

The role of the military in collecting evidence in terrorism cases before ordinary criminal courts

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Challenges and prosecutorial strategies in cases related to FTFs

- Difficult to collect in destination countries
- No cooperation possible, no diplomatic ties with the government in destination countries
- No cooperation possible, the government in destination countries has no control over large part of the territories
- Difficulties in admissibility of intelligence and/evidence obtained from Internet
- Alternative prosecutorial strategies: focus on preparatory acts; intent to travel; conspiracy to participate in crimes; support activities/financing which may lead not doing justice to the retributive principle

How and in which context can military be in a position to play a role?

- Own national troops or foreign troops under an international mandate
 - At the request of a receiving State
 - Under Chapter VII of the UN Charter
 - Or on the basis of self-defence
- Context in which military can be deployed:
 - Active in combat
 - As part of a counter-insurgency
 - As part of 'search and arrest' or 'arrest and prosecute' missions

Hypothetical case: A Dutch FTF family in Iraq

- A Dutch Prosecutor receives credible information through the internet about a Dutch FTF family in Syria/Iraq.
- The wife has indicated on social media that she would like to leave and come back to The Netherlands.
- US troops are stationed near by the residence of the family.
- UNAMI has come across vital documents relating to the Dutch FTF family.
- The area in Iraq is very unsafe.
- The Iraqi authorities has no effective control in this area.

Legal challenges

- What is the applicable legal framework?
- What to do with competing jurisdictions?
- Legal mandate to collect or share?
- According to which domestic laws should evidence be collected?
- What if evidence is collected by a foreign army involved human right abuses?
- Can the military make a lawful arrest?
- What about witnesses?

Practical challenges

- How to deal with the security of witnesses?
- Is the military willing and able to collect evidence?
- Does the military have enough knowledge and skills to collect evidence?
- How can crimes scenes be sealed off?
- How and where to preserve evidence?
- Language and cultural differences?

Other experiences?

- Counter-piracy operations
- Experiences of international criminal tribunals
- Sinjara documents
- National experience: LTTE case in The Netherlands

Recommendations

- Include prosecutorial task in international mandates
- Set up Standard operating procedures (SOPs)
- Set up good lines of communication between different states; different actors (military, prosecutors and investigators); set up coordination mechanisms
- Prepare evidence kits, evidence grids etc
- Draft manual and provide training for military
- Declassify information
- Set up rapid response investigative teams; embed investigative officers; use military policy

THANK YOU FOR YOUR ATTENTION

More information:

Van Ginkel & Paulussen, 'The role of the military in securing suspects and evidence in the prosecution of terrorism cases before civilian courts: legal and practical challenges', ICCT Research paper 6, no 4 (2015), <http://dx.doi.org/10.19165/2015.1.04>

Van Ginkel, 'Prosecuting Foreign Terrorist Fighters: What role for the Military?', ICCT Policy Brief 7, no 1 (2016), <http://dx.doi.org/10.19165/2016.2.01>

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