

# 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.

## About the Authors

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## Preface/Credits<sup>1</sup>

With funding from the Netherlands Ministry of Foreign Affairs and the International Centre for Counter-Terrorism – The Hague (ICCT), the project “Challenges Raised by the Use of Evidence Collected by the Military in Terrorism-Related Cases Prosecuted before Civilian Jurisdictions” was initiated in September 2013. The aim of the project was to explore and raise awareness of legal and practical challenges regarding this topic.

In close cooperation with the United Nations Counter-Terrorism Executive Directorate (UN-CTED), ICCT organised a high-level international expert meeting debating the various aspects of these challenges, in a first attempt to arrive at legal and practical recommendations, which could be used to develop good practices and a toolbox to better face these challenges. The meeting was also organised with an aim to finding initial solutions that would enhance the capacity of states to bring terrorists to justice in civilian courts while respecting human rights and the rule of law. Among the participants of the expert meeting were representatives of the military, the police, policy makers, academics, prosecutors, defence lawyers, human rights experts, representatives of UN-CTED, the United Nations Office on Drugs and Crime (UNODC), the Organisation for Security and Co-operation in Europe (OSCE), the European Union (EU), the international criminal tribunals, Eurojust, Interpol, and Justice Rapid Response. The authors would like to express their deep gratitude to all the panellists and the participants of the expert meeting, whose presentations and valuable input form the basis of this Research Paper. Nevertheless, it goes without saying that all errors are the authors’ own.

## 1. Introduction

In various international documents, the international community has committed itself to effectively counter terrorism, as it considers terrorism in all its forms and manifestations committed by whomever, wherever or for whatever purpose, as one of the most serious threats to international peace and security.<sup>2</sup> To a large extent, (counter-) terrorism is a battle of ideas, as extremist organisations through their (online) communications and through their actions among other things intend to undermine the norms and values of civilised nations. It is therefore important in the course of counter-terrorism efforts to communicate these values, ideas, standards and principles of the rule of law and democracy. Counter-terrorism instruments are versatile, and range from hard military responses to soft preventative measures. Bringing terrorists to justice by prosecuting them before a civilian court in full respect of international (human rights) law, including the right to a fair trial, is *par excellence* a way to communicate these principles in practice. Additionally, bringing terrorists to justice is also required under United Nations Security Council (UNSC) Resolutions, such as Resolution 1373 (2001).<sup>3</sup> Moreover, victims and society wish to see justice done, which in turn can contribute to reconciliation and resilience.<sup>4</sup> The authors agree

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<sup>1</sup> Both authors are Research Fellows at the International Centre for Counter-Terrorism – The Hague. They would like to thank Frédérique van Oijen and Jonathan Baddley for their assistance in the preparation of this report as well as Brandon Gale for research done in preparation of the expert meeting. In addition, the authors would like to thank Eva Entenmann, Jonathan Hafetz, David Scharia, Svetlana Martynova, Adria De Landri, and Christiane Höhn for their valuable comments on an earlier version of this report, and Sofia Zavaglia for assisting in writing the executive summary of this Research Paper.

<sup>2</sup> See for instance the wordings in the Preamble of the unanimously adopted UN General Assembly Resolution 60/288 of 20 September 2006, adopting the UN Global Counter-Terrorism Strategy.

<sup>3</sup> UNSC Resolution 1373, a wide-ranging anti-terrorism resolution which was adopted on 28 September 2001 under Chapter VII of the UN Charter, requires Member States, among other things, to bring terrorists to justice. UN-CTED helps States to implement the Resolution. See for an elaborate analysis of UNSC Resolution 1373, B. van Ginkel, *The Practice of the United Nations in Combating Terrorism from 1946 to 2008; Questions of Legality and Legitimacy*, Intersentia: Antwerp [etc.] 2010, <http://dspace.library.uu.nl/handle/1874/44572>, pp. 245-255 and 352-360.

<sup>4</sup> See for example B. de Graaf, L. van der Heide, S. Wanmaker and D. Weggemans, “The Anders Behring Breivik Trial: Performing Justice, Defending Democracy”, *ICCT Research Paper*, 23 August 2013, <http://icct.nl/publications/icct-papers/the-anders-behring-breivik-trial-performing-justice-defending-democracy>.

with European Union (EU) Counter-Terrorism Coordinator Mr. Gilles De Kerchove and his advisor Mrs. Christiane Höhn when they write: “Terrorism is a crime that needs to be investigated and prosecuted. Treating terrorism as the crime that it is de-glorifies terrorists and shows them as the criminals they are (they would rather be seen as combatants and martyrs)”<sup>5</sup>.

Normally, only civil authorities are involved in the investigation and prosecution of terrorist crimes. However, in some circumstances, the military *can* play an important role: for instance, when there is a lack of local civil capacity, a high level of threat or in conflict situations. In such conditions, the military – either national forces or foreign forces – could be involved in gathering evidence or arresting suspects of terrorist crimes. Rather than questioning the military involvement per se, the authors seek to investigate how the tasks conducted by the military in relation to terrorism – including the collection of evidence or the arrest of suspects – can contribute to the objective of bringing terrorists to justice before civilian courts in full conformity with international legal safeguards.<sup>6</sup> The legal questions related to prosecution before military tribunals or commissions,<sup>7</sup> including questions that relate to Guantánamo Bay, although very relevant for the overall ambition to counter-terrorism in a manner that respects the principles of fair trial, fall outside the scope of this Research Paper.

In this Research Paper, the authors will first examine different scenarios where military authorities may be in a position to collect evidence and/or secure suspects and explain some of the challenges they face (section 2). Next, the focus will be on several past experiences, to see whether it is possible to draw any lessons from other comparable contexts in addressing these challenges (section 3). After that, the legal frameworks and related challenges will be discussed (section 4), before considering the practical problems (section 5). The last section of this Research Paper will offer conclusions and concrete recommendations (section 6).

## 2. Situations, Scenarios and Challenges

There are various scenarios of particular operations possible in which the military can be called upon to collect evidence and/or arrest terrorist suspects. They could be in that position as described above in the Introduction because they are involved in a conflict situation, in a non-conflict, but high security risk situation, or in a situation lacking local civilian capacity. Depending on the reason why the military find themselves in a situation where they can collect evidence and/or arrest terrorist suspects, and the particular circumstances of the scenario, there are differences in what one can expect from the type and quality of the evidence. Furthermore, the operational goals of the military deployment determine to a certain extent what type or what quality of evidence can be gathered (see further section 4). These factors play an important role in predicting the kind of practical and legal challenges both the military, as well as the prosecution, may face when they intend to collect evidence or arrest suspects with the purpose of starting a trial before a civilian court.

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<sup>5</sup> G. De Kerchove and Ch. Höhn, “Counter-Terrorism and International Law Since 9/11, Including in the EU-US Context”, in: T. D. Gill, T. McCormack, R. Geiss, R. Heinsch, Ch. Paulussen and J. Dorsey (eds.), *Yearbook of International Humanitarian Law*, Vol. 16 (2013), T.M.C. Asser Press: The Hague 2015, p. 271. The authors also note, and this relates to the earlier-made point about (counter-) terrorism as a battle of ideas, that treating terrorism as the crime that it is “devoids terrorist groups using counter-terrorism measures as propaganda tools leading to radicalization and recruitment to terrorism – as for example President Obama has said happens with Guantánamo” (*Ibid.*). Finally, the authors argue that terrorists might furthermore be more willing to cooperate within the criminal process as this might lead to a reduction of the sentence (*ibid.*, p. 277).

<sup>6</sup> Some years ago, this was still very much uncharted waters. In this respect, the *Hamdan case* is relevant. Hamdan, a Yemeni national and Osama Bin Laden’s driver, was near the Afghanistan and Pakistan border in November 2001 when he was seized by US and Afghan military personnel. These Special Forces, however, did not know what to do with the potential evidence they found on him, which included documents and a notebook. Hence, there was a lack of proper procedural mechanisms.

<sup>7</sup> For a critical analysis of the current US system of military commissions, see J.J. Paust, “Still Unlawful: The Obama Military Commissions, Supreme Court Holdings, and Deviant Dicta in the D.C. Circuit”, *Cornell International Law Journal*, Vol. 45 (2012), pp. 367-401, <http://www.lawschool.cornell.edu/research/ILJ/upload/Paust-final.pdf>.

