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# 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

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**CTED**

UNITED NATIONS SECURITY COUNCIL  
COUNTER-TERRORISM COMMITTEE  
EXECUTIVE DIRECTORATE



**UNODC**

United Nations Office on Drugs and Crime



UNITED NATIONS  
OFFICE OF COUNTER-TERRORISM  
UN Counter-Terrorism Centre (UNCCT)

**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*

**Working Group on Criminal Justice, Legal Responses and Countering the Financing of Terrorism of the United Nations Global Counter-Terrorism Coordination Compact Task Force**

*by the*

**Counter-Terrorism Committee Executive Directorate (CTED)**

*with the support of*

**Department of Peace Operations (DPO)  
Rule of Law Unit of the Executive Office of the Secretary-General  
United Nations Development Programme (UNDP)  
United Nations Interregional Crime and Justice Research (UNICRI)  
United Nations Office of Counter-Terrorism (UNOCT)  
United Nations Office on Drugs and Crime (UNODC)  
United Nations Office on Genocide Prevention and the Responsibility to Protect**

*and with the participation, as observers, of*

**United Nations Team of Experts on the Rule of Law and Sexual Violence in Conflict**

- ❖ *It should be noted, at the outset, that this document is a first attempt at the international level to address this complex issue. All the stakeholders involved in its elaboration understand that this public version will require future review by relevant stakeholders, Member States, civil society and academia. The Military Evidence Guidelines are merely intended to serve as a basis for discussion and to illustrate the issues that will need to be comprehensively addressed at the national level by those national authorities responsible for determining and enforcing the criteria for the admissibility of evidence in national criminal proceedings. The Military Evidence Guidelines, while recognizing certain obligations under various sources of international law, do not themselves impose any obligations upon States. Their sole aim is to assist Member States to develop their domestic policies and legal frameworks in this area.*

## Preface

The Working Group on Criminal-Justice, Legal Responses and Countering the Financing of Terrorism of the United Nations Global Counter-Terrorism Coordination Compact Task Force (formerly the Counter-Terrorism Implementation Task Force (CTITF)) consists of 12 entities: the United Nations Office of Drugs and Crime (UNODC) (*Chair*), the Counter-Terrorism Committee Executive Directorate (CTED) (*Vice-Chair*), the United Nations Office of Counter-Terrorism (UNOCT) (*Vice-Chair*), the United Nations Department of Peace Operations (DPO), the Office of the United Nations High Commissioner for Human Rights (OHCHR), the Rule of Law Unit of the Executive Office of the Secretary-General, the United Nations Development Programme (UNDP), the United Nations Interregional Crime and Justice Research (UNICRI), the United Nations Office of Legal Affairs (OLA), the United Nations Office on Genocide Prevention and the Responsibility to Protect, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, and (as observers) the International Committee of the Red Cross (ICRC) and the Team of Experts of the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict.



### Rule of law and human rights

All measures to bring terrorists to justice, including the collection, handling, preservation and sharing of information, must be taken in accordance with international law, including international human rights law (IHRL) obligations. The obligations must be reflected in the relevant practices and in the relevant legislation or policies. In the context of the present Military Evidence Guidelines, particular attention must be given to the right to a fair trial, including the right to a fair and public hearing by a competent, independent and impartial tribunal established by law (International Covenant on Civil and Political Rights (ICCPR), art. 14 (1)); the right to be presumed innocent until proved guilty according to law (ICCPR, art. 14 (2)); the right to be informed promptly and in detail in a language which he understands of the nature and cause of charge against him (ICCPR, art. 14 (3) (a)); the right to have adequate time and facilities to prepare a defence and to be tried in his presence and to defend himself in person or through legal assistance (ICCPR, art. 14 (3) (b) and (d)); the right to be tried without undue delay (ICCPR, art. 14 (3) (c)); and the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him (ICCPR, art. 14 (3) (e)). In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation (ICCPR, art. 14 (4)) and the right to his conviction and sentence being reviewed by a higher tribunal according to law (ICCPR, art. 14 (5)).

Member States must also respect the right to liberty and security of person and the right of persons deprived of their liberty (ICCPR, art. 9) and the right to be free from arbitrary or unlawful interference with privacy, as set forth in the relevant international and regional human rights treaties, including the ICCPR, and in accordance with international humanitarian law (IHL), where applicable.

Member States must also respect the absolute prohibition of torture, which is also applicable when collecting, handling, preserving and sharing information, including the questioning of suspects, victims and witnesses.

In 2017, CTED launched the project to develop the present “*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* (hereafter Military Evidence Guidelines)”. (The term Battlefield Evidence has been also used by many practitioners to describe information collected by the military but it is acknowledged that the present Military Evidence

Guidelines are broader in scope than collection in the battlefield *stricto sensu*.) The Security Council has since adopted resolution 2396 (2017), pursuant to Chapter VII of the Charter of the United Nations, which calls upon Member States to share best practices and technical expertise, informally and formally, with a view to improving the collection, handling, preservation and sharing of relevant information and evidence obtained, in accordance with domestic law and the obligations Member States have undertaken under international law, including information obtained in conflict zones, in order to ensure that foreign terrorist fighters (FTFs) who have committed crimes, including those returning and relocating to and from the conflict zone, may be investigated and, where appropriate, prosecuted. Although the FTF phenomenon was the impetus for this document, its applicability goes well beyond Iraq, the Syrian Arab Republic, and FTFs. The present Military Evidence Guidelines were developed by CTED as a key project output, with the financial support of the Government of Switzerland and the United Nations Counter-Terrorism Centre (UNCCT) of the United Nations Office of Counter-Terrorism (UNOCT) and in close consultation with UNODC; the other Working Group member entities; and the International Centre for Counter-Terrorism – The Hague (ICCT), as Senior Consultant. They are based on several sources, including international law and practices of some Member States.<sup>1</sup> The draft text of the Military Evidence Guidelines has been reviewed by the members of the Working Group and by other relevant stakeholders and experts.

**It should be noted, at the outset, that this document is a first attempt at the international level to address this complex issue. All the stakeholders involved in its elaboration understand that this public version is a living document and will require future review by relevant stakeholders, Member States, civil society and academics.** We believe that its publication should facilitate and inform this important discussion. It should also be noted that State practice in this area continues to evolve and that several important issues (e.g., the need to develop detailed guidance for the detention, arrest and questioning of witnesses and victims) are not comprehensively covered in this first edition. **The Military Evidence Guidelines are merely intended to serve as a basis for discussion and to illustrate the issues that will need to be comprehensively addressed at the national level by those national authorities responsible for determining and enforcing the criteria for the admissibility of evidence in national criminal proceedings.** At the national level, Member States will need to pay careful attention to their human rights obligations and ensure that any measures taken to address the issues set out in this guidance are fully compliant with their obligations under international law.

**The present Military Evidence Guidelines, while recognizing certain obligations under various sources of international law, do not themselves impose any obligations upon States. Their sole aim is to assist Member States to develop their domestic policies and legal frameworks in this area.**

<sup>1</sup> Responses to questionnaires sent to policymakers, national military and counter-terrorism prosecutors, and international and regional organizations; the outcomes of a high-level expert meeting (held in New York in April 2018 and attended by around 40 international experts, including prosecutors, military actors, and expert representatives of international, regional and national organizations); existing research conducted in this area; lessons learned from counter-piracy operations; and the experiences of national prosecution services.

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## I. Introduction

An integral part of the international community’s efforts to counter terrorism is bringing 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.<sup>2</sup> For example, there may be an insufficient or non-existent civilian investigatory capacity in the State in which the conflict is occurring, or there may be no mutual legal assistance (MLA) treaty between the Government and foreign authorities. In other cases, there may be a lack of effective inter-agency coordination between military and criminal-justice actors within a State.

The present Military Evidence Guidelines are intended to inform a broad range of relevant stakeholders, including the military, law-enforcement officials, prosecutors, judges, international and national policymakers, and international and regional judicial and police organizations. States are encouraged to establish inter-agency cooperation mechanisms to offer clear relevant guidelines or a recommendation for practice to relevant actors to enable the question of the admissibility of evidence acquired in conflict, immediate post-conflict or high-risk situations to be rigorously and consistently addressed. The Annex contains a list of the stakeholders targeted by each Guideline, as well as a glossary of key terms.

