IS A TERRORIST ENTITLED TO THE PROTECTION OF THE LAW OF EVIDENCE?

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This paper addresses two questions: should the laws of evidence apply to the trial on criminal charges of terrorists or alleged terrorists? Is it possible to argue that certain rules of evidence should be altered where the accused is suspected of being a terrorist? Inasmuch as this sort of contextual approach to the law of evidence is unusual, it may be appropriate to note that the paper arose out of certain reflections on a case, decided by the Australian High Court in 1984, *Alister* v. *The Queen*[1] otherwise known as the *Ananda Marga Case.* For this reason it will be appropriate before addressing the two questions raised above to set out and explain the facts of that case. It will also be necessary to attempt to define the term "terrorism" fairly quickly.

THE ANANDA MARGA CASE:

In February 1978, during the course of a Commonwealth Heads of Government Meeting in Sydney, a bomb was planted at the Hilton hotel where the Indian delegate was staying. It exploded and some bystanders were killed. No charges have ever been laid in connection with that bombing, but its occurrence led to a public outcry demanding stringent measures be taken to control terrorism.

In the following month a police informer, Richard Seary, joined the Ananda Marga. The Ananda Marga was a quasi-religious, quasi-militaristic organization based in India which was running a recruitment programme and training camps here in Australia. Richard Seary was later acknowledged to be working for the Special Branch of the N.S.W. Police. Evidence suggesting that he was psychologically unstable was introduced at the trial and later inquiry.

On the evening of June 15, 1978 the police stopped a car containing Paul Alister, Anthony Dunn, and Richard Seary. This car was, as all parties agree, on its way to the house of Robert Cameron, the leader of a neo-Nazi party. The police found explosives in the car and alleged that Dunn tried to set the explosives off when the police approached the car.

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[1] (1983) 50 A.L.R. 41; (1984) 58 A.L.J.R. 97.

Seary stated that the plan was to murder Cameron and that after the explosion, Anderson, who had remained in the Ananda Marga office, was to send out a press release claiming credit for the assassination. The accused, Alister, Dunn, and Anderson, were charged with conspiracy to murder Cameron. Alister and Dunn were also charged with attempted murder of the police who stopped the car. The accused have maintained throughout that they only planned to write graffiti on Cameron's footpath.

Before the trial the accused sought discovery of any ASIO files relating to inquiries by Richard Seary into the Ananda Marga. The Attorney-General for the Commonwealth claimed that public interest immunity protected him from the necessity to disclose whether any such files existed. The claim was allowed. This issue will be fully explored below.

At the trial the accused testified and were subjected to a lengthy cross-examination about the aims and activities of the Ananda Marga. References were made to the "Hilton bombing" by both the Crown and the accused. The prosecution also referred to other incidents in India, in New Zealand, and in Western Australia with which the Ananda Marga, but not the defendants, were allegedly involved.

The accused were convicted and appealed first to the Court of Criminal Appeal of the New South Wales Supreme Court and then to the High Court. Two issues in the law of evidence were considered on the appeal: the claim to public interest immunity and the proper scope of cross-examination. In the end the appeal against the charge of conspiracy to murder was dismissed.

In the course of the High Court judgments certain comments that are relevant to the more general question of the application of the law of evidence to charges relating to terrorist activities were made. These comments are important to the topic of this paper and will be discussed later.

It may be noted at this stage that subsequent to the dismissal of the High Court appeal, the N.S.W. Government ordered a judicial inquiry into the case. As a result of the inquiry the accused have been released on licence. The inquiry did not conclude that the accused were innocent, but did conclude that it was unsafe to rely upon the convictions.

Definition of Terrorism

This might be an appropriate stage to stop and define the term "terrorism". The term is defined in the Oxford Dictionary as "the policy or system of ruling, seeking to obtain political demands &c. by violence and intimidation." The term is not used in a legal context in Australia.

If we look abroad for a legal definition we find several, but, as Warbrick points out, none of these is satisfactory.[2] In fact the question

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[2] C. Warbrick, "The European Convention on Human Rights and the Prevention of Terrorism" (1983) *I.C.L.Q.* 82, 82.

is so difficult that the term is neither defined nor used in the European Convention for the Suppression of Terrorism.

In Britain, legislation was adopted in the 1970's for the specific purpose of dealing with terrorism. This legislation took the form of the Prevention of Terrorism Act, 1974 (U.K.) which was replaced and repealed by an Act of the same name in 1976. There was also a Prevention of Terrorism (Northern Ireland) Act 1976 and a Northern Ireland (Emergency Measures) Act 1973. These were both repealed and replaced by the Northern Ireland (Emergency Provisions) Act 1978. The definition of terrorism found in s. 14(1) of the Prevention of Terrorism Act 1976 (U.K.) is that terrorism is "the use of violence for political ends and includes any violence for the purpose of putting the public or any section of the public in fear."

The term "terrorism" also has legal connotations in the context of public international law. It is used in Protocol II of the Geneva Conventions of 1949. Protocol II was adopted in 1976 but was and is highly controversial. Forty-one states not including Australia have since become parties to the Protocol. The Protocol was to become effective six months after the second ratification which it received in 1977. It addresses the problems inherent in the application of international humanitarian law to internal armed conflicts. Article 13(2) of Protocol II states that: "Acts or threats of violence, the primary purpose of which, is to spread terror among the civilian population, are prohibited."

It has been pointed out[3] that although the terms "terrorism" and "guerilla" have become familiar in popular usage in the last quarter century, they have not acquired a precise meaning and are frequently used to connote approval or disapproval of the same sort of activities. At other times the two terms are used to distinguish between two different stages in the escalation of an internal conflict. When the terms are used in this sense they are used in reference to a paradigm of an insurrection in which three stages of violence may be distinguished.[4] The initial state is a stage of small scale scattered violence. The intermediate stage involves a phase of somewhat more organized sustained military activity, and the third stage involves conflict at the level of conventional warfare. In this three-tiered analysis acts characteristic of the first stage may be labelled acts of terrorism while acts characteristic of the second stage are designated as guerilla acts. Terrorist activities would include assassinations, raids on banks, acts of sabotage and indiscriminate attacks on civilians. Clearly, if the term is used in this sense, the Hilton bombing and the alleged attack on Cameron are to be considered acts of terrorism if it is accepted that the Ananda Marga were in insurrection against established government and society.

The factor that distinguishes acts of terrorism from other crimes, the factor which it is suggested may require a different approach from

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[3] F. Kalshoven, " 'Guerilla' and 'Terrorism' in Internal Armed Conflict", (1983) 33 *Am.U.L.Rev.* 67.
[4] *Id.* 67-68.

the courts, is the fact that the motivation for the acts is found in an attempt to overthrow the established legal institutions/government and the fact that the individual act and the individual actor are not isolated. The problem with this definition for the purposes of the law of criminal evidence, lies in the necessity to establish insurrection or revolutionary intent as against a desire to change society by evolutionary means. It may be that the definition should be wider. The relevant factors in the definition are, it is suggested, the organization and the generalised threat of violence. That is violence not actuated by any motive relevant to the person of the victim, however distorted. The reason it may be appropriate to treat trials of such individuals in a special way is that the process or the personnel involved in the trial process may otherwise be at risk. The individual terrorists or the terrorist organization may see the trial as an incident in the continuing battle between themselves and society, and the administration of justice may be imperilled.

THE GENERAL ISSUE:

In his judgment in *Alister* v. *The Queen*, Mr. Justice Murphy made the initial point that the trial was a political trial.[5] He stated that the accused had been subjected to heavy pre-trial prejudice because of the widespread publicity given to the various alleged activities of the Ananda Marga and went on to say that it was the duty of the judge and the prosecution to avoid further prejudice to the accused, but that "the case degenerated into a political trial".[6] He cited several studies of political trials[7] and commented that: "Political trials have stained the judicial system in many countries."[8] It appeared to follow for him that the claim to public interest immunity must be disallowed as he disposed of that issue without saying anything more on the topic. He went on to deal with the specific issue of the scope of the cross-examination. It appears on the face of the judgment that the finding that the trial was a political trial was an independent ground for his decision. It is submitted, with respect, that his judgment is therefore unsatisfactory.

