

Use of Foreign Evidence in Terrorism Trials

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Introduction

- * Prosecutors and judges must have an understanding of intelligence and intelligence development.
- * In CT (Counter-Terrorism) or CFT (Combating the Financing of Terrorism) cases, there are increasing challenges made as to whether there was a proper intelligence basis, particularly where covert evidence is gathered.
- * This is especially sensitive when the world community of nations tries to act in concert.
- * Use of foreign evidence is among the range of investigative, procedural, and human rights issues that countries may differ on.

Use of Foreign Evidence in Terrorism Trials

Overview

- * Nature of Intelligence
- * Sources of Intelligence
- * Mutual Legal Assistance and Informal Assistance
- * Challenges to Foreign Evidence Gathering in Terrorism Trials
- * Extradition
- * Issues in Court Proceedings



The Nature of Intelligence

There is a distinction between intelligence and evidence.

- * Intelligence may or may not be relevant or capable of being admitted as evidence.
- * Evidence is capable of being introduced in a criminal trial and must be relevant and admissible.



The Nature of Intelligence

- * Not necessarily admissible in court.
- * If admissible in one country, may not be admissible in another.
- * Informal communication between law enforcement agencies at the investigative stage is critical.



The Nature of Intelligence

- * Law enforcement is not only trying to stop the attack, but is also trying to gather intelligence about the terrorist organization:

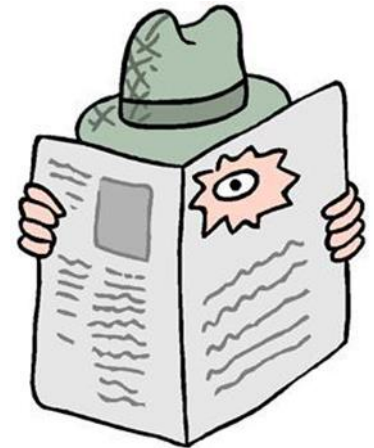
- * Activities
- * Plans
- * Associates
- * Finances
- * Lifestyle



- * It is critical for law enforcement to understand the extent of the terrorist organization/network and that usually means multi-national intelligence gathering.

Sources of Intelligence

- * Communications Intelligence
- * Physical Surveillance and Observation
- * Human Intelligence
- * Financial Intelligence
- * Special Investigative Techniques



Sources of Intelligence: Communications Intelligence

- * Sometimes referred to as intrusive electronic surveillance.
- * Includes both the interception of telephonic and internet systems, emails, as well as information acquired through the routine monitoring and analysis of communications traffic.



Sources of Intelligence: Communications Intelligence

* Issues:

- * To be successful, a communications intelligence system must have continuous monitoring.
- * The information passed is often encrypted e-mail.
- * Intelligence agencies (i.e., NSA) need to retain the data longer than industry providers (e.g., AT&T, Verizon, Sprint).
- * Not all nation states permit the use of intercepts.
 - * E.g., the U.K. does not permit the intercept product to be relied upon in any prosecution but it is used for intelligence gathering.

Sources of Intelligence: Physical Surveillance and Observation

- * The target is placed under physical surveillance by following, photographing, and videoing him.
- * Trash can searches are admissible evidence in the United States (*California v. Greenwood*).



Sources of Intelligence: Human Intelligence

- * Law enforcement recruits the human source (H.S.) for the purpose of providing information.
 - * The U.K. refers to these witnesses as “Crown Witnesses.” The U.S. refers to them as “Cooperators.”
- * Often these witnesses are criminals or reformed criminals who have been a part of the criminal organization.
- * Cooperators have a unique ability to report on the live activity of the terrorist group, explain the organization structure and key leaders, and the future activities and plans of a terrorist group.

Sources of Intelligence: Human Intelligence

- * Courts in a civil system and jurors in a jury system will always have to evaluate the credibility of the Crown Witness/Cooperator.
 - * Is the source motivated by greed, monetary reward, or goodwill?
 - * The source may be trying to remove a competitor in jihad.
 - * The “competitor removal” motivation happened in the narco-trafficking War on Drugs.



