

The Role of the Military in Securing Suspects and Evidence in the Prosecution of Terrorism Cases before Civilian Courts: Legal and Practical Challenges

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Notwithstanding the fact that civil authorities are usually involved in the investigation and prosecution of terrorist crimes, reality on the ground often leads to a different situation. Indeed, the military may be called upon to carry out law enforcement activities when embedded in situations characterised by conflict, high risk level of threat and/or a lack of local civil capacity. In this Research Paper, the role of the military when performing law enforcement activities in terms of collecting evidence and/or securing suspected terrorists is analysed. ICCT Research Fellows Dr. van Ginkel and Dr. Paulussen point out that past experiences, for instance from counter-piracy operations and evidence-based operations, may provide some guidance for future cases. After having outlined these various contexts, the Research Paper turns to the legal frameworks applicable in these situations and their challenges. In addition, the authors address specific legal challenges which may arise when military authorities are involved in the gathering of evidence and the arrest and detention of suspects of terrorist acts. Lastly, very practical challenges are examined that stem from the insecure environment in which the military operate, such as difficulties in sealing off the area, recovering bodies, immediate hearing of witnesses and so forth. In conclusion, the authors argue that even though arresting terrorist suspects and collecting evidence in terrorism cases would ideally be the task of regular law enforcement officials, the new task of certain law enforcement activities could in fact be added to the mandate of the military, as long as they are properly trained and can follow standard operating procedures. Finally, the authors outline a series of recommendations to all involved stakeholders.

Executive Summary

The present Research Paper stems from the belief that notwithstanding the fact that civil authorities are usually involved in the investigation and prosecution of terrorist crimes, reality on the ground often leads to a different situation. The military may thus be called upon to carry out law enforcement activities when embedded in situations characterised by conflict, high risk level of threat and/or a lack of local civil capacity.

The general aim of this Research Paper is therefore to analyse the role of the military when performing law enforcement activities in terms of collecting evidence and/or securing suspected terrorists.

Three scenarios can be discerned. First of all, military personnel can accidentally find themselves in the position to collect evidence or arrest suspects in the course of a military operation. Secondly, in the aftermath of a terrorist attack, the military may be the first to arrive on the scene and therefore may be in the position to collecting evidence. Thirdly, among its operational goals, it might be the specific objective of securing suspects and evidence after intelligence information. These scenarios raise pertinent questions relating to the role of the military when performing investigative and prosecutorial acts, such as:

- Are the mandates under which the military are operating adequate for prosecutorial tasks?
- Is there a need to standardise proceedings?
- How can one preserve the integrity of the civilian prosecution/the integrity of the judicial proceedings if military evidence is brought into court?
- How can one avoid the tendency to over-classify intelligence?
- How to deal with intelligence in court, while at the same time respecting the (human) rights of the suspect?
- What happens in case evidence and persons are irregularly secured?
- How to deal with the credibility and security of witnesses?
- How can one secure the chain of evidence, and the investigation of evidence?

The authors point out that past experience from a) national criminal prosecutions, b) counter-piracy operations, c) evidence-based operations (EVBOs) and d) the international criminal tribunals may provide some guidance for future cases. Case a) shows that investigative powers may be extended to the sending state to investigate crimes committed by their own troops on the territory of the host state pursuant to so-called Status of Forces Agreements (SOFAs), but as for now, these investigative powers are restricted to personnel of the sending state only, excluding access to local victims, witnesses or the collection of evidence not under the ownership of the sending state. Case b) illustrates the pivotal role that the military had in law-enforcement situations at sea in collecting evidence and arresting alleged pirates before transferring them to national authorities in order to be prosecuted before civilian courts. Case c) shows that experience from the EVBOs in Iraq and Afghanistan is of valuable help in providing practical understanding of how international troops may assist in local law enforcement operations. Lastly, case d) illustrated that international criminal tribunals may rely heavily on the military, and not only because the latter may function as its enforcement mechanism.