The present Military Evidence Guidelines aim to address different scenarios in which military personnel may play a role in collecting or processing information that could subsequently be used as evidence. The different scenarios may have different applicable laws and some of the present Military Evidence Guidelines may or may not be relevant in all such instances. For example, the military may be deployed in its own State in the context of a non-international armed conflict or in a situation below the threshold of a non-international armed conflict. The military may also be deployed in the context of a regional force (such as the G5 Sahel or Multinational Joint Task Force (MNJTF)), in either of which situation the relevant domestic legal regimes for prosecution purposes



### **Difference between “information” and “evidence”**

Criminal-justice actors need both “information” and “evidence” to understand who was responsible for the crime, and when and how the crime occurred. “Information” and “evidence” can take various forms, including those of physical objects (e.g., hard copy documents, cell phones or weapons), and those of immaterial objects (e.g., statements from witness and suspects, electronic data and forensic information), as well as those of a testimonial nature (e.g., statements from witness and suspects). However, the terms *information* and *evidence* have different meanings. Whereas all evidence is information, not all information is evidence. The term *evidence* is used to describe information that complies with the legal rules of evidence and is used in judicial proceedings to prove or disprove the alleged crime. For example, a document retrieved by the military in the conflict zone is “information”. The same document can become “evidence”, however, if it complies with legal rules of evidence and is admitted in a judicial proceeding.

<sup>2</sup> Although the present Military Evidence Guidelines principally make reference to prosecutors and judges and to steps to enable admissibility, each reference should be taken to recognize the right of defence counsel or those representing those accused of a terrorist act to challenge the admissibility of evidence. This is a fundamental pillar and principle of ensuring the adherence of any criminal processes to human rights and rule-of-law requirements.



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 high-risk situations.<sup>3</sup> Evidence collection in these types of situations can be challenging for investigators and prosecutors. But ensuring the proper collection, handling, preservation, and sharing of information by military forces in conflict, immediate post-conflict or high-risk situations could assist in the successful prosecution of suspected terrorists, including FTFs.



### Good practices

Fingerprints can sometimes be retrieved from physical objects such as improvised explosive device (IED) components, weapons and smartphones to help establish the identity of the alleged terrorist who touched it or provide useful insights into the *modus operandi* of a terrorist organization. Forensic experts deployed or seconded to the military, or military personnel trained in collecting, handling and analysing forensic material, play a vital role in securing evidence in the investigation and prosecution of terrorism-related crimes. The International Criminal Police Organization (INTERPOL)-led initiative **Project “Watchmaker”** aims to counter the global threat of IEDs by gathering, analysing and sharing information on devices to identify, locate and arrest known and suspected bomb-makers involved in the acquisition, manufacture or use of IEDs. Watchmaker facilitates enhanced data flow from military forces deployed to relevant hotspots via police channels.

Electronic evidence (which includes any documents, emails, or other files that are electronically stored) can also be retrieved. Terrorists and terrorist organizations use the Internet and social media for terrorist purposes, including in conflict, immediate post-conflict and high-risk situations. Because terrorists rely so heavily on the Internet, they leave digital traces that can potentially be used as evidence in court. Through the use of digital forensics, digital data contained in smartphones and computers can be retrieved and used in the investigation and prosecution of terrorism-related crimes. The military can assist in the collection and identification of information, by carefully seizing computers, smartphones and other relevant devices during military operations such as Sensitive Site Exploitation (SSE).

States differ in their approach to this challenge, and even within States we may see different solutions developed based on the specific scenario encountered by the State. Some States have an established special branch of the military (i.e., the gendarmerie or the military police), which is properly trained and legally mandated to engage in the collection, handling, preservation and sharing of information for the purpose of supporting civilian criminal-justice proceedings. However, most States have not established such a branch. If there is no such special military branch in place, and if civilian criminal-justice actors cannot perform the relevant tasks, a State might consider requesting the military to assist with, or when necessary, perform the collection, handling, preservation and sharing of relevant information for use by criminal-justice actors, including as evidence, in the territory of another State, or in the territory of its own State.<sup>4</sup> The performance of this role in support of the prosecution of suspected terrorists and FTFs may also be facilitated by

<sup>3</sup> Examples include information collected by the military for operational purposes; statements of victims and witnesses; cell phones, computers, documents containing information about the criminal conduct in which terrorist organizations have engaged as a matter of policy and practice; and weapons and IEDs from which information with forensic value, such as fingerprints, can be extracted by forensic experts.

<sup>4</sup> See section II, below.



international judicial cooperation, including through existing MLA agreements or arrangements with foreign authorities. For the purpose of assisting in criminal-justice proceedings, the collection, handling, preservation and sharing of information must be conducted in compliance with relevant domestic and international law.<sup>5</sup> Such measures must be taken in accordance with international law, including international human rights law (IHRL) obligations such as fair-trial guarantees, as set forth in the relevant international and regional human rights treaties (including the International Covenant on Civil and Political Rights (ICCPR)) and in accordance with international humanitarian law (IHL), where applicable. The absolute prohibition of torture is also applicable to the questioning of suspects, victims and witnesses. The specific characteristics and needs of women and children being questioned or detained should also be addressed and respected in accordance with the relevant international law, as applicable and with regard for relevant international standards, as appropriate.<sup>6</sup>



#### **Relevance of different bodies of law**

International humanitarian law (IHL) is the *lex specialis* in armed conflict. It requires not only States, but also non-State armed groups to, among other things, treat humanely persons not taking a direct part in hostilities and to take measures to protect civilians and civilian objects in the conduct of military operations. International Human Rights Law (IHRL) applies both in peacetime and in times of armed conflict, unless modified by IHL *lex specialis*, and sets forth the obligation for States to respect human rights. A number of provisions of IHRL instruments are relevant to the collection and use of evidence. They include, non-exhaustively, ICCPR arts. 7 (prohibition of torture), 9 (right to liberty and security of person), 10 (treatment of persons deprived of their liberty), and 14 (right to a fair trial), as well as art. 15 (prohibition on the invocation as evidence of any statement made as a result of torture) of the Convention against Torture (CAT), among other provisions of international human rights treaty and customary law. IHRL, however, does not regulate in detail the mechanisms by which evidence is gathered and preserved. Domestic law generally regulates those mechanisms. The relevant domestic law must reflect the relevant obligations of States under international law. If IHL applies because of the existence of an armed conflict, additional rules are relevant to the collection of evidence by the armed forces. As far as international armed conflict (an armed conflict between States) is concerned, prisoners of war, civilian internees, and other persons in the power of a party to the conflict must be treated humanely and are entitled to judicial guarantees (Third and Fourth Geneva Conventions and art. 75 of Additional Protocol I). In a situation of non-international armed conflict (an armed conflict between the State's armed forces and an armed group, or between armed groups), persons not taking a direct part in hostilities must be treated humanely and are entitled to judicial guarantees (although the relevant rules are not as detailed as those that apply to international armed conflicts (art. 3 common to the Geneva Conventions, Additional Protocol II – where applicable)).

Military personnel, as appropriate, should be properly trained, prepared and tasked with the collection of information that may be used as evidence in a manner consistent with the relevant domestic and international legal obligations. The challenge of collecting relevant information in conflict, immediate post-conflict and high-risk situations was identified by CTED and the

<sup>5</sup> For example, the requirement to make information admissible as evidence (i.e., through proper preservation of evidence and its chain-of-custody) may be set forth in national criminal law, national criminal procedure law, and/or national laws of evidence.

<sup>6</sup> International Convention on the Rights of the Child; United Nations Rules on the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders; United Nations Standard Minimum Rules for the Administration of Juvenile Justice; United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

International Centre for Counter-Terrorism – The Hague (ICCT) in 2014. It was also noted in the 2015 Madrid Guiding Principle<sup>7</sup> and its *Addendum*,<sup>8</sup> in Security Council resolution 2396 (2017)<sup>9</sup>, and in a report of the Secretary-General of the United Nations.<sup>10</sup>

Currently, many criminal-justice systems do not accept the introduction as evidence of information collected, handled, preserved or shared by military personnel – particularly in conflict, immediate post-conflict and high-risk situations – before national criminal courts in terrorism-related cases. Legislators and courts should consider reviewing their 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.<sup>11</sup> 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 place so that, should these circumstances arise, the military has the capability to support civilian criminal-justice actors and proceedings in a manner that complies with relevant domestic and international legal standards. At the moment in which criminal-justice actors or military forces collect information, it may not be clear how and if the information will or could be used as evidence in court and to what kind of charges the information might lead, particularly in conflict, immediate post-conflict and high-risk situations.



