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26/11 ATTACKS: LOOKING INTO THE LEGAL QUESTIONS

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26/11 ATTACKS: LOOKING INTO THE LEGAL QUESTIONS

Saroj Kumar Rath¹

Abstract

During the 26/11 Mumbai attack Ajmal Kasab was intercepted alive by the Mumbai police and the capture of a foreign terrorist led to an intricate legal battle as Mumbai police filed an 11,280 page chargesheet. The FBI filed four Chargesheets in the same case in a US court. The investigative mechanism adopted by the US and India for 26/11 attacks case inspire different degree of confidence. As for the terrorist crime, much is said for its prevention, and even the Afghan War against Taliban is said to be future security of the US and the world. But punishment without fail is very much important for prevention. The legal trial of the Mumbai case is different as legal structure of counts of indictment of such a crime which are thought to be applied in ordinary crime which occur in ordinary life, does not appropriately reflect actual social reality of the crime, of it's gravity, of it's structural whole, of each criminal's role. How

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far India's and US' investigation in the Mumbai attacks case establishes the design, plan and purpose of the crime? Is the post crime legal procedure of India and the US is deterrence for terror attack or otherwise? The article examines these questions both theoretically and empirically, with specific analysis of the chargesheet filed by the Mumbai police and FBI. Theoretically I identify various aspects – legal infrastructure, forensic data, electronic interception, intelligence input and conventional method of investigation – and hypothesized that there are different level of conviction for the same crime in both these countries.

Keywords

Global terrorism, Internal security, 26/11 Mumbai attacks, Chargesheet, Investigation in US and India, Law.

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26/11 ATTACKS: LOOKING INTO THE LEGAL QUESTIONS

Saroj Kumar Rath, Ph.D

Introduction

Terrorism is now one of the worst kinds of global problem. All parts of the world be it New York or New Delhi, London or Lahore, Madrid or Mumbai, Bali, Baghdad or Beslan all parts of the world is affected by the menace of terrorism. The acts of terrorism are taking precious human lives, damaging properties and arresting economic developments across the world. When 9/11 attacks happened people from more than 84 nations perished in the debris of the attacks. Similarly when 26/11 Mumbai attacks happened, people from 14 countries perished in the diabolic attacks. On both the occasions the terrorists came from beyond the borders and inflicted economic damage and loss of lives to a great number of countries. Terrorism no more remained a local affair and no country may claim immunity from the assault of international terrorism. The devastating attacks of the September 11 cost an estimated \$30 billion direct loss to the US economy. 60 thousands employee of airlines sector alone in the US reduced unemployed, which rise to three lakes in the subsequent period. Except the Defense industry, all the other industries around world witnessed a cataclysmic effect of the September 11 attacks. The US economy is not only the largest but also it is the engine

of growth for the rest of the world economy². Similarly the 26/11 attacks had effected a huge loss to India as well as to the global economy. The magnitude of setback, both in terms of the monetary loss and credibility in the foreign investors' community, was huge after the attacks. The Indian economy suffered an estimated \$80.8 million loss in the immediate aftermath of 26/11 attacks. And the tremors from the attack side traveled across the flat world³.

The objective of the research is to study the difference in the methods adopted in India and in the US to deal with terrorist attacks. The study examines the investigation procedure to establish the structure, design and purpose of the crime. The different judicial outcomes in both the countries for the same case make it a classic case of study. The focus of the study is to analyze the Chargesheets filed in both the countries on 26/11 terror attacks and compare the response as well as redressal system against terrorism in both the countries.

The Different Approaches of Investigation

Comparing the 9/11 with 26/11, Secretary of State Hillary Clinton said, "Americans share solidarity with this city and nation. Both our people have experienced the senseless and searing effects of violent extremism. And both can be grateful and proud of the heroism of brave men and women whose courage saved lives

² Rath, S. K., 2003, 'Joint Response of US and UK to Terrorism since 11 September 2001', Dissertation, Jawaharlal Nehru University, New Delhi, pp-86-87.

³ Mukherjee, N., 'From Bad to Battered', India Today, December 15, 2008.

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and prevented greater harm on 26/11 and 9/11”.⁴ Unlike the United States, India did not create the equivalent of a Homeland Security Department. While a high-profile bipartisan American commission published a best-selling report on the failures that led to the 2001 attacks, Indian lawmakers have kept secret a similar report (*Report of the Hi Level Enquiry Committee on 26/11*) about the Mumbai attacks. Almost all the political officials who resigned as a result of the attacks either are back in their old jobs or have been promoted. No senior members of the police force were fired or reprimanded.⁵

In one of the recommendations to the US government, the 9/11 commission recommended that “the US government must identify and prioritize actual and potential terrorist sanctuaries. For each it should have a realistic strategy to keep possible terrorist insecure and on the run, using all elements of national power. We should reach out, listen to, and work without other countries that can help”.⁶ The US government implemented this recommendation along with others in letter and spirit to keep the country out of the reach of terrorists. “A number of plots conducted by individuals have been prevented as a result of the increase in effective counterterrorism investigations by the United States in cooperation with friendly and allied governments”.⁷ A similar commission in India in its report tells how callous is Indian police and how they never learn any lesson from their devastating mistakes. The

⁴ ‘Hillary compares Mumbai attacks with 9/11 carnage’, The Indian Express, July 18, 2009.

⁵ Polgreen, L., & Bajaj, V., ‘India’s Guard Is Up, but Weaknesses Remain’, The New York Times, November 25, 2009.

⁶ ‘The 9/11 Commission Report’, 2004, W.W. Norton & Co. Publication, pp. 384

⁷ Carafano, J., ‘US Thwart 19 Terrorist Attacks against America Since 9/11’, Backgrounder, No. 2085, November 13, 2007.