After having outlined the various contexts from which military involved in securing evidence and suspects in terrorism-related cases could learn, the Research Paper turns to the legal

frameworks applicable in these situations and their challenges. There are different legal bases for foreign military troops to be involved in host/other countries. The presence of foreign troops in another country can be mandated by a UN Security Council Resolution, it can be based on the right to self-defence or finally through authorisation or consent by the host country. Depending on the legal basis of the military's involvement in another country, the different tasks and objectives can be determined, as well as the ability to collect evidence and arrest suspects. These bases or mandates should thus clarify what actions can be taken by the military in the field and what legal regime applies to their operations. During armed conflict, international human rights law (IHRL) and international humanitarian law (IHL) apply, with IHL usually being the *lex specialis*, whereas in peacetime, only IHRL applies. The progressive incorporation of IHRL to military operations may imply the application of many IHRL provisions that affect the collection and use of evidence.

When military authorities are involved in the gathering of evidence and the arrest and detention of suspects of terrorist acts, specific legal challenges might arise:

1) Since the rules of evidence are detailed at the national level, overlapping regimes might collide. For instance, in the United States and in the European Union, different criteria apply when it comes to assessing the admissibility of illegally obtained evidence. Another challenge with regard to the use of evidence is related to the use of military-obtained intelligence as evidence in civilian criminal prosecutions.

2) Given the new role of the military and the chaotic situation on the ground, the defence may argue that a suspect was brought into the jurisdiction of the civilian court in an irregular way. If serious irregularities are indeed established, this may even lead to the end of the entire case. However, there are no exact guidelines as to the effect of such an irregular capture on the jurisdiction of the prosecuting court. This will completely depend on an assessment by the judiciary of the specific circumstances of the case, which may include the seriousness of the suspect's alleged crimes, in this case terrorism.

3) For the same reasons as outlined under 2), legal challenges may arise from the detention and transfer of terrorism suspects captured by military forces with the aim of prosecuting them in civilian jurisdictions, especially when there is a switching between IHL and criminal detention regimes discernible.

Lastly, practical challenges stem from the insecure environment in which the military operate, such as difficulties in sealing off the area, recovering bodies, immediate hearing of witnesses and so forth.

The authors then distinguish three and sometimes overlapping situations in which the military can be involved and which have an impact on the military's ability to fulfil prosecutorial tasks.

In a traditional theatre of active combat, military objectives prevail over prosecutorial objectives. In counter-insurgency operations, it is not always decided from the outset of the operation whether the operational objective or the prosecutorial objective has primacy. A third situation occurs when the very aim of the military operation is to "capture and prosecute", in which case law enforcement has primacy.

In conclusion, the authors argue that even though arresting terrorist suspects and collecting evidence in terrorism cases would ideally be the task of regular law enforcement officials, it is a reality that sometimes a civilian investigation is not possible. As a consequence, given the fact that the armed forces are in a great number of cases capable of fulfilling a variety of tasks, as long as they are properly trained and can follow standard operating procedures (SOPs), the new task of certain

law enforcement activities could be added to their mandate. Nevertheless, the authors feel that the rule of thumb should be, “as civilian as possible, and only as military as needed”.

The authors lastly outline a series of recommendations to all the involved stakeholders, emphasising the importance of clarifying and specifying the role of the military within the relevant legal regimes if and when they will perform law enforcement operations such as the collection of evidence and arrest and detention of suspects.

About the Authors

Dr. Bibi van Ginkel is Senior Research Fellow at the Netherlands Institute of International Relations 'Clingendael', and a Research Fellow at the International Centre for Counter Terrorism – The Hague. She studied International and European Law (Netherlands). In June 2010, she defended her PhD thesis *The Practice of the United Nations in Combating Terrorism from 1946-2008; Questions of Legality and Legitimacy*. Before working at the Clingendael Institute, she taught International and European Law at Utrecht University. She coordinated the research project 'Ethical Justness of European Counter-Terrorism Measures', which was part of the Sixth Framework Programme of the European Commission. She is a member of the Peace and Security Committee of the Dutch Advisory Council on International Affairs. Additionally, she is General Secretary of the Daily Board of the Netherlands Helsinki Committee. Her areas of interest include the security related aspects of law, such as terrorism, piracy and the employment of Private Security Companies.

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