed in pursuance to the agreed plot. French legislators, for example, have recognised the need for a specific offence of conspiracy in terror related cases, yet stipulated that the terrorist’s be evidenced by a “fait

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<sup>3</sup> E.g., *Yip Chiu-Cheung v R.*, 99 Cr. App.R. 406, 410 PC (Lord Griffiths). It should also be noted that in certain United States jurisdictions, contrary to the situation in the United Kingdom, regard an agreement to achieve a legal end by illegal means as a conspiracy.

<sup>4</sup> Wagner, Wienczyslaw J., *Conspiracy in Civil Law Countries*, in: *Journal of Criminal Law, Criminology, and Police Science* (Volume 42, Number 2), Northwestern University, Chicago, July to August 1951, pp. 171-183.



materiel”: “Constitue également un acte de terrorisme le fait de participer à un groupement formé ou à une entente établie en vue de la préparation, caractérisée par un ou plusieurs faits matériels, d’un des actes de terrorisme mentionnés aux articles précédents.”<sup>5</sup>

International anti-terror legislation, as evidenced by the similar drafting of a number of multi-lateral treaties<sup>6</sup>, while explicitly obliging signatory states to outlaw criminal attempts to commit various offences, does not, apparently, recognize conspiracy as an alternative inchoate mode of commission. Article 2 of the International Convention for the Suppression of Acts of Nuclear Terrorism, for example, after outlawing certain acts pertaining to the possession and use of radioactive material, provides for various modes of co-perpetration of which one, while similar to the concept of conspiracy, is more akin to the doctrine of joint criminal enterprise as promulgated in international humanitarian law:

“2.3. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of the present article.

2.4. Any person also commits an offence if that person:

- (a) Participates as an accomplice in an offence as set forth in paragraph 1, 2 or 3 of the present article; or
- (b) Organizes or directs others to commit an offence as set forth in paragraph 1, 2 or 3 of the present article; or
- (c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1, 2 or 3 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.”

The jurisprudence of the International Criminal Tribunal for the Former Yugoslavia has, nevertheless, held that “joint criminal enterprise” is a primary mode of co-perpetration quite distinct from conspiracy: “[w]hilst conspiracy requires a showing that several individuals have agreed to commit a certain crime or set of crimes, a joint criminal enterprise requires, in addition to such a showing, that the parties to that agreement took action in furtherance of that agreement.” In other words, “while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise”.<sup>7</sup>

Given such conflicting approaches to the concept of conspiracy, as evidenced in the common law and civil law systems, the criminalization of conspiratorial agreements has, understandably, been subject to much philosophical discussion. After all, it is often hard to justify why mutual agreements *per se* to perpetrate criminal acts should be regarded as a more definite manifestation of criminal intent than the resolute and vocalized determination of an individual who takes preliminary steps towards the execution of a substantive offence yet falls short of committing a criminal attempt. Certain common law systems, apparently, regard mutual and secretive agreements *per se* as, potentially, *more injurious* to society than the declarations and preliminary acts of a tenacious individual. Professor Glanville Williams has expressed this paradox succinctly: “Conspiracy, the most complex of the inchoate offences at common law, may seem somewhat arbitrary. If the mere intention of one person to commit a crime is

<sup>5</sup> Article 421-2-1 of the French Criminal Code as amended by Loi No.96-647, 22 July 2006.

<sup>6</sup> General Assembly of the United Nations, *International Convention against the Taking of Hostages*, New York, adopted on 17 December 1979; General Assembly of the United Nations, *International Convention for the Suppression of Terrorist Bombings*, New York, adopted on 15 December 1997; General Assembly of the United Nations, *International Convention for the Suppression of the Financing of Terrorism*, adopted on 9 December 1999; General Assembly of the United Nations, *International Convention for the Suppression of Acts of Nuclear Terrorism*, New York, 13 April 2005.

<sup>7</sup> Prosecutor v. Milutinović et al., *Decision on Dragojub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise*, Case No. IT-99-37-AR72, 21 May 2003, para 23 and 24. Available online at: <http://www.un.org/icty/Supplement/supp41-e/milutinovic-a.htm>.