To say that a trial is a political trial without more is insufficient. This is shown by the very studies which the learned judge cites. Friedman[9] indicates that the term can be used in two ways. He states that the term has been used pejoratively indicating that the normally neutral legal process is being manipulated for political ends. Alternatively the term may be used to indicate any court proceeding that gives one or other of the parties the opportunity to make a political point. He goes on to say

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[5] *Supra* n. 1 at 54-55.

[6] *Id.* 55.

[7] Murphy, J. cites R. Spicer, *Conspiracy: Law Class and Society*, Lawrence and Wishart (1981); O. Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends*, Princeton U.P. (1961); Becker, *Political Trials* (1971); and Friedman, "Political Power and Legal Legitimacy: A Short History of Political Trials" (1970) 30 *Antioch Review* 157.

[8] (1983) 50 A.L.R. 41,55.

[9] Friedman, *supra* n. 7 at 158.

that if the term is used in the second sense it catches three types of judicial proceedings: cases which are politically motivated, those which are politically determined, and those which have substantial political consequences.

The statement that a trial is a political trial means little or nothing unless the speaker indicates the consequences which should flow from that fact. It is suggested that the statement might be expected to have any of the following consequences:

1. It leads to the consequence that the case is to be considered non justiciable.
2. It leads to certain consequences for the laws of extradition and political asylum.
3. It leads to the consequence that the prisoner, if convicted, enjoys a special status as in Tsarist Russia in the late nineteenth century and Northern Ireland in the 1970's.
4. It suggests that the court should take a certain attitude based on the speaker's approach to a "strong state theory".
5. It suggests, merely, that the court should recognise its bias and try not to let this influence its decision.

This writer sees no need to explore either 2 or 3 any further in the context of the current paper. Suggestions 1, 4 and 5 will be explored at some depth.

NON JUSTICIABILITY:

It may be suggested either that political trials should never come to court or that the court should refuse jurisdiction in such cases. Either suggestion appears to be a suggestion that such a case is non justiciable. However, the first suggestion is in its origins a comment on the discretion to prosecute. It amounts to a statement that the discretion to prosecute should normally be exercised against bringing such proceedings, and that if it is not, then the court should scrutinise the trial procedure very carefully in order to protect the accused. This argument blends into, and may be indistinguishable from the argument in suggestion 5 above.

The argument that jurisdiction should be refused, is essentially an indefensible one, but nevertheless it appears to gain some support from both authoritarian and libertarian sources.

There are statements in a number of British cases[10] that: "No man is placed on trial for his political beliefs." At first sight these statements would support the contention that if the potential accused were motivated by political belief he/she will not be put on trial. Considered more closely they amount merely to a statement that under the law as it stood in that society at that moment, it was the actions designed to give effect to the belief, not the belief itself to which the charge must relate. It can be argued

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[10] Spicer, *op. cit. supra* n. 7 at 168.

that this should always be the situation. Indeed it is an argument to which the writer would subscribe, but it is outside the scope of this article.

If one accepts that it is the acts not the beliefs which are the *locus* on which the law may act, the question arises as to whether justification can be offered for treating the terrorist who commits a specific crime in a different manner to a criminal who commits that same crime for more ordinary motives. Kalshoven,[11] in discussing the definition of crime, focuses on the requirement of purpose in Article 13(2) of Protocol II and asks if the prohibition of acts intended to spread terror, adds anything to the content of international law. He concludes that it does not. It remains true, however, that the fact that persons charged with crimes of violence belong to an organization which aims at a particular political objective may have consequences for the trial process and thus for the law of evidence. Here the question is not as to the substantive law, but as to the degree of certainty that must be achieved in the conviction and the ways in which facts can be proved. Some methods of proof may put witnesses and community interests at risk.

Support for the suggestion that a trial in such a case is inappropriate, could also come from the authoritarian extremists, who may argue that terrorists should not be tried—they should be stood up against a wall and shot out of hand. The argument for this view is stronger and less easily disposed of than the argument for the libertarian view. It is founded on the proposition that the terrorists have rejected the laws of society and should not be able to claim the benefits conferred by those laws. Work done by Jenkins at the Rand Corporation suggests that there is widespread support for severe action against terrorists.[12] Nevertheless, there are three reasons for rejecting the view. The reasons are practical, jurisprudential and legal.

To deal first with the practical reasons for adopting the suggestion, it may be pointed out that history seems to show that the adoption of the policy of summary justice for terrorists works against the interests of those who adopt it. It may lead to revulsion of public sentiment and crystallize the opposition to the regime.[13]

There are also jurisprudential reasons for rejecting that proposed course of action. The concept of the rule of law is based on the argument that the law is entitled to obedience because it protects the fundamental rights of all, and also because the government is itself under the law.[14] It may be that the law must be applied by judges who will take positions that reflect our political and intellectual traditions. However, an official attitude of concern and respect for minorities must be maintained, to make the rule of law defensible.[15] Dworkin states that:[16]

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[11] Kalshoven, *supra* n. 3 at 79.
[12] Brian M. Jenkins, *The Psychological Implications of Media-Covered Terrorism*, Rand Paper Series, 6627 (1981).
[13] Spicer, *op. cit. supra* n. 7 at 41.
[14] R. Dworkin, "What is the Rule of Law?", (1970) 30 *Antioch Review* 151.
[15] *Id.* 153.
[16] *Id.* 155.

> It is wrong to think of legality as the subject of a social contract so that if one side breaks the bargain the other side is free to do so as well. If a fair rule of law is a possible goal, then everyone ought to try to reach it, and another side's failings can never be an excuse, though they may be an explanation of one's own.

Finally, there are legal reasons for rejecting the authoritarian argument. These reasons must come from outside the system of domestic law. When the question is whether the system can or should apply in the face of a challenge to its validity, an internal reference will not supply an answer that is acceptable to the challenger, and here the challengers are both the terrorists and the authoritarians. The authoritarian argument is that the system need not be applied because the terrorist has rejected it. The counter-argument, that if the system is set aside the terrorist has achieved a victory, may not persuade. If for the sake of argument, the domestic system is suspended, any relevant legal reasons must come from outside that system. International humanitarian and human rights law supply the necessary external reference.

Australia signed the International Covenant on Civil and Political Rights in 1972 and ratified it in 1981. The Covenant gives effect to the Universal Declaration of Human Rights which, though it gained wide adherence, had no binding legal effect. The Covenant on Civil and Political Rights on the other hand is binding international law which imposes obligations on the nations which are parties to it. The provisions in the Covenant on Civil and Political Rights which are relevant to the obligation to apply the rules of evidence to terrorist offenders are found in article 6, article 9, article 14 and article 26.

Article 6 protects the right to life, while article 9 protects the right to liberty and security of person. Both articles require the judgment of a competent court to justify interference with these rights. Article 14 is designed to ensure that the accused, faced with a criminal charge, is given a fair and public hearing before a competent independent and impartial tribunal, and that certain minimum guarantees governing the trial will be fulfilled. It guarantees due process of law to persons charged with criminal offences. Article 26 provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. It is expressly stipulated that the law shall prohibit any discrimination on any ground, such as, *inter alia*, political or other opinion. It is true, however, that in emergency situations nations are permitted to derogate from the protections afforded by the Convention on Civil and Political Rights.

The relevant guarantees are reinforced by the Geneva Conventions of 1949 and Protocol II to those conventions drawn up in 1976. Australia is a party to the Conventions of 1949 but is not a party to Protocol II. The Conventions would apply in "emergency" situations and do not permit derogations.

Article 3 which is common to all of the Conventions of 1949, provides that persons taking no active part in hostilities, including members of

armed forces who have laid down their arms or been detained, shall be treated humanely, and it specifically forbids the passing of sentences and the carrying out of sentences without previous judgment pronounced by a regularly constituted court "affording all the judicial guarantees which are recognised as indispensable by civilised persons."