Sources of Intelligence: Financial Intelligence

- * Pivotal in CT (Counter-Terrorism) and CFT (Combating the Financing of Terrorism) in developing investigative leads.
 - * Judges presiding over terrorism cases must have some understanding of the multi-faceted financial evidence presented in courts.
- * The financial investigation often produces the principle evidence that shows the extent of the terrorist network, the scale of the terrorist attack, and even the intended target.



Sources of Intelligence: Financial Intelligence

- * A good financial investigation:
 - * Seeks to identify evidence movement such as the transfer of funds that relate to criminal activity.
 - * Seeks to build as complete a financial picture as possible with a view to target the origins of the financing (i.e., who received the terrorist funding from where).
 - * Allows freezing and/or confiscation of assets instrumental to the terrorist ISIS-aid.



Sources of Intelligence: Financial Intelligence

- * One of the purposes of the financial investigation is to gather evidence in the execution of a request from another state for Mutual Legal Assistance (MLA) in relation to CT and CFT cases.



Sources of Intelligence: Special Investigative Techniques

- * These are techniques used to gather evidence or information in such a way that they do not alert those being investigated. Their deployment will usually involve a breach of the right to privacy.
- * Examples:
 - * Controlled Delivery
 - * Electronic Surveillance
 - * Trash Can Searches
 - * GPS Devices
 - * Thermal Imaging
 - * Telephone Intercepts/Wiretaps



Mutual Legal Assistance (MLA) & Informal Assistance

- * A terrorism financing case will often involve financial networks and money movements that cross through several states.
- * There will inevitably be a need to obtain evidence or information from one or more foreign jurisdiction.
- * There are two different request processes:
 - * Informal Assistance (Administrative)
 - * Mutual Legal Assistance (MLA)



Mutual Legal Assistance (MLA) & Informal Assistance

- * Informal approach: Should always be the first step in any evidentiary request and it is usually police-to-police or prosecutor-to-prosecutor.
- * Advantages:
 - * Usually welcomed by the requested state.
 - * Usually dealt with efficiently and expeditiously.
 - * Frequently obviates the need for a formal letter to obtain evidence.
 - * Establishes an positive working relationship.

Mutual Legal Assistance (MLA) & Informal Assistance

- * Examples of informal assistance:
 - * Routine requests that do not require the “requested state” to use coercive powers.
 - * Obtaining public records (i.e., “open source” material).
 - * Contacting potential witnesses to see if they are willing to assist law enforcement voluntarily (Bosnia).



Mutual Legal Assistance (MLA) & Informal Assistance

- * MLA = later-stage, evidence gathering mechanism.
- * Examples of when formal MLA will likely be required:
 - * Obtaining account information and documentary evidence from banks and financial institutions.
 - * Obtaining testimony from a non-voluntary witness.
 - * Seeking to interview a person as a suspect.
 - * Requesting search and seizure.
 - * Obtaining internet records and emails.



Mutual Legal Assistance (MLA) & Informal Assistance

- * Characteristic of MLA: Delay!
 - * The key is to ensure that evidence and/or intelligence reaches the requesting state while such material is operable.



Mutual Legal Assistance (MLA) & Informal Assistance

* Commonwealth States: Harare Scheme

- * Non-treaty based scheme to augment existing forms of MLA in commonwealth states.
- * Types of assistance include:
 - * Identifying and locating persons
 - * Serving documents
 - * Examining witnesses
 - * Search and seizure
 - * Obtaining evidence
 - * Facilitating the personal appearance of witnesses
 - * Tracing, seizing and confiscating the proceeds or instrumentalities of crime



Challenges to Foreign Evidence Gathering

- * Requests for Freezing & Confiscation of Assets
 - * Banks have been reluctant to comply.
- * Search and Seizure
 - * Terrorism suspect may be viewed as a national or patriotic hero by the requested state.
 - * Delay may render evidence unavailable for trial.
- * Absolute Denial by the Requested State
 - * Is the request to execute contrary to domestic law?
 - * Lack of reciprocity.
 - * Abolition of death penalty in requested state may prevent extradition (e.g., U.K. and Mexico refusal to extradite if USA will seek death penalty).
 - * Requested evidence is inadmissible in requested state.
 - * Requested state views the special investigative techniques as illegal.

