

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 ('Military Evidence Guidelines ')

Developed within the framework of the

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and with the participation, as observers, of

The Military Evidence

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I. Introduction

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perpetrators of terrorist acts to justice and holding them accountable for their actions, in accordance with the rule of law and human rights. For this purpose, prosecutors and courts need evidence that is admissible in accordance with the relevant rules and procedures of their respective criminal courts. There are, however, particular situations, such as conflict, immediate post-conflict or high-risk situations in which investigators and prosecutors may face challenges in ensuring that evidence is collected and retained in a manner that will enable its admissibility in proceedings.

are more readily identifiable. The military may, however, be deployed in a foreign territory and face FTFs coming from over the world. This makes identifying potentially relevant domestic legal regimes for prosecution purposes impractical for the military.

The military often has the authority to, and routinely do, collect information during the execution of military operations for military and intelligence-related purposes. Significant information, which may lead to further investigations or may eventually be used as evidence for criminal prosecutions, can be retrieved in conflict, immediate post-conflict or e intuition(.)]TJ/TT0 88 f 4 6 prosecuors.e nforalitaey)-697 (focese)26938333 (in)26938333 (conflict,)2693.25 (immediate)5382.667 (post-conflict)

internationaljudicial cooperation,including through existing MLA agreements

International Centre for Counter-Terrorism
±The Hague (ICCT) in 2014. It was also
noted in the 2015 Madrid Guiding Principle
and its Addendum⁸, in Security Council
resolution 2396 (2017), and in a report of
the Secretary-General of the United
Nations¹⁰

domestic legal systems to ascertain and understand the bars to admissibility for such information and discuss whether and how to ensure that such evidence can meet the admissibility requirements under domestic and international law, including the requirements that such information be collected in accordance with IHRL (e.g., the prohibition of torture, the prohibition of arbitrary or unlawful detention, the right to fair trial guarantees and IHL), as applicable.

The present Military Evidence Guidelines were developed to address the challenges in full respect of IHRL and IHL, as applicable, as well as the principles of sovereignty, non-intervention in the internal affairs of States, and territorial integrity. In general, the collection, handling, preservation and sharing of relevant information for criminal-justice proceedings should be the responsibility of civilian criminal-justice actors. Where civilian criminal-justice actors cannot perform their duties on the ground owing to conflict, immediate post-conflict or high-risk situations, States may exceptionally rely upon the military to assume such responsibilities.¹ The objective of the Military Evidence Guidelines is to assist States to identify the issues and to provide a basis for ensuring that appropriate standards and procedures are in

For example, the information might be used in an investigation or prosecution of acts of terrorism that may also amount to war crimes in an international court. The present Military Evidence Guidelines were developed with a focus on the prosecution of terrorism-related crimes as criminalized in national legislation and as described in the relevant international instruments and Security Council resolutions, including offences committed by EOs and sexual-violence crimes committed with a terrorist intent, whether committed against women or men, before a national criminal court.¹² The United Nations supports the abolishment of the death penalty.¹³ Article 6 of the ICCPR provides that the death penalty may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to other provisions of the ICCPR, including its article 14. IHL (whether in the case of international or non-international conflict) also prohibits the passing of sentences and

II . General guidelines

1. Evidence collection for criminal-justice purposes by the military should be considered as the exception

Unless States have established a special branch of the military that is properly trained and legally mandated for the collection, handling, preservation and sharing of relevant information in conflict, immediate post-conflict and high-risk situations, the collection of evidence should be the responsibility of civilian criminal-justice actors, save in genuinely exceptional circumstances¹⁷. When civilian criminal-justice actors are unable to perform their duties owing to conflict, ¹⁸ immediate post-conflict or high-risk situations, States should consider whether it is appropriate for the military to play that role, including the possible human rights implications, and address barriers to the fulfilment of that role in the collection, handling, preservation and sharing of relevant information for use in civilian criminal-justice proceedings.

2. Observing the key principle of the rule of law

Bringing to justice before national criminal courts individuals

FLY Liminal Criminal Justice actors and the military, pursuant to the relevant mandate, perform or facilitate the collection, handling, preservation and sharing of information that may later be used as evidence in rule of law-based civilian criminal-justice proceedings.



5. Introducing procedures to ensure the admissibility as evidence of information collected by the military with appropriate safeguards

Usually, the circumstances under which the military collects information in conflict, immediate post-conflict, and high-risk situations are unique in comparison to standard domestic criminal investigations. Consequently, where appropriate, States should consider adopting legislation which recognizes those unique circumstances to enable the introduction as evidence of information collected, handled, preserved or shared by the military before national criminal courts in terrorism-related cases. Such information should be collected in accordance with applicable domestic law and international law, including the prohibition of torture, the prohibition of arbitrary or unlawful detention, and fair trial guarantees, with proper safeguards in place to verify compliance.

²⁰ See Guideline 6.