*not criminal, why should the agreement of two people to do it make it criminal? The only possible reply is that the law (or if you prefer, the Establishment) is fearful of numbers, and that the act of agreeing to offend is regarded as such a decisive step as to justify its own criminal sanction”.*<sup>8</sup>

Notwithstanding, this philosophical irony is less pronounced under United States federal law where it is necessary to prove the commission of an “overt act” in pursuance of a conspiratorial objective before an agreement will attract criminal liability<sup>9, 10</sup>.

It should be stressed that the uniquely ephemeral and independent nature of the crime of conspiracy, as recognized in a number of common law systems, entails that a suspect will continue to be criminally liable for participation in a conspiratorial agreement even if he withdraws from the plot before the overt objective thereof is accomplished<sup>11</sup>. In such circumstances, the extent of the penitent terrorist's remorse and the success of the contemplated act will be factors relevant to the question of sentencing.

### **III. Charging a Criminal Conspiracy**

Certain authorities argue that it is both superfluous and bad practice to charge a suspect with an offence of conspiracy when a substantive offence has been committed. It is considered a basic principle of justice that a defendant should not only know the exact details of the charges leveled against him but should also be convicted on the basis of the best available evidence. It is further maintained that unbridled use of the conspiracy charge is an abuse of process if it is purposefully employed as a means of short-cutting what would otherwise be an awkward and expensive prosecution.

The prosecutorial task of stipulating the objective of a terror conspiracy, especially in the context of alleged Taliban and Al-Qa'ida operatives captured by the US Armed Forces, has been shown to be extremely problematic in practice. Given the fact that many of the alleged terror operatives had, prior to capture, not committed any substantive offence other than affiliating themselves with the spirit of certain proscribed organizations and undergoing military training in Afghanistan, stipulating a substantive offence was a wholly conjectural exercise. As a result, military prosecutors, in a number of the so-called Guantánamo Bay cases, taking advantage of what was perceived to be the wider jurisdiction of the military commissions established by the US Department of Defence, alleged general conspiracies to breach international laws governing the conduct of hostilities without stipulating a conspiracy to contravene any specific treaty or statutory provision<sup>12</sup>.

Some human rights organizations were, initially, quick to support the application of the rule of law to detainees brought before military commissions for criminal trial after having previously been consigned to the legal black hole of administrative detention. These organizations, nevertheless, protested the use of nebulous conspiracy charges in order to disguise prosecutorial uncertainty as to the ulterior motives of parties to an alleged terror conspiracy: “*Human Rights Watch is concerned about reports that the*

<sup>8</sup> Glanville, Williams, *Textbook of Criminal Law* (2<sup>nd</sup> edition), Stevens & Sons, at p. 420.

<sup>9</sup> *United States v. Hermes*, 847 F.2d 493, 496 (8th Cir. 1988) where it was held that the “overt act” itself need not be criminal in nature, and *United States v. Donahue*, 539 F.2d 1131, 1136 (8th Cir. 1976) where it was held that the “overt act” may be perfectly innocent. It should be noted that the “overt act” need not involve more than one of the conspirators: *United States v. Bass*, 472 F.2d 207, 213 (8th Cir.), cert. denied, 412 U.S. 928 (1973).

<sup>10</sup> This concept of the “overt act” has not been recognized, to date, as essential to the traditional common law conspiracy, perhaps, because it comes perilously close to blurring the distinction between a conspiracy and the classical notion of criminal attempt.

<sup>11</sup> *United States v. Shabani*, 513 U.S. 10 (1994).

<sup>12</sup> E.g., *United States v. Ibrahim Ahmed Mahmoud al Qosi* - a Sudanese national against who legal action was suspended on 9 November 2004 pending resolution of the issues which were later settled in *Hamdan v. Rumsfeld*, namely that that the military commissions violated international agreements to which the United States was a signatory.