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committee said, “the Maharashtra police had not experienced a direct commando attack such as the like of 2001 Parliament attack or 2002 Akshardham temple attack. Except the 1993 serial bomb attacks through hidden timed explosive devices, where in arms, ammunitions and explosives had come through sea route, all other terrorist attacks in Mumbai city were by use of IEDs (Improvised Explosive Devices). This had perhaps led to a police mindset of thinking only of ‘stealth bomb attacks’”.⁸

Not only this, India is committing one after another compromises with her national security which in turn is encouraging the terrorists to take one after another devious attack plan. In November 1989, when Rubaiya Sayeed, daughter of Union Home Minister Mufti Mohammed Sayeed was kidnapped in Srinagar, government of India succumbed to barter five JKLF militants. In December 1999, external affairs minister Jaswant Singh personally delivered three terrorists in Afghanistan, in exchange of the hijacked Indian Airlines IC-814. The terrorists freed in Afghanistan included Maulana Masood Azhar who went back and set up Jaish-e-Mohammed, a terror organization targeting India. Afzal Guru, the co-conspirator of Parliament attack of 2001, was convicted and sentenced to death in 2004 but he is still languishing in jail and his mercy petition before the President of India is in suspended animation.⁹

The Office of Intelligence and Analysis of the United States of America had analyzed the November 26-28, 2008 Mumbai terror attacks and told to the Senate Committee on the Homeland Security that Mumbai draw comparison with New York being the densely populated financial capital, multi-cultural metropolis and a hub of media and entertainment industries. In their analysis the Office of Intelligence and

⁸ Maharashtra Government, ‘Report of the Hi Level Enquiry Committee on 26/11’, December 30, 2008, p-8.

⁹ Poorie, A., ‘Pledge to Win This War’, India Today, December 15, 2008.

Analysis told to the Committee that a civil police like Mumbai Police would not have been able to face a professional and well trained group of heavily armed commando terrorists unless they had an equally professional and well trained set of commandos who should have superior weaponry.¹⁰ New York Police Commissioner Raymond Kelly deposed before the Committee and said, “The attackers displayed a sophisticated level of training, coordination, and stamina. They fired in controlled, disciplined bursts”. He also said, “For example, they used hand signals to communicate across loud and crowded spaces”.¹¹ These are the testimony of the intensity and precision of the attacks Mumbai faced on November 26, 2008. The Mumbai attackers entered the city via sea route as it was the best way to avoid detection. Sea infiltration permitted the attackers to come ashore with a substantial cache of weapons that might have been detected during a land entry into the city.

Investigation of Mumbai Police: A Peek into the Matter

Then Home Minister of India Mr. Shivraj Patil was divested from his job in the immediate aftermath of the attacks and new incumbent to the post Mr. P. Chidambaram made a statement in the Lok Sabha and informed that “cases have been registered and the investigations have been entrusted to the Crime Branch of the Mumbai Police. The authorities of the Maharashtra Police and the Central agencies have extended their full support to the Mumbai Police in the conduct of the

¹⁰ Allen, C., Testimony before the ‘Senate Committee on Homeland Security and Governmental Affairs’, "Lessons from the Mumbai Terrorist Attacks", Dirksen, Senate Office Building, Washington DC, January 8, 2009.

¹¹ Kelly, R., Testimony before the ‘Senate Committee on Homeland Security & Governmental Affairs’, “Lessons from the Mumbai Terrorist Attacks”, Dirksen, Senate Office Building, Washington DC, January 8, 2009.

investigations”.¹² The investigation to the Mumbai attacks started within hours of the attack.

One of the 10 Mumbai attackers, Mohammed Ajmal Mohammed Amir Kasab was captured alive on the night of November 26, 2008 by the DB Marg Police of Mumbai and handed over to the Crime Branch on November 27, 2008. On November 28, 2008, the Crime Branch produced him before magistrate N.N. Shrimangale, at the 37th Esplanade Court of Mumbai. The judge asked the terrorist if he is having any complaint to which “the terrorist gestured no”. He was remanded to the police custody till December 11, 2008.

Following the attacks, the state Government and Mumbai Police had assured of filing the chargesheet within 60 days. However, the deadline could not be met as necessary sanctions to file a chargesheet under different sections of the Indian Penal Code, the Criminal Procedure Code (CrPC), the Explosives Substances Act, the Arms Act, the Customs Act and the Unlawful Activities (Prevention) Act (UAPA) were pending before different authorities of state and central government. A series of hearings come before the session court on various dates only to extend the custody of the terrorist. On December 11, 2008 the second hearing held and on December 24, 2008 the third. Subsequently four similar hearings come before the court on January 6, January 19, February 2 and on February 13, all in 2009 before filing the voluminous chargesheet on February 25, 2009.

Meanwhile, following a letter sent by the Joint Commissioner of Police (Crime), Rakesh Maria requesting for the set up of a special court, the Registrar General of the

¹² Chidambaram, P., Parliament Debate, ‘Suo-Motu Statement of the Home Minister in Parliament’, December 11, 2008.

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Bombay High Court had issued a notification on February 11, 2009 to the principal judge of the sessions court, T V Nalavade, city Police Commissioner Hasan Gafoor and Judge M L Tahiliani, who has been appointed to conduct the trial in the terror attack case directing the immediate set up of a special court in the Arthur Road jail premises in Mumbai.