II I. Mandates and cooperation

the military on how to collect, handle, preserve and share information for potential use as evidence in civilian criminal-justice proceedings, in particular to further promote domestic or international inter-agency cooperation. Such policies and instructions, if developed, can provide guidance in a number of areas. Such policies, SOPs and TTPs, with instructions, may provide useful guidance on issues such as (i) indicating the appropriate level of military command at which information-collection decisions are to be made; (ii) identifying the military personnel best situated and trained to carry out or supervise these tasks; (iii) setting out how and when the military can conduct information-collection activities; (iv) setting out operational scenarios where the collection of information for potential use as evidence in civilian criminal-justice proceedings is required (e.g., sensitive site exploitation (SSE), IED strikes, suicide bombings); (v) setting out effective independent oversight mechanisms; (vi) providing an outline of investigation liaison between civilian criminal-justice actors and the military; (vii) encouraging the integration of the military of civilian law-enforcement officers and prosecutors where possible; and (viii) procedures for the military regarding the collection of information in a manner that meets rule-of-law and due-process requirements for civilian criminal-justice proceedings (e.g., establishing a secure environment, cordoning off the area and restricting access by locals, and the recording and maintenance of a chain of custody for information). Those States that have already developed a practice see (Annex 407.20 for custody of information). Those States that have not yet developed a practice see (Annex 407.20

8. Promoting inter-agency communication, cooperation and coordination

The quality of the evidence collected from the conflict situation can be enhanced by increased liaison between criminal-justice actors and the military (see also Guideline 4). Prior to military missions, States should consider establishing effective lines of communication to enhance information-sharing between civilian criminal-justice actors, intelligence agencies and the military, in full compliance with HRL and IHL, as applicable. Building trust is vital for inter-agency cooperation (e.g., between criminal-justice actors and the military). Where a military is operating on its own national territory, such lines of communication are also important to ensure that information is not improperly obtained. Communication and coordination mechanisms to streamline information-sharing can be set up between the military and civilian criminal-justice actors within a State or between civilian

sharing, especially relevant to the sharing of biometric data. States that share DNA profiles with

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information could be used as evidence in criminal proceedings that could lead to the imposition
or carrying out of the death penalty by the receiving State, States could consider sharing
information under strict diplomatic assurances²⁸ or adopting guidance on sharing information
that establishes a framework for assessing the use made of transferred information and what
safeguards need to be in place.

Receiving and sharing information for operational purposes must be carried out in compliance
with IHRL and IHL, as applicable. Every effort should be made to consider the sending
State's compliance with IHRL and IHL, as applicable, including with respect to the
circumstances under which the information was obtained. States should refrain from sharing
information if there are substantial grounds for believing that it would lead to a situation in
which individuals would be in danger of being subjected to torture or other forms of cruel,
inhuman or degrading treatment or punishment²⁹.

12. Legal safeguards for storing information in databases³¹

When information retrieved from conflict, immediate post-conflict or high-risk situations is
stored in a national database, it is important to ensure that accessibility, storage, and use of this
information is managed in compliance with applicable IHRL, notably the right to be free
from arbitrary or unlawful interference with privacy³² and without distinction of any kind, such
as race, colour, sex, language, religion, political or other opinion, national or social origin,
property, birth or other status.

For this purpose, States should adopt adequate legal safeguards and data-protection measures to
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IV. Jurisdiction and legal challenges

A. Jurisdiction

Security Council resolution 1373 (2001) requires States to ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice. Security Council resolutions 2322 (2016) and 2396 (2017) urge States to act in accordance with their obligations under international law to find and bring to justice, extradite or prosecute any person who supports, facilitates, participates or attempts to participate in the direct or indirect financing of activities conducted by terrorists or terrorist groups. The relevant international counter-terrorism instruments provide obligations for States parties to criminalize and establish jurisdiction over certain terrorist acts and to extradite or prosecute suspects.³⁴

To be able to prosecute suspected terrorists, States need to criminalize terrorist acts within their national legislation³⁵ and establish jurisdiction.³⁶ The notion of jurisdiction has a strong relationship with the principle of sovereignty. However, as jurisdiction can be claimed on the basis of various principles, more than one State may assert jurisdiction over a person or case.³⁷

13. Clarifying from the outset which State(s) has (have) jurisdiction, where appropriate

When the military operates on the territory of another State with the consent of that State, it is a

State military the authority to collect information in relation to terrorism-related crimes and facilitate close cooperation between the law-enforcement actors of the troop-sending or troop-receiving State and the military of the troop-sending State.

15. De-conflicting competing jurisdiction and distribution systems, where appropriate

Although it may not be feasible in all cases, States operating abroad should consider, where practicable and appropriate, establishing communication channels with the troop-receiving State and with other States active in that State, so that possible competing jurisdiction claims can be communicated, discussed, resolved as early as possible. This may lead to a more efficient distribution system, with different States taking responsibility for various suspects and cases, thus avoiding overlap, confusion and possibly impunity due to significant delays in the pre-trial phase. It is not always possible to clarify in advance which State has jurisdiction, but in a regional setting, it may be possible. Where possible and appropriate, States should also consider identifying and agreeing on which State has the best likelihood of a successful prosecution based on various factors, including access to the information, and whether or not the judicial system has the capacity and expertise to handle the case.