A first scenario presents itself, when military personnel accidentally find themselves in the position to collect evidence or arrest suspects during the course of a military operation. In this scenario, it will not be clear from the outset what the scope of the criminal act is, what the relevance is of the evidence pertaining to the particular criminal act, what the credibility of the witnesses is to establish the act, what the involvement is of the suspect and finally what the correlation is between all these various elements.

Another scenario may occur after a terrorist attack has taken place, whereby the military are the first responders, and thus have the opportunity to collect evidence. The relevance of the different elements mentioned above might be much clearer here than in the previous example.

A third scenario could arise when it follows from the *deliberate* operational goals to collect evidence or make arrests, based on prior (intelligence) information that triggered the specific assignment. There might still be a difference depending on whether the goal is purely operational or partly prosecutorial, as for instance might be the case in a search and arrest mission pursuant to an (international) arrest warrant. In many cases, however, a person is arrested by the military because he/she constitutes a high threat from an operational perspective, rather than for prosecutorial reasons. Another form of *deliberate* involvement of the military follows if the suspect's specific location is in a high-risk area posing too much challenges for local law enforcement authorities to operate under such conditions.

What happens with the evidence and the arrested persons depends first of all on the reason why a person was detained by the military. For instance, when a combatant is detained during an international armed conflict (Prisoner of War (PoW)), this is usually done not for prosecutorial reasons, but only for reasons of military necessity, that is: to prevent this person from returning to the battlefield. This implies that such a person can be detained until the cessation of active hostilities, after which he/she should be released and repatriated without delay.<sup>8</sup> However, when criminal proceedings are pending against that person for an indictable offence, the individual may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment.<sup>9</sup>

These examples raise pertinent questions that are relevant for many current operations. For instance, in Mali, during Operation Serval, the French troops made more than 400 arrests,<sup>10</sup> yet this hardly led to any prosecutions or convictions. Why this is the case is unclear, but this might be related to the question whether members of Islamic armed groups in Mali “must be treated as mere criminals, or members of armed groups fighting on a battlefield”.<sup>11</sup> Quite possibly, this may also be linked to the reluctance of France to transfer detainees to Malian authorities, in view of France's international (human rights) obligations.<sup>12</sup>

When considering the role of the military in evidence gathering and arrests, several challenges can be identified:

- 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?

<sup>8</sup> Art. 118 of Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

<sup>9</sup> *Ibid.*, Art. 119.

<sup>10</sup> Maharbal 5022, *Mali War (documentary) – Operation Serval*, 8 June 2014, <https://www.youtube.com/watch?v=nt6yj6kXoKs/>.

<sup>11</sup> A. Coco, A. Kaboré and J.B. Maillart, “The Malian Conflict and International Law”, *The Global Journal*, 13 February 2013, <http://theglobaljournal.net/article/view/996/>.

<sup>12</sup> *Ibid.*

- How to deal with the credibility and security of witnesses?
- How can one secure the chain of evidence, and the investigation of evidence?

### 3. Past Experiences

Military evidence for prosecution of terrorism suspects in civilian courts is an under-explored topic with little practical experience. Nevertheless, four comparable situations may provide some guidance for future cases. These are national criminal prosecutions of military personnel who committed crimes during the course of an operation (section 3.1); arrests by the military during counter-piracy operations (section 3.2); evidence-based operations conducted in Iraq and Afghanistan (section 3.3); and, finally, prosecution by international criminal tribunals which are supported by the military for the gathering of evidence and arrest of suspects or whose investigators have to work in conflict-prone areas (section 3.4).

#### 3.1 Experiences from national criminal prosecutions

National authorities need to control the legality of the use of force by their own military abroad. Criminal investigations and prosecutions could be started if soldiers, for example, violate international humanitarian law (IHL) (both against civilians or, for example, against military *hors de combat*) or their Rules of Engagement. To make prosecution possible, countries often sign Status of Forces Agreements (SOFAs) with the host state, which “prescribe the exclusive right for the troop sending States to bring their soldiers to justice in their home country for offences committed on the territory of the receiving State”.<sup>13</sup> In principle, sovereign states start trials on the basis of territorial jurisdiction, meaning they cannot exercise adjudicative jurisdiction over persons or activities outside their own territory. In certain situations, however, extra-territorial jurisdiction can nevertheless be exercised. This could, for instance, be the case if the active personality principle (nationality of the perpetrator), the passive personality principle (nationality of the victim) or the universal jurisdiction principle (heinousness of the act) applies. It is based on these forms of extraterritorial jurisdiction, prescribed in the SOFAs, that a state sending troops abroad might want to prosecute in relation to an event that occurred on the territory of a troop receiving state, in which military of the troop sending state were involved. This would entail a situation of shared jurisdiction between the troop sending state and the troop receiving state. It is, however, not clear whether these agreements also “authorize visiting military law enforcement officers to use investigative powers, and if so, to what extent?”.<sup>14</sup> Bas Van Hoek, Jarin Nijhof and Joop Voetelink have examined this question and concluded that it must be answered in the affirmative, although the investigative powers “are limited as they can only be used with regard to the *personnel of the sending State*. This caveat heavily affects investigations regarding incidents which require access to local victims, witnesses or the collection of evidence which is not under the ownership of the sending State [emphasis added]”.<sup>15</sup> This shows that also in these situations, questions arise with respect to the possibility of the military to gather evidence. Hence, best practices resulting from this context could be of interest for the topic of this Research Paper as well.

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<sup>13</sup> B. Van Hoek, J. Nijhof and J. Voetelink, “The Scope of Jurisdiction Provisions in Status of Forces Agreements Related to Crisis Management Operations”, *Military Law and the Law of War Review* 51/2 (2012), p. 337, [http://heinonline.org/HOL/Page?handle=hein.journals/mlwr51&div=22&g\\_sent=1&collection=journals](http://heinonline.org/HOL/Page?handle=hein.journals/mlwr51&div=22&g_sent=1&collection=journals).

<sup>14</sup> *Ibid.*, p. 338.

<sup>15</sup> *Ibid.*, p. 356.

### 3.2 Experiences from counter-piracy operations

Experiences with counter-piracy operations off the Coast of Somalia have contributed to a steep learning curve with respect to the success of investigation and prosecution of piracy activities after military involvement. Even though there is universal jurisdiction with regard to the crime of piracy, the competence to investigate and prosecute only exists for national authorities once this universal jurisdiction has been translated into national criminal codes. Furthermore, much depends on the political will of states to actually proceed with investigations and prosecutions. Within Working Group 2 of the Contact Group on Piracy off the Coast of Somalia,<sup>16</sup> several of the legal challenges concerning the prosecution of pirates have been addressed. For instance, programmes to build the capacity of regional courts have been stepped up. Also, evidence grids have been developed which help the military on board of navy vessels who make arrests of alleged pirates to know what type of evidence needs to be collected to pass the different penal law thresholds of a variety of coastal states. Furthermore, experiences with detention on the high seas, where conditions to bring suspects before a judge are challenging, have shown that solutions can be found through videoconferencing or by having a law enforcement official on board.

### 3.3 Experiences from evidence-based operations

Evidence-based operations (EVBOs) are military operations conducted in accordance with domestic law, during which the (foreign) military are tasked to effectively investigate, apprehend, search and seize criminal suspects and affiliated property in accordance with domestic law of the host state and with a view to initiate subsequent criminal proceedings in the same domestic legal system. EVBOs are part of Rule of Law activities.<sup>17</sup> They occurred for example in Iraq, where multinational operations became increasingly focused on criminal prosecution in Iraqi courts, and in Afghanistan as part of a growing reliance on criminal law and domestic prosecutions in both Operation Enduring Freedom and ISAF operations. More information on this will follow in section 4.

