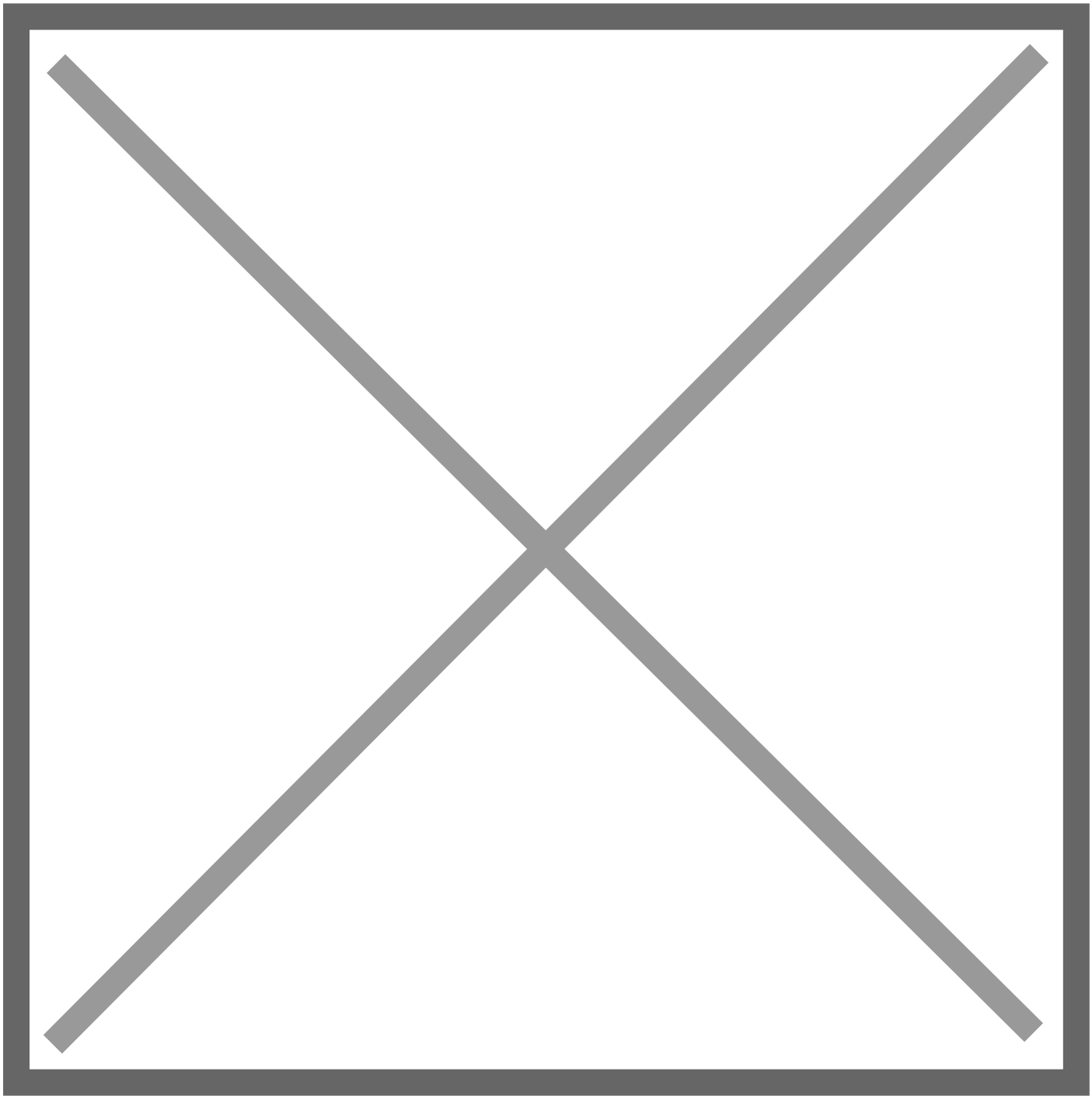


The Search for Justice: Military Collection of Evidence on the Battlefield

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By: Kenneth Watkin

The International Search for Evidence

As we enter into the third decade of this century the quest for international justice has witnessed a number of successes but is also facing a number of challenges. On a positive note States continue to take action to bring perpetrators of horrific crimes to justice including the trial of a former Syrian intelligence officer before a German court for crimes against humanity, the May 2020 arrest near Paris of a Rwandan financier who had been charged with a number of genocide related offences, and the commencement of a trial before a Spanish court "of two former Salvadoran military men for their alleged involvement in the massacre of five Spanish priests in El Salvador more than three decades ago" (see also Extra-Territorial Jurisdiction Update). The International Criminal Court has also endeavoured to broaden its investigations by turning its attention to the Middle East, and the counterterrorism missions of the post 9/11 period. In dealing with a relatively new phenomenon, the Foreign Terrorist Fighter [FTF], EU member States have "demonstrated that it is possible to cumulatively prosecute and bring to justice FTFs for both sets of criminal acts - core international crimes and terrorism-related offences."