Challenges to Foreign Evidence Gathering

- * Difficult Areas:
 - * Dual criminality
 - * Bank secrecy (Switzerland)
 - * Extra-territoriality (Pakistan)
 - * Political offenses
 - * The political offense exception has declined as a defense in terrorism cases (Libya)
 - * Locating the suspect
 - * Witness protection
 - * Protected witness may be asked to travel to the requesting state to give evidence. Video-linked evidence might be an alternative (Pakistan).
 - * Use of Commissions (Pakistan)

Challenges to Foreign Evidence Gathering

- * Lack of Competent Authority in States Undergoing Conflict:
 - * The competent authority is a judicial, prosecutorial, or law enforcement authority or agency within a state that is authorized under the law of the state to make and/or execute a request for MLA.
 - * In the War on Terror, many states have no competent authority (e.g., Yemen, Sudan, Libya, Syria).
 - * The requesting state is more apt to use extra-judicial means.
- * Receiving Foreign Material into Evidence in the Requesting State:
 - * Procedural and evidence-gathering laws of states can differ considerably.
 - * Example: Confessions
 - * Requesting state may have more strident criteria for admissibility of confessions than requested state.

Extradition

- * Process by which a state seeks the return of a person.
- * Governed by the laws of the requested state.
- * Why necessary?
 - * If not available, terrorist could always have “safe haven” in another state after fleeing from the state where the terrorist act was committed.
 - * A state might obtain jurisdiction over the bomber but never over the donor, financier, or leadership that operated outside the requesting state but targeted the “Far Enemy.”



Extradition

- * Reviewing judge (in requested state) must determine if the conduct alleged in the extradition crime amounts to a crime under domestic law.
- * Historically, states would enter bilateral extradition treaties.
- * Crime became more international → international community adopted multi-lateral treaties.
- * First requirement: Legal basis for making the request
 - * Bilateral arrangements
 - * Regional extradition
 - * International instruments
 - * Example: U.N. Convention & Protocols
 - * Ad hoc arrangements
 - * Comity



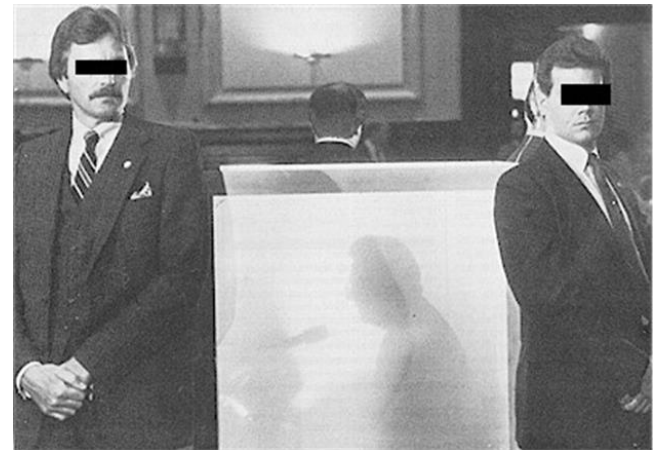
Issues in Court Proceedings

* Witness/Juror Protection:

- * A witness in a CFT or CT case might be subject to a high level of risk.
- * Court must balance interest in protecting a vulnerable witness with the defendant's right to a fair trial.

* Examples:

- * Anonymous witnesses – anonymous jurors
 - * (Aryan Brotherhood – prison beating video)
- * Use of screens (anti-terrorism courts in Pakistan)
 - * Witness could at least be seen by defendant's counsel.
 - * X v. United Kingdom



Issues in Court Proceedings

- * Sensitive & Confidential Information:
 - * Concern heightened in CT/CFT cases because many investigations are intelligence sensitive
 - * Grey Mail
 - * State Secrets

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