### 3.4 Experiences from International Criminal Tribunals

The evidence gathered by military forces also played an important role at the *ad hoc* international criminal tribunals, for instance in the context of the International Criminal Tribunal for the former Yugoslavia (ICTY). A military analysis team worked closely within the ICTY Office of the Prosecutor (OTP) and approximately 65 percent of the evidence secured by the prosecution stemmed from operations conducted with military support. Although initially, cooperation was complicated by, on the one hand, the on-going conflict situation on the ground, and, on the other, a reluctance among the military to have investigators accompany them, the degree and quality of collaboration improved quickly, to the extent that, eventually, the OTP relied heavily on peacekeeping forces to conduct its operation. For example, the UNPROFOR peacekeeping force in Bosnia provided physical security to ensure that the OTP could take witness statements. It can be argued that the OTP could not have conducted as effective crime scene investigations as it did without the assistance of the military. Other crime scene investigations were conducted with the assistance of the military in Srebrenica (1995) and in Kosovo (1999). In Kosovo, the OTP worked closely with a professional military police, which enabled the conversion of seized documents into admissible evidence. The military also provided assistance in the courtroom, for instance as witnesses regarding the factual course of events or as expert witnesses regarding questions related to the proportionality of an attack, or to certain command and control structures.

The military also had an important role in tracking fugitives and the execution of arrest warrants for persons indicted for war crimes (PIFWCs). As from 1997, more pro-active arrests were made and the military

<sup>16</sup> See Contact Group on Piracy off the Coast of Somalia, Working Group 2, <http://www.thecgpcs.org/work.do?action=workSub2>.

<sup>17</sup> J. Voetelink, "Evidence-Based Operations; How to remove the bad guys from the battlefield", *Militaire Spectator*, Jrg 182, no. 10, 2013, p. 434-444, <http://militairespectator.nl/sites/default/files/teksten/bestanden/MS%2010-2013%20Voetelink%20Evidence-Based%20Operations.pdf>.

became the *de facto* police force of the tribunal. An example is the arrest of Dokmanović, who was arrested by the OTP and United Nations Transitional Authority in Eastern Slavonia, Baranja and Western Sirmium (UNTAES) soldiers on 27 June 1997.<sup>18</sup>

The military may also be indispensable for the permanent International Criminal Court (ICC). The ICC often operates in war-type situations, meaning that military forces on the ground are sometimes best placed to gather the evidence needed to prosecute cases. They may be the first ones on the spot to collect evidence and have the first contact with both suspects and witnesses (this is the so-called “golden hour”), and thus collect crucial evidence which otherwise may go lost. Also in the ICC’s very first case against Thomas Lubanga, there was a “strong reliance on confidential information from the UN Peacekeeping Mission in the DRC”.<sup>19</sup> However, because of the refusal of the OTP to disclose this information, the case was nearly dismissed. This stresses yet again the challenge to put the two worlds of investigators/prosecutors and third parties, such as the military, together.<sup>20</sup>

## 4. Legal Frameworks and Challenges

Following the description of some situations and contexts from which the military involved in securing evidence and suspects in terrorism-related cases could learn, the focus in this section is on the legal frameworks and challenges applicable to this latter and specific situation. In this context, it is important to keep in mind that both foreign military or national military troops could be involved in these tasks. In this section, the different ways international mandates can be provided in the event that foreign military troops are involved in host countries will first be discussed (section 4.1), before examining the legal frameworks (section 4.2). Finally a selection of the various legal challenges, which the authorities could be confronted with (section 4.3), namely challenges related to evidence (4.3.1), arrest (4.3.2), and detention and transfer of suspects (4.3.3) will be addressed.

### 4.1 Mandates

For foreign military troops to be deployed on the territory of another country (which is one of the possible situations which can place military in the position to collect evidence and make arrests), an international legal mandate for the intervention is required. The international mandate can follow from an explicit request of the host state to assist in, for instance, fighting a violent extremist movement and/or restoring the peace and security. Alternatively, the mandate may be issued by the UN Security Council in a Chapter VII UN Charter Resolution. Finally, the right of individual or collective self-defence, as laid down in Article 51 of the UN Charter, can be invoked to legitimise a military operation in another country.

The military’s authority to intervene, as well as actions during the intervention itself, including the collection of evidence or arrest of suspects, depends very much on the type of legal basis from the listing above. The main question is what is and what is not allowed within the scope of this legal basis/mandate? A basic list of tasks and objectives is usually provided by and stated in the mandate, for instance in the UNSC Resolution itself.

<sup>18</sup> See for a detailed account Ch. Paulussen, *Male captus bene detentus? Surrendering suspects to the International Criminal Court*, Intersentia: Antwerp [etc.] 2010, [https://pure.uvt.nl/portal/files/1273457/Paulussen\\_Male\\_24-09-2010\\_emb\\_tot\\_24-09-12.pdf](https://pure.uvt.nl/portal/files/1273457/Paulussen_Male_24-09-2010_emb_tot_24-09-12.pdf), p. 383.

<sup>19</sup> H. Fujiwara and S. Parmentier, “Investigations”, in: L. Reydam, J. Wouters and C. Ryngaert (eds.), *International Prosecutors*, Oxford University Press: Oxford 2012, p. 597.

<sup>20</sup> This also applies to arrests of course, see, e.g., Human Rights Watch, “Human Rights Watch Memorandum to States Members of the Assembly of States Parties”, November 2005, [http://www.iccnw.org/documents/HRW\\_MemorandumFourthASP\\_Nov05.pdf](http://www.iccnw.org/documents/HRW_MemorandumFourthASP_Nov05.pdf), p. 14: “In some situations peacekeeping missions have an important role to play in assisting the ICC with witness protection, evidence gathering and arrests”.



However, its formulation is not always very clear. Sometimes, the words “all necessary means” are used, but what do these words mean exactly and how widely can this phrase be interpreted?

Obviously, from a legal perspective, the UNSC should define the mandate as clearly as possible, including words such as “all necessary means”. If this is not evident for the authors of the mandate, it is definitely not clear for those in the field. When searching for guidance on whether the military should play a (pro-) active role in the gathering of evidence and the arrest of terrorist suspects, a UNSC Resolution providing a clear mandate is a good place to start. A strong political will must be spelled out in the mandate, and the mandate must be specific about what needs to be done and what legal regime to apply. This is of importance in any situation, but even more so when the military are tasked to collect evidence and arrest suspects. The more specific the mandate, for instance by differentiating between various specialised units that make up a military force, instead of merely referring to the “the military”, the better.

The fact that military forces from an intervening state, based on host state authorisation or a UNSC mandate, are entitled to use force on another state’s sovereign territory does not necessarily provide information about that intervening state’s *exact* powers on, for instance, gathering evidence or arresting suspects. This may be spelled out in greater detail in another UNSC Resolution or in documents between the states involved (see below for more information). Another example stems from a situation of occupation, when territory is forcibly placed under the authority of a hostile army. Whether or not the occupation is lawful or not (this is to be determined on the basis of the *jus ad bellum*, or the law regulating whether or not inter-state force can be used), when a *de facto* situation of occupation exists, the law of occupation applies. But that does not give the occupying power a free reign with regard to all governance issues in the occupied territory, also in terms of exercising police functions. In fact, international law demands that “the occupying power must allow the territory to be administered as before. It must respect the laws in force in the territory before occupation unless it is absolutely prevented from doing so”.<sup>21</sup>

Of the four situations that may occur, namely a) a foreign state’s troops operating in occupied parts of another state; b) a foreign state’s troops operating on hostile foreign territory in an armed conflict; c) a foreign state’s troops operating on foreign territory in the context of an act of self-defence; or d) a foreign state’s troops acting with the consent of the state where they are temporarily stationed, only in the latter case are the rights and obligations of the military personnel described in international agreements between the troop contributing nation and the receiving state. These rights and obligations of the military can be laid down in mutual legal assistance treaties<sup>22</sup> or clauses in the already briefly explained SOFAs<sup>23</sup> between the troop sending state and the troop hosting state.

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<sup>21</sup> See International Committee of the Red Cross, “The law of armed conflict: the law of belligerent occupation”, Geneva: 2002, [https://www.icrc.org/eng/assets/files/other/law9\\_final.pdf](https://www.icrc.org/eng/assets/files/other/law9_final.pdf), p. 6.

<sup>22</sup> Within the EU some of these issues have been overcome through, for instance, the Schengen Convention, the Convention on Mutual Assistance in Criminal Matters (between Member States of the EU) the Framework Decision on Joint Investigation Teams, the European Arrest Warrant and the European Investigation Order. These instruments allow national members of an investigation team to operate on the territory of another Member State in order to carry out investigative measures with the consent of the competent local authorities. The principle of mutual recognition is in this respect also very important. Some participants of the expert meeting suggested that these legal arrangements could function as an example for legal arrangements that could fit the circumstances that are topic of this Research Paper.