*U.S. government is considering prosecuting detainees under loose conspiracy theories. (E.g., Neil A. Lewis, „U.S. Weighing New Doctrine for Tribunals,“ The New York Times, April 21, 2002.) We recognize that conspiracy prosecutions are appropriate if it can be proved that a suspect joined a criminal enterprise knowing of its criminal purpose and with the intent of furthering its criminal objectives. However, we caution against inferring such intent from mere participation in the armed conflict in Afghanistan. For example, joining forces with the Taliban to defend its government does not necessarily imply active support for Al-Qa'ida's alleged plans to kill civilians. Even joining Al-Qa'ida does not necessarily imply an intent to further its alleged crimes against civilians, since many Al-Qa'ida members were apparently seconded to the Taliban war effort, as illustrated by the 55<sup>th</sup> Brigade. Theoretically, fighters who assisted the Taliban might have done so to provide a safe haven for Al-Qa'ida and its alleged criminal activity, but that would require specific proof, since many fighters seem to have taken up arms to defend an Islamist regime, without reference to Al-Qa'ida's international activities. From the perspective of the September 11 attacks, Al-Qa'ida was a large presence in Afghanistan, but that is not necessarily the perspective of the average fighter who joined the battle earlier. In short, we welcome conspiracy prosecutions as one tool to bring to justice people who in fact knowingly advanced a project of committing war crimes and crimes against humanity, but we caution against simplistic assumptions about the intent to be drawn from a suspect's involvement in military activity in Afghanistan... ”<sup>13</sup>.*

It should be stressed, however, that the view cited above was by no means universally supported. While there can be no disputing that conspiracy charges should, preferably, not be used to disguise prosecutorial ignorance as to a terrorist's motive, it is incorrect to assume that international humanitarian law, as submitted by Human Rights Watch hereinabove, recognizes an offence of “conspiracy to commit war crimes or crimes against humanity” as a substitute for conspiring to commit substantive criminal offences. The statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), for example, while providing, specifically, for an offence of conspiracy to commit genocide, purposefully does not provide for an offence of conspiracy to commit violations of the laws of war. Nor does the statute of the ICTY stipulate that conspiracy *per se* be regarded as an inchoate mode of commission. In a comment on the United States' Supreme Court judgment in *Hamdan v. Rumsfeld*<sup>14</sup>, former US Ambassador at Large for War Crimes Issues David Scheffer summarized the issue as follows: „*As the chief U.S. negotiator during the United Nations talks for the International Criminal Court (ICC), I had the opportunity to address the conspiracy issue very directly when the general principles of law on individual criminal responsibility were being considered over many drafting sessions. Some common law countries felt comfortable pursuing theories of conspiracy because such a crime exists in their domestic law (albeit not for the law of war). Civil law countries do not embrace the crime of conspiracy, however, and require evidence that the defendant acted with respect to the underlying crime. Being far more numerous than their common law brethren, civil law jurisdictions have never agreed to incorporate the crime of conspiracy into the law of war. The statutes of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), approved by the U.N. Security Council in 1993 and 1994, respectively, and of the Special Court for Sierra Leone, all with full U.S. support, identify the crime of conspiracy only with genocide consistent with the Genocide Convention. In their many judgments, the ICTY and ICTR have held that with respect to war crimes, a charge of joint criminal enterprise associated with an actionable war crime - rather than adjudicating a stand-alone charge of conspiracy to commit war crimes - is the proper reasoning for establishing individual criminal responsibility for war crimes*”<sup>15</sup>.

<sup>13</sup> Human Rights Watch, U.S.: *Growing Problem of Guantanamo Detainees*, Human Rights Watch Letter to Donald Rumsfeld, 29 May 2002. Available online at: <http://hrw.org/press/2002/05/pentagon-ltr.htm>.

<sup>14</sup> 548 U.S. (2006).

<sup>15</sup> Scheffer, David, *Why Hamdan is Right about Conspiracy Liability*, in: JURIST forum, 30 March 2006. Available online at: <http://jurist.law.pitt.edu/forumy/2006/03/why-hamdan-is-right-about-conspiracy.php>.