The sanction for Section 121 of the IPC relating to waging war against the nation is granted by the State Government but the sanction to use Section 188 of the CrPC, which deals with an offence committed by a foreign national in a foreign country and then applying it to a resulting crime in India, was to be received from the Central Government. On February 11, 2009 before the 90-day deadline, the Mumbai Police received the requisite sanction to file the chargesheet and to charge Ajmal Amir Kasab as well as his accomplices with waging war against the nation.

An unprecedented scale of investigations was carried for three months by the Mumbai Police before filing the 11,280 page chargesheet before metropolitan magistrate M. J. Mirza at the Qila Court, Esplanade, and Mumbai. Charges have been filed against Ajmal Amir Kasab and 44 other Pakistanis including 35 still wanted in connection with the attack. The Mumbai Police also wants to investigate the Pakistan Army link to the Mumbai terror attacks further. Two terror suspects Fahim Ansari and Sabauddin arrested from Uttar Pradesh also form part of the chargesheet. The chargesheet also contains 2,202 witness statements, including those of officers of the U.S. Federal Bureau of Investigation. It incorporates forensic evidence, fingerprint reports, and documentary and oral evidence collected in India and abroad. Transcripts of communication among the terrorists and their handlers, Call Phonex and Global Positioning System (GPS) records, and purchase and sale details of the Yamaha outboard motor all used by the terrorists also constitute the evidence.

The international ramification of the case can be judged from the fact that, according to Crime Branch of Mumbai Police, while foreign nationals of 15 countries were killed in the attacks which includes U. S. A., England, Germany, Israel, Canada, Australia, Mauritius, Belgium, Malaysia, Japan, France, Thailand, Italy and Singapore, five of these nations — the US, Singapore, Italy, France and Japan — have registered offences in their own nations over the deaths of their citizens.

The Chargesheet of Mumbai Police

As many as 12 F.I.Rs were filed at various police stations in Mumbai in between November 27, 2008 to November 30, 2008. The final chargesheet was filed by combining all the F.I.Rs which was produced before the 37th Court, Esplanade, Mumbai. A strong indictment was made in the chargesheet against Pakistan as it is said, “this Fidayeen Mission was part of a larger criminal conspiracy planned in Pakistan for attacking the commercial capital of India with intent to wage war, to weaken India economically and to create terror and dread amongst the citizens of the Mumbai metropolis in particular and India in general and, thereby, through the said unlawful activities its perpetrators committed terrorist acts”.¹³ The involvement of the army or security force of Pakistan can easily be ascertained from the telling remarks of the chargesheet, “the military precision with which all these attacks were conducted, the commando like action, the complexity of the operation, the detailed and meticulous planning, the familiarity and dexterity in the handling of sophisticated weaponry and

¹³ Mumbai Police, ‘Final Report Mumbai Terror Attack Cases 26th November 2008’, 37th Court, Esplanade, Mumbai, February 25, 2009, p-1.

electronic equipment all undoubtedly and conclusively point to training by professionals in Pakistan”.¹⁴

It is further stated that 35 wanted terrorist of LeT, who still resides in Pakistan, had planned the attack with military precision for over a period of one year. The names of the terrorists most of which it seems are not their real name but as known to the Mumbai Police includes, 1) Hafeez Muhammad Saeed @ Hafiz Saab, 2) Zaki-Ur-Rehman Lakhvi, 3) Abu Hamza, 4) Abu Al Kama @ Amjid, 5) Abu Kaahfa, 6) Mujjamil alias Yusuf, 7) Zarar Shah, 8) Abu Fahad Ullah, 9) Abu Abdul Rehman, 10) Abu Anas, 11) Abu Bashir, 12) Abu Imran, 13) Abu Mufti Saeed, 14) Hakim Saab, 15) Yusuf, 16) Mursheed, 17) Aakib, 18) Abu Umar Saeed, 19) Usman, 20) Major General Sahab – Name not known, 21) Kharak Singh, 22) Mohammed Ishfak, 23) Javid Iqbal, 24) Sajid Iftikhar, 25) Col. R. Saadat Ullah, 26) Khurram Shahdad, 27) Abu Abdurrehman, 28) Abu Mavia, 29) Abu Anis, 30) Abu Bashir, 31) Abu Hanjla Pathan, 32) Abu Saria, 33) Abu Saif –ur- Rehman, 34) Abu Imran and 35) Hakim Saheb”.¹⁵

The terrorists used sophisticated communication gadgetry to remain in constant contact with their co-conspirators in Pakistan for a continuous flow of operational and motivational inputs. But what baffle the world and as the chargesheet mentioned is, the recording of the calls made and received from the Pakistani handlers of the terrorists. “A total number of 41 calls (8834 seconds) were made from Taj Mahal Hotel, 62 calls (15,705 seconds) were made from Oberoi /Trident and 181 calls (35, 172 seconds) were made from Nariman House”. The law enforcing agencies never bothered to cut the communication amongst the terrorists and their handlers, which could have proved vital in ending the operation. Instead the authority lawfully intercepted the same.

¹⁴ Ibid, p-1-2.

¹⁵ Ibid, p-4-5.

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The investigative agencies have commendably employed Forensic Science Laboratory of Mumbai for detailed examination and report on the DNA samples of nine deceased terrorists and the arrested terrorist and its matching with that of the articles seized from the fishing trawler M.V. Kuber viz. Jackets, Handkerchief, Skull cap, Blankets and Israeli cap. The report of forensic expert dated February 2, 2009 established the fact that the DNA samples of the five deceased and one arrested accused has matched with the DNA remnants on the articles seized on M.V. Kuber which was hijacked by the terrorist to travel to India. This is a telling evidence of the involvement of Pakistani citizen and their origin to which no one can deny. Forensic evidences carry more value than any other evidence as it is scientifically proved and through the proper use of it the source of crime can easily be established without fail. While the age old legal procedures of establishing a crime through oral statement is credulous, crime established through forensic evidences cannot be denied. Mumbai investigation is largely relied on the oral evidences as there are 2202 witnesses were examined and Kasab's confessional statement is taken as gospel truth to embarrass Pakistan.