<sup>23</sup> There are no standard templates for SOFAs, not even within organisations such as NATO. They vary from operation to operation. In 1990, the UN drafted a Model SOFA. It specifies that the sending State shall ensure that prior authorisation for access to any victim or witness who is not a member of the national contingent, as well as for the collection or securing of evidence not under the ownership and control of the national contingent, is obtained from the host nation’s competent authorities. However, it ultimately depends on the States involved whether they base their SOFA on this model issued by the UN.

### **Two case studies of UN Security Council mandates**

*Libya* - In 2011, the UNSC adopted two Resolutions in relation to the situation in Libya. In Resolution 1970 (26 February 2011) the Security Council, due to the widespread and systematic attacks taking place against the civilian population that could amount to crimes against humanity, decided to refer the situation in Libya to the Prosecutor of the ICC. The Council, in the same decision, urged all states and concerned regional and other international organisations to cooperate fully with the Court and the Prosecutor.

Less than a month later, on 17 March 2011, the UNSC adopted Resolution 1973, and – acting under Chapter VII of the UN Charter – authorised Member States to take all necessary measures to protect the civilians and civilian populated areas under threat of attack by Libya. The Resolution excluded from its scope the possibility of a foreign occupation force, and so any direct role for international military forces in gathering evidence *on the ground* or making arrests was not possible. However, it is clear that the international coalition forces engaged in air attacks based on intelligence indicating attempts of the Libyan forces to attack the civilian population. This intelligence could be of use in investigations by the Prosecutor of the ICC to assess whether crimes against humanity have been committed. However, due to the confidential status of this information, it remains to be seen if and if so, how, this can be used in the prosecution. Although Resolution 1970 encouraged Member States to cooperate with the ICC, Resolution 1973 only referred to the authorisation to use all necessary measures, without any reference to the cooperation with the ICC.

*Mali* - On 13 July 2012, the Transitional Authorities of Mali referred the situation in Mali to the ICC and on 20 December 2012, the UNSC adopted Resolution 2085 under Chapter VII of the UN Charter. In this Resolution, the Council urged Member States, regional and international organisations to provide assistance, expertise and training including on human rights and international humanitarian law, and capacity-building support to the Malian Defence and Security Forces, consistent with their domestic requirements, in order to restore the authority of the state of Mali and to reduce the threat posed by terrorists. No mention was made of training in criminal investigation and law enforcement activities. In the same Resolution, the Council requested the African Union to report on the activities of the African-led International Support Mission in Mali (AFISMA) regarding the training of military and police units of both AFISMA and Malian defence and security forces in their obligations under international human rights, humanitarian and refugee law. The Council also called upon AFISMA to support national and international efforts, including those of the ICC, to bring perpetrators of serious human rights and international humanitarian law violations to justice.

In UNSC Resolution 2100 of 25 April 2013, the Council, after welcoming the intervention of the French forces at the request of the Transitional Authorities of Mali in its preamble, and acting under Chapter VII of the UN Charter, decided to establish the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), and authorised both MINUSMA and the French troops to use all necessary means within the limits of their capacities and areas of deployment. The Council subsequently decided that the mandate of MINUSMA should include the support of national and international efforts towards rebuilding the Malian security sector, especially the police and gendarmerie through technical assistance, capacity-building, and rebuilding of the rule of law and justice sectors. The Council also decided that MINUSMA should support the efforts of the transitional authorities of Mali, to bring to justice those responsible for war crimes and crimes against humanity in Mali, taking into account the referral to the ICC. It is noteworthy that no mention is made of bringing to justice those who committed terrorist attacks as distinct crimes (thus not falling under the header of crimes against humanity and war crimes).

## 4.2 Legal Frameworks

As highlighted above, the military (either as foreign troops deployed in a host state, or national military forces as emergency powers) may find themselves required to collect evidence not only while engaged in combat, but also in non-conflict settings, in which case two legal frameworks can be applied. 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.<sup>24</sup> The latter is not limited to a state's own territory: it is internationally recognised that IHRL applies extraterritorially when a state exercises effective power or control over persons or territory.<sup>25</sup> Multiple human rights law provisions affect the collection and use of evidence (such as Articles 7 (prohibition of torture) and 9 (right to liberty and security) of the International Covenant on Civil and Political Rights, ICCPR), but IHRL regulates less closely the mechanisms by which evidence is gathered and preserved, which traditionally falls within the purview of domestic law.<sup>26</sup> Eventually, the procedural thresholds that follow from domestic law are guiding with respect to the eligibility of the evidence in a court case. These domestic law standards should be in line with international law.

If IHL applies because of the existence of an armed conflict situation, the main question is in what ways might this legal regime affect the collection of evidence during a particular operation? Restrictions and provisions include Common Article 3 to the Geneva Conventions (which prohibits torture and other ill-treatment, but also elaborates on personal dignity), and Article 75 of Additional Protocol I of the Geneva Conventions (which prohibits ill-treatment and requires humane treatment of detainees). In addition, it could be argued that in cases where the main legal framework (for instance: IHL in an armed conflict situation) does not regulate how evidence can be secured for the purpose of criminal prosecution, domestic law and the *lex generalis* IHRL can complement the *lex specialis* IHL.

In recent years, IHRL has gradually been incorporated into military operations. This increased incorporation of IHRL into military operations is the result of several factors:

- Convergence of IHL and IHRL in certain areas, such as humane treatment of detainees;
- The strategic value of sticking to IHRL (for instance because of the intention to “win hearts and minds”) and of building criminal prosecutions, even where IHL would be the main legal framework;
- Expansion of and reliance on extraterritorial criminal jurisdiction, partly in response to threats in states allegedly unable or unwilling to prosecute terrorist groups or contain other risks to public safety.<sup>27</sup>

## 4.3 Legal Challenges

Following this brief outline of the applicable legal frameworks, it is time to focus on various concrete and specific legal challenges. When military authorities are involved in the gathering of evidence and the arrest and detention of suspects of terrorist acts, legal challenges might arise with respect to the admissibility of the evidence in court, the arrest, and finally the detention and transfer of suspects.

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<sup>24</sup> In situations of occupation, a mixture of IHL and IHRL applies.

<sup>25</sup> See e.g. International Court of Justice, “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)”, 9 July 2004, <http://www.icj-cij.org/docket/files/131/1671.pdf>, para. 109 and International Court of Justice, “Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)”, 19 December 2005, <http://www.icj-cij.org/docket/files/116/10455.pdf>, para. 216.

<sup>26</sup> States may, in emergency situations, formally derogate from certain treaty-based IHRL obligations, e.g., the right to personal liberty. Other relevant obligations are non-derogable, e.g., the prohibition on torture and ill treatment. A more restrictive view of a State's authority to derogate is adhered to, e.g., in UN Human Rights Committee General Comment No. 29 (Derogations during a State of Emergency), where the Human Rights Committee held that the right to a fair trial must be respected even in times of emergency.

<sup>27</sup> Recent examples of this include the extraterritorial captures by US Special Forces of terrorism suspects Ahmed Abdulkadir Warsame (2011, Yemen); Abu Anas al-Liby (2013, Libya) and Ahmed Abu Khatallah (2014, Libya).

### 4.3.1 Evidence

As mentioned before, as regards evidence and IHRL, it can be said that rules of evidence are detailed at the national level, but there are no such rules at the international level. Generally speaking, it is a matter for national courts to determine the rules of admissibility.

#### *Illegally obtained evidence*

The US system in relation to the admissibility of illegally secured evidence in civilian courts, for instance, is quite strict and fully respects the rights of the defense. (This is different for military commissions, but as mentioned before, this falls outside the scope of this Research Paper.) According to the exclusionary rule, evidence directly secured by illegal actions, such as coercive interrogation, may be excluded from trial. The so-called *fruit of the poisonous tree doctrine* is an offspring of this exclusionary rule. According to this rule, evidence (“fruit”) derived from the tainted source (e.g. confessions from a tortured individual – the “poisonous tree”), is in principle<sup>28</sup> inadmissible.