#### Other available resources

- The *Recommendation on the Collecting, Use and Sharing of Evidence on Terrorist Suspects* of the Global Counterterrorism Forum (GCTF) contains recommendations on evidence collected by the military, as well as forensic evidence and electronic evidence.
- INTERPOL’s Mi-LEX model and database (*see textbox on page 16 for a more detailed explanation*).
- NATO’s Battlefield Evidence Collection Guide.
- Based on the present Guidelines, UNODC will provide technical assistances to pilot States, as Phase 2 of this project, in close cooperation with CTED.

<sup>7</sup> [https://www.un.org/sc/ctc/wp-content/uploads/2016/10/Madrid-Guiding-Principles\\_EN.pdf](https://www.un.org/sc/ctc/wp-content/uploads/2016/10/Madrid-Guiding-Principles_EN.pdf) (S/2015/939, 23 December 2015).

<sup>8</sup> [https://www.un.org/sc/ctc/wp-content/uploads/2019/02/N1900963\\_EN.pdf](https://www.un.org/sc/ctc/wp-content/uploads/2019/02/N1900963_EN.pdf) (S/2018/1177, 27 December 2018).

<sup>9</sup> [https://undocs.org/S/RES/2396\(2017\)](https://undocs.org/S/RES/2396(2017)). Security Council resolution 2396 (2017) calls on Member States to share best practices and technical expertise to improve the collection, handling, preservation and sharing of relevant information and evidence obtained in conflict zones, in accordance with obligations under domestic and international law, in order to ensure prosecution of FTFs who have committed crimes.

<sup>10</sup> In 2018, the Secretary-General of the United Nations stated that only a few States had established proper legal frameworks and capacity to collect information in conflict-related situations that could be used as evidence, that efforts to collect such information should be strengthened, and that the military might play a critical role in particular situations. (Seventh report of the Secretary-General on the threat posed by ISIL (Da’esh) (S/2018/770) of 16 August 2018.)

<sup>11</sup> The present Military Evidence Guidelines recognize that criminal-justice actors, in typical circumstances, may receive information from the military during the course of the execution of their responsibilities, provided that it complies with all applicable national and international legal standards.

For example, the information might be used for 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 FTFs and sexual-violence crimes committed with a terrorist intent, whether committed against women or men, before a national criminal court.<sup>12</sup> The United Nations supports the abolishment of the death penalty.<sup>13</sup> 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 the carrying out of the death penalty except pursuant to the judgment of a regularly constituted court that respects judicial guarantees.<sup>14</sup> It should also be noted that the Human Rights Committee has underscored that “the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned” and should occur only in “exceptional” circumstances. The Committee has also emphasized that “it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14 [of the ICCPR].”<sup>15</sup> Trial by the military or special tribunals must comply with IHRL and IHL, as applicable, including legal guarantees related to the independent and impartial functioning of such tribunals.<sup>16</sup>

<sup>12</sup> ICCPR, art. 14, refers to “competent, independent and impartial tribunal established by law”, and Geneva Conventions Common art. 3 refers to “regularly constituted courts”. The focus of the present Military Evidence Guidelines is the prosecution of terrorist suspects before national criminal courts. The existence of military or special courts is noted in General Comment No. 32 of the United Nations Human Rights Committee on art. 14 of the ICCPR and the right to fair trial (CCPR/C/GC/32), of 23 August 2007. As noted in General Comment No. 32, although the trial of civilians in military or special courts is not prohibited, such trials should be exceptional and require full compliance with the requirement of art. 14 of ICCPR. Its guarantees cannot be limited or modified because of the military or special character of the court concerned. It is also important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in art. 14.

<sup>13</sup> A/HRC/39/19; United Nations criminal tribunals, United Nations-assisted criminal tribunals and the International Criminal Court (ICC) are not empowered to impose capital punishment on any convicted person, regardless of the seriousness of the crime(s) of which he or she has been convicted. United Nations investigative mechanisms are mandated to share information with national courts and tribunals and should do so only with jurisdictions that respect international human rights and standards, including the right to a fair trial, and only for use in criminal proceedings in which capital punishment will not be imposed or carried out. It is the policy of the United Nations that it will neither establish nor directly participate in any tribunal that allows for capital punishment.

<sup>14</sup> Common Article 3: “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”; Third Geneva Convention, arts. 84, 102-108, 129; Fourth Geneva Convention, arts. 5, 66-75, 146; API, art. 75(4): “No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure”.

<sup>15</sup> CCPR/C/GC/32, para. 22; Human Rights Committee, *Madani v. Algeria*, Communication No. 1172/2003, UN Doc CCPR/C/89/D/1172/2003 (2007), para. 8.7. See also: Human Rights Committee, *Benhadj v. Algeria*, Communication No. 1173/2003, UN Doc CCPR/C/90/D/1173/2003 (2007), para. 8.8; and Human Rights Committee, *Akwanga v. Cameroon*, Communication No. 1813/2008, UN Doc CCPR/C/101/D/1813/2008 (2011), para. 7.5.

<sup>16</sup> For more information, see United Nations Global Counter-Terrorism Coordination Compact Task Force (formerly CTITF) Basic Human Rights Reference Guide on the right to a fair trial and due process in the context of countering terrorism. <https://www.ohchr.org/EN/newyork/Documents/FairTrial.pdf>.

## 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 circumstances.<sup>17</sup> When civilian criminal-justice actors are unable to perform their duties owing to conflict,<sup>18</sup> 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 suspected of having committed terrorist acts, as criminalized in national legislation and as described in the relevant international instruments<sup>19</sup> and Security Council resolutions, must be done in full compliance with national law and international law, including IHRL, IHL, and international refugee law, as applicable. National counter-terrorism law, national criminal law, national criminal-procedure law, and national criminal court precedents provide for the requirement, in accordance with the relevant obligations of States pursuant to international law, to make information admissible as evidence through proper preservation and its chain of custody.

### *3. Respecting international human rights law and international humanitarian law*

The military must respect IHL and IHRL, as applicable, when collecting, handling, preserving and sharing information. Of particular relevance are the applicable rules regarding fair-trial guarantees, the prohibition on arbitrary or unlawful deprivation of liberty, and the absolute prohibition of torture. Failure to comply with these requirements may render inadmissible information provided for use as evidence.

### *4. Promoting cooperation between criminal-justice actors and the military in the lawful collection of information that may be used as evidence*

Recognizing that the military may collect information or material that can be valuable in criminal-justice proceedings, States are encouraged to consider promoting cooperation between

<sup>17</sup> Noting that in cases where military personnel are either the subject or victim of a crime, the military has a responsibility to investigate the matter. Furthermore, military forces have the authority to, and routinely do, collect information during the execution of military operations in these environments for military and intelligence-related purposes. Nothing should prohibit civilian criminal-justice actors from receiving that information, provided that it is done in compliance with applicable national and international laws.

<sup>18</sup> Where a State's military is deployed abroad, the civilian-justice actors of such State may not have the mandate to operate outside of their national territory, unless a special agreement for that effect is available or to be concluded.

<sup>19</sup> <http://www.un.org/en/counterterrorism/legal-instruments.shtml>.

civilian criminal-justice actors and the military, pursuant to the relevant mandate<sup>20</sup> to 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.



#### **Right to a fair trial**

The right to a fair trial is one of the fundamental guarantees of human rights and the rule of law. The standards are principally prescribed in article 14 of the International Covenant on Civil and Political Rights (ICCPR). The rights particularly relevant to the present Military Evidence Guidelines are:

- The right to a fair and public hearing by a competent, independent and impartial tribunal established by law. (ICCPR, art. 14 (1))
- The right to be presumed innocent until proved guilty according to law (ICCPR, art. 14 (2))
- The right to be informed promptly and in detail in a language which he understands of the nature and cause of charge against him (ICCPR, art. 14 (3) (a))
- The right to have adequate time and facilities to prepare a defence and to be tried in his presence and to defend himself in person or through legal assistance (ICCPR, art. 14 (3) (b) and (d))
- The right to be tried without undue delay (ICCPR, art. 14 (3) (c))
- The right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against them (ICCPR, art. 14 (3) (e))
- In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation (ICCPR, art. 14 (4))
- The right to his conviction and sentence being reviewed by a higher tribunal according to law (ICCPR, art. 14 (5)).