Having summarized the potential abuses of conspiracy charges in terror cases, it is worth mentioning that the British practitioners' handbook *Archbold* recognizes three legitimate and common situations in which the use of the conspiracy charge will be regarded as beneficial:

- 1) Cases of factual and legal complexity where the interests of justice are best served by presenting an „overall picture“ which cannot be achieved by charging a relatively small series of substantive offences;
- 2) Cases where authentic evidential difficulties preclude meeting the requisite burden of proof for the full contemplated act. Should, for example, the DNA or fingerprints of two suspects be found on the remains of an explosive device and no other evidence exist apart from the suspects' mutual incrimination, reasonable doubt would exist, on a substantive charge of murder, as to which of the suspects had detonated the device and killed the victims. There would, nevertheless, be more than reasonable grounds for charging a conspiracy since there can be no reasonable defense of innocently handling such an offensive weapon;
- 3) Cases where the agreement to commit the offence is more egregious than the substantive act itself. This situation could, potentially, arise when the prescribed sentence for the substantive offence is actually less than that indicated for the offence of conspiracy.

#### **IV. The Organizational Structure of a Conspiracy**

Although the number of parties to a conspiracy will vary, the organizational infrastructure thereof will commonly fall into one of three categories colloquially referred to as “chain”, “wheel” and “hybrid” conspiracies – the latter being a combination of the former two conspiracies. “Chain” conspiracies are, typically, the easiest to prove in a court of law and are typified by the linear organization of the parties to the plot and the streamlining of decision taking – for example a gang involved in the smuggling of weapons. “Wheel” conspiracies, however, are characterized by the presence of a plot originator situated at the “hub” of the conspiratorial network allocating specific roles to various terrorist sub-contractors situated along the “spokes”. In this latter scenario, the various sub-contractors will sometimes, but not necessarily always, be aware of the existence of other co-conspirators and their respective roles. As a result, “wheel” conspiracies generally present more operational problems for intelligence authorities and investigators than “chain” conspiracies. One reason for this is due to the fact that the “cellular” compartmentalization of terrorist activity, as evidenced in “wheel” conspiracies, while facilitating effective infiltration of a host community, also, reduces the chance of detection and subsequent incrimination of the larger terrorist infrastructure. Furthermore, when such a “cellular” terror network is foiled, investigating authorities are, often mistakenly, led to believe that a plot stops at the operational level.

The problems in investigating cellular terrorist activities have been compounded in the last decade due to the use of internet chat rooms for planning and orchestrating terrorist activities: *“Many terrorist groups, among them Hamas and Al-Qa’ida, have undergone a transformation from strictly hierarchical organizations with designated leaders to affiliations of semi-independent cells that have no single commanding hierarchy. Through the use of the Internet, these loosely interconnected groups are able to maintain contact with one another — and with members of other terrorist groups. In the future, terrorists are increasingly likely to be organized in a more decentralized manner, with arrays of transnational groups linked by the Internet and communicating and coordinating horizontally rather than vertically.*

*Several reasons explain why modern communication technologies, especially computer-mediated communications, are so useful for terrorists in establishing and maintaining networks. First, new technologies have greatly reduced transmission time, enabling dispersed organizational actors to communicate swiftly and to coordinate effectively. Second, new technologies have significantly reduced*



*the cost of communication. Third, by integrating computing with communications, they have substantially increased the variety and complexity of the information that can be shared*<sup>16</sup>.

The phenomenon of cyber-conspiracies involves complex questions of jurisdiction which invariably lead to challenges being made as to the form of an indictment. Procedural difficulties, furthermore, often arise in securing such non-tangible “chat” evidence in a form which will allow its presentation before a court of law without challenges being made as to its authenticity.