It is contended that, read together, the effect of the Covenant on Civil and Political Rights and the Geneva Conventions of 1949 is to establish that the right to a fair trial, or due process of the law, is not subject to derogation.

It is therefore concluded that to say that a trial is a political trial cannot and should not have the consequence that jurisdiction cannot be exercised.

ATTITUDES TOWARD POLITICAL TRIALS

It was suggested above that the statement that a trial was a political trial might have any of five consequences. The first of these has been discussed and rejected—the statement should not, it is argued, lead to refusal of jurisdiction. The second and third potential consequences are specialized consequences, not of interest for the purposes of this paper. The fourth and fifth consequences now fall to be considered. The suggestion in both instances is that the identification of a trial as a political trial will affect the attitude in which the case is approached.

The fourth suggested consequence is that the court's attitude to the case will or should be affected by an approach to the "strong state theory". What is strong state theory? Spicer states that:[17]

> A different view of political law is taken by others who see political and economic forces generated by the recurring crisis of capitalism, moving Britain in the direction of the 'Strong State'. The main characteristic of this 'Strong State' is the strict regulation of political activity involving tight control over education and the mass media, a secret police force and the brutal suppression of opposition to the regime.

Warbrick also makes reference to a variant of strong state theory when he states that in debates about the responsibilities of governments to respond to terrorist activities within their territories, it is argued both that the state has a positive duty to act against terrorists, and that by reason of the terrorists' extreme conduct the authorities are entitled "to act swingeingly" against them and need not be constrained by the normal limits to official measures for the prevention of crime.[18]

Lopez[19] identifies four ideologies that would support a strong state argument: authoritarianism, militarism, national security consciousness,

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[17] Spicer, *op. cit. supra* n. 7 at 171.

[18] Warbrick, *supra* n. 2 at 83.

[19] G. A. Lopez, "A Scheme for the Analysis of Government as Terrorist" in M. Stohl and G. A. Lopez (eds.) *The State as Terrorist*, Greenwood Press (1984) 59.

and patriarchy. These ideologies, he states,[20] all reify the state, making it the institutional value to which the ruling elite must maintain their highest commitment. Lopez is concerned to direct attention to the study of governmental use of terror to control the citizenry, but clearly, where these ideologies command support, the judicial climate will be different.

It may be noted that if the person who identifies the trial as a political trial is the judge in a Western country, it may be assumed that the judge's position will be libertarian. The judge will be an opponent of the strong state as was Murphy, J. in the *Ananda Marga case.* Judges such as Wilson, and Dawson, JJ., who seem, in their judgment in the same case, to lend support to a version of the strong state will avoid the term because of its emotive connotations.

This is not necessarily a good thing. Indeed, it is urged that judges should be encouraged to recognize a political trial for what it is. Political trials, to use the term in the second sense defined by Friedman, are inescapable, and this fact should be recognised because the fact that a trial is a political trial may entail consequences of importance. This is the thesis advanced by Kirchheimer.[21] He points out[22] that the courts operate in the zone of seemingly endless thrusts and counterthrusts through which power positions are strengthened and the incumbent regime's authority is impressed on friend and waverer; but often, at the same time, new images and myths are pressed forward by foes of the regime who try to expose and erode established authority.

It has been asserted that in the twentieth century certain changes have been made in the presuppositions for judicial action. In particular, the generalization of the political–ideological conflict has caused many, if not all, regimes to reinforce police and informal institutional controls over their subjects' associations and political activities.[23] In these circumstances, resort is had to the court only where formal restriction of freedom is necessary, or where carefully chosen segments of deviant political activity are submitted to court scrutiny, less for direct repressive effect, than for the purpose of rallying public support.[24]

The identification of a trial as a political trial, whether conscious or unconscious, may lead the judges to adopt or modify certain principles in their treatment of the case according to their view of the legitimate role of government in the circumstances. Those who make the identification may well be arguing that a certain approach is proper in these circumstances. This is what has been called the fourth suggestion. If this is in fact done then it may be that the rule of evidence in question will not be appropriately applied in other circumstances.

The alternative, the fifth suggestion, is that the trial should be identified as a political trial in order to isolate and identify these

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[20] *Id.* 65.
[21] *Id.* 47.
[22] Kirchheimer, *op. cit. supra* n. 7 at 4.
[23] *Id.* 16.
[24] *Id.* 17.

temptations. As historians are encouraged to identify their assumptions and viewpoints in the hope of avoiding bias in their conclusions,[25] so our judges should also be encouraged to recognise that in the context of such trials they will have a particular sympathy. This will help to ensure that that sympathy does not distort the judgment.

It may be that the fifth position is the position that Murphy, J. intended to adopt in the *Ananda Marga case*, but he fails to make this clear. Furthermore, even if this is the correct position, it is suggested that his judgment is distorted because of a failure to identify correctly the consequences that should follow from the fact that it was a political trial. However, it is equally suggested that the dissenting judgment of Wilson and Dawson, JJ. was also adversely affected by the failure to realise that this was a political trial. It is suggested that as their judgments were affected by strong support for the government in the circumstances, it would not be desirable to adopt the same approach in subsequent cases where there is no such element.

SEPARATE RULES OF EVIDENCE?

A point that was made incidentally above, was that the law of evidence can and should be applied to trials of terrorists. The next two sections of the paper will explore the suggestion that the rules of the law of evidence to be applied to the trials of terrorists might appropriately contain certain special provisions, provisions that differ in some respects from the rules of evidence which apply to other civil and criminal trials.

The suggestion that special rules of evidence might be appropriate is premised on the fact that the law of evidence recognizes several interests. These interests include, but are not limited to, a search for the objective truth. Additional interests served by the law of evidence include the social interest in controlling the behaviour of the police force, which has been responsible for the development of the rules on illegally obtained evidence, and the protection of various social relationships such as that between lawyer and client, and husband and wife, protected by the rules of evidence. Now as terrorists have declared war on society in general, terrorist activities may represent a threat to the processes and personnel involved in the trial. Witnesses who appear in court to testify against terrorists may be in danger of violent retaliation by the terrorists' friends or colleagues. The court itself may be bombed. It may be that there is a strong public interest which justifies altering the rules which would normally be insisted upon in the interests of the highest standard of accuracy. Further, inasmuch as the acceptability of the verdict is one of the aims of the laws of evidence,[26] it might be argued that those rules of the law of evidence which are directed to furthering interests over and above accuracy should be suspended.

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[25] E. H. Carr, *What is History?* Penguin, 1978.

[26] C. Nesson, "The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts" (1985) 98 *Harvard L.R.* 1357.

Before embarking on this exploration of particular rules of evidence which might be altered it is necessary to answer three preliminary questions:

(1) Is there a reason of principle for insisting on the uniform treatment of all cases?
(2) Is there a legal obligation to apply the same rules of evidence to all cases or to all criminal cases?
(3) Is there any reason of convenience for insisting that the laws of evidence should be uniform that is so strong as to make this exploration pointless at the outset?

As to reasons of principle, it is suggested that principle would demand that all like cases be treated alike, but that there is no principle which demands that all legal cases be treated in the same way. It is suggested that where a crime can be defined as a crime of terrorism it can justifiably be treated differently from another crime. In fact it may be argued that in the conspiracy exception to the hearsay rule which was applied to the cross-examinations in the *Ananda Marga Case* we have a rule of evidence which applies in some cases and not in others. Neither is there, it is suggested, an obligation to achieve the highest degree of accuracy conceivable in any trial. This is consistent with the arguments advanced by Dworkin in "Principle, Policy, Procedure" in *Crime Proof & Punishment.*[27]

The discussion of a legal obligation to apply the same rules of evidence must, once again, be by reference to an external framework. Is such an obligation imposed by international law? It is clear from decisions of the European Court of Human Rights that that court does not insist that the same rules be applied to the cases involving terrorists as are applied to other criminal trials.

Warbrick states that:[28]

> if the state is subject to no limitations in its pursuit of terrorists then there is no place for human rights . . . if the pursuit of terrorism justifies no different restriction of human rights than the normal policing of society, then the problems of terrorism will pose no (special) questions under the Convention . . . The Court has not assumed either extreme position.