IHL also imposes fair-trial obligations on prosecutions occurring in the context of an armed conflict. Under IHL, there can be no derogation from the relevant fair-trial provisions of the Geneva Conventions or their Additional Protocols. If some changes are to be made to trial processes because of the particular challenges of prosecuting terrorism-related offences (such as measures to protect the identity of vulnerable witnesses or using military rather than civilian courts where even high-security civilian courts are inadequate and recourse to military courts is unavoidable), such changes must be consistent with the applicable minimum requirements of a fair trial and describe the necessity clearly, subject to “sunset clauses” as well as independent review. For further guidance, see “Basic human rights reference guide – Right to a fair trial and due process in the context of countering terrorism (October 2014)” (<https://www.ohchr.org/EN/newyork/Documents/FairTrial.pdf>).

### ***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.

<sup>20</sup> See Guideline 6.



### III. Mandates and cooperation

#### A. Mandates

If the State wishes to see its military purposefully engaged in the collection, handling, preserving or sharing of information to be used as evidence in criminal-justice proceedings, it should consider including it in the mandate of the military, subject to safeguards and limitations, to ensure compliance with international and domestic law. Where appropriate, the mandate should stipulate that the military can exceptionally assist civilian criminal-justice actors to prevent impunity for terrorism-related crimes committed in the designated area and that, henceforth, the military is authorized to collect, handle, preserve and share information with civilian criminal-justice actors to be used as evidence in civilian criminal-justice proceedings.

When operating on the territory of another State, the military should operate in accordance with international law, including IHRL and IHL, as applicable, as well as relevant bilateral agreements entered into with that State, taking into account the importance of respecting applicable international law, such as the principles of sovereignty, non-intervention in the internal affairs of the State, and territorial integrity.

IHL, bilateral agreements, and national laws of both the troop-sending State and the troop-receiving State may dictate the powers of the military in a given situation.

Collecting information for military- and intelligence-related purposes from a conflict-related or high-risk situation is a normal part of the military's mission. However, it would be advisable to develop policies, standard operating procedures (SOPs) and other instructions on how the military can carry out, assist in, or facilitate the collection, handling, preservation and sharing of information with civilian criminal-justice actors for civilian criminal-justice proceedings, in compliance with IHRL and IHL, as applicable.

#### ***6. Ensuring that there is a national legal framework allowing the military to assist in the collection of information that could be used in civilian criminal-justice proceedings***

In general, law enforcement tasks, including the collection, handling, preservation and sharing of information for civilian criminal-justice proceedings, are assigned to civilian criminal-justice actors. When civilian criminal-justice actors are unable to perform these tasks on the ground, owing to conflict, immediate post-conflict or high-risk situations, in accordance with their national legal system, States should consider developing legal frameworks and or rules of procedure that allow the military to assist in the collection, handling, preservation and sharing of information for potential use as evidence in civilian criminal-justice proceedings, subject to “sunset clauses” as well as independent periodical review for an ad hoc mandate.

#### ***7. Developing policies, SOPs and other instructions***

States, international and regional organizations, as appropriate, may wish to consider developing policies, SOPs, tactics, techniques and procedures (TTPs) with instructions to provide guidance for

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 into 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 of information). Those States that have already developed a practice of developing policies, SOPs and TTPs, with instructions for the military, in this context, are encouraged to share their experiences with other States.

## **B. Coordination and cooperation**

Terrorism-related crimes, including crimes committed by FTFs and sexual violence committed with a terrorist intent, as criminalized in national legislation and as defined by the counter-terrorism conventions <sup>21</sup> and the relevant Security Council resolutions, <sup>22</sup> often have a transnational dimension. FTFs may cross multiple borders to join a terrorist organization in another State, move on to another conflict zone, return home, or plan an attack in a third State.

Investigation of terrorist acts and efforts to track FTFs require international cooperation and the sharing of information by law-enforcement officials and prosecutors within a State and between States. However, during conflict, immediate post-conflict and high-risk situations, international cooperation may not always be effective or possible. To ensure the maximum usage of information collected by the military for criminal-investigation and prosecution purposes, coordination and cooperation among the military, civilian criminal-justice actors, and other relevant branches of Government within a State is vital.

<sup>21</sup> <http://www.un.org/en/counterterrorism/legal-instruments.shtml>.

<sup>22</sup> <https://www.un.org/counterterrorism/ctitf/en/resolutions>.





### “Foreign terrorist fighters (FTFs)”

Security Council resolution 2178 (2014) defines “foreign terrorist fighters” as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict”.

The United Nations has acknowledged concerns regarding the labelling of individuals (as well as their families, by association) as FTFs (as defined in Security Council resolution 2178 (2014)), who may themselves be victims of international crimes such as forced marriage, and the difficulties relating to the criminal regulation of individuals’ intentions and the blurring of lines between terrorism and armed conflict. This has consequences for human rights protection and the protection regime provided for in international humanitarian law. The present Guidelines use the term *foreign terrorist fighters (FTFs)* in accordance with the relevant Security Council resolutions.

Information collected from conflict, immediate post-conflict or high-risk situations can have both an intelligence/investigative use and an evidentiary use. However, it may not be immediately clear that information collected by the military for operational or intelligence purposes may be useful for the prosecution of terrorist suspects long after the events took place. To support the potential prosecution of terrorist suspects, the collection, handling, preservation and sharing of information should be conducted in accordance with the relevant national and international legal standards (*see Guideline 3*). For example, applying forensic standards and maintaining an appropriate chain of custody not only support potential evidentiary use, but may also result in higher-quality intelligence.

The retrieving, processing and storing of information may involve legal obligations regarding privacy or data protection that need to be addressed<sup>23</sup> for successful prosecutions to be subsequently carried out. States need to be aware of these applicable obligations and adopt adequate legal safeguards.



### Sardar v. UK case

Anis Abid Sardar was a member of a bomb-making cell in Iraq in 2007. Two months after an attack in which an IED built by himself and a co-conspirator killed an American soldier, he re-entered the U.K. British agents took his fingerprints at Heathrow airport. Meanwhile, a U.S. military unit had recovered the components from that and several other attacks, sending them to the FBI’s Terrorist Explosive Device Analytical Center (TEDAC) for processing. Seven years later, Sardar’s fingerprints were found on two of those bombs, and a U.K. court sentenced him to 38 years in prison on Murder and Conspiracy to Murder charges.

<sup>23</sup> Article 12, Universal Declaration on Human Rights; Article 17, International Covenant on Civil and Political Rights; Article 16, Convention on the Rights of the Child; Article 14, International Convention on the Protection of All Migrant Workers and Members of Their Families. See <https://www.ohchr.org/EN/Issues/Privacy/SR/Pages/Internationalstandards.aspx> for more information.

## 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 IHRL 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 criminal-justice actors of other States. A good model is the Military-to-Law Enforcement information exchange mechanism (Mi-LEx) developed by the International Criminal Police Organization (INTERPOL).



### **“Mi-LEx”: Project Vennlig**

Project “Vennlig” (the first “Green-to-Blue” military-to-police information-exchange model) was set up in 2005 by INTERPOL. The purpose of the project is to declassify military information and making information from sensitive sites available for investigation and prosecution purposes. This mechanism – Mi-LEx (Military-to-Law Enforcement data Exchange) - facilitates a streamlined information exchange for multiple actors. It is readily applicable across all regions, and can potentially be useful for investigations and for the collection, storing and sharing of information by the military that can be used as evidence in court. It ensures that the chain of custody is not broken and that data-protection is respected.