Most of the communication gadgets used by the terrorists were acquired from various companies operated from or based in the United States of America. So to solve the mystery of Mumbai attacks, the Chief Investigating Officer requested the Hon'ble Session Court regarding issuance of Letter Rogatory under the "Treaty of Mutual Legal Assistance" to the concerned Judicial Authority in the U.S.A. requisitioning assistance in investigation. The US Department of Justice provided the personal details of the people who facilitated the communication between the deceased accused and the wanted accused during the course of the offence. Their names and addresses of the persons in whose name those gadgets acquired reveal the fact that they are from the Pakistani cities of Lahore and Rawalpindi. During the course of communication amongst the terrorists and their handlers in Pakistan few names appeared from the

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crime side. The names appeared from Nariman House are that of – i) Wassi, ii) Zarar, iii) Jundal, iv) Buzurg and v) Major General. Similarly from Hotel Oberoi the name of i) Kafa, ii) Wassi and iii) Zarar appeared and from Taj Hotel that of i) Wassi appeared.¹⁶

While making the final charges against the three arrested accused, nine dead accused and 35 wanted accused in the *State of Maharashtra Vs. Mohammad Ajmal Mohammad Amir Kasab and Ors.*, the court charges the accused with “being members of *Lashkar-e-Taiba* (internationally banned terrorist organization) during the period between December 2007 and November 2008 were party to a criminal conspiracy to wage war against the Government of India and to commit the offences punishable under sections 302, 307, 326, 325, 332, 342, 343, 353, 364, 365, 419, 427, 435, 436, 465, 468, 471 and 474 of Indian Penal Code, offences punishable under sections 10, 13, 16, 17, 18, 20 and 23 of Unlawful Activities (Prevention) Act, 1957, Sec 25 and 27 of the Arms Act offences punishable under Explosives Act and Explosives Substances Act, offences punishable under Section 3 and 4 of Prevention of Damage to Public Properties Act. Offences punishable under sections 151, 152 and 153 of the Railways Act. Offence punishable under section 135 of the Customs Act and offences punishable under the provisions of Foreigners Act and the Passport (Entry into India) Act. 1920 and to commit following illegal acts and certain acts by illegal means to destabilize the Govt. of India, create instability, terrorize people, weaken India’s economic might, seriously damage tourism business of India and affecting harmony”.¹⁷ Kasab and his associates were charged with 86 counts of charges by the Session Court judge.

¹⁶ Ministry of External Affairs, Government of India, ‘Dossier on Mumbai Terrorist Attack’, pp-50

¹⁷ Sessions Court Gr. Mumbai, Session Case No. 175/09, Charge, May 6, 2009.

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The final draft charges framed by the court against all the accused includes a greater number of charges which was about 312 charges which says, “being the members of *Lashkar-e-Taiba* (internationally banned terrorist organization) during the period between December 2007 and November 2008 enter into a criminal conspiracy and/or were members of the said criminal conspiracy whose object was to wage war against the Government of India and that you all agreed to commit the following illegal acts, to wit to overawe the Government, strike terror, organize training camps in Pakistan for attacking Cities of India, to attack territorial integrity of India and/or to capture Kashmir.¹⁸

The chargesheet filed by the Mumbai Police did not say anything about the involvement of Inter Service Intelligence of Pakistan about whose involvement all senior government officials and ministers admitted publicly. Also there was no mention of the Pakistani Army, whose hand behind the attack was widely suspected and there was talk of the presence of strong evidence against the same. A large part of the probe was on the crime and a small portion only dedicated to the establishment of a foreign hand. The assistance of FBI in the investigation proved vital to establish the source of various electronic gadgets to Pakistan which was used in the crime. But the indictment never indicted any of the Pakistani government’s establishment rather the investigations indicted *Lashkar-e-Taiba*, a terrorist organization which is already outlawed by Pakistan. There is no telling evidence which tells about the involvement of any government agency of Pakistan. This is what giving Pakistan the elbow room to claim that there is no evidence of involvement of Pakistan in the terrorist crime. In an attempt to pacify international community Pakistan is outlawing various terrorist organizations and taking cosmetic action against them. Probably India is not equipped

¹⁸ Ibid.

to conduct an international level of investigation where international players are involved. It makes India vulnerable to foreign attackers and still vulnerable to send a signal to the perpetrators of the foreign attackers that they can stay away from the periphery of the Indian law even if their identities are established by investigative agencies in India.

On February 20, 2009, the captured terrorist Kasab made his confessional statement before a magistrate which is admissible before the court of law as evidence. In his statement Kasab described minutest details of the crime story about the Mumbai attack. The story narrated by Kasab has been picked up by the Mumbai police to establish the modus operandi of the operation. Lines are picked up from his confessional statement and the larger design of Pakistan is established by the Mumbai police which is seen by the cynics as an act of over simplification. No wonder the Pakistani authority is declining to own up the evidences saying that these all are *literature* not *evidence*! In the absence of a mechanism to trace the handlers and match the voice sample recorded during the crime, the Mumbai police are confronting a new kind of circumstance where national laws are ineffective.