The organizational infrastructure of a “wheel” conspiracy also presents legal problems for prosecutors. As mentioned previously, an integral element of a conspiracy is that a conspirator is possessed not only of an intent to commit a criminal offence but, also, of an intent to further the objective of the conspiracy. Very often, the exact nature of the enterprise will only be known to a select few at the command centre of the conspiratorial web. The question frequently arises, therefore, as to what extent a terror suspect has to be appraised of the full criminal enterprise in which he is involved. To what extent will it be permissible to convict such an individual of taking a minimal role in a larger scheme the full extent of which is not known to him? United States drug legislation and precedent, for example, has stipulated a test which requires “knowledge of the essential objectives of the conspiracy”<sup>17</sup>. Such a definition is patently vague and subject to problems of definition. A potential terrorist may, for example, agree to carry out an “attack” plotting the destruction of governmental property whilst his co-conspirator envisages the murder of civilians. In such a scenario, the burden will normally be on the prosecution to show that there was a true meeting of minds, shared by all parties to the conspiracy, and that the agreement extended to all the forms of illegal conduct alleged<sup>18</sup>.

Obviously, it would be unreasonable to expect that co-conspirators who jointly agree to carry out a terrorist attack, calculated to maximize the loss of civilian life and subsequently thwarted, should be acquitted of a conspiracy merely because there was no meeting of minds as to the *modus operandi* of the attack. In other words, two co-conspirators who agree to kill commuters on an underground railway ought not be acquitted of a conspiracy to murder because one of them intended that the attack be carried out by way of explosives whereas the other intended that it be effected by way of poison gas.

Ironically, certain integral participants in a wheel conspiracy whose role may be a *sine qua non* to the success of the plot will escape criminal liability by virtue of having agreed to carry out a *prima facie* legal activity without knowledge of the ultimate illegal objective of the conspiracy. For example, parties to a terror network might be requested to rent out a “safe house” without, necessarily, knowing that it is destined for accommodating and arming a potential suicide bomber immediately prior to his deployment. The Israeli court system has dealt with a number of cases involving taxi drivers, unwittingly, ferrying suicide bombers to their ultimate destinations. Only when a breach of a duty to enquire as to the identity and the geographical origin of the passenger can be ascertained will involvement in a conspiracy or liability for negligent manslaughter be inferred.

## **V. Dealing with Intelligence Information during an Investigation**

Many of the problems encountered in the litigation of terror conspiracies arise as a result of the conflict between the differing mandates of the criminal justice system and the intelligence agencies. The *raison d'être* of the latter is to gather information, to analyze it and, thereby, to provide the means for preventing future attacks. Nevertheless, while ideally operating within the rule of law, the activities of

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<sup>16</sup> Weimann, Gabriel, *How Terrorism Uses the Internet*, Special Report No. 116, United States Institute for Peace, March 2004, at p. 9. Available online at: <http://www.usip.org/pubs/specialreports/sr116.pdf>.

<sup>17</sup> *United States v. Carter*, 130 F.3d 1432, 1439 (10th Cir. 1997); *United States v. Bell*, 154 F.3d 1205, 1208 (10th Cir. 1998) & *United States v. Dozal*, 173 F.3d 787, 797 (10th Cir. 1999).

<sup>18</sup> *R.v. Roberts and others* [1998] 1 Cr.App.R. 441, CA.



intelligence agencies are not, necessarily, attentive to the need to provide evidence of a persuasive value and admissible in a court of law.

Although it is not possible to penetrate the mind of a would-be terrorist, it is frequently possible to track his movements and intercept his communications both verbal and electronic. Most forms of electronic surveillance, including wiretapping while, undoubtedly, an infringement of civil liberties, are, nevertheless, deemed to be a necessary evil in the face of a new and dangerous threat. Although many jurisdictions permit wiretapping under judicial supervision, many problems arise during the course of litigation when such interception of communications is carried out either without a warrant or in contravention of the terms thereof.

Human Intelligence (HUMINT), albeit an equally intrusive form of surveillance, offers several advantages over other forms of intelligence gathering. Human agents, for example, can provide key insights into the specific plans of a hostile entity, whereas technical collection systems are often limited to determining general capabilities. HUMINT is also, by and large, more cost effective when compared with the investment in manpower and resources needed to operate state-of-the-art electronic surveillance systems. Nevertheless, when the terrorist menace originates in a marginalized community, integrated within the society under threat yet distinct from it ethnically, HUMINT infiltration is extremely problematic. In such circumstances, intelligence agencies are required to seek the cooperation of informants who are capable of crossing the boundaries of language and religion undetected. Furthermore, given the fact that effective agents are few and far between and often well-entrenched within the target community, intelligence agencies will be loath to terminate their activities prematurely.