## 9. *Increasing usability and ensuring traceability of information obtained by the military*

As part of their general activities, military personnel gather information for operational and intelligence purposes. Such information may be subject to classification by the military for that reason. In some situations, this information may subsequently also be considered relevant, in evidential terms, for prosecutorial purposes in civilian criminal proceedings. To increase the usability of this information for investigation and prosecution purposes, the military should strive to classify information, in accordance with national laws, only when necessary, and declassify information wherever possible to ensure that the information can be shared and used to support civilian criminal investigations. Wherever possible, the collection, handling, preservation and sharing of such information should be carried out by personnel with law-enforcement skills. When such personnel are not available on the site, it is recommended that military personnel transmit the relevant information to criminal-justice authorities as soon as practicable. Furthermore, to ensure that the prosecutor, and later the court, can rely on the information as evidence, it is important to make efforts to maintain the integrity of the evidence by establishing proper procedures (*see also Guideline 24*). In this regard, States should consider establishing clear mechanisms for cooperation between the military and civilian criminal-justice actors.

## 10. *Sharing information multilaterally*

To effectively prosecute terrorism-related crimes, States are encouraged to share information multilaterally. INTERPOL or dedicated regional models can be used for multilateral information-

sharing, especially relevant to the sharing of biometric data. States that share DNA profiles with INTERPOL, for instance, retain ownership of the DNA profiles and determine what type of information will be shared with which States.<sup>24</sup> Sharing of information must be conducted in compliance with IHRL, including the right to be free from arbitrary or unlawful interference with privacy. States are encouraged to ensure that data protection, transparency and accountability are also provided for in any dedicated regional model that may be established (*see also Guideline 12*).

## ***11. Sharing information bilaterally***

Information obtained by a military force may be requested by a prosecutor or a State's Central Authority from another State and, in some cases, may even be requested by multiple prosecutors from different States. The primary mechanisms of information-sharing between States in legal matters are MLA or judicial cooperation through bilateral and multilateral treaties, and ad hoc and informal arrangements. States should therefore enact and, where appropriate, review and update MLA laws in connection with

terrorism-related offences in compliance with IHRL and IHL, as applicable, and should consider strengthening implementation of relevant MLA treaties concerning criminal matters relating to counter-terrorism.<sup>25</sup> In the absence of applicable treaties for MLA and judicial cooperation, States are encouraged to cooperate, where possible, on the basis of reciprocity and comity.<sup>26</sup>

In some States, courts are not currently authorized to consider information from foreign jurisdictions as evidence if it is not shared through the traditional MLA process. The areas from which the military retrieves information are often subject to conflict or dispute. Alternatively, there may be no functioning Government administering the territories concerned. In such circumstances, information-sharing through traditional MLA or judicial cooperation (which usually require information-sharing between officials of the Ministry of Justice or the Prosecutor's Office of the respective States) may not be practical. To facilitate the transfer of information in full respect for fair-trial guarantees, States should consider, in conformity with IHRL and IHL, as applicable, (i) establishing appropriate laws and mechanisms that allow for the broadest possible cooperation between States, such as police-to-police cooperation, with necessary safeguards to protect human rights;<sup>27</sup> (ii) providing their courts with the flexibility required to determine whether information obtained by the military and shared through police-to-police or military-to-police cooperation should be admitted in court and whether such information is reliable and meets standards required by relevant domestic law, and international law, including IHRL and IHL, as applicable; and (iii) provide for the obligation to exclude the use as evidence any information that is established to have been made as a result of torture and other ill-treatment from any



### **Law on preventing the risk of torture**

In November 2017, the Canadian Minister of Defence issued the Ministerial Direction to the Department of National Defence and the Canadian Armed Forces: Avoiding Complicity in Mistreatment by Foreign Entities, to limit the use, sharing and requesting of information that would result in a substantial risk of torture by foreign entities (which include foreign Governments, their departments, agencies and militaries, and also military coalitions).

<sup>24</sup> INTERPOL has also established a data-protection office to ensure data protection, transparency and accountability in order to facilitate and ensure trust among States in their sharing of forensic data with INTERPOL.

<sup>25</sup> S/RES/2322 (2016), paras. 13 (b) and (c).

<sup>26</sup> S/RES/2322 (2016), para. 13 (a).

<sup>27</sup> S/RES/2322 (2016), para. 15.

proceedings;<sup>28</sup> while (iv) providing adequate safeguards to ensure fair-trial guarantees. If the 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 assurances<sup>29</sup> 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 punishment.<sup>30</sup>

## *12. Legal safeguards for storing information in databases<sup>31</sup>*

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 privacy,<sup>32</sup> 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 (i) adopt adequate legal safeguards and data-protection measures to avoid arbitrary or unlawful interference with privacy; (ii) have in place a legal and policy framework that addresses the purpose of the collection, use and storage of the information, which competent authorities may store and control data, the procedures for storing and using data, as well as existing controls and guarantees against abuses; (iii) establish the duration of storage of information, who can access the data, and procedures for destruction of information; (iv) set up effective independent oversight mechanisms; and (v), as appropriate, provide for the right to redress in cases of abuse. States should also consider (vi) developing and implementing specific frameworks and safeguards in matters concerning data of children and victims of terrorism, in particular victims of sexual violence committed with terrorist intent, in situations where they may be placed on databases, including in situations where children are

<sup>29</sup> When a State provides information to another State which can impose the death penalty, the State may seek an assurance that the death penalty will not be sought or imposed, or if imposed, will not be carried out against anyone found guilty of any criminal offence arising from the investigation or the legal assistance provided by the State. Although there are some good examples that such assurances have worked, the judicial authority should note that such assurances may not always be sufficient. For example, United Nations Human Rights bodies have expressed the view that diplomatic assurances do not provide sufficient protection. See, for instance, Committee against Torture CAT/C/34/D/233/2003, §13.4. CAT, General Comment No.4 (2017), art. 3, §20, Special Rapporteur on torture.

<sup>30</sup> See art. 7 of the International Covenant on Civil and Political Rights and arts. 1 and 16 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>31</sup> For more detailed guidelines see United Nations Global Counter-Terrorism Coordination Compact Task Force (formerly CTITF) Guidelines to States on human rights-compliant responses to the threat posed by foreign fighters, p. 30, available at <https://www.ohchr.org/EN/newyork/Documents/Human-Rights-Responses-to-Foreign-Fighters-web%20final.pdf>.

<sup>32</sup> See art. 12, Universal Declaration of Human Rights; art. 17(1) International Covenant on Civil and Political Rights; art. 8(1) European Convention on Human Rights; art. 11(1), American Convention on Human Rights.

placed on database for child-protection purposes.<sup>33</sup>

## 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.<sup>34</sup>

To be able to prosecute suspected terrorists, States need to criminalize terrorist acts within their national legislation<sup>35</sup> and establish jurisdiction.<sup>36</sup> 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.<sup>37</sup>

#### *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 good practice (although it may not always be possible) for the States concerned to clarify in advance or on a case-by-case basis which State should exercise jurisdiction. States should also consider informing other States whether and to what extent the troop-receiving State has authorized the troop-sending State to conduct law-enforcement functions.

#### *14. Consider concluding arrangements for operations with the consent of the troop-receiving State*

In a situation where foreign military troops are operating on the territory of another State with the consent of that State, a Status of Forces Agreement (SOFA) will generally be concluded.<sup>38</sup> In the event that the troop-receiving State is willing to allow the foreign State's military to assist in the collection of evidence, the SOFA or other relevant agreement could grant the foreign

<sup>33</sup> See Guiding Principle 2 (h) of the *Addendum to the guiding principles on foreign terrorist fighters (2018)* (S/2018/1177).

<sup>34</sup> <http://www.un.org/en/counterterrorism/legal-instruments.shtml>.

<sup>35</sup> Legal Basis for *nullum crimen sine lege* under IHL: Geneva Convention, III art. 99(1); Additional Protocol I, art. 75(4)(c); Additional Protocol II, art. 6(2)(c); [Customary International Humanitarian Law Rule 101](#).

<sup>36</sup> States may initiate a criminal case if there are sufficient links between the prosecuting State and the criminal conduct (e.g., because the conduct took place on the territory of the State (principle of territoriality)); because the suspect is a national of the prosecuting State (active nationality principle); because a victim is a national of the prosecuting State (passive nationality principle); because the conduct threatens the security of the prosecuting State (protective or security principle); or, even if there are no other links to the prosecuting State, if the conduct is considered a crime for which universal jurisdiction exists (universality principle).

<sup>37</sup> It should be stressed that the above-mentioned forms are classified as *adjudicative* jurisdiction (which enables States to establish a criminal case) and are different from *enforcement* jurisdiction (which is a basis for States to perform law enforcement functions). Enforcement jurisdiction is usually the prerogative of the host State on whose territory it is performed.