Investigation of FBI

On October 3, 2009, the FBI's Joint Terrorism Task Force arrested a man named David C. Headley at O'Hare International Airport before boarding a flight to Philadelphia, intending to travel to Pakistan. In the subsequent chargesheet filed by the FBI against Headley at the Northern District Court of Illinois, Headley was charged with "participated with others in a conspiracy to commit terrorist acts involving murder and maiming outside the United States, and that Headley and others conspired to

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provide material support to that conspiracy”.¹⁹ The court charged him with among other thing of conducting extensive surveillance for facilitating attacks, working with an individual called Individual A²⁰, Ilyas Kashmiri (a leader of Harkat-ul Jihad Islami), another Pakistan based terrorist organization; and others. Till October 11, 2009 when the FBI filed the chargesheet, India was unaware of this fact that a Pakistani origin US citizen was involved in the planning and execution of the Mumbai attacks.

FBI’s meticulously prepared chargesheet provides unflinching details about the involvement of David Headley in the Mumbai attacks and an impending attack on the facilities of Danish newspaper *Jyllands-Posten*. Not only Headley had done his surveillance work in India successfully but also he was conducting many more such surveillance for many such future attacks when Mumbai Police was investigating the Mumbai crime. The FBI paper reveals that there was another ongoing terror plan of which Headley was part of the conspiracy. The investigators intercepted a coded communication where Headley communicated with Individual A and *Lashkar* Member A which mentioned about a plan called the “Mickey Mouse Project” and “the northern project”. The project was meant for attacks at *Morgenavisen Jyllands-Poseten*, a Danish newspaper which in 2005 published cartoons depicting the Prophet Muhammed, to which many Muslims took great offense.

¹⁹ Case Number 09 CR 830 ‘United States of America V. David C. Headley’, United States District Court, Northern District of Illinois, Eastern Division, p.3.

²⁰ Individual A’s identity is known to the FBI which informed the court that member A is a LeT member with substantial influence and responsibility within LeT, ‘United States of America V. David C. Headley’, p-9.

***Lashkar's* Mumbai Attack Plan**

As the intension of Headley was no secret to the FBI much before the Mumbai attacks, the agency was keeping an eye on the visits of Headley who made a series of trips to identify places to be attacked in Denmark and in India. He traveled to Mumbai during September 2006, February 2007, September 2007, April 2008, and July 2008 for extended periods for the purpose of conducting surveillance of possible targets of attacks by *Lashkar*, using his association with First World Immigration as cover for his travels. The plan involved two persons among others who are Member A and Individual A. Member A use to give deliberations to Headley about the places to be surveyed each time before his trip to India. In return after every visit to India, Headley traveled to Pakistan to appraise *Lashkar* Member A about his work. The FBI chargesheet made specific mention about the work done by Headley in September 2006 when he taken the pictures of Taj Hotel and other places in Mumbai.

The chargesheet revealed how the design of Mumbai attack was planned and how money changed hands for reconnaissance activities. During 2007, Headley visited Pakistan where he met *Lashkar* Member A and received \$2000 worth of Indian currency for expenses in connection with his visit to India.²¹ It was during this visit, the chargesheet said, that *Lashkar* Member A showed a Styrofoam mockup of the Taj Mahal Hotel to Headley and Headley information about the places of Mumbai he surveyed. In March 2008 as a precursor to the Mumbai attack, Headley received \$1000 worth of Indian currency from *Lashkar* Member A and was asked by *Lashkar*

²¹ Case No. 09 cr 830, 'United States of America v. Ilyas Kashmiri, Abdur Rehman Hashim Syed, a/k/a "Major Abdur Rehman," a/k/a "Pasha," David Coleman Headley, a/k/a "Daood Gilani," Tahawwur Hussain Rana', United States District Court, Northern District of Illinois, Eastern Division, p-8.

Members A and B and others to take boat trips in and around the Mumbai harbor and videotape the same. Unearthing the whole planning of Mumbai attack, the chargesheet said, it was during the April 2008, *Lashkar* Members A and B provided Headley a Global Positioning System (device) and taught how to enter locations into the GPS device and instructed him to use it to record the locations of possible landing sites²². As per the plan Headley visited Mumbai and applied his GPS device. He entered all the potential targets into the GPS device including the landing place for terrorists who are supposed to come to Mumbai for the attack. After the surveillance he traveled to Pakistan and provided the GPS device and videos to *Lashkar* Member A. In June 2008 *Lashkar* Member A again provided an amount of \$1,500 worth of Indian currency to Headley, who again traveled to Mumbai and surveyed Chabad House among other places.

The analysis of the evidences collected by the FBI reveals the fact that – terrorists belong to different banner for their personal identity and influence but they are committed to a common purpose of wrecking terror in the mind of people. While picking up a target the terrorists are normally influenced by a set of reasons which includes but limited to personal aggrandizement, a replication of a 7th century Arabia, religions hatred, state policy and misinterpretation of the holy Quran. The evidences suggest to the fact that there is clear division of labour for different persons inside a terror group or of different terror groups according to their capabilities. What is amazing on the part of the FBI chargesheet is the specific mention of the training of the attackers which was done during the month of July and August 2008 by *Lashkar* Member B and others to a number of young men in Pakistan in various skills and

²² Ibid, p-8.

tactics to be used in carrying out terrorist attacks in Mumbai, including combat tactics, room entry, hostage rescue, nautical training and swimming.