The European perspective on illegally obtained evidence differs from the one of the United States. For example, according to the Dutch evidentiary system, a judge can choose whether information can be used as evidence even when it was illegally obtained. However, evidence will be excluded when it is unreliable or when it was obtained under severe conditions, like torture. The prosecution is not held responsible for the quality of evidence gathered by other parties, such as civilians, police officers, intelligence agencies and the military. Hence, even if the military did not follow legal evidence gathering procedures, this does not mean that the evidence has to be excluded in a Dutch court of law. However, a defence lawyer might question the reliability of evidence obtained from the military. Indeed, can the armed forces be seen as a disinterested party, for example, when they are involved in shootings, or when they are the target of an attack? Can they in such circumstances function as “neutral” and objective investigators? And should a prosecutor, for instance, be allowed to work together with an army from another country that is considered to have committed war crimes or torture? These questions are relevant, but answers cannot be provided in general. Eventually, a court will rule on these objections.

#### *Use of intelligence in court*

Another challenge follows from the use of military-obtained intelligence as evidence in civilian criminal prosecutions. The prosecution and the military intelligence services might have a different view on the usefulness and eligibility of evidence obtained by the military in civilian criminal prosecution. These different views might even lead to tensions and suspicion: the prosecution has a preference for information being available and declassified in order to facilitate prosecution and ensure admissibility, while intelligence services may view this as a (security) risk.

Many countries (both civil law and common law) have established institutional mechanisms to enable better cooperation between the prosecution and intelligence services. Indeed, institutional mechanisms can

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<sup>28</sup> Evidence will *not* be excluded 1) if it was discovered from a source independent of the illegal activity, 2) when its discovery was inevitable (when it would inevitably have been discovered, even without the illegal activity) and 3) if there is attenuation between the illegal activity and the discovery of the evidence. This last exception is also called the passage of time rule; through passage of time, the causal connection between the illegal activity and the derivative evidence is weakened. Moreover, the poisonous tree rule does not apply when suspects are not granted the so-called Miranda rights. Hence, if the Miranda warning has not been given, the direct evidence can be excluded, but if the direct evidence points to other evidence, that evidence can be used, even if initially, there was a poisonous tree, namely the fact that the Miranda warning was not given. Finally, note that there are several situations to which the exclusionary rule (and hence also its offspring the fruit of the poisonous tree doctrine) does not apply. For instance, in 1990, the US Supreme Court held in the *Verdugo-Urquidez* case that the Fourth Amendment, which protects people from unreasonable searches and seizures by the government, “is not applicable to a search conducted abroad by American agents where the search was conducted of a house belonging to a criminal defendant who was not a United States citizen or a resident alien.” See M. Abbell, *Obtaining Evidence Abroad in Criminal Cases 2010*, Martinus Nijhoff Publishers: Leiden 2010, p. 27.

ensure that these two agencies can increase mutual trust and can more effectively cooperate with each other.<sup>29</sup> Another development is the role increasingly played by liaison officers who serve as links between prosecutors and intelligence officers, or between the government and the defendant.<sup>30</sup>

A more important role could also be given to legal advisors in the intelligence community, to ensure that issues of disclosure are eventually being solved in a manner that is consistent with the rule of law. The legal advisor of the intelligence service, comparable to the legal advisor of the military, is in a good position to ensure that the interaction between intelligence and prosecution is lawful and effective, and should therefore be given more prominence.

With respect to military personnel (either in conflict situations or as emergency powers in non-conflict situations) acting in a context that might involve counter-terrorism operations, the situation might occur that a prosecutor or a defence lawyer requests the disclosure of military intelligence in civilian courts to obtain culpatory or exculpatory evidence of a defendant's involvement in terrorist activities. If material and relevant information is not disclosed to the defendant, this could raise fundamental fair trial issues.<sup>31</sup>

#### 4.3.2 Arrest

With military forces acting in the capacity of emergency powers within their own state and performing law enforcement tasks, arrests of suspects need to be made while respecting the rule of law, and the rights of the suspect as laid down in (inter)national law. Foreign military troops acting in another state are obliged to respect the applicable IHL (in armed conflicts) and IHRL frameworks during their operations, as well as domestic law. The international legal standards laid down in these frameworks should provide a minimum standard of respect for the rights of the suspects, which is of vital importance, especially in the event that a prosecution after an arrest is being considered.

A situation may occur whereby an arrest was made irregularly, but where nonetheless the case is brought within the jurisdiction of a court. This issue is relevant to the collection of military evidence, since the irregular way in which a person was brought before a court (this is sometimes referred to as the *male captus* (lit. "bad, i.e. irregular capture") concept) may lead, in serious *male captus* situations, to a court vitiating jurisdiction and thus to the end of the entire case. Such a decision is usually taken in the pre-trial phase, when the legality of the pre-trial process is assessed. A decision to refuse jurisdiction and thus to cease the proceedings implies that the

<sup>29</sup> An example of this is the Fusion Center in Germany that brings together prosecution, law enforcement and intelligence services. More informal mechanisms to enhance cooperation and increase trust building are, for instance, in place in Australia and in the United Kingdom.

<sup>30</sup> See for instance the Canadian and British mechanisms with Special Advocates, as described in the ICCT Paper by Q. Eijkman & B. Van Ginkel, "Compatible or Incompatible? Intelligence and Human Rights in Terrorist Trials", *ICCT Expert Meeting Paper*, 2011, <http://www.icct.nl/download/file/ICCT-Eijkman-vanGinkel-EM-Paper-Intelligence-in-Court.pdf>. See also the GCTF Rabat Good Practices Memorandum, Recommendation 6 and its further recommendations for implementation as laid down in the report on the expert meeting, most notably no. 3: [https://www.thegctf.org/documents/10162/159887/14sept19\\_gctf+rabat+gp+6+recommendations.pdf](https://www.thegctf.org/documents/10162/159887/14sept19_gctf+rabat+gp+6+recommendations.pdf).

<sup>31</sup> Nevertheless, others argue that the fact that the prosecution is offered intelligence information does not mean that it should also be offered to the defence. The common test used by the European Court of Human Rights (ECtHR) is whether the information would help the defence in establishing its case: "The entitlement to disclosure of relevant evidence is not, however, an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. Nonetheless, only such measures restricting the rights of the defence, which are strictly necessary, are permissible under Article 6 § 1. Furthermore, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (...). In the present case, however (...) [i]t was not (...) possible for the defence representatives to argue the case on entrapment in full before the judge. (...) During the course of the criminal proceedings, the applicant and his representatives were not informed of the content of the undisclosed evidence and were thus denied the opportunity to counter this allegation (...). In these circumstances, the Court does not consider that the procedure employed to determine the issues of disclosure of evidence and entrapment complied with the requirements to provide adversarial proceedings and equality of arms or incorporated adequate safeguards to protect the interests of the accused." See ECtHR (Grand Chamber), *Edwards and Lewis v. UK*, 27 October 2004, Applications nos. 39647/98 and 40461/98, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67226, para. 46>.

carefully collected evidence is not even considered. Examples of *male captus* situations are kidnappings, lurings,<sup>32</sup> disguised extraditions,<sup>33</sup> or irregular pre-trial detentions. Norms that can be violated by *male captus* situations, depending on the exact situation, are, for example, the sovereignty of the state where the *male captus* took place and the human rights of the suspect including his/her right to liberty and security. Due to the oftentimes chaotic circumstances on the ground and/or the fact that the military are involved in processes that some might claim should be reserved to regular law enforcement authorities, a situation could very well occur that a suspect will claim (rightfully or not) that he/she was arrested in an irregular way.