While these actions highlight contemporary efforts to impose individual criminal accountability for violations of international law, there has also been controversy. The exercise of universal jurisdiction has not always been met with cooperation by other States. This can be seen in the lack of success in having Spanish extradition requests bear fruit in the case of the murdered priests in El Salvador. With regard to the International Criminal Court adverse State reaction can be seen in the 2017 and 2019 withdrawals of Burundi and the Philippines respectively from the jurisdiction of the International Criminal Court; some African nations expressing interest in doing so because of a perceived bias against States on that continent; and a June 11, 2020 United States Presidential Executive Order indicating that sanctions and additional visa restrictions against ICC personnel are justified.

Regarding FTFs many States, particularly Western ones including Canada, have demonstrated considerable reluctance to repatriate their citizens who fought with the Islamic State. In respect of FTF prosecutions a March 2020 report by the George Washington Program on Extremism noted that "[a]fter the inevitable security challenges that emerge when a country repatriates its foreign fighters, the most significant challenges are found at the legal level." A primary legal challenge was that "[i]n order to bring terrorists to justice within a legal framework, prosecutors need to have evidence." It is this fundamental legal requirement of evidence collection that may present the greatest challenge to ensuring the end to immunity for the perpetrators of international crimes regardless of the forum of trial. It is an area where military forces sometimes have been engaged. However, the often-untapped capabilities of military forces conducting operations in the areas where these crimes occur must be better assessed and leveraged.

This is not to say that present efforts to collect evidence for such crimes are entirely inadequate. It has been reported by Eurojust/"The Genocide Network" that in respect of Syria, in addition to traditional sources available to national criminal investigators, information has been collected by United Nations bodies and specialized civil society organizations. The report also notes this is a region where military forces "have collected information during the hostilities". Furthermore, a number of States such as Canada, Germany, France, The Netherlands and Switzerland have dedicated units for the investigation of war crimes, crimes against humanity and genocide. These efforts can be facilitated by technology leveraged to assist in investigations, such as the release by the UN investigative team in Iraq of a mobile phone app that will allow former Yazidi sex slaves and others who suffered at the hands of the Islamic State to upload evidence against their abusers.

The ability to obtain evidence admissible at a criminal proceeding is the Achilles heel of contemporary efforts to obtain justice. This impacts on all prosecutions, whether international or domestic. Unfortunately, the existing investigatory capacity to handle the number of and scale of alleged international crimes is far from ideal. Jeremy Pizzi noted in this Journal that the capacity of the Office of the Prosecutor (OTP) of the ICC , for investigating and safeguarding justice for the Rohinga is no greater than human rights investigations that "involve a lower evidentiary burden than criminal charges." Further, an extremely high number of victims means "significant resources will have to be dedicated to the collecting and processing of witness testimony", and, due to a lack of access to specific sites, "the OTP will be lacking physical evidence relating to the deceased victims and direct physical evidence where the destruction took place".

States seeking to exercise universal jurisdiction can be similarly limited in terms of capacity, their ability to locate credible witnesses, and obtaining access crime sites. For example, the French Central Office to fight Crimes against Humanity, Genocide and War Crimes (OCLCH), has 15 paramilitary Gendarmes and 5 police officers, who are working on "105 cases covering some 15 countries." As for the German unit focused on Syria composed of 17 staff, it had received 4,000 tips between 2015 and 2017, and is reported to be "overwhelmed with tips of potential war crimes and crimes against humanity." It has been suggested that the lack of success on the part of the Swiss war crimes unit in bringing forward cases can, in part, be linked to a lack of resources. The reality is that for a large number of victims it is unlikely perpetrators, particularly low ranking or low profile ones, will be brought to justice at least in a timely manner using small specialized police based units to collect evidence for prosecution.

The Military Role

Noémi Manco and Valérie Paulet have rightly noted in a review of evidentiary challenges in universal jurisdiction cases that "[a] crucial ally for national prosecuting authorities is civil society." However, another important ally is the military, which can also provide greater assistance in evidence collection whether before the ICC, in courts exercising universal jurisdiction, dealing with FTFs, or national prosecutions within the territory where the crimes take place. The growing realization that military forces can perform a useful evidence collection role is reflected in the December 2019 United Nations

issued Guidelines to facilitate the use and admissibility as evidence in national criminal courts of information collected, handled, preserved and shared by the military to prosecute terrorist offences. Such a use of military forces has also been the subject of a number of reports published by the International Centre for Counter-Terrorism (here, and here).