The involvement of Pakistani nationals are mentioned as the chargesheet said during attacks on Mumbai, “the attackers were in telephonic contact with *Lashkar* Members A, B and C, all of whom were then located in Pakistan. More specifically, during the course of the attacks, the attackers were advised to, among other actions, kill hostages and throw grenades. *Lashkar* Member A also sought to arrange the release of a hostage in exchange for the release of a captured attacker”.²³

Once the attacks on Mumbai was over, *Lashkar* Member A advised Headley, who was in Pakistan, to avoid any contact with him and to remove any incriminating materials from his home in Pakistan. But what confabulate the common citizen of India was the fact that when India was looking threadbare into the Mumbai attack plan during the month proceeding November 2008, Headley was busy conducting another set of surveillance of various targets in India, including but not limited to, the National Defense College in Delhi and Chabad Houses in several cities in India during March 2009 barely three month after the Mumbai attacks. Charges against Headley includes violation of Title 18, United States Code, Section 2332F (a) (2) which says that the members of the conspiracy concealed, misrepresented and hid, and caused to be concealed, misrepresented, and hidden, the existence and purpose of the conspiracy and the acts done in furtherance of the conspiracy.

During interrogation as the chargesheet says, Headley confessed that “prior to 2006 he worked at various times with *Lashkar-e-Taiba* and that he received training from

²³ Ibid, p-11.

LeT. He also stated that at times he worked with Ilyas Kashmiri, including in connection with planning the Denmark attack”.²⁴ The chargesheet tells in details how Headley in association with Ilyas Kashmiri planned and undertaken surveillance trip to Copenhagen and Arhus to attack *Jyllands-Posten*. Headley in this case used his influence amongst the terrorists to reduce the scale of attack from bombing the entire building of *Jyllands-Posten* to killing the cultural editor, Flemming Rose and cartoonist Kurt Westergaard. He also surveyed the nearby synagogue and Danish troops posted nearby. By doing this the FBI certainly preempted a major terrorist attack in Denmark.

Financing the Terror: Tahawwur Hussein Rana

The FBI recorded a telephonic conversation in between Tahawwur Hussein Rana and David Headley discussing an attack on the National Defense College in India and recovered a video titled “Bombing of Denmark Embassy” from his possession on 18 October 2009. The DVD recovered from Rana was prepared by As Sahab Media, the media wing of al Qaeda where two Al Qaeda operatives prominently featured. The two operatives are Al Qaeda spokesman Abu Yahya al-Libi, who reportedly escaped from American custody in Afghanistan and Mustafa Abu al-Yaid, the third ranking al Qaeda member. The 54 minutes long video was primarily made to incite religious passion and violence against *Jyllands-Posten* and Denmark. Once the cartoons were published by the *Jyllands-Posten* in 2005, violent protests followed across various parts of the Muslim world primarily in Nigeria, Libya, Pakistan and Afghanistan causing a death

²⁴ Case Number 09 CR 830, ‘United States of America V. David C. Headley’, United States District Court, Northern District of Illinois, Eastern Division, p.7.

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toll of 100 persons. In Iran, Syria and Lebanon protestors set the Danish Embassies on fire and Danish flag was dishonored in other countries. A plan to kill the cartoonist and his editor was foiled by the Denmark police in February 2008. The *Jyllands-Posten* republished the cartoon after the failed bid to the life of the cartoonist to express freedom of speech. After that the al Qaeda appeared in As Sabab Media in April 2008 and in June 2008 a suicide bombing rocked the Danish Embassy in Islamabad killing 6 persons. In October 2008, the Taliban announced that Danish troops in Afghanistan would be their primary target because of the cartoons. It was under this background of multiple failed bids to the life of the cartoonist and the news agency, Rana began supporting a conspiracy in Pakistan in late 2008 against the *Jyllands-Posten*.

While Rana and Headley both are product of LeT school, after training they were separated from LeT in their action to run their own sleeper cell. When both of them are committed to the LeT, they never shy of collaboration with HuJI and others to conduct terror attacks. Rana and Headley conducted surveillance of Mumbai for the *Lashkar* backed Mumbai attack, as *Lashkar* is active and capable in India, the same duo conducted surveillance of *Jyllands-Posten* in Denmark for HuJI, as HuJI is capable of an attack in Europe. In his coded communication Headley said that “I don’t care that if I am working for Microsoft or I am working for a...any...GE or Philips”. A careful review of the coded communication reveals the fact that Headley is indicating that he does not care whether he works for Ilyas Kashmiri’s group HuJI or Hafiz Sayeed’s LeT, as long as he helps carry out attacks.

Tawahhur Rana was charged with providing material support and resources, and to conceal and disguise the nature, location, source and ownership of such material support and resources, knowing and intending that they were to be used in preparation for, and in carrying out, a conspiracy to commit terrorist acts involving murder and maiming outside the United States. The chargesheet against Rana said that “Rana was

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born in Pakistan and is a Canadian citizen who primarily resides in Chicago, Illinois with business interest in Chicago, New York and Canada. He graduated from a military school located in the Pakistani town of Hasan Abdal.²⁵

The FBI intercepted how Headley performed a Google search for “Ilyas Kashmiri” at approximately 7.29 p.m on September 16, 2009 as it was on that day a press report appeared online indicating that Ilyas Kashmiri had been killed on September 14, 2009 in a drone attack. After this news their plan was disturbed as their supply structure is devastated with the death of Kashmiri.

Security agencies in India are deceived many times by the terrorists. In late 1994, a police raid near Delhi rescued several foreign hostages being held by a group of terrorists, seeking the release of some arrested militant leaders including Maulana Masood Azhar. Azhar had been arrested in February that year. “The commander of the terrorist group Harkat-ul Jihad-al-Islami, Ilyas Kashmiri and his trusted lieutenant Omar Saeed Sheikh confronted the police and in the gun battle that ensued, Sheikh was injured and arrested but Kashmiri escaped. Omar Sheikh was later released in exchange for passengers aboard the hijacked IC-814 at Kandahar”.²⁶ Things would have different had the security agencies handled the affair with steely resolve.