The above-mentioned forms of clandestine surveillance are, without a doubt, the most attractive and direct way of proving the factual element of an offence of conspiracy. Such surveillance, nevertheless, presents the police and intelligence agencies with the dilemma of deciding when to exercise powers of arrest. Early intervention may, indeed, prevent an immediate and pending terrorist outrage, yet is also liable to frustrate the gathering of evidence of sufficient quality to ensure a criminal conviction. In addition, premature arrests are liable to compromise an ongoing surveillance operation and, thereby, terminate the flow of intelligence information received from that particular source.

## **VI. Dealing with Intelligence Information at Trial**

Most common law jurisdictions require, as a rule, full and frank disclosure of all material capable of assisting an accused in the conduct of his defense. Nevertheless, given the generally sensitive nature of classified intelligence and the need to protect both sources and the means of surveillance, it is often imperative to withhold such material from a terror suspect and his counsel. Such a denial of evidential material is usually effected by way of a certificate of public interest immunity which may also be subject to challenge by way of interlocutory hearing. Problems, however, frequently arise in the conduct of terror trials where, in addition to investigative material collated by the police in the aftermath of a terrorist event, the state authorities are, also, inundated with information supplied by intelligence agencies. Such information, naming certain individuals as conspirators, may very well have been available prior to an attack and, for whatever reason, been archived and not made subject to further action. In the aftermath of the very same attack, however, should it turn out that the accused defendants are different people entirely to those conspirators named in the archived intelligence report then this latter material, in light of its exculpatory nature, will be of the utmost importance for the conduct of an effective defense. This dilemma was eloquently encapsulated by the Australian Law Reform Commission (ALRC):

*“7. These problems arise most clearly in court proceedings—especially criminal proceedings—where there is a strong common law tradition of ‘open justice’. In practice, this means that cases normally are to be conducted in public, and all material evidence will be made available to the parties to examine*





*and test. However, in a matter in which some reliance is, or may be, placed upon classified and security sensitive information, the Government is placed in a quandary. The disclosure of such information may be critical to providing the Crown with sufficient cogent evidence to secure a conviction (or to the Minister for Immigration to justify refusal of a visa or revocation of a passport, or to a government department to defend an FOI application or a civil lawsuit, and so on).*

*8. On the other hand, disclosure for these purposes may have very serious consequences outside the courtroom and the logic and needs of the individual case, perhaps even to the extent of: endangering the lives of intelligence officers; compromising on-going national security operations; revealing hitherto secret information about strategic alliances, techniques, operations and capabilities; and straining international relationships—whether with allies who have produced or shared information that they do not wish to see made public, or with other nations that learn they are subject of intelligence gathering or unflattering security assessments”<sup>19</sup>.*

In the above cited report, the ALRC proposed a National Security Information Procedures Act which would provide for certain measures to mitigate the extreme situation in which national security considerations require preventing the release of an exculpatory document to a defendant. The ALRC proposed a number of recommendations, currently applied in a number of national jurisdictions, which address the need to ensure the transparency of justice while safe-guarding the interests of national security. These measures include, *inter alia*, the redaction of sensitive material to exclude information that is liable to injure national security while retaining the exculpatory core of the evidence, using visual and voice distortion in order to hide the identity of sensitive witnesses, and conducting court proceedings *in camera* or in the absence of the suspect or his counsel.