What might be the effect of such an irregularity, if the latter is indeed established by the judge? In practice, one can see that national and international courts deal differently with the *male captus* question. At the national level, the rule *male captus bene detentus* (an irregular capture will lead to a *bene detentus* (“good detention”, i.e. the continuation of the trial) is sometimes still applicable, but it very much depends on the exact circumstances what the effect of a *male captus* will be: a serious *male captus* will more easily lead to *male captus male detentus*: in which case the *male captus* will lead to a *male detentus* (“bad detention”), i.e. the refusal to exercise jurisdiction.<sup>34</sup> A less serious *male captus*, however, leads more easily to *male captus bene detentus*. It is interesting to see that quite often, the seriousness of the alleged crimes of the victim of the *male captus* is taken into account in determining what should be the consequence of a certain *male captus*. Considering that terrorism is qualified as a serious crime, the *male captus* of a terrorist suspect compared to one of a suspect of a lesser crime such as fraud will less likely result in a refusal to exercise jurisdiction. The seriousness of the alleged crimes also plays an important role at the international and hybrid criminal tribunals, which, by their nature, deal with suspects of very serious crimes. And also here, one can see that even though the rather old-fashioned *male captus bene detentus* rule is not openly supported, practice shows that usually, a *male captus* (even a rather serious one) will not quickly lead to *male detentus*, namely a refusal to exercise jurisdiction, but to the continuation of the trial (*bene detentus*), combined with other remedies, such as a reduction of the sentence.<sup>35</sup> It follows that a civilian court might often uphold jurisdiction even in case of a *male captus* by the military of a terrorism suspect (thus also ensuring that the evidence collected in that case is not directly disregarded entirely). However, on a more normative level, it can be argued that if judges are confronted with a very serious *male captus* situation, for instance when state authorities were involved in an abduction operation flouting all the relevant legal rules, then these judges *should* refuse jurisdiction if they still want to be taken seriously as custodians of the law, irrespective of whether or not that suspect was charged with terrorism.<sup>36</sup>

#### 4.4.3 Detention and Transfer

A further legal challenge relates to the detention and transfer of terrorism suspects captured by military forces with the aim of prosecuting them in civilian jurisdictions. When placed in detention, several suspects’ rights come into play including the right to freedom from arbitrary and secret detention and the right of access to a lawyer upon detention. Under the oftentimes-chaotic circumstances during military operations, it might be unrealistic to ensure that a detainee is brought before a magistrate swiftly. Although IHRL may apply here, as well as a

<sup>32</sup> See Ch. Paulussen, *Male captus bene detentus? Surrendering suspects to the International Criminal Court*, Intersentia: Antwerp [etc.] 2010, [https://pure.uvt.nl/portal/files/1273457/Paulussen\\_Male\\_24-09-2010\\_emb\\_tot\\_24-09-12.pdf](https://pure.uvt.nl/portal/files/1273457/Paulussen_Male_24-09-2010_emb_tot_24-09-12.pdf), p. 38: “Luring (or trickery) is a method by which “deceit, fraud and tricks [are used] to lure individuals from the country of their residence to a location where there is jurisdiction to arrest the suspects.”” [original footnote omitted]

<sup>33</sup> This occurs when a mechanism, set up for other purposes (such as expulsion or deportation), is unlawfully used to make an impossible extradition possible or to make a possible, but, for example, too slow or expensive, extradition quicker or cheaper. See *ibid.*, p. 35.

<sup>34</sup> See *ibid.*, p. 1023, where Paulussen concluded “that it appeared that the more recent cases showed that courts would refuse jurisdiction in the case of an abduction (performed by the prosecuting State’s own agents on another State’s territory without the latter’s consent) which 1) was accompanied by serious human rights violations/serious mistreatment or 2) was followed by a protest and request for the return of the suspect from the injured State”.

<sup>35</sup> In that sense, the ICTR *Barayagwiza* case is exemplary. For more information on this topic, see *ibid.*, p. 520 et seq.

<sup>36</sup> *Ibid.*, p. 1049.

detaining state's domestic law, there may be some degree of flexibility as regards the application of these rights in practice. An example is the use of a video-link where a person cannot quickly be brought before a magistrate. This has also occurred in anti-piracy operations.

Other challenges may arise during the transfer of suspects after capture by the military abroad. For instance, Anas al-Libi<sup>37</sup> and Ahmed Abdulkadir Warsame<sup>38</sup> were captured by US Special Forces abroad and spent eight days and over two months, respectively, on US naval vessels prior to transfer to US territory for criminal prosecution. The government invoked IHL as the basis for these extra-territorial detentions, which raises questions over the interplay and switching between IHL and criminal detention regimes.<sup>39</sup>

## 5. Practical Challenges on the Ground

Turning now to the *practical* challenges on the ground: when military are deployed in areas where terrorists are active, irrespective of whether they are engaged in active combat, a counter-insurgency operation, or to preserve peace and fulfill tasks that would otherwise be undertaken by civilian authorities, the insecure environment in which the military operate is the common denominator. These circumstances have a substantial impact on the ability of the military to collect evidence, question witnesses, or arrest suspects in a way that actually contributes to effective prosecution of terrorist suspects before civilian jurisdictions. The challenges relate to the preparedness of the military in terms of training, their knowledge and skills with respect to evidence gathering, questioning of witnesses or detainees, as well as the compatibility of prosecutorial tasks with operational military objectives; the reliability and eligibility of evidence gathered by the military; the reliability and security of witnesses; and the communication and coordination with other stakeholders in order to guarantee an effective and successful prosecution before a civilian criminal court. To list some concrete challenges on the ground:

- Sealing off the area is hardly possible;
- Bodies are seldom recovered;
- Pathology and autopsies are rare;
- Exhumation is seldom achieved;
- Investigations are conducted by different entities;
- Criminal investigators have limited capacity and means;
- Immediate hearing of witnesses is almost always impossible; and
- Timely legal assistance in different areas is difficult for safety and security reasons.

On the ground, one can discern three archetypical situations in which the military can be involved and which have an impact on the military's ability to fulfill prosecutorial tasks. In reality, these situations, including their legal frameworks, may overlap.

The first situation relates to a traditional theatre of active combat, such as the operations in Afghanistan between 2001-2002. In this situation the military objective is paramount and has primacy over prosecutorial objectives. One should be realistic in this situation as to what one can ask of the military under these combat circumstances. The military are likely to collect evidence for their own use (i.e. to protect their own troops). They can, however, also collect evidence, such as objects, photos or loot, or question civilians as witnesses when they are the first to arrive on the scene where a possible terrorist attack has taken place. The military can certainly

<sup>37</sup> Al-Libi, a suspect of the 1998 attacks against the US embassies in Kenya and Tanzania, was captured by US forces in 2013 during a raid in Libya and held incommunicado aboard a navy ship in international waters before being transferred to the US for prosecution.

<sup>38</sup> Warsame, a Somali terrorist suspect, was captured in 2011 by US forces off the coast of Yemen, and held aboard a naval ship in the Gulf of Aden before being transported to the US for prosecution.

<sup>39</sup> See for a more detailed analysis J. Hafetz, "Abu Khattalah and the Evolution of Ship-Based Detention", *Just Security*, 28 June 2014, <http://justsecurity.org/12395/abu-khattalah-evolution-ship-based-detention/>.

make copies of documents they find, and send these – classification permitting – to both intelligence and law enforcement officers. However, considering the primacy of the military (security) objective, it will be less of a priority for personnel to conduct their actions with a view to ensuring that information gathered during these actions can be translated into evidence for use in a civilian court later.

The second situation involves a non-traditional theatre of combat, such as the counter-insurgency operations conducted in Iraq in 2006. Here, it is probably not decided from the outset of every operation whether the operational objective or the prosecutorial objective has primacy. Either way, the fact remains that soldiers are in principle there to protect the security, independence and interests of their country<sup>40</sup> or the country they are assisting. They are not professional evidence-gatherers, making it all the more important to have a law enforcement or investigative officer as close to the site of occurrence (i.e. point of capture/seizure/attack) as possible, to carry out investigations as well as to verify statements from the military. In this regard, it would be worth researching the experiences with gendarmerie officers embedded in the French intervention in Mali or other liaison officers such as the ones used by the US army who could fulfil this role and overcome many of the problems with evidence collection. A law enforcement officer who is quickly available can also testify about what he/she observes, something members from the special forces for example are less likely to do in order not to corroborate operational intelligence. The involvement of a law enforcement officer is also needed in case someone makes a voluntary statement, so that the law enforcement officer can state that he/she was present when the statement was given and testify to the voluntary nature of the statement. The question is of course, taking into account the sometimes chaotic or insecure circumstances under which one is operating, how soon law enforcement officers can be involved in evidence gathering? When can they enter the crime scene? When is it safe enough? And how would the right of counsel, guaranteed under IHRL, apply?