The collection of evidence on the battlefield by military forces needs to be further embraced, instituted into military practice and assessed from a broader operational perspective. In this regard, the military remains an under-utilized, but potentially effective resource for the timely collection of evidence at the site where crimes are alleged to have taken place. Importantly, in a number of situations not only is the procurement of timely evidence more likely, the preparation for and involvement of military forces can directly, or through mentoring, also help inculcate a culture of accountability within State security forces; various military technical capabilities can be leveraged; military/police cooperation can be improved; operations against insurgent threats may be more narrowly focused, and the number of persons detained as suspects reduced. However, in leveraging this potential, existing biases must be addressed regarding the use of military forces in this "law enforcement" role. There may also be a requirement to convince States and their military commanders of the operational advantages of carrying out this function.

One concern that can arise is whether military personnel are sufficiently independent and impartial to engage in an investigatory type function. This frequently leads to a bias towards civilian police and prosecutors carrying out such activity. This approach is largely based on a lack of understanding of the international diversity of military justice systems including its investigatory arms. As I have written elsewhere (here and here), the genesis of that viewpoint appears to have arisen, in part, because of the different approaches applied by civil law and common law countries. The former tends to rely on civilian courts and investigatory authorities to exercise jurisdiction over the military and its operations, while the latter have a long history of reliance on military justice systems and their investigatory arms that operate extra-territorially (see Second Turkel Commission Report).

Critiques of the ability of the military justice system to meet international human rights standards also often rely disproportionately on two regional human rights tribunals: the European Court of Human Rights and the Inter-American Court of Human Rights, which generally do not consider the case law of countries that do not fall within their jurisdiction. As was reflected in the 2019 Supreme Court of Canada decision, R v. Stillman, although it dealt with courts martial rather than investigatory capability, a common law based military justice system can meet human rights law standards. In any event, as has been painfully been witnessed in the largely failed United Kingdom effort to investigate allegations of war crimes in Iraq, reliance on a primarily civilian process does not necessarily offer a panacea for obtaining justice.

There are a number of State militaries, such as Canada, the United States and the United Kingdom, that deploy with their own integral military police units, which often include a criminal law investigatory capacity. European and other countries may have paramilitary gendarmerie available who can operate effectively in armed conflict situations. These police forces can be leveraged to investigate

criminal acts carried out not only by their own forces, but also those of an opponent. It should be remembered that the Canadian military has a history of engagement in war crimes investigations. This includes the 1 Canadian War Crimes Investigation Unit created at the end of World War II to investigate all reports of war crimes affecting any member of the Canadian Forces, and the Canadian military lawyers and military police investigators who participated in the early 1990s investigations in the former Yugoslavia as part of the Commission of Experts inquiry, which resulted in the establishment of the ICTY. The collection of evidence on the battlefield by military personnel, including military police, also became an integral part of Canadian Forces operations during its operations in Afghanistan.

Most armed contemporary conflicts remain State versus non-State actor in character with security forces primarily engaged in counterinsurgency operations. Good governance is the key to winning an insurgency. At the heart of ensuring proper governance in these situations is the counterinsurgency doctrine of "police primacy", where it is the police that have the lead responsibility for establishing order. However, military forces may still be called upon to perform a policing function either directly, or in support of host nation police forces. This frequently occurs because the local police forces are not functioning, are too few in number, lack training, cannot operate in the existing threat environment, or are inadequately equipped to carry out an investigation. Similarly, an intervening State's own civilian police forces may not be deployed to theatre or employed in that role.

Forensics and Physical Evidence

In failed or failing States the law enforcement agencies often have little or no access to forensic capability. In other circumstances military police and even civilian investigators who can be embedded with military forces may not be at the scene of the crime, or it is too dangerous to transport them to that location. In these situations, non-police military personnel can still take action such as secure the scene and preserve evidence, take pictures, seize evidence such as weapons and bomb parts, detain and search suspects, and identify potential witnesses. They may also seize evidence such as computer hard drives, cell phones, etc. when conducting "sensitive site exploitation" during raids. This information may provide valuable evidence for criminal prosecution, as well has having considerable intelligence value. Appropriate Standing Operating Procedures (SOPS) and tactics, techniques and procedures (TTPs) can be developed outlining how evidence is to be collected, recorded and safeguarded. The collection of that evidence can in turn be later challenged subsequently in court if the need arises.