<sup>38</sup> An agreement concluded between a troop-sending State or an international organization and the troop-receiving State, regulating the status of the troop-sending State's forces while present in the troop-receiving State.



State's 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, and 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 recommended that they minimize the risk that the evidence will be dismissed by establishing and following SOPs for the collection and processing of information that increase the likelihood of its admissibility before a criminal proceeding, as discussed above.

To ensure that deliberate testimonies from suspects, victims and witnesses can best be used as evidence in court, it is a good practice that such tasks be primarily performed by law-enforcement actors or military personnel with a law-enforcement function and law-enforcement skills. Whenever victims and witnesses are involved, those collecting information must understand, and be properly trained in, how to deal with victims and witnesses, in particular vulnerable witnesses, such as victims of rape and sexual violence committed with a terrorist intent (e.g., sexual slaves held by terrorist groups), children (including child soldiers), and the elderly or disabled. Appropriate humanitarian service referrals may also help build trust with victims and local communities. In addition, questioning of suspects, victims and witnesses must comply with the absolute prohibition of torture and other ill treatment. Confessions and information obtained through torture or other ill treatment are inadmissible in criminal proceedings, in accordance with international and national laws.<sup>39</sup>

<sup>39</sup> Art. 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that “each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any

## *16. Raising civilian criminal-justice actors' awareness of the circumstances under which the military is operating*

States should consider raising awareness, among judges and law-enforcement actors (e.g., prosecutors and magistrates who are usually assigned to lead an investigation), of the circumstances under which the military is operating and might collect, handle, preserve and share information that may be used for civilian criminal-justice purposes. Such training should inform participants of the military's mandates, roles, capabilities, limitations, and operating circumstances. Where possible, the military could be encouraged to attend such training together with civilian criminal-justice actors so that both the military and the civilian criminal-justice actors can fully understand the important role that they can play in assisting to bring terrorist suspects to justice.

## *17. Developing evidence grids*

It is advisable, if appropriate and feasible, that charts or evidence grids setting out the respective applicable standards for the admissibility of evidence of those participating States most likely to be involved in the investigating and prosecuting of terrorism-related crimes will be developed. This is to encourage the military to become aware of procedural and other standards in different States.

## *18. Considering special circumstances when questioning victims and witnesses<sup>40</sup>*

In obtaining statements, all victims and witnesses must be treated humanely and not subjected to any torture, cruel, inhuman or degrading treatment or punishment, or arbitrary or unlawful detention.<sup>41</sup> Terrorists may also be captured, or surrender, accompanied by members of their family, who will likely be questioned or interrogated. Many victims and witnesses may find themselves in a vulnerable position, either for security reasons or owing to the traumas that they have experienced. They also face the risk of being rejected by their own community for cooperating in investigations. It is therefore important for investigators to understand how to deal with victims and witnesses, in particular those who are vulnerable, such as women, children,<sup>42</sup> the disabled, the elderly, or victims of sexual violence committed with a terrorist intent.



### **Evidence grids and counter-piracy**

During operations to counter maritime piracy, military units operating at sea play a role in collecting evidence and in arresting suspects to be surrendered to those States that are willing to prosecute. Evidence grids were developed for operations in the Horn of Africa to provide necessary information on the specific requirements for admissibility of evidence in coastal States (to which the suspects were in most situations surrendered). The International Maritime Organization (IMO) has adopted Guidelines on the Preservation and Collection of Evidence Following an Allegation of a Serious Crime Having Taken Place on Board a Ship (resolution A.1091 of 4 December 2013). A similar approach would be useful in counter-terrorism operations, for the reconciliation of evidentiary standards of involved States.

proceedings, except against a person accused of torture as evidence that the statement was made"; Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, para. 6, Committee against Torture, General Comment No. 2, CAT/C/GC/2, para. 6.

<sup>40</sup> The authors of the present Military Evidence Guidelines acknowledge that more comprehensive and detailed guidelines on questioning are required and that more extensive training is required to enable the military to question persons in full compliance with IHRL and IHL. States are therefore encouraged to provide appropriate training to the military by referring to the existing manual or to the guidelines on detention developed by United Nations Offices (e.g. OHCHR).

<sup>41</sup> See arts. 7 and 9 of the International Covenant on Civil and Political Rights; arts. 2, 10, 11 and 15 of the Convention against Torture; art. 3 of the Geneva Conventions (1949); and rules 90 and 99 of Customary International Humanitarian Law. See also the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly resolution 43/173, annex);

<sup>42</sup> The relevant juvenile-justice standards of the Convention on the Rights of the Child must be respected.



Special procedures, training and guidelines on good practices should be developed for the 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 law-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.<sup>43</sup> International requirements for the conditions of detention must be respected in the questioning of detained terrorist suspects (*see also Guideline 23*).

For questioning with law-enforcement purposes, the degree to which a suspect's statement or confession is made voluntarily is a key factor to be weighed by a court when determining the admissibility of the evidence. In this respect, every person has the right not to be compelled to testify against himself or herself or to confess guilt. Thus, not only must a suspect be protected from abuse, but there are also additional legal safeguards to be met regarding the taking of statements in a law-enforcement context. Owing to the potential intelligence value of detained terrorists, questioning for intelligence purposes may frequently precede efforts to obtain a confession for admission in court. It is recommended that States develop procedures that would identify what additional steps may be taken by criminal investigators to enhance the likelihood of admissibility of a statement where the suspect has already been interrogated for intelligence purposes.

Finally, special consideration should be given to the handling of female or child terrorist suspects. Specialized training and instructions should be provided to the military on the handling of women and children and their possible involvement in the judicial process. For cases involving children, it should be recognized that such children may be victims of terrorism. States should put in place special safeguards and legal protections, in full compliance with their respective obligations under international law, to respect and promote the rights of the child, taking into account the best interests of the child as a primary consideration.<sup>44</sup>

### *20. Right to a fair trial and the availability of officers and witnesses to testify in court*

In court, the accused is entitled to cross-examine, or have cross-examined, the witnesses against him or her.<sup>45</sup> This is one of the guarantees to a fair trial, sometimes called the principle of the "equality of arms". In some States, rules on hearsay might affect the admissibility of the

<sup>43</sup> See arts. 7 and 9 of the International Covenant on Civil and Political Rights; arts. 2, 10, 11 and 15 of the Convention against Torture; art. 3 of the Geneva Conventions (1949); and Common Article 3 of the Geneva Conventions, Art. 75 of Additional Protocol I, and Art. 4 of Additional Protocol II. In international armed conflicts, IHL have more comprehensive and detailed guidelines on questioning.

<sup>44</sup> See Guiding principle 42 of the *Addendum to the guiding principles on foreign terrorist fighters* (2018) (S/2018/1177).

<sup>45</sup> Art. 14(3)(e) of the ICCPR provides that "[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". IHL requires that the accused

written statements 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.<sup>46</sup> Where the risk of reprisals is high and no other measures are adequate to protect victims and witnesses, the court may also exceptionally grant them anonymity (anonymous witness testimony).<sup>47</sup>

Military personnel involved in the gathering of evidence may also face challenges in their efforts to testify in court should they be invited to testify, whether for security reasons or because of the potential to disrupt military operations. In such cases, the military can work with prosecution authorities to identify processes that would not affect the credibility of their testimony, but could address the relevant concerns. This may include testimony by videoconference, partly concealing the identity of a witness (only where necessary to protect their privacy or security), the provision of witness statements or sworn statements by the military service members involved in the capture to supplement the arguments of the prosecution teams, or the appointment of a legal representative to present the evidence on behalf of the State responsible for its collection. The court should consider allowing such measures only insofar as they do not fundamentally undermine the right to a fair trial.