Especially given the lack of clarity with regard to the objective of these kinds of operations, it is important to ensure that if someone is interrogated, it is clear to the suspect or witness whether this is done by an intelligence officer or by a law enforcement officer who will read out the rights to the suspect or witness. Sometimes, a “cooling down” period between the intelligence interview and the criminal justice interview can clarify to the interviewee that the second interview is done by different actors with different backgrounds and roles. However, it remains to be seen whether such a construction, which has probably been applied in the ship-based detention of Abu Khatallah,<sup>41</sup> is in conformity with a person’s right not to incriminate him/herself.<sup>42</sup> Given the fact that there is often uncertainty surrounding the purpose of interrogations, it would be recommendable from the outset to respect the requirement to conduct all interrogations and gathering of evidence, to the maximum extent possible, as though the statements/evidence will eventually be presented in a civilian criminal prosecution.

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<sup>40</sup> See e.g. the “What we do” text on the website of the UK Ministry of Defence, <https://www.gov.uk/government/organisations/ministry-of-defence/about>.

<sup>41</sup> Abu Khatallah is considered to be the brains behind the attack on the US Mission in Benghazi, Libya, on 11 September 2012. See D. Wise, “The capture of Khatallah: How things went down in Libya”, *Reuters*, 20 June 2014, <http://blogs.reuters.com/great-debate/2014/06/20/the-capture-of-khatallah-how-things-went-down-in-libya/>.

<sup>42</sup> Additionally problematic in the Khatallah case is that he was captured in Libya and detained on a Navy ship in the Mediterranean. Hafetz notes that such “detentions, due to their inherent isolation and inaccessibility, (...) create a risk of diluting presentment and *Miranda* rights, particularly given the government’s increased latitude to gather intelligence in terrorism cases”. See J. Hafetz, “Abu Khattalah and the Evolution of Ship-Based Detention”, *Just Security*, 28 June 2014, <http://justsecurity.org/12395/abu-khattalah-evolution-ship-based-detention/>. (The *Miranda* warning is an “[e]xplanation of rights that must be given before any custodial interrogation, stemming largely from the Fifth Amendment privilege against self-incrimination. The person detained and interrogated must be made aware of the right to remain silent, the right to consult with an attorney and have the attorney present during questioning, and the right to have an attorney appointed if indigent”. Explanation available at the Legal Information Institute of Cornell University Law School’s website: [https://www.law.cornell.edu/wex/miranda\\_warning](https://www.law.cornell.edu/wex/miranda_warning).)



A case in point with regard to the second situation is the military operation in Mali, from which some lessons can be learned. As mentioned above, the French military, during Operation Serval (2013-14), arrested around 430 suspects. Due to France's "no prisoners" approach, all apprehended suspects needed to be transferred to the Malian authorities,<sup>43</sup> after which many were released without trial. An organisation that can and has played an instrumental role in this regard is Interpol, which is currently working very closely with liaison officers in Mali who help the military to eventually bring individuals to justice. It would also be interesting to evaluate the role of the "gendarmerie prévôtale" (military police)<sup>44</sup> within the French military troops with regard to these tasks in more detail.<sup>45</sup> What lessons learned can be distilled from this operation, and can they be useful for future situations? While the conducting of investigations falls exclusively within the jurisdiction of the Malian authorities, Interpol and the French military police can share experiences, assist, help and train Malian authorities.

In the third situation, the very aim of the military operation is to "capture and prosecute", and therefore bring suspects before a civilian criminal court. In this situation, law enforcement has primacy. It might even be so that the military are merely assisting a law enforcement operation. When the military execute the initial capture, a law enforcement officer should subsequently ensure that the right person is captured (confirming identity); and it must be clear under what legal authority a person is detained: military orders or law enforcement orders?

An example of this situation can be found in the EVBOs (see also section 3.3 above) conducted by ISAF troops in 2011, during the deployment of the NATO Rule of Law Field Support Mission (NROLFSM) to Afghanistan. Some lessons have been identified during these EVBOs relating to Afghan law enforcement in cooperation with international forces. Because of their background, experience and training, and taking into account that military operations are normally intelligence-driven, it was clear that it was difficult from the outset to ask military forces to change to law enforcement operations. It became also clear during these operations that basic evidence, such as photos, sketches, and witness statements yield the best results for subsequent use in court. More advanced forensic techniques (e.g., fingerprints, explosive residue tests, etc.) may be used, but in those situations extra training of local officers is required to familiarise them with the proper use and application of these techniques.<sup>46</sup> The best results can be achieved when the host state's criminal justice actors are to the maximum extent possible involved in the EVBO.

In all three situations, one will probably encounter challenges with regard to the reliability of evidence provided by witnesses. This first of all follows from the already-mentioned chaotic circumstances that are characteristic for war-torn areas, but it might also follow from language barriers or the culture of the region. In such circumstances it might be hard if not impossible to verify the identity of the witness. The prevailing cultural norms might also dictate that not the actual witness but the village elder will step forward to give testimony (even if he was not present at the scene). Details might also get lost in translation, or be altered by the translators because of their own analysis of the situation. Testimonies might furthermore be coloured by perceptions towards the military. And there could also be genuine fears for retaliation once a testimony is given. When determining the reliability of evidence it is important to consider unintentional intimidation of witnesses and detainees. Therefore, the military may not be the best to interrogate a detainee. Because of these challenges, it is

<sup>43</sup> Maharbal 5022, *Mali War (documentary) – Operation Serval*, 8 June 2014, <https://www.youtube.com/watch?v=nt6yj6kXoKs/>.

<sup>44</sup> See for more information: <http://www.gendarmerie.interieur.gouv.fr/fre/Sites/Gendarmerie/Notre-Institution/Nos-missions2/Presence-dans-le-monde/Prevote>.

<sup>45</sup> See e.g., French Ministry of Defence, "Mali: la gendarmerie prévôtale veille sur la force Serval", 2 April 2014, <http://www.defense.gouv.fr/operations/autres-operations/operations-achevees/operation-serval-2013-2014/actualite/mali-la-gendarmerie-prevotale-veille-sur-la-force-serval>: "Les prévôts participent également au renseignement dans le domaine de la sécurité publique et peuvent soutenir la gendarmerie malienne lorsque ces dernières interpellent des individus".

<sup>46</sup> See J. Voetelink, "EvBO: Evidence-Based Operations: How to Remove the Bad Guys from the Battlefield", *Journal of International Law of Peace and Armed Conflict* (4) 2013, p. 200, <http://militairespectator.nl/sites/default/files/teksten/bestanden/MS%2010-2013%20Voetelink%20Evidence-Based%20Operations.pdf>.

worth looking at the experience from the international criminal tribunals.<sup>47</sup> A general rule is that the prosecution must be flexible – if necessary, involving third parties in the evidence gathering process – but should never solely trust its own evidence. Evidence should always be scrutinised; otherwise the defence will challenge it (with possible serious consequences, such as the end of the proceedings, if evidence turns out not trustworthy). New tactics, techniques and practices are required to support the criminal justice system and even when the military are able to gather information, it is difficult to convert this into evidence that is admissible in civilian courts. Some of these problems relate to the (underdeveloped) criminal justice system and cultural practices of the host State, illustrated by a lack of knowledge about forensics, the poor infrastructure and complex way of cooperating between police and local prosecutors in the host State, but also from the fact that it stems from its judicial culture that confessions from a suspect may be sufficient to build a case.

Finally, the military must be aware that good detention procedures and evidence collection procedures contribute to the mission, and that this is not merely a legal issue, but also an operational issue. After all, a proper evidence collection will enable a status determination of the detainee (operational interest), failure to adhere to a proper evidence collection will lead to an inability to prosecute (which is also an operational interest) and to correctly assist in local criminal proceedings is a critical element in counter-insurgency operations (again an operational interest).

Military officers therefore need to be well trained on how to detain suspects and collect evidence. This will become more evident if these activities are to become part of military doctrine and included in standard operating procedures (SOPs). During operations, the operational goals might differ per unit and per operation, but it is important at all times to determine how the military goals relate to the prosecutorial goals. In case prosecutorial goals are indeed part of the operational goals, it is advisable that the military develop an understanding of the local criminal system when engaging in missions where they might be able to collect evidence for civilian criminal prosecution. It is also advised that the military police, if part of the troops, build a good relationship with the local enforcement authorities.

## 6. Conclusion and Recommendations

The discussion on the role of the military and the challenges they face when securing suspects and/or evidence with the purpose of prosecuting terrorist suspects in civil criminal proceedings is very complex. Clearly, unequivocal policies need to be developed. Conformity with international law, including human rights law, as well as accountability for breaches and transparency need to be at the very core of these policies.