He goes on to cite a number of cases in which the European Court of Human Rights has been asked to rule on the question of whether attempts of government to derogate from the human rights of alleged terrorists in respect to aspects of criminal procedure conflicted with the European Convention on Human Rights. These cases include *Ireland* v. *U.K.*[29] in which the court held that there was official encouragement and toleration

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[27] *Crime Proof & Punishment, Essays in Memory of Sir Rupert Cross*, Butterworths, 1981, 193.
[28] Warbrick, *supra* n. 2 at 90.
[29] Eur. Ct. H.Rs. A/25 para. 224.

of inhuman treatment in Northern Ireland and that the British Government's action was only compatible with the Convention by dint of a declaration made under article 15 which allows derogation from the provisions of the Convention "in time of war or other public emergency threatening the life of the nation", but specifies that the Secretary General must be kept fully informed of the measures taken and the reasons therefor.

In respect of Article 6 of the European Convention on Human Rights, which guarantees a right to a fair trial, questions have arisen as to the right to a trial within a reasonable time[30] and as to the limitations on the right of access to the courts which are justifiable. In both *Haase*[31] and *Bonazzi*[32] there are suggestions that rights under Article 6 may have limits implied by the requirements of national security and the preservation of public order.[33] Warbrick comments[34] that this is a dangerous doctrine and that even a suspected terrorist is entitled to an effective right to a fair trial. However, for present purposes the significant feature is that it was established that there may be justifications for applying special rules of procedure to the trials of terrorists. As the suggestion that separate rules of evidence be applied falls far short of suggesting limits on access to the court, these authorities would suggest that at least under the European Convention on Human Rights, it would be valid to apply specially modified rules of evidence to the trials of terrorists.

It is true that the authorities Warbrick cites are not directly applicable to Australia, but it is suggested that similar lines will be followed in interpreting the Covenant on Civil and Political Rights to which Australia is a party. Indeed it has already been noted that there are provisions in that Covenant which allow derogations from the protections afforded by the Convention. It is therefore submitted, that the first question posed above, the question as to whether there is a legal obligation to apply the same rules of evidence to all cases or to all criminal cases, can be answered in the negative.

We turn now to address the third question as to whether there are strong arguments of convenience against adopting separate rules of evidence for terrorist trials. There appear to be two such arguments. The first is to the effect that it is generally desirable for the rules of evidence to be the same in all trials. This is because the lawyers who are called upon to appear in various jurisdictions and causes will then be able to concentrate on the substantive points of law. It is true that many of the works addressed to the reform of evidence law have been urging uniformity of approach as a desirable end. The suggestion that the rules of evidence that apply to the trials of terrorists should be altered runs counter to this general

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[30] Warbrick, *supra* n. 2 at 113 citing *Ventura*, No. 7438/76 23 D.R. 5, *Foti* No. 7406/76 and *Coriglano* No. 8304/78.
[31] No. 7412/76 11 D.R. 78, 92.
[32] No. 7975/77 15 D.R. 169.
[33] Warbrick, *supra* n. 2 at 114.
[34] *Ibid.*

trend but it is clear that this is relatively weak argument from convenience only and that if good reasons exist for making a distinction, the argument from convenience should give way.

The second and stronger argument from convenience is that counsel must know before going into court which rules of evidence will be applied to the trial, or counsel will not be able to prepare the case properly. The strength of this argument cannot be denied, but the objection may be overcome if it is considered appropriate to alter or modify the rules of evidence as they will apply to trials of terrorists.

Assuming that different rules of evidence are adopted either statutorily or by the courts, it will be necessary to decide whether it is appropriate to apply these rules to a particular case. This decision must be made before the trial and may be contentious. It is clear that the decision should be made by a judge. It would be totally inappropriate for it to be made by the prosecutor and it cannot be expected that agreement will easily be reached between the parties on this point.

In order to get a decision from a judge before the trial commences it will be necessary to hold a pre-trial hearing.[35] There are precedents for such pre-trail hearings. In the United States of America the device of the motion in limine is provided for this purpose by Rule 12(b) of the Federal Rules of Criminal Procedure. In Victoria in 1983 the Crimes Act was amended by the insertion of s. 391A. This section provides that where a person is arraigned on indictment or presentment the trial judge may, before the jury is empanelled, "hear and determine any question with respect to the trial of the accused person which the court considers necessary to ensure that the trial will be conducted fairly and expeditiously." In addition it is possible before the arraignment for the accused person, the Director of Public Prosecutions and the Criminal Trial Listing Directorate to make application to a judge for directions with respect to the conduct of a trial of a criminal case where this is necessary for its fair and expeditious conduct.[36] It is considered that in the case of an application to apply specially modified rules of evidence to the trial of a terrorist, the prosecution should be required to apply for and obtain court permission several days before the trial is to occur, in order to allow counsel for the defence to prepare adequately. At this hearing the prosecution would be required to establish a *prima facie* case proving that the accused is/are terrorists and perhaps that it is feared that the trial processes would be jeopardized, before such an order would be given.

The conclusion is that there is no reason of principle, of law or of convenience that would lead to an out of hand rejection of the suggestion that different rules of evidence be applied to trials of terrorists. The question now arises as to whether appropriate areas can be identified where such changes might be considered.

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[35] See, J. Hunter, " 'Tainted' Proceedings: Censuring Police Illegalities" (1985) 59 A.L.R. 709, 712-713.
[36] R. G. Fox, *Victorian Criminal Procedure*, 3rd ed., Monash Law Book Co-operative 1981 at 93.

PUBLIC INTEREST IMMUNITY:

One area of the law of evidence that might appropriately be reconsidered in the context of trials of terrorists is the area of rules relating to public interest immunity. These rules state that where the executive government claims that it is not in the public interest to disclose specific information, the claim is not conclusive. The court will weigh that public interest against the interest of justice in the particular case and decide whether or not to order disclosure. Where the case is a criminal prosecution for an act of terrorism, it may be appropriate instead for the court to accept that the information will not be disclosed and instead consider whether the information concerned is necessary for the case. If the information is vital and cannot be produced then it may be appropriate to dismiss the case.

The decision in *Alister* v. *The Queen*[37] is directly in point here, although only one judge in the High Court, Brennan, J., made any specific reference to the fact that there was a suspicion of terrorism. The trial court decided that the claim to public interest immunity should be allowed. On appeal it was held that this ruling was wrong. Before reanalysing the case in an attempt to show the relevance of the fact that the alleged offences were of a terrorist nature, it will be necessary to examine the facts and the reasons for decision relied on in the judgments, and also to consider how the appeal court dealt with the consequences the misruling should have entailed.

It was common ground that Seary, the chief prosecution witness, was an undercover agent for the Special Branch of the N.S.W. Police. It was assumed by the accused that Seary had also been working for the Australian Security Intelligence Organization (ASIO). The accused accordingly subpoenaed documents held by the N.S.W. Police. They also subpoenaed any ASIO documents that might exist. There was no contest at the trial as to the subpoena relating to the police documents although it was subsequently revealed at the judicial inquiry that not all such documents had been produced.[38]

The Attorney General for the Commonwealth responded to this subpoena by claiming that public interest immunity made it unnecessary to disclose whether any such documents existed. In an affidavit sworn out by Senator Durack, then Attorney General for the Commonwealth, the claim was advanced that it would be prejudicial to security to reveal whether or not any such documents were in existence on the grounds set out in paragraph 5, subparagraphs a), b) and c).