## *21. Use of classified information as evidence in court*

To ensure the most effective possible use of information in criminal proceedings, States are encouraged to refrain from overclassifying such information. They are also encouraged to develop simplified procedures for the declassification of such materials where they are likely to be used in such proceedings. States are encouraged to consider establishing procedures and mechanisms for turning classified intelligence into admissible evidence in criminal proceedings in compliance with the specific rules of domestic law and applicable international obligations and with full respect for fair-trial guarantees, in particular to ensure adequate equality of arms, while protecting sensitive or classified sources and methods. Domestic procedural rules should also regulate how intelligence is used as evidence in court. The procedures developed by States vary and very much depend on the legal tradition, specific checks and balances, and experience of the State concerned. For example, in one Civil Law State, a third party linked to both the intelligence community and the law-enforcement community, such as an independent commission or special intelligence prosecutor, may review the intelligence and decide whether or not certain information can be declassified and turned over. In another Common Law State, law-enforcement officials work with the military and with intelligence officers to identify which information is relevant to the case, after which the

has the opportunity to examine witnesses and to have witnesses examined. Under IHL: Geneva Convention III, arts. 93(3) and 105(1); Geneva Convention IV, art. 72(1); Additional Protocol I, art. 75(4)(g); [Customary International Humanitarian Law Rule 100](#).

<sup>46</sup> Such as testimony by teleconference, the use of a screen or voice distortion to protect the identity, or deposition prior to the hearing. See paras. 20, 84 and 85 of United Nations Global Counter-Terrorism Coordination Compact Task Force (formerly CTITF) Basic Human Rights Reference Guide on the right to a fair trial and due process in the context of countering terrorism.

<https://www.ohchr.org/EN/newyork/Documents/FairTrial.pdf>.

<sup>47</sup> *Ibid.*, paras. 86-88.

prosecutor will decide in what form the information may be disclosed to the court.<sup>48</sup> States may wish to share with each other more of their experiences in handling this delicate issue.<sup>49</sup>

## *22. Addressing reliability and admissibility issues relating to Military Evidence*

Whether because of the security situation or the limited knowledge of the personnel who discover the information, the military may not be able to meet all the established requirements set forth in national and international law for the collection, handling, preserving or sharing of information for the purposes of civilian criminal-justice proceedings. Missing links in the chain of custody are a good example in this regard. Even though this may be expected, courts need to be in a position to rigorously analyse the effect of such circumstances on the reliability or even the admissibility of such evidence so as to ensure consistency of practice with practice in other circumstances where the individual collecting the information or the situation in which the information is collected does not meet all the established requirements of national and international law. Some violations infringe important legal prohibitions (e.g., the extraction of information by torture). The information should always be inadmissible as evidence in the case of such violations.

While fully respecting the independence, impartiality and autonomy of the judiciary and national law, IHRL and IHL, as applicable, judicial authorities may consider developing guidelines for judges on how to handle such issues. A good practice for handling such issues is that the more serious the irregularity, the more serious the consequences. For example, if irregularities are very serious, judges could consider dismissal of the case. For minor infringements, such as procedural violations, judges could consider declaring that an irregularity has occurred and thus reducing the sentence or excluding a certain piece of evidence.

## *23. Ensuring arrest and detention in accordance with the rule of law<sup>50</sup>*

Information obtained from arrested or detained persons can be important evidence for criminal proceedings, only if it is obtained in compliance with IHRL and the rule of law (*see also Guideline 19*). Regardless of whether the military is operating on its own territory or on a foreign territory, detention and arrest must be performed in accordance with the applicable law governing its operation and with international law.

Detention for security reasons must be applied in accordance with IHRL and IHL, as applicable, and based on domestic legal frameworks. Arbitrary detention and enforced disappearance are prohibited, including for the detention of terrorist suspects. States are advised to appropriately plan whenever possible the necessary conditions for the arrest and detention of individuals suspected of terrorist crimes during a military operation; to ensure compliance with legal obligations regarding their handling, detention, and transfer; and to ensure that subjects of criminal prosecutions are not

<sup>48</sup> Report of the Special Rapporteur on the independence of judges and lawyers, A/68/285, 7 August 2013, paras. 80-81.

<sup>49</sup> See in this regard the UN Counter-Terrorism Committee Executive Directorate (CTED) report on its prosecutors' seminar, held in June 2012 in Ankara. [http://www.un.org/en/sc/ctc/docs/2011/2011-12-16\\_ankara\\_prosecutorseminar.pdf](http://www.un.org/en/sc/ctc/docs/2011/2011-12-16_ankara_prosecutorseminar.pdf). See also the GCTF Recommendations for Using and Protecting Intelligence Information in Rule of Law-Based, Criminal Justice Sector-Led Investigations and Prosecutions.

<sup>50</sup> The authors of the present Military Evidence Guidelines acknowledge that more comprehensive and detailed guidelines on detention are required. The authors also acknowledge that extensive training is required to enable the military to detain persons in full compliance with international human rights law and international humanitarian law. States are therefore encouraged to provide appropriate training to the military by referring to the existing manual or handbook on detention developed by United Nations Offices (e.g., UNODC and OHCHR).

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 Committee of the Red Cross (ICRC) have developed a corpus of guidelines, which must be consulted in addition to the present guidance.<sup>51</sup>

Regardless of who arrests or detains an individual, international law dictates that all persons deprived of their liberty must be treated humanely in all circumstances, irrespective of their alleged involvement in terrorist acts or their affiliation with terrorist organizations. The term *humane treatment* encompasses States' obligations to ensure adequate conditions of detention with due regard to the age and sex of the detainees and in respect for their convictions and religious practices.<sup>52</sup> This involves the provision of adequate food and drinking water, clothing, safeguards for health and hygiene, suitable medical care, protection from violence and the dangers arising out of armed conflict, and appropriate contact with people outside the detention facility (particularly with lawyers, physicians and family members).<sup>53</sup>

The relevant authorities are required to acknowledge any deprivation of liberty and ensure that the fate or general whereabouts of the detained is not concealed.<sup>54</sup> Placing the detainee outside the protection of the law would create a heightened risk of torture and enforced disappearances.<sup>55</sup> The personal details of persons deprived of their liberty must be recorded.<sup>56</sup> Those arrested or detained on criminal charges have the right to be informed of the reasons for their arrest, including the charges against them,<sup>57</sup> and to be informed of their rights and of how to avail themselves of those rights, including the right to freely chosen and qualified legal counsel.<sup>58</sup> SOPs and orders should be developed to help ensure that a terrorist suspect is informed of

<sup>51</sup> See International Covenant on Civil and Political Rights, arts. 9 and 10; Human Rights Committee General Comment No. 35; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly resolution 43/173, annex); Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37, annex).

<sup>52</sup> See the United Nations Standard Minimum Rules for the Treatment of Prisoners ("Nelson Mandela Rules") and United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders ("Bangkok Rules").

<sup>53</sup> See Common Article 3 to the Geneva Conventions, *ICRC Updated Commentary on GC I (2016)* para 558; [Customary International Humanitarian Law Rule 87](#) and [Customary International Humanitarian Law Rule 121](#).

<sup>54</sup> International Convention for the Protection of All Persons from Enforced Disappearance, art. 1, and [Customary International Humanitarian Law Rule 98](#).

<sup>55</sup> For the definition of "secret detention", see paras. 8 and 9 of the Joint Study on Secret Detention in the context of countering terrorism (A/HRC/13/42): "For the purpose of the present report, it is construed that a person is kept in secret detention if State authorities acting in their official capacity, or persons acting under the orders thereof, with the authorization, consent, support or acquiescence of the State, or in any other situation where the action or omission of the detaining person is attributable to the State,1 deprive persons of their liberty; where the person is not permitted any contact with the outside world ("incommunicado detention"); and when the detaining or otherwise competent authority denies, refuses to confirm or deny or actively conceals the fact that the person is deprived of his/her liberty hidden from the outside world, including, for example family, independent lawyers or non-governmental organizations, or refuses to provide or actively conceals information about the fate or whereabouts of the detainee. In the present report, the term "detention" is used synonymously with "deprivation of liberty", "keeping in custody" or "holding in custody". The distinction drawn between "detention" and "imprisonment" in the preamble to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly in its resolution 43/173, in the section entitled "Use of Terms", does not purport to provide a general definition.2 9. Secret detention does not require deprivation of liberty in a secret place of detention; in other words, secret detention within the scope of the present report may take place not only in a place that is not an officially recognized place of detention, or in an officially recognized place of detention, but in a hidden section or wing that is itself not officially recognized, but also in an officially recognized site. Whether detention is secret or not is determined by its incommunicado character and by the fact that State authorities, as described in paragraph 1 above, do not disclose the place of detention or information about the fate of the detainee." See also Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/56/156), para. 39 d; and Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters by the UNCTITF Working Group on Promoting and Protecting Human Rights and Rule of Law while Countering Terrorism (2018), para 27.