B. Legal challenges

Regardless of how information is obtained, by whom, under what mandate, or during what type of operation, prosecutors will be able to use only information that is admissible in court. Ultimately a court will decide on the reliability, admissibility and probative value of the evidence based on applicable procedural law or practice, informed by IHRL and IHL, as applicable. Those who collect the information may not know to which court the information might eventually be submitted as evidence or what admissibility standards will be applied. It is therefore

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handling of victims of terrorism, particularly women and children. This includes procedures for coordination and exchange of information between military personnel and civilian criminal-justice actors, if the military personnel lack the necessary enforcement function or skills, as well as the taking of appropriate steps to ensure the physical security and physical and mental health of victims.

19. Questioning terrorist suspects

During its operations, the military may be involved in the questioning of suspected terrorists for operational, intelligence-gathering or for security purposes. Regardless of the purpose, both IHRL and IHL prohibit torture, and other cruel, inhuman or degrading treatment or punishment of any persons by State actors, including military units. International requirements for the conditions of detention must be respected in the questioning of detained terrorist suspects 2

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Statement of witnesses intending or available to testify in court. Challenges can arise regarding the appearance of victims and witnesses in court proceedings. Where there is a risk of intimidation or reprisals for victims and witnesses, alternate options should be considered. Where

adversely affected by the failure to act in accordance with the law. On the issue of detention, United Nations human rights bodies and the

International Security Assistance Force (ISAF), and also played an important role in collecting evidence for the International Criminal Tribunal for the former Yugoslavia.

roles in ensuring preservation of the chain of custody. In some States, further descriptions can be included in the record. For example, military personnel with a law-enforcement function (e.g., military police, gendarmerie or civilian police, or prosecutors attached to the military) may obtain information relating to the investigation of the scene, the circumstances of detention, or statements. In other States, specialized military personnel (e.g., combat engineers or intelligence personnel) may carry out forensic functions, such as IED analysis.

(see also Guideline 16).

27. Observing objectivity

It is essential, in all cases concerning the admissibility of evidence, that such evidence not be biased. Whenever the military is involved in the collection, handling, preservation and sharing of information that will be subsequently used as evidence, it is essential that the military do

- h. Appoint and train military personnel designated for the collection, handling, preservation and sharing of the information that may be used as evidence; and
- i. Set up cooperation arrangements with the United Nations presence on the ground.

9. Increasing usability and ensuring traceability of information obtained by the military			*	*	
10. Sharing information multilaterally	*	*	*	*	*
11. Sharing information bilaterally		*	*	*	*

Annex 2: Glossary of terms

- x Addressing irregularities: remedies provided by judges for non-compliance with established requirements set forth in national and international law on the collection, handling, preserving or sharing of information.
- x Chain of custody: chronological records of how the evidence is seized and handled. The record must be continued from the seizure until the information is taken to court, in order for the information to be legally admissible.
- x Conflict, conflict-related situations: this term includes both international and non-international armed conflicts under international law.
- x Criminal-justice actors: in the context of the present Military Evidence Guidelines, this term refers to civilian law-enforcement officials, investigators, prosecutors and judges.
- x Equality of arms: Equality of arms requires that there be a fair balance between the opportunities afforded to the parties involved in litigation. For example, each party should be able to call witnesses and to cross-examine the witnesses called by the other party.
- x Evidence: a formal term for information that forms part of a trial in the sense that it is used to prove or disprove the alleged crime. All evidence is information, but not all information is evidence. Information is thus the original, raw form of evidence.
- x Evidence grids: tables/schemes detailing the specific requirements for admissibility of evidence in different States.
- x High-risk situations: situations of high security, yet not meeting the threshold of an armed conflict, making it impossible for civilian law-enforcement actors to perform their tasks of investigating crimes, collecting evidence, and arresting suspects without risking their own life, or without proper protection from security forces. High

- with jurisdiction to try criminal offences in the present Military Evidence Guidelines the term court refers to a national criminal court.
- x Post-conflict situation: situation in which open warfare has come to an end and which may remain tense and unstable for a considerable time.
 - x Powers the mandate to carry out activities.
 - x Terrorism (crime/offence) in the context of the present Military Evidence Guidelines this term refers to crimes as described in the relevant international terrorism instruments and Security Council resolutions, including crimes committed by FTFs and sexual violence crimes committed with a terrorist intent (whether committed against women or men).
 - x Troop-contributing/troop-sending States: States that provide the troops who operate on the territory of the troop-receiving State.
 - x Troop-receiving/Host States: States receiving the troops that will operate on their territory.