## VII. Incrimination

Conspiracies that do not evolve beyond the planning stage, while remaining criminal, rarely leave tangible evidence which may be produced in a court of law. Conspirators are, therefore, commonly convicted on the basis of incrimination by a fellow suspect or self-incrimination. Co-conspirators are, generally, regarded as being unreliable witnesses since they are possessed of a natural tendency to minimize the extent of their own rôle in the conspiracy - often to the detriment of the individual against whom they are required to give evidence. Furthermore, when an incriminating witness is given an inducement to procure his co-operation, and is thereby deemed a “state-witness”, his evidence is viewed even more circumspectly due to the need to eliminate any allegation that he is fabricating testimony in order to curry favor with the prosecution. Given these considerations, a prudent prosecutor will often be mindful of the need to corroborate any oral evidence from such witnesses.

A sobering reminder of the dangers of relying on weakly corroborated evidence of alleged co-conspirators was provided by the so-called „ricin“ plot trial at the Old Bailey in London when a number of alleged conspirators were acquitted of a conspiracy to cause a public nuisance by use of poison<sup>20</sup>. It is now a notorious matter for the record that there never was any ricin involved in the affair and, although Bourgass himself was convicted of a conspiracy to cause a public nuisance (yet not of the more serious charge of conspiracy to murder), his alleged co-conspirators were all acquitted of being jointly involved with him in an international terror plot. Bourgass' conviction was largely effected on the basis of the physical evidence found in his bed-sit accommodation in Manchester: poison manuals downloaded from survivalist websites, a mortar and pestle with which Bourgass had, allegedly, tried to extract ricin poison from castor beans, cherry stones and apple pips and a jar of skin cream containing a bungled “nicotine poison”.

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<sup>19</sup> Australian Law Reform Commission, *Report 98: Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Commonwealth of Australia, 2004. Available online at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/98>.

<sup>20</sup> *R. v. Kamel Bourgass and Others* [Unreported], London Central Criminal Court, 8 April 2005.



When it was finally proved that traces of ricin had never been found in the utensils seized from Bourgass' residence, the rest of the case against him and his co-accused collapsed in the most spectacular fashion. The reason for this was due, primarily, to the equivocal nature of the incriminatory evidence provided by an illegal immigrant - Mohammed Meguerba who, after being released on bail in the United Kingdom before his significance had been appreciated, was subsequently arrested and interrogated in Algeria. Meguerba implicated Bourgass in a number of conventional terrorist activities including undergoing military training in Afghanistan, being linked to Al-Qa'ida and planning to smear poison on car door handles in London. These damning statements, however, were later withdrawn by Meguerba, during interrogation by British police investigators, leading many to believe that the original inculpatory evidence had been obtained by the Algerian authorities through the use of torture. Despite the presence of a number of different fingerprints implicating the majority of Bourgass' alleged accomplices, the prosecution wholly failed to convince the jury that such circumstantial evidence could prove the existence of an al-Qa'ida cell to which all the defendants belonged.

## VII. Self-Incrimination

The problem of investigating a highly motivated terror suspect ought not to conclude with obtaining a confession. Certain common law jurisdictions do not allow a suspect to be convicted on the basis of his confession alone and make statutory provision for a certain element, albeit minimal, of evidential corroboration. The reason for such is that a criminal tribunal, as a rule, has to be certain that a defendant is making an authentic, as opposed to fanciful, confession. Given the current wealth of information available in cyberspace, it is necessary to bear in mind that certain plots which, *prima facie*, appear to be serious, by virtue of their sophistication, are essentially the bizarre mental machinations of daydreamer fuelled by regurgitated material gleaned from the internet. Indeed, some of the more outlandish methods of committing terrorist outrages, in particular the use of contact poisons allegedly contemplated by Kamel Bourgass, have gained popular currency on certain *jihadist* internet websites where such information is offered to all and sundry: *"The World Wide Web is home to dozens of sites that provide information on how to build chemical and explosive weapons. Many of these sites post The Terrorist's Handbook and The Anarchist Cookbook, two well-known manuals that offer detailed instructions on how to construct a wide range of bombs. Another manual, The Mujahadeen Poisons Handbook, written by Abdel-Aziz in 1996 and „published“ on the official Hamas website, details in twenty-three pages how to prepare various homemade poisons, poisonous gases, and other deadly materials for use in terrorist attacks. A much larger manual, nicknamed „The Encyclopedia of Jihad“ and prepared by Al-Qa'ida, runs to thousands of pages; distributed through the Internet, it offers detailed instructions on how to establish an underground organization and execute attacks. One Al-Qa'ida laptop found in Afghanistan had been used to make multiple visits to a French site run by the Société Anonyme (a self-described „fluctuating group of artists and theoreticians who work specifically on the relations between critical thinking and artistic practices“), which offers a two-volume Sabotage Handbook with sections on topics such as planning an assassination and anti-surveillance methods“*<sup>21</sup>.