Even though arresting terrorism suspects and collecting evidence in terrorism cases would ideally be the task of regular law enforcement officials only, it is a reality that sometimes a solely civilian investigation is not possible. To ensure clear policy development, it is advised that states and other stakeholders consider all elements, starting with the planning and policy level down to the practical implication of how the gathering of evidence by military personnel will actually work on the ground. In addition, potential risks – such as the possibility that some countries prefer to use the military whenever they want and in all situations – need also to be taken into account. The authors feel that the rule of thumb should be, as one participant of the expert meeting aptly noted, “as civilian as possible, and only as military as needed”.

Clearly, the most important aspect to take into consideration follows from the national criminal codes under whose jurisdiction suspects of terrorism are ideally prosecuted, and in which the rights of the suspects are

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<sup>47</sup> For more information on the challenges in obtaining accurate evidence before international criminal tribunals, see N.A. Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge University Press: Cambridge 2010.

laid down, in conformity with international legal norms. The rules that subsequently need to be upheld for a judge to allow evidence to be submitted, and to rule that the suspect was arrested and detained in a manner respecting his or her rights, are key for any successful prosecution. In order to better prepare and render more effective in this sense the military's contributions, the authors recommend taking the following points into consideration.

Firstly, at all stages, states and international organisations involved are advised to stipulate from the outset if, and if so, how, the military operation's mandate also has prosecutorial purposes. By being explicit, those involved will learn to understand that it is important to collect evidence because it can be part of the conflict resolution strategy, the exit strategy, and transitional justice. In other words, if there is a need for peacekeepers, crisis management troops or military forces in an international coalition to be involved in criminal investigations, this must be clearly mandated. As highlighted above, under international law it is otherwise not allowed to simply start an investigation on another State's territory. For the UN, as an international law-based organisation, it is imperative to have a specific plan and a legal basis for any military operation related to the organisation.

Another point concerns increasing awareness of the nature of counter-terrorism-driven operations, where the main aim is not to "simply" defeat the enemy but to suppress terrorism more generally. Sometimes less force generates better results. How the military respond and what form that response takes is important, not only in relation to how the military represent themselves, but also whether or not their actions have the potential to contribute to radicalisation and even terrorism. Establishing a rule of law-based environment is likely to reduce such radicalisation processes. Furthermore, complex technical issues relating to areas not traditionally within the remit of the military may need to be clarified for the military to ensure sufficient knowledge about the purpose and practice relating to evidence collection, and bring about a shift of mind-set regarding the role of the military vis-à-vis the collection of evidence for use in civilian jurisdictions.

Apart from the political will and the practical needs of both military and law enforcement personnel, there is one underlying and essential question: is it possible and necessary to impose a new task on the military? On the one hand, the argument is made that the military are basically trained to fight, and that they should therefore not be tasked with new (law enforcement) activities, but that it should be accepted that the military cannot do everything. The argument is then that it cannot be expected of them to take the role of *de facto* police officers or investigation commissioners. However, on the other hand, the reality is that of all concerned actors, the military are often the first to arrive on the scene and are thus in the best position to secure suspects and evidence. 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 SOPs, this new task could be added to their mandate. In particular, the military police forces could have a special role with regard to the task of collecting evidence for the purpose of civilian prosecution.

Collecting evidence as part of the military mission is probably new for many countries. Military units engaged in counter-terrorism operations, either as part of a foreign deployment in another country in either a conflict or non-conflict situation, or as (inter)national forces in the role of emergency powers as a result of highly insecure situations and/or lack of civilian capacities, therefore need to prepare themselves properly. Preparation should include gaining a good understanding of the legal frameworks that govern the collection of evidence and training of skills. These are important steps to take in order to ensure that during operations, key principles of evidence collection can be respected, just like the authorities traditionally involved in collecting evidence and arresting and detaining suspects for prosecution before a civilian criminal court would. Furthermore, the military authorities must work as closely as possible with (national) civilian investigators and prosecutors, and learn from experiences with embedded prosecutors or gendarmerie officers. Thus, it is important that the military authorities engage (also prior to the start of an operation) with the (national) prosecutors and *vice versa*, in order

to know how they can best cooperate in a specific situation, and what kind of information prosecutors are looking for. This must be done from both a national and an international perspective.

To further facilitate this process of cooperation in the field, it would be advisable to appoint liaison officers who are able to speak both the language of the military and the language of civilian courts/law enforcement officers. There is an important role for units that are able to conduct operations in both environments. However, there might also be a need to train judges on military experiences or the experiences of others that work in conflict prone areas where they are involved in the collection of evidence. Magistrates should therefore be educated sufficiently to understand the special areas of expertise of the military and their potential role in securing suspects and evidence.

This project and Research Paper are essentially a first attempt to shed light on some of the most important challenges related to this new, complex, and under-explored topic. During this process, the authors identified areas and practices for further research, including in particular the recent experiences from Mali. Nevertheless, several recommendations can already be made at this stage.

#### **General recommendations to security organisations, troop sending states and host states:**

1. There is a need for **clear definitions and specification of instructions in the mandates** that are drafted for different military operations, since military units may find themselves in a position to collect evidence and arrest and detain suspects of terrorist activities for the purpose of prosecution before civilian criminal courts. To the maximum extent possible, evidence should be collected on the assumption that it could be used in civilian prosecutions, hence respecting the legal principles that apply in those situations.
2. **In cases where the military are expected to support law enforcement, Standard Operating Procedures need to be specified** relating to the collection of evidence, and arrest and detention of suspects. This will help to protect the rights of the suspect, as well as to secure a conviction. There has to be instruction before the deployment takes place for the military to know what to do when they arrive in theatre.
3. **International law, including human rights law, must be respected at all times, in order to enhance the chances of evidence being eligible to be used in civilian cases, and arrested suspects to be successfully prosecuted.**
4. **Terms like “evidence” should be clearly defined**, as the military might collect intelligence information that may have a dual use.
5. **Make use of what is already available.** In situations where the international community is faced with the challenges that occur because of a lack of mechanisms to deal with the collection of evidence by the military, quick solutions may be necessary. Some states have already developed standard operating procedures to fit this purpose and a NATO working group has also been set up to draft a common understanding on how to detain individuals, the procedures upon detention, and what to do with evidence.
6. **Set up effective communication lines and cooperation mechanisms** between the different relevant actors during the operation and for future prosecution.
7. **Set up rapid response investigation teams, embed investigative officers in the mission, and/or make use of military police officers with law enforcement powers.**

8. **Ensure that suspects or witnesses under interrogation are aware of the difference between information gathering for intelligence purposes and for law enforcement purposes.** It is highly recommended to conduct all interrogations and gathering of evidence, to the maximum extent possible, as though the statements and evidence, as well as the suspects, will be presented in a civilian criminal prosecution.
9. **Avoid overclassification of military information as intelligence,** for instance by allowing the option of dual use of a particular evidence report: one to keep within the intelligence community and one that can easily enter the law enforcement chain of activities in order to avoid problems with declassification.
10. **Draft specialised manuals and training programmes for the military** to help raise basic knowledge of evidence collection, witness questioning and respect for human rights when arresting and detaining suspects.
11. **Prepare minimal evidence collection kits** for the military that can be easily used under all circumstances and are easy to carry.

#### **Recommendations to international organisations and agencies:**

12. **Set up international and regional inter-agency and inter-institutional cooperation and consultation mechanisms** by organising regular meetings to improve the effectiveness and success of the cooperation between multiple stakeholders (e.g. military, policy, prosecutors, judges). This will also foster learning from each other's perspectives and looking through the lens of different actors, and will furthermore **improve and facilitate regional judicial cooperation such as mutual legal assistance mechanisms.**
13. **Create a network of experts** that can develop recommendations, tools and guidelines for the actors involved in the collection of evidence to enhance the ability to bring terrorists to justice in accordance with international law, including human rights law.
14. **Make an inventory of available handbooks, instruction manuals and so forth that already exist for the military** to help them prepare for the task of effectively collecting evidence and arresting and detaining suspects.
15. **Draft a digest of jurisprudence** to help analyse the legal challenges that might occur and to improve operational mechanisms, instruction manuals and training programmes.
16. **Draft evidence grids for the different regions in which the military** operate for the purpose of knowing the exact threshold for evidence delivery in a particular jurisdiction.

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