The Director-General of ASIO then filed a notice of motion to have the subpoena set aside. The motion was heard by the trial judge after the trial had commenced but before the examination in chief of Seary had been completed. The trial judge, Lee, J., heard argument on the motion

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[37] *Supra* n. 1.
[38] *Sydney Morning Herald*, August 31, 1984.

on 17 July 1979. At the end of the day he said: "I think it is a case in which I should examine any documents in private." However the next morning he indicated that he had considered the authorities cited, namely *Conway* v. *Rimmer*[39] and *Sankey* v. *Whitlam*,[40] and concluded that: "the affidavit of the Attorney General asserts matters which this court should without more accept."[41]

On the appeal to the High Court it was argued that the trial judge's first ruling was correct and should not have been set aside. The grounds relied on by the Attorney General were:

(1) that it was in the public interest to establish and maintain an organization to obtain and evaluate intelligence relevant to security;
(2) that to disclose that a particular person has carried out an investigation for the organization could in general be a crucial breach of security and confidentiality required for effective operation of the organization and would be such a breach in some circumstances; and
(3) that effective security in relation to the organization can only be maintained if the organization is able to refuse to divulge whether such information exists.

The judges in the High Court, by a majority of three (Gibbs, C.J., Murphy and Brennan, JJ.) to two (Wilson and Dawson, JJ.), held that the trial judge had been wrong to accept the affidavit. The three judgments which need detailed analysis on this issue are the two majority judgments of Gibbs, C.J. and Brennan, J. and the joint minority judgment.

Gibbs, C.J. discerned two separate issues that had to be dealt with in order to reach a conclusion as to public interest immunity. The first was the effect of the Attorney General's affidavit. He held, on the basis of *Sankey* v. *Whitlam*, that an objection to production taken by a Minister is not conclusive.[42] Then, dealing with the grounds of objection advanced by the Attorney General, he held that the first ground was merely preliminary and was insufficient in itself as a claim to the immunity. The second ground was, he held, *prima facie* convincing, but it was expressed in a qualified way. In some cases disclosure might not only injure security, but endanger the particular person. However, this would not always be so. This ground called for an examination of the circumstances of the particular case in order to decide whether any danger was likely. With regard to the third ground, he held that it was unconvincing if it was intended to stand alone and did not follow as a conclusion from the other claims. He thus rejected the governmental objections to disclosure.

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[39] [1968] A.C. 910.
[40] (1978) 142 C.L.R. 1.
[41] Facts as set out in the judgment of Brennan, J. 50 A.L.R. 40 at 75-76.
[42] *Supra* n. 1 at 45.

The second issue, with which the Chief Justice experienced more difficulty, arose out of the speculative nature of the subpoena. He referred to the cases of *Burmah Oil Co. Ltd.* v. *Bank of England*[43] and *Air Canada* v. *Secretary of State for Trade.*[44] These cases supported the proposition that where public interest immunity is claimed the judge should not look at the documents unless an order for production is contemplated. However, Gibbs, C.J. distinguished these cases on the basis that they were both civil cases.

He pointed out that applications for discovery should be more readily granted if the documents are necessary to support the defence of an accused person whose liberty is at stake in a criminal trial. Similarly, special weight should, he held, be given to the fact that the documents may support the defence of an accused person in criminal proceedings when considering whether the court should inspect them to determine a claim of public interest immunity.

> Although a mere "fishing" expedition can never be allowed it may be enough that it appears to be "on the cards" that the documents would materially assist the defence.[44A]

Gibbs, C.J. decided that he was not persuaded that the public interest would be harmed by discovery of the fact that Seary made reports to ASIO in the circumstances that the fact that Seary was an inquiry agent and the field of his inquiries was already public knowledge.

Murphy, J.'s judgment on this issue was, as has been noted, very brief. Murphy, J. held that "the authorities reviewed by the Chief Justice persuade me" that the trial judge should have examined the documents. He added that:

> [t]he processes of criminal justice should not be distorted to prevent an accused from defending himself or herself properly. If the public interest demands that material capable of assisting an accused be withheld then the proper course may be to abandon the prosecution or . . . to stay proceedings.[45]

In this last comment Murphy, J. is making a point that is of general relevance to the suggestion that the rules of evidence sould be adapted to apply to the trials of terrorists. We will return to the argument in the conclusion.

Brennan, J. held that, if the ground of complaint was the rejection of admissible evidence, it would be necessary for the applicants to state the nature of the evidence that they sought to tender. However, as the ground of complaint related to the loss of an opportunity to obtain evidence, it was not necessary to point to specific evidence that they could have used if the subpoena had been effective.[46]

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[43] [1980] A.C. 1090.
[44] [1983] 2 W.L.R. 529.
[44A] *Supra* n. 1 at 46.
[45] *Supra* n. 1 at 60.
[46] *Id.* 76.

Brennan, J. then went on to discuss the history of the struggle for the right of an accused person to compulsory process. He held that the right to compulsory process cannot be dependent upon the party's ability to prove the existence and content of a document when the party has reasonable grounds to believe that a document exists.[47]

In commenting on the grounds set out by the Attorney General, Brennan, J. found that the third ground denied the possibility that, on the balance of public interest in a particular case, the benefit of disclosure to the forensic process will outweigh the peril to national security of compelling disclosure. He held that in denying that possibility, the claim denies the duty of the court to determine how that balance should be struck in each case. He, therefore, concluded that the claim was unsupportable. He held that Lee, J. did not pose for himself the relevant question of whether the public interest could best be served and least injured in the circumstances of the particular case by compelling or refusing disclosure.

Brennan, J. then addressed the question of whether the trial judge should have inspected any documents that might have existed for the purpose of deciding whether they would be made available to the accused. If it was decided that the documents could never be made available to the accused, there would have been no point in inspection. He held that:

> If ASIO were to disclose the information and documents sought by the subpoena to the court with a view to disclosure to the accused, ASIO would be disclosing some or perhaps all of the intelligence it had about a suspected terrorist organization (or, conversely its failure to obtain intelligence about that organization) at the behest of persons who might well have been under investigation by ASIO as suspected terrorists. There would have to be weighty reasons for allowing the accused access to the documents sought from the ASIO file, if such documents existed, or for allowing them to know that there were no such documents.[48]

He indicated that if the documents did no more than injure Seary's credit or reveal ASIO's assessment of the organization they should not be made available for inspection by the accused. However, the documents might show the case against the accused was "a fabrication and a frame-up" then these documents must be made available to the defence if the prosecution were to proceed. The judge had a duty to inspect the documents to see if such a document existed.

In dealing with the suggestion that the accused were indulging in a "fishing expedition", Brennan, J. held that in a criminal case it is appropriate to adopt a more liberal approach to the inspection of documents by the court. The approach needed to be more liberal to ensure "that the secrecy which is appropriate to some of the activities of govern-

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[47] *Id.* 77.
[48] *Id.* 80.

ment" does not furnish an incentive to misuse the processes of the criminal law. He referred again to the balance that needs to be struck between the security that is desirable to protect security and the safeguards necessary to ensure individual liberty, and insisted that the balance must tilt in the direction of safeguarding the individual's freedom because "the safety of a democracy rests upon the common commitment of its citizens to the safeguarding of each man's liberty."[49] Brennan, J. concluded that the trial judge had erred in having the subpoena set aside without having regard to the contents of the documents.

It followed that the verdicts must be set aside unless the proviso to s. 6(1) of the Criminal Appeal Act 1912 (N.S.W.) could be applied. That is, the appeal must be allowed unless the Crown proved that the error did not cause a substantial miscarriage of justice. Brennan, J. suggested that the Crown could discharge that onus in three ways. First, the Crown could show that there were no documents. Secondly, the Crown could attempt to show that although the applicants ought to have been given access to the documents there was no substantial miscarriage in that the documents would not have assisted the accused. Thirdly, the Crown could show that the claim to public interest immunity was made out but in this case the Crown would also have to show that the convictions were safe and satisfactory.[50] Brennan, J. indicated that if the Crown intended to rely on the first method the Attorney General would need to file a new affidavit. If the Crown were to rely on either the second or third method the High Court would need to inspect the documents.

Wilson and Dawson, JJ. dissented on the issue of public interest immunity. They began by stating that the principles are not in doubt.[51] They held that the anterior question of the existence of the documents and of access to the documents which arose before the question of whether the documents should be admitted in evidence, fell to be determined by the same principles that would determine whether they were admissible as evidence.[52] They insisted that national security forms a category of public interest of special importance and held that it is the function of the Minister to make a claim in the interests of security and not to form a view as to competing interests. It was the Minister's role to assist the court by expressing the claim to public interest immunity with as much specificity as the circumstances will allow. To this stage they were in agreement with the majority.