To hatch a big conspiracy and to shift Headley to Pakistan for five years Rana started making arrangement on 25 September 2009. Rana contacted the Consul General at the Pakistani Consulate in Chicago in an effort to get a 5-year visa for

²⁵ No. 09 CR 849, ‘United States Of America V. Tahawwur Hussain Rana’, United States District Court, Northern District of Illinois, Eastern Division, p-8.

²⁶ Dhall, P, ‘Omar Shaikh’s Pak handler Ilyas Kashmiri also Handled Headley’, The Indian Express, November 16, 2009.

Headley to travel to Pakistan. The FBI had ascertained the fact that the Consul General knows Rana and Headley personally as all the three attended the same high school but the Consul General knows Headley by a different name Daood Gilani. Rana fabricated a story that he wanted the visa for a white American “Headley” who is out of Chicago on business purpose hence cannot come to meet him but he can send someone else to collect the visa. The FBI proved the fact that Rana wanted to deceive the Consul General into granting a visa for Headley.²⁷ It was this time the FBI suspected that Headley may not return to the US for a long time and arrested him at the O’Hare International Airport.

The Retired Pakistani Major

FBI filed another chargesheet against a man named Abdur Rehman in the same conspiracy case. The US law enforcing agency meticulously investigated and found that “after visiting Denmark in January 2009, Individual A traveled to Pakistan to meet with Abdur Rehman. During this trip, Abdur Rehman took Individual A to the Federally Administered Tribal Area (FATA) region in northwestern Pakistan in order to meet with Kashmiri and solicit the participation of Kashmiri and his organization in the planned attack on the *Jyllands-Posten*. Individual A returned to Chicago in mid-June 2009”.²⁸ As Individual A visited Chicago, his identity is very much known to the FBI and the identity of Individual A can be traced to David Headley from the revelation of the FBI chargesheet which says “Individual A was arrested by FBI agents

²⁷ Case No. 09 CR 849, ‘United States Of America V. Tahawwur Hussain Rana’, United States District Court, Northern District of Illinois, Eastern Division, p-43.

²⁸ ‘United States of America v. Abdur Rehman Hashim Syed, also known as ‘Pasha,’ ‘Major’, and ‘Abdur Rahman’, United States District Court, Northern District of Illinois, Eastern Division, p-5

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on October 3, 2009 as he prepared to board a flight from Chicago to Philadelphia. During a search of the luggage of Individual A, a memory stick was recovered that contained ten videos of Copenhagen, Denmark, including video focused on the *Jyllands-Posten* building as well as video of a nearby Danish military barracks, and a map of Copenhagen”.²⁹ The description fit into the arrest of David Headley.

The flawless investigation of FBI also leads to the identification of the retired Pakistani military officer. It was Abdur Rehman Hashim Syed, who resides in Lahore and he is retired Major in the Pakistani military who was arrested by the Pakistani authorities in summer 2009 and released later. The indictment says Abdur Rehman has also used the names ‘Major’ and ‘Pasha’ and he is associated with the *Lashkar-e-Taiba* terrorist organization.³⁰ While identifying Individual B, the FBI chargesheet says, “Individual B was born in Pakistan and is now a Canadian citizen who primarily resides in Chicago, Illinois. Individual B, who has received medical training, is the owner of several businesses, including First World, which has offices in Chicago, New York, and Canada,³¹ a description fit into the description of Rana.

Headley, Rana and Abdur Rehman charged in the US court with conspiracy to provide material support and resources, namely personnel, tangible property and false documentation and identification, and to conceal and disguise the nature, location, source and ownership of material support and resources, knowing and intending that they be used in preparation for, and in carrying out, a violation of Title 18, United

²⁹ Ibid, p-7

³⁰ Ibid, p-7

³¹ Ibid, p-11

States Code, Section 956 (a) (1) (conspiracy to kill, kidnap, maim or injure persons in a foreign country).

Chargesheets of Mumbai Police and FBI: A Comparison

The “Hi-Level Enquiry Committee on 26/11” appointed by the Maharashtra Government in the aftermath of the 26/11 terror attacks, in its report conclusively proved that the Mumbai police simply did not had the expertise, training, manpower and weaponry to deal with such a specialized terror attack. The inability of Mumbai police continued even after the attack when the chargesheet was filed. The voluminous chargesheet of the Mumbai police providing painstaking details about the attacks and the damages causes by the attack is a thorough document to know about the attackers who were killed or captured and who had committed the crime. It makes the task of the court easy to penalize the arrested accused. But what it missed is the adequate evidences that are required to book the conspirators who are residing beyond Indian borders.

The FBI on the other hand relied heavily on the evidences it gathered through various means especially by using technology and forensic laboratories to establish the truth. The identities of the people involved in the conspiracy, as unraveled by the FBI, is readily provided and their where about is mentioned in the chargesheet. Who are behind the attack, how much funding was pumped into the conspiracy, from where the money come and when the money is changed hands are also answered in the chargesheet filed by the FBI.

Mumbai police’ chargesheet said that the terrorist attack is a proxy war but it was far from establishing the fact that which agency of Pakistan waging the proxy war. The

charge sheet proved the fact that *Lashkar-e-Taiba* is behind the attack, which is already outlawed by the Pakistani government. In an interview to the German Magazine Spiegel's reporter Susanne Koelbl, the Inter-Services Intelligence Chief of Pakistan, Lieutenant-General Ahmed Shujaa Pasha has maintained that "They have given us nothing, no numbers, no connections, no names. This is regrettable". The chargesheet also never mentioned anything about the involvement of ISI or Pakistani military. Compared to that the FBI chargesheet provided all the details of travel plan of one Pakistani retired Major whose name is Abdur Rehman. After which, the retired Major was arrested during the summer of 2009 by Pakistan. ISI on the other hand take adequate precaution, while directing a terror attacks against India, that its employee must not get caught in the act.