By way of example, it is worth noting the case of Morad Kamel Alian, an immature 18 year old youth from East Jerusalem, who was later sentenced to 40 months imprisonment in 2005 by the Jerusalem District Court for his part in a conspiracy to commit various acts of terror against the Israeli public. One particular scheme he considered, and discarded, involved the aforementioned use of contact poison: *"I also surfed the Azz-a-din al-Qassam website and read material relating to poison - a chemical compound which one can smear on car door-handles. When a person touches the car door-handle the poison enters his body through the skin and kills him"*<sup>22</sup>.



<sup>21</sup> Weimann, Gabriel, *How Terrorism Uses the Internet*. at p. 15.

<sup>22</sup> Morad Kamel Alian, Police Interview, Jerusalem, 7 March 2005.

The case of the Zacarias Moussaoui provides an instructive example of the dangers of relying solely on the self-incriminating evidence of an eccentric. Moussaoui's testimony, delivered throughout his trial, was characterized by a large number of fundamental contradictions. For example, in the latter stages of his trial<sup>23</sup>, Moussaoui testified that both he and the so-called “shoe bomber” Richard Reid had conspired to crash a hijacked airplane into the White House on 9/11. Such testimony, however, contradicted previous statements that he had made to the effect that he was destined to play a role in other terrorist outrages *post* 9/11 and, furthermore, had had contact with those who orchestrated the attack on the World Trade Center. One of these individuals - Ramzi Bin-al-Shibh, testifying from United States custody, admitted to having had contact with Moussaoui yet stated that the latter was deemed unsuitable for the 9/11 attacks due to his having drawn attention to himself after displaying a prurient interest in crop-dusting techniques and having aborted a series of flying lessons. Such a willingness to identify himself with the conspirators of 9/11, when firm evidence apparently existed to show that he had been disqualified as a potential hijacker, ought to have thrown severe doubt on the authenticity of Moussaoui's confession. Indeed, Moussaoui's preference for a martyr's death, by way of judicial execution as an identified 9/11 plotter, rather than receive a life sentence as a member of an unrealized scheme, throws further doubt on his self-admitted connection to 9/11. It is worth noting that in May 2006, Moussaoui filed a motion requesting withdrawal of his guilty plea arguing that his earlier claim of participation in the 9/11 plot was a “complete fabrication”. Moussaoui, perhaps with a certain degree of disappointment, added that he was “extremely surprised” that he was not sentenced to death.

### VIII. Sentencing

Sentencing conspiracies to commit terrorist offences which do not extend beyond the conceptual stage is an extremely conjectural exercise. Furthermore, when detailed evidence is not produced in order to protect intelligence sources or because the proceedings are concluded by way of plea bargain, the court is often deprived of the means of assessing how determined a would-be terrorist was to execute his plans. It is fairly axiomatic that the severity of sentencing tariffs will increase exponentially in relation to the particular danger perceived to be emanating from the suspect himself and the general threat facing society at large. Caution, nevertheless, has to be exercised in such cases in order to prevent oft-cited mantras of „state security“ and „the war on terror“ from clouding judicial discretion.

	<p>The HUMSEC project is supported by the European Commission under the Sixth Framework Programme “Integrating and Strengthening the European Research Area”.</p>	
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<sup>23</sup> United States District Court for the Eastern District of Virginia Alexandria Divisio, *United States of America v. Zacarias Moussaoui*, Criminal No. 1: 01cr455, 27 March 2006.