Commenting on the affidavit in question, they held that neither the trial judge nor the appeal court was in a position to do other than accept that the disclosure of the information would endanger the national security.[53] They then raised the question: "What is there to place in the

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[49] *Id.* 81.
[50] *Id.* 82.
[51] *Id.* 62.
[52] *Id.* 63.
[53] *Id.* 65.

scales on the other side?" Factors that they thought might support the applicant's position were firstly, that the case involved the administration of criminal justice and; secondly, that there was more than a possibility that Seary was an ASIO agent. However, the critical consideration in their opinion was the fact that the applicants could not show any basis for a rational inference of any likelihood that the documents would go substantially to proof of their innocence. The dissenting judges held that the applicants case broke down completely at this point.[54] "A bare unsupported assertion that on inspection something may be found that is helpful is not enough."

The order given by the Court was in accordance with Brennan, J.'s judgment. The special leave to appeal was granted and the appeals were stood over until Tuesday 13 December 1983 "to permit the Attorney General on or before that time" to select one of the three options. This is all that is found in the report of the case in the Australian Law Report. The Australian Law Journal Report shows that the Attorney General produced some documents which the court inspected and that further judgments in the case were delivered on 13 February 1984. On that date a joint judgment subscribed to by Gibbs, C.J., Brennan, Wilson, and Dawson, JJ. was delivered dismissing the appeal. Murphy, J. delivered a dissenting judgment.

The majority took the position that, having inspected the documents, they were certain that they would not have assisted the accused and that "the trial judge after performing the balancing process described in the judgments of the Court would properly have upheld the claim of privilege."[55] The Court reached that conclusion without the advice of counsel who had not been given access to the documents. This was despite the fact that the Attorney General had indicated that if the Court was in any doubt the documents could have been disclosed to counsel if appropriate undertakings were given.

Murphy, J., on the other hand, took the position that counsel should have been shown the documents. He held that the onus was on the Crown to show that production of the material would not have affected the outcome of the trial. He indicated that there was a great deal of material, and that counsel for both sides wanted to assist the Court by examining the material and making submissions. He then referred to the Attorney General's new affidavit, which stated that there was no objection to access by counsel if the court was in any doubt as to whether the documents would have assisted the defence and held that "without the assistance of counsel for the parties I am in such doubt." He further held that not seeking the assistance of counsel was "an injustice to both the Crown and the accused and casts a further shadow over this case."[56]

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[54] *Id.* 66.
[55] (1984) 58 A.L.J.R. 97 at 124.
[56] *Ibid.*

In a note on the case which appeared in June 1984,[57] Starke is highly critical of this aspect of the decision. He gives nine reasons why the decision was "untenable in principle and contrary to established canons." These nine reasons are said to be mirrored in one sentence in the judgment of Murphy, J.

The first reason given is that the issue was whether the material if produced would have affected the result, not whether the privilege was rightly claimed. However, if the material could not have affected the result and if the privilege was correctly claimed, Starke does not explain why the public interest should be jeopardized by the disclosure of the material in the appeal court.

The second reason was that the procedure required the court to assume the Crown's function of proving beyond all reasonable doubt that the material would not have resulted in an acquittal. Thirdly, Starke argued that the fact that Murphy, J. expressed a doubt meant that objectively there was a doubt and the test should not be a subjective one. It is suggested that the conclusion that there was an objective doubt does not follow. The fourth point made was that the court deprived itself of the assistance of counsel while it was argued that considerations of national security could have been satisfied by hearing argument *in camera.* Reasons five through seven were that the rights of both accused and the Crown were adversely affected. The rights of the accused that are at stake are obvious. The Crown has a right to a reputation for fair prosecution and a right to satisfy itself that it has done the right thing to the accused. The eighth reason is the most important for our purposes. It is set out in these words:[58]

> It is hardly possible to discern or conceive what was to be lost by allowing the disclosure to counsel and allowing arguments to be heard in camera. There was, on the other hand, much to be gained, because it would have served to a very great degree to increase public confidence in the administration of justice.

The final reason was that the High Court had created a precedent that might be followed in other courts.[59]

Some of the reasons urged against the procedure taken by the High Court have undoubted force. But it is submitted that the objection is misconceived because it is possible to discern or conceive what was to be lost by allowing the documents to be disclosed. It is at this point that it becomes essential to remember that the prosecution was based on the assertion that the accused were terrorists dedicated to overthrowing the current Australian system. The case can be distinguished on this ground. It is possible to argue that the approach taken is appropriate only where that assertion is made. It does not matter whether the assertion was correct or not in the *Ananda Marga case.* The precedent will be appropriately

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[57] (1984) 58 A.L.J. 313.
[58] *Id.* 315.
[59] *Ibid.*

applied in subsequent cases where the accused might in fact be terrorists even if Alister, Dunn and Anderson were not.

It is submitted, with respect, that the majority was in the circumstances correct, both in deciding that the documents should be inspected and in deciding that the documents should only be inspected by the judges. However, it is also submitted, that both positions can only properly be understood against the background that the Ananda Marga was alleged to be a terrorist organization. In a normal criminal investigation there will be no basis for suspecting that access to the investigative reports could have any independent relevance to the trial. The basis for that suggestion arose from the fact that the Ananda Marga was admittedly under investigation before the particular crime was planned. There might also be a pre-existing investigation where the accused were alleged, for example, to be part of a drug ring picked up and charged in relation to one shipment where that shipment was alleged to be one of a series. However, it is suggested, that the investigating officers would not have and could not be suspected of having the same motivation to "cook" the evidence or "frame" the accused. The fact that such motivation can be suspected in cases of alleged terrorism makes it essential that the accused have a right to insist that someone other than the investigating officers should take any possible steps to investigate such a possibility. To insist, as the minority judges did, that the applicants should state specifically what they think will be found in the documents, is to miss the point because of the nature of the suspicion the accused cannot do this.

The fact that the trial was a trial of alleged terrorists is also relevant to the second issue, the issue of whether the judge should seek assistance in reading the documents. The nature of the threat to the public interest is important here. The fact that access to such documents can be of substantial help to a terrorist organization that is still operational regardless of the fate of the individual accused must not be overlooked. The argument that counsel as officers of the court can and should be trusted is an unrealistic one. It may be safe to assume that counsel as officers of the court are men of integrity above minor criminal impulses but men of integrity can be utterly convinced on principle that society should be reorganised on sounder principles. To pretend otherwise is to ignore the lessons of the last thirty years, to ignore the fact that sleepers and undercover agents such as Burgess have passed undetected in positions of trust even when subjected to rigorous security checks. Any suggestion that barristers should be subjected to such security checks would be repellent and would be rejected out of hand. It follows, therefore, when the claim to public interest immunity is based on a threat to national security of this nature, counsel should be prevented from having access to the documents. If the rule is general then there is no reflection on the individual counsel in the case. It is argued that the recognition of this factor can lead to allowing counsel access to the documents when the claim is based on some other public interest. In such other cases the objections to the High Court procedure must be recognized as valid.

At the subsequent inquiry conducted by Justice Wood, the ASIO documents were in fact disclosed. It then appeared that ASIO had no knowledge of, or connection with, Seary and the Yagoona charges. It is true that the ASIO files would have strengthened the defence[60] in a number of ways but it does not appear either that it would have introduced new issues or that it would have proved that Seary was lying as to the main issue. The result of the inquiry was a finding that "a doubt remains as to their guilt". This finding seems to have been premised primarily on the evidence of the Special Branch tapes suppressed at the time of the trial and on new and damaging facts relating to Seary's credibility that came out at the inquiry. It is submitted that these facts do not require a rejection of the principles outlined above even if they might suggest that the High Court had grounds on which to question whether the conviction was unsafe and unsatisfactory. The distinction is one between principle and the application of the principle to the facts which is a perennial problem for all courts.