The Mumbai police never answered convincingly why Mumbai was attacked, although various versions of the reason of attacks are available in the media. The Mumbai police' chargesheet gives almost no explanation about the purpose of this terrorist attack except a brief description on LeT. The chargesheet mentioned 35 wanted terrorist. It is not clear why and from what evidences the police reached the conclusion that these 35 are wanted terrorists. It is understood that many of them are mentioned as trainers or facilitator of communication between deceased accused and conspirators in Pakistan. But it is not clear the role of other wanted accused, and even for wanted accused as trainers, concretely what they did is neither clear. FBI chargesheet is different. They have filed four different Chargesheets and decisively mentioning who done what, where, when and how!

Mumbai police' chargesheet said that mobile account in New Jersey was opened by Kharak Singh and 2 payments \$250 and \$229 each were made on October 27 and November 25, 2008. But they were not included as conspirators! It is widely believed and published in the popular media that the purpose of the attack is to distract the

attention of Pakistani government from the Afghan war to the conventional foe India especially the problem of Kashmir. It is believed that there are a quite number of persons in ISI itself who are disagreeing to fight with the US and other NATO countries in Afghanistan. Before filing the chargesheet senior officials of Mumbai police including the public prosecutor use to say that the entire international community is following the case and hence the chargesheet must be prepared with due diligence. But there is absence of the background information why the attack happened which is making it difficult to take this matter to international forum. It was only on February 25, 2010, for the first time, India asked for two serving Pakistani Army officers, Major Iqbal and Major Samir Ali to be handed over to India in connection with the Mumbai terror attacks. Contrary to this, the FBI chargesheet deal with each of the event with immaculate maturity and established the whole structure and motive behind the attack plan, both on Mumbai and on *Jyllands-Posten*.

The high power committee on 26/11 in its report, observed how red tape has held up any police modernization plans as well as purchase of arms & ammunition for the Maharashtra police, which is a dying necessity of the Mumbai police. To quote the report of the committee which said, “the DGP has stated that the purchase involves a lengthy procedure of 13 stages. There are other difficulties like absence of approved testing laboratories, non-availability of special equipments in the market which have to be manufactured or imported, delay in getting abstract bill permission from Govt., etc.”³² It is not difficult to imagine why the terrorists are succeeding in their attack on Mumbai.

³² Maharashtra Government, ‘Report of the Hi Level Enquiry Committee on 26/11’, December 30, 2008, p-74-75.

Taking a strong exception of the security apparatus of India the Parliamentary Standing Committee on Defense in its February 2009 report said, “it was because of lack of coordination among different intelligence gathering agencies including those of military intelligence resulting in loss of precious lives of defense services and police force personnel as well as those of civilians”.³³ The committee recommended for a federal intelligence agency covering under its umbrella even the tri-service intelligence gathering network. Probably it was because of such uncoordinated effort, the plan and design of the terrorists, although known to the security forces cannot be established. It is evident that not because of the precision strategy or the commando style of attacks of the terrorists but because of total absence of retaliatory tactics and command structure of the Indian security agencies, Mumbai attacks penetrated deep into the psyche and left an indelible mark on the Indian national mind and international community.

Conclusion

Having the advantages of deciding the timing, place, element of surprise and choice of instrumentalities for a terror act, terrorist walks a step ahead of the security forces. But with constant vigil of security agencies, terror attacks can be minimized if not eliminated. The US had prevented 19 terror attacks since September 11. India has done little of the painful public soul-searching that followed the September 11 attacks on the United States. But the failure of India to prevent such attacks are all the more unsettling as conditions in India’s neighbor to the west, Pakistan, deteriorate by the

³³ Thirty Sixth Report, ‘Status of Implementation of Unified Command for Armed Forces’ Standing Committee on Defence (2008-2009), Ministry of Defence, Lok Sabha Secretariat, New Delhi, February, 2009, p-24.

day, making the risks of another Mumbai-style attack from Pakistan-based militants impossible to ignore.

The cases filed in India and in the US in the 26/11 attacks not only adopt different method but also aim different outcome – when India’s court procedure is more conventional centric, the US method is driven by hard and undeniable fact which is the prime reason of differential judicial outcome. The deterrent against terrorist acts as well as redressal mechanism for the crime linked to terrorism in both the countries offering different degree of security to its citizen. India’s investigation procedure involved a multiple investigating agencies of which none have any real power to investigate and for a range of investigation even the highest law enforcing agency rush to some authority seeking permission which offer vital time to the criminal to efface the evidence and evade from the crime scene. US rely on a sound system of law enforcement procedure where even a Sherriff can challenge and prevail over an Obama.

In 2002, the US created a single, unified Department of Homeland Security to protect America. Subsequently, most of the nations including UK, France, Germany and Australia revamped their security laws. India’s Ministry of Home Affairs has too many security agencies to deal with making it highly unwieldy and ineffective against terror strikes. The immediate need for India is a strong policy with no clemency for terror, an integrated security department, tough terror law, fast track special court for terrorist crime and special mega city policing. Criticisms of post-9/11 efforts to protect the United States from attack and the claim that “America is more vulnerable than ever to the transnational terrorist danger” is vastly over-hyped. When the US prevented another 9/11 since 2001 due to its elaborate measures against terrorist crime; with 64 terror attacks across India in 2008 only, India is as vulnerable as before because of its less tactful handling of terrorism on its soil.

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