In some situations the use of forensics to investigate IED strikes has become the norm, with the United States, European forces and Canada even deploying forensic laboratories to support operations on larger missions such as in Afghanistan. This forensic capability is equally important for contemporary peacekeeping deployments. While primarily instituted for counter IED purposes, the collection of fingerprints and DNA from the scene of bomb blasts can be carried out to "police-level standards" by properly trained combat engineers and military intelligence personnel. It has also become common for advanced military forces to utilize biometric screening, which in turn can provide

important information for subsequent investigations. It has been reported that in Afghanistan "forensic/technical, analysis, and exploitation of captured enemy material" is "provided to coalition forces and the Afghan National Defense and Security Forces to counter the IED threat, attack the counterinsurgent networks, [and] advise the Afghanistan government". An example of the global reach of this forensic capability was demonstrated in a case where fingerprints collected by United States military bomb disposal personnel in 2007 in Iraq resulted in the 2015 conviction of a London cab driver in the United Kingdom. He was convicted of murder and conspiracy to commit murder in respect of an IED that killed one American serviceman and wounded others. The offender had constructed the bomb in Syria with another jihadist.

There is a concern amongst international lawyers that many battlefield crimes are being dealt with as more general terrorism offences, such as membership in a terrorist group, rather than as international crimes. This tendency can be seen in the May 2020 Eurojust/The Genocide Network report, which highlighted that most States focus on preventing and punishing terrorism-related cases in Europe". That report stressed "it is possible to adjudicate foreign terrorist fighters cumulatively for terrorism offences and for core international crimes." Military forces (both local and international) are likely to be more focused on domestic offences in the territory where they are operating since the evidence would normally be relied on to justify the detention of suspects. However, much of the evidence that those forces collect could be relevant to both categories of offences, and SOPS/TTPs can be created that help focus, when appropriate, on evidence related to war crimes, crimes against humanity, and genocide. There is also a vital need to develop procedures that ensure evidence regarding crimes against women, children and victims of sexual abuse is properly collected.

Convincing Military Commanders

One of the challenges may be convincing military commanders why evidence collection should be prioritized as it comes with a resource, training and operational cost. Those commanders have many conflicting priorities, and the collection of evidence may have to take place under severe time limitations due to security concerns. However, commanders at all levels should be responsive to the reality that information collected to evidentiary standards leads to better intelligence, which can more narrowly focus operations. It also limits the number of persons detained, a chronic problem on counterinsurgency operations that can alienate the local population. Further, the information collected reduces the likelihood that a detained person will be quickly released to fight again, which can be frustrating for security personnel and civilians who might subsequently be attacked. The collection of physical evidence is particularly important since in many situations poorly funded and trained local security forces rely almost exclusively on confessions. This in turn can lead to allegations of abuse and torture, and ultimately wrongful convictions as a result of forced confessions. Importantly, including appropriate evidence collection in the mentoring that military forces (both police and other personnel) provided to host nation police and other security forces helps reinforce the importance of the rule of law.

The collection of evidence by military forces does not offer a panacea for those seeking international justice and must be seen as complementary to other international efforts. It is a resource that can help fill in some of the investigatory gaps that presently exist. Importantly it also helps to inculcate a culture of accountability within the military force involved and enhance their operational effectiveness. Bernard Fall "wrote, in 1965, that a government which is losing to an insurgency isn't being out-fought, it's being out-governed." At the heart of governance is respect for the rule of law and a well policed society. Properly collecting evidence, whether by military or civilian authorities, can only enhance that goal of good governance.

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About the author

Ken WatkinKen Watkin served for 33 years in the Canadian Forces, including four years (2006-2010) as the Judge Advocate General. In 2010 he was appointed as a Foreign Observer to the Israeli Independent Commission investigating the 31 May 2010 Gaza blockade incident, was the Charles H. Stockton Professor of International Law at the United States Naval War College (2011-2012), and has worked as a counterterrorism/national security consultant with the United Nations in Nigeria and for the Canadian government. Ken has published extensively on the application of international law in armed conflict, with his book *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict* (Oxford University Press, 2016) being awarded the 2017 Francis Lieber Prize by the American Society of International Law. Ken also co-authored a second book, *Law in War: A Concise Overview* (Routledge, 2018). He is a graduate of The Royal Military College (Hons BA), Queens University (LLB and LLM) and was a visiting fellow at the Human Rights Program at Harvard University. In 2002 Ken was appointed to the Order of Military Merit, in 2006 a Queen's Counsel, and in 2010 received the Canadian Bar Association President's Award that recognizes the significant contribution of a Canadian jurist to the legal profession, to the CBA or to the public life of Canada.