HEARSAY EVIDENCE

This issue did not arise in the *Ananda Marga case* since Richard Seary, the police informant in question was present in court as the chief prosecution witness. In fact it is noteworthy that Seary does not appear to have been either a professional member of the Special Branch on the one hand, or a person who had had a long and intimate association with the Ananda Marga, on the other. No fears were entertained for his safety and his use as a witness did not appear to jeopardise national security efforts to keep track of a group that posed a continuing and serious threat to any government or society as a whole. Where one or two members of a terrorist organisation are put on trial one or all of these factors will often be present and there will be a strong desire on the part of the security forces to protect the identity of the informant. In these circumstances the hearsay rules pose a problem. The informant will be required by these rules to appear in court and his identity may become known even if the court waives the requirement for the witness to give his name and address. The accused, and if the court is open, the accused's friends may be able to identify the witness, the witness may be followed or intercepted on the way to court. Partial solutions to these problems may be found in non-publication orders or in the use of a mask and a voice distorter but security forces remain unsatisfied with these proposals. It is proposed therefore to explore solutions to this problem using a comparative law approach. Reference will be made to German procedures, to provisions once in force in Northern Ireland, to provisions now in force in the United States of America and finally to practices and provisions in Australia.

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[60] T. Anderson, *Free Alister, Dunn and Anderson: The True Story of the Hilton Bombing* (1985) 12.

The point was made by Professor Zeidler, Vice-President of the Constitutional Court of the Federal Republic of Germany in an address delivered at the University of Adelaide that:[61]

> In the last few years problems involving hearsay evidence have become more and more serious, especially in the field of the international intelligence struggle, international terrorism, and organized crime.

It is, he points out, frequently a condition of obtaining the information that the informants be given a complete new identity to protect them from retaliation by the organisation. Once such an identity has been provided the prospective witness can no longer appear in court. The German courts now accept the non-availability of such witnesses and accept the evidence of the written statements by non-available declarants and of the police officers who interrogated them. If the court needs more information it formulates written questions which in due time are answered anonymously, the identity of the answerer being unknown even to the judges.[62] A similar procedure is followed in Austria.

Two cases which upheld this type of procedure may be cited. There is a decision of the European Court of Human Rights[63] which dismissed a complaint about the Austrian procedure. The second case is a decision of the Federal Constitutional Court of Germany. In the German case a member of the State Parliament of Bavaria had been convicted of conspiring with a foreign intelligence service. He challenged the constitutionality of his conviction on the grounds that his rights to due process and fair trial had been violated. The Federal Constitutional Court accepted the assertion by the security forces that there was a plot to kidnap or kill the prosecution witness whose new identity was being protected. The complaint was dismissed. The court did however outline several requirements for the validity of a conviction founded on such an exceptional procedure. These requirements included:[64]

1. The decision to invoke this procedure must be taken at the highest executive level.
2. Reasons must be given for this decision so as to enable the court to evaluate these reasons independently.
3. There must be corroborating evidence confirming the hearsay evidence.
4. In evaluating the evidence the court must take into account that the hearsay evidence is of less value than evidence heard in court directly and immediately.

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[61] W. Zeidler, "Court Practice and Procedure under Strain: A Comparison" (1982) 8 *Adelaide L.R.* 151, 159.

[62] *Ibid.*, see also H. Reiter, "Hearsay Evidence and Criminal Process in Germany and Australia" (1984) 10 *Monash U.L.R.* 51, 68.

[63] *Id.* 70.

[64] Zeidler, *supra* n. 61 at 158.

5. In stating its conclusions the criminal court must indicate that these conditions have been fulfilled.

The argument that the secret information could be disclosed *in camera* was not considered to be an acceptable alternative as the guarantee of a legal hearing in court where the defendant has a right to hear and comment on all the facts founding the decision was considered indispensable. The view was taken that this procedure allowed the defendant the right to formulate questions and hear the statements made by the prosecution witness even if it denied him the right to confront the witness.

It is true that there is a basic difference between the trial systems of civil law and common law countries and that German law does not include a hearsay rule. In Germany the hearing of evidence is governed by no specific rules, apart from rules about privilege. The paramount principle is that of free evaluation of evidence.[65] Before this fact is used to discount the German practice as of no relevance for common law countries, two things should be noted. First, there are comparable rules and practices in some common law countries. Secondly, both the Germans who compare the practice with Australian procedures discount the importance of the distinction. They assert that there are procedural rules which have the effect of excluding much of this evidence.

Reiter points out that a motion to introduce evidence will be rejected by German courts if the fact to be proved is of no importance for the decision or is completely unsuitable due to its inherent incapability to further the exploration of truth.[66] Having scrutinized the common law hearsay rule as it applies in Australia and its statutory modifications he concludes[67] that generally the

> practical working of the rule when compared with the German hearsay concept in its procedural context reveals similar results; indeed in some situations the hearsay exceptions are more generous in admitting hearsay evidence than under the German position.

Reiter concedes that uneasiness remains about the practice in respect of reception of the evidence of undercover agents and that an out-of-court examination by a delegated judge would seem preferable.

A statutory exception to the hearsay rule was created in Northern Ireland in 1973 and although these provisions have been repealed, a perusal of them is instructive. The Northern Ireland (Emergency Provisions) Act 1973 altered trial procedure and certain rules of evidence for trials of scheduled offences. A scheduled offence included certain common law offences (murder and manslaughter, riot and arson) as well as offences under certain specified Acts including the offences defined by the Emergency Provisions Act of being a member of a proscribed organisation

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[65] *Id.* 156.
[66] Reiter, *supra* n. 62 at 59.
[67] *Id.* 71-2.

and of collecting information likely to be useful to terrorists. It was provided in s. 5 of the Northern Ireland (Emergency Provisions) Act 1973 that:

> a written statement made and signed by any person in the presence of a constable shall be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible if it is shown that:
>
> (a) the maker of the statement is dead, or is unfit by reason of his bodily condition to attend as a witness, by reason of a mental condition which has arisen since he made the statement, or
>
> (b) he is outside Northern Ireland and it is not reasonably practicable to secure his attendance, or
>
> (c) all reasonable steps have been taken to find him, but he cannot be found.

This provision was much less satisfactory than the German provisions. It was unsatisfactory because there was no requirement that an undertaking be given that the statement was true nor was there any liability involved in the use of a false statement. The decision to record a statement was taken at a very junior level and there were no procedural requirements other than the presence of a constable. It is true that the statement was only to be used if the maker was unavailable in court but might it not be realistic to assume that if an undercover agent's life or usefulness would be threatened by appearance in court "all reasonable steps" might fail to find that agent. The provision was subjected to a great deal of criticism and was repealed in 1975 by s. 7 of the Northern Ireland (Emergency Provisions) Act 1975.

Another instance in which the Northern Ireland (Emergency Provisions) Act 1973 alters the hearsay rules is in relation to the exception to the rule for confessions. The provision in s. 6 has not been repealed. It provides that a confession may be given in evidence if relevant unless excluded by the court on the basis that there is *prima facie* evidence that the accused was subjected to torture or inhuman or degrading treatment and the court is not satisfied that the statement was not so obtained. The common law applies the voluntariness rule to confessions offered in evidence in criminal trials. This rule requires the prosecution to prove that the confession was voluntary, that is neither the result of brute force or oppression applied by the police or the result of inducements held out by a person in authority. The Northern Ireland provision in question thus alters the onus of proof and excludes consideration of inducements.

In the United States of America, rule 3503 was inserted in 1970 into the rules on Crimes and Criminal Procedure. This rule covers depositions to preserve testimony. It provides:

> (a) whenever due to exceptional circumstances it is in the interest of justice that the testimony of a prospective witness . . . be taken and preserved, the court at any time after the filing of an

> indictment . . . (may) order that the testimony of such witness be taken by deposition.

It is provided that a motion by the Government to obtain such an order "shall contain certification by the Attorney-General . . . that the legal proceeding is against a person who is believed to have participated in an organized criminal activity." Subsequent paragraphs give the opposite party the right to reasonable written notice of the time and place for taking the deposition. If the defendant is in custody then he must be produced at the hearing to take the deposition. If the defendant is not in custody the defendant has a right to be present, but may waive that right (3503(b)). On the taking of the deposition the scope of the examination and cross-examination shall be such as would be allowed in the trial itself (3503(d)). It is provided that, at the trial, a part or all of a deposition may be used if it appears that the witness is dead, or out of the United States or unable to testify because of sickness or infirmity, or that the witness, refuses to testify. There is, however, a proviso with respect to the absence of the witness, that it cannot be relied on if it appears that the absence was procured by the party offering the deposition. It is not clear how this proviso would work if the absence is deemed necessary for the protection of the witness. Rule 3521 empowers the Attorney General to provide for the relocation and protection of a witness or potential witness for the government in an official proceeding concerning an organized criminal activity or other serious offence. This rule was introduced in 1984. It makes no direct reference to presence at the trial.

Both the American and German provisions extend beyond trials of defendants allegedly motivated by the desire to produce fear in the populace and committed by criminals that are not terrorists. It is clear from this fact that this sort of provision can be considered useful in other situations. It is also clear that the American provision is not intended to apply where the reason for not revealing the informant's identity is a desire not to destroy that informant's usefulness.

In many of the Australian jurisdictions there are provisions to allow forms of documentary evidence, otherwise in breach of the hearsay rule, to be used. The N.S.W. provisions will be used by way of example. In N.S.W. there are provisions to allow documentary evidence to be used "where direct oral evidence of a fact would be admissible" in s. 14B of the Evidence Act, but this provision does not apply to criminal proceedings. Provisions that do apply to criminal trials are found in s. 409 of the Crimes Act, 1900 (N.S.W.) which allows depositions, once taken at a coronial inquiry or a committal hearing, to be used at the trial if the witness is unavailable because dead or so ill as to be unable to travel or give evidence or is out of Australia. One condition imposed is that the witness must have been questioned in the presence of the accused and must have been subject to cross-examination.[68] There is no provision to allow a

[68] S. 409(1) Crimes Act, 1900 (N.S.W.).

deposition to be taken because fears are entertained for the witness's safety, such as there is in the United States of America, nor is there any provision to allow evidence to be obtained from a witness whose attendance at court is excused. It is submitted that consideration should be given to whether it is desirable to introduce such provisions.

This submission is strengthened by a disturbing statement found in the article by Reiter. He states that the question of the application of the hearsay rule to evidence of police undercover agents or informers is not dealt with in Australian legal literature at all and that there is no applicable exception to the hearsay rule. He goes on to say that "no special squad could sacrifice their undercover agents . . . by presenting them in every single case as witnesses for the Crown without seriously impeding their future detection abilities."[69]

He then asserts that "as ascertained by a personal survey among some barristers and other legal practitioners" the dilemma is resolved by having police witnesses in fact informed by undercover agents pretend to give direct evidence.[70] If there is any basis for this assertion it must be very strong reason to consider solutions to the problem. One such solution would be the creation of an exception to the hearsay rule. If the practice is going to be followed it would be better to acknowledge it openly and consider the introduction of safeguards to prevent unnecessary abuses. There are of course other solutions that could be adopted, such as the use of mask and voice distorter.

There is a case then and precedents for an alteration to the hearsay rule such as is suggested. This case must be weighed against the policies supported by a strict application of the hearsay rule. An initial difficulty lies in identifying these policies. These policies are not identified in the cases. However, the discussion of justifications for the hearsay rule in the A.L.R.C.'s Interim Report on the Law of Evidence[71] will be used for this purpose. Seven justifications are suggested there. They are:

(a) the out of court statement is not on oath;
(b) the absence of cross-examination of the maker of that statement;
(c) the evidence is not the best evidence;
(d) there is a danger that the repetition will be inaccurate;
(e) there is a risk of fabrication;
(f) the rule, by limiting the evidence that can be brought forward, reduces court time and the cost of litigation;
(g) the rule minimises the risk of surprise by making it possible to predict which witnesses will be used.

Most of these reasons are not in fact objections to the procedure suggested. The informant will be on oath and subject to penalties for

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[69] Reiter, *supra* n. 62 at 68.
[70] *Id.* 71.
[71] Australian Law Reform Commission, *Report No. 26 – Interim Report on the Law of Evidence*, vol. 1, para. 661-675.

perjury as long as the prosecution knows the identity of the witness. If the German procedure is accepted, questions can be put to the witness and clearly the dangers of inaccurate repetition do not exist in the way contemplated. It is conceded that time and cost will be increased but this is deemed acceptable. The risk of surprise does exist and in fact the argument for the procedure is that the accused and the accused's organization are not entitled to know who testifies against them. Inasmuch as the evidence the court is receiving, albeit indirectly, is original evidence, most of the justifications supporting the rule against hearsay do not apply. The court will, however, lose the opportunity to see and assess the witness's demeanour. The value of this opportunity is, however, debatable. Psychologists have suggested that it has been overvalued. One problem that does occur, however, is that in being denied the ability to question the witness orally, the defence is denied the opportunity to trip the witness up and surprise admissions out of him. It may be that the risk of fabrication is thereby increased. However, the cynic may doubt the value of cross-examination for this purpose in any event.

Having thus discounted the arguments against the suggestion, it must be admitted that a consideration of the facts of the *Ananda Marga case* is not calculated to support the argument that such provisions should be adopted. The case seems to have hinged on the question of the credibility of Seary. The facts about his psychiatric history could not have been elicited if the accused did not know his identity. The question may, however, be raised of whether the accused would have been convicted even if the evidence had been obtained under the German procedure without producing Seary in court. This is because it is a condition of that procedure that corroborative evidence be produced. It is submitted that there was little or no independent corroborative evidence as the police evidence that explosives were found in the car can be discounted on the basis that Seary might have been responsible for this fact. Other safeguards might in addition be considered, such as an assertion by an independent psychiatrist that the witness is sane and not suffering from delusions.

CONCLUSION:

The thrust of this paper has been to establish that the rules of evidence must be applied to trials of terrorists and to raise the question of whether it would be appropriate to alter certain rules of evidence in their application to such trials. No attempt has been made to provide a definitive answer to the second question, but the view that there are special problems raised by this sort of crime has been explored. The special features are said to lie in the fact that the individuals who are on trial belong to a group who are, it is alleged, engaged in an ongoing no holds barred struggle to destroy the social and political framework of the society. It is true that the fact that the struggle is ongoing and that the terrorists belong to an organization is not a unique feature of this type of case. These features are shared by drug cases and others where the police allege or

suspect a continuing organized criminal operation. Does the political context of the terrorists' activities then make a crucial difference? It is submitted that it does, purely and simply, because if the state is prevented from taking steps to restrain such activities through the courts, "the forces of law and order" will proceed to take such steps extrajudicially and will be supported in such steps by the opinion of many citizens. Our police forces must be kept from resorting to tactics of state terror by keeping the courts relevant to their activities.

Murphy, J. in a passage from his judgment quoted above, took the position that if certain evidence must be withheld the proper course is to abandon or stay the proceedings. The term he used for such evidence was "material capable of assisting the accused". It is submitted that those words are too wide. If material capable of proving that the accused are innocent is to be excluded or if the exclusion of the material will make the conviction unsafe or leave substantial doubts as to whether the accused are guilty then it may be agreed that the proper course is to abandon the prosecution but the fact that evidence that might have merely collateral or persuasive relevance is excluded should not mean that the case cannot be heard. This would be to put the state at too much of a disadvantage in the judicial process with the consequence that state terror might well escalate.

In introducing the question of whether separate rules of evidence could or should be adopted, reference was made to the fact that the rules of evidence embody many values, including but not limited to, the search for truth. The doctrine of public interest immunity is notably a doctrine that embodies a value other than the search for truth. Thus application of special rules in this area may well seem appropriate. By way of contrast, the hearsay rules do not serve any precisely identified public policy purposes and may be considered as rules designed to serve the search for truth—it has therefore been suggested that while it might be appropriate to adopt new and special procedures in this area, care must be taken at the same time to introduce special safeguards against abuse.