<sup>56</sup> [Customary International Humanitarian Law Rule 123](#).

<sup>57</sup> Geneva Convention III, art. 104(2); Geneva Convention IV, art. 71(2); Additional Protocol I, art. 75(4)(a); [Customary International Humanitarian Law Rule 100](#).

<sup>58</sup> Geneva Convention III, arts. 99 and 105; Geneva Convention IV, arts. 72 and 74; Additional Protocol I, art. 75(4)(a) and (g); Additional Protocol II, art. 6(2)(a); [Customary International Humanitarian Law Rule 100](#).

his or her rights by an appropriately qualified person. The military personnel at the point of capture may not be able to provide those rights (e.g., owing to the security situation). However, they should be provided at the earliest appropriate opportunity, as failure to do so may affect the subsequent admissibility of any information obtained during this period.

Individuals arrested or detained on criminal charges also have the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power.<sup>59</sup> The length of time that a detainee can be held before transfer to a judicial authority, and which authority carries it out, will be determined by the applicable law. Particular reference is likely to be made to the law of the territorial State within which the detention occurs, but the law of the detaining State will be equally significant. Whatever timeline is established should take into account the remoteness of the location of capture, the security situation, and the availability of competent judicial authorities under the applicable law.

## V. Military practice

Military forces are commonly deployed to a conflict, immediate post-conflict or high-risk situation to provide stability and counter threats to peace and security. These two operational objectives, the capability of the forces deployed, and the operational situation on the ground must be clearly understood when assessing a possible role of the military in collecting, handling, preserving and sharing information that may be used as evidence.

Military personnel may find themselves in a situation in which they could assist in the collection of information that could be used as evidence in civilian criminal-justice proceedings, perhaps as part of the specific operational objective of a mission, because they are the first responders to a scene after a terrorist attack, or during the course of an operation or routine surveillance. The situation on the ground and the level of security are likely to be different in each scenario. This may affect the ability of military personnel to collect information for the purpose of civilian criminal proceedings or assist other authorities in that task.

In circumstances of a deliberately planned operation against a specific target, if appropriate and feasible, the military should consider including personnel trained in the collection of information that might be used in legal proceedings<sup>60</sup> to ensure that the collection of evidence is conducted under controlled circumstances and that the evidence is processed in a manner that is in accordance with respect for the chain of custody, due process, and the rights of all those involved. A key aspect of the preparation of military personnel engaged in counter-terrorism operations can be the development of appropriate orders, instructions and SOPs that anticipate the evidence-collection role.

In some States, the military has already gained considerable experience in performing a range of tasks (e.g., securing the crime scene, collecting physical evidence, or making arrests) that could benefit law enforcement. Military forces provided assistance in this regard in Iraq and Afghanistan, within the framework of Operation Enduring Freedom and the operations of the

<sup>59</sup> In States where the national legal framework allows for the granting of conditional amnesty to voluntary defectors, these individuals might be transferred from detention to rehabilitation centres based on risk assessments, conducted by national security entities, which take into account past crimes and threat levels.

<sup>60</sup> Such as securing and investigating a site; seizing and recording evidence; conducting forensic examinations; or questioning witnesses, victims or suspects.




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

Some States have established in their military forces dedicated branches with a law-enforcement capability. Others have established military police personnel or a gendarmerie force. These various branches could be tasked with investigating crimes committed by their own forces and/or with specialist capabilities (e.g., forensic investigations). There are also States that have seconded civil investigatory authorities' personnel to the military during an operation.

#### ***24. Respecting the chain of custody throughout different circumstances***

The quality and nature of the information that can be collected by the military can differ, depending on the mandate of the military operation and on the circumstances of the location of the operation. For example, under relatively controlled circumstances, military personnel performing a law-enforcement function or having such skills may collect information in accordance with good practices for the seizure, recording and processing of information. In many circumstances, the military nevertheless may not be able to meet all the established procedural requirements. For civilian criminal proceedings, chronological records of how the evidence was seized and handled (preservation of the chain of custody) is a key consideration for the



**Screening form**

States of the Lake Chad Basin are developing a screening form to collect and capture key information (e.g., circumstances of arrest or surrender, possession of weapon) at the initial point of contact between the authorities and individuals associated with Boko Haram. Because military personnel are frequently the initial point of contact, they are particularly well-placed to play a critical role in the collection of the information. Military personnel record the information on a simple, two-page form that should accompany the concerned individuals when they are handed over to law-enforcement or justice officials, who use it to screen the individuals and direct them to the appropriate treatment. Use of the form helps ensure that the information collected is standardized and increases the likelihood that key information will be included in subsequent stages of the criminal-justice process. This initiative was inspired by the experience of Niger, where the investigating unit in charge of terrorism cases designed a similar form (*Fiche de Mise à Disposition*) for the use of military units.

admissibility of the information as evidence. It is therefore advisable that States provide clear direction both to their military (when involved in such activities) and to the relevant criminal-justice practitioners, on what constitute reasonable requirements to preserve the chain of custody. Any record should at least include what information was seized, when, and by whom, who handled the information, and when it was transferred to law-enforcement authorities or a court. It may not be possible for military personnel to seize and record the information immediately at the site, owing to an insecure environment. In such circumstances, once the relevant personnel are in safety, they should try to follow the documenting procedures to ensure that the chain of custody remains as intact as possible. Any breaks in the chain of continuity would also need to be explained.

Hence, during the preparatory phase of missions and specific operations, military personnel should assess how the chain of custody will be respected during the collection, handling, preservation and sharing of information, taking into consideration the expected circumstances, and consider including the relevant procedures in SOPs. This should ideally be done in close cooperation with law-enforcement actors, where possible, particularly where there are no specialized personnel with a law-enforcement function in the unit (*see also Guideline 8*). Military personnel can play various

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 suspects' statements. In other States, specialized military personnel (e.g., combat engineers or intelligence personnel) may carry out forensic functions, such as IED analysis or document analysis, and document the results. When personnel with law-enforcement skills are not available on site, it is recommended that military personnel who are on site seize and record the information (if possible, taking a photograph of the scene of terrorist attacks, accused persons or items) and transmit the information as soon as practicable to the civilian criminal-justice authorities. To promote this practice, States should consider awareness-raising measures and establish clear mechanisms for cooperation between the military and law-enforcement actors.

### *25. Developing evidence kits and checklists*

A good practice applied by some States is to supply military forces with small evidence kits (should the military be relied upon to collect evidence as described above) to facilitate the processing of evidence, aide-memoires, and checklists specifying how to perform these tasks in a manner that complies with the relevant legal requirements, particularly in relation to the chain of custody and right to a fair trial.

### *26. Skills training*

States are encouraged to provide appropriate skills training to military personnel who might, in accordance with their mandate, collect, handle, preserve or share information that could be later used as evidence in civilian criminal-justice proceedings, including interviewing suspects, victims and witnesses. Even for States that have established special units with a law-enforcement function, such as military police or gendarmerie, there are risks that those personnel might not be available at the scene of an IED strike or other situation where potential evidence is to be collected. Military personnel who do not have the skills or mandate for the collection, handling, preservation and sharing of information may therefore also need training to properly secure information in such situations in order, in particular, to ensure that the evidential value of the relevant information is not contaminated. Such training may include instruction on forensic examination, as well as on fair-trial principles and other obligations set forth in IHRL and IHL, as applicable (e.g., right to a fair trial and the proper handling of detainees) and the maintenance of the chain of custody. Such training may also focus on the specific legal requirements to be respected during the interviewing of individuals, as applicable.<sup>61</sup> It should also be sensitive to the special needs of vulnerable witnesses and victims, including children and women. In addition, steps should be taken to raise awareness of cultural issues that may apply in the area in which military forces operate, and possible solutions should be provided. A good practice is to consider using female soldiers to conduct interviews with female witnesses where it may be culturally inappropriate for females to come into contact with other males outside the family environment. Language barriers should also be addressed, including with respect to the use of an interpreter and ways to ensure that the interpreted information would be admissible as evidence. Where possible, criminal-justice actors, especially law-enforcement actors, should attend such training, together with the military

<sup>61</sup> See especially arts. 7 and 14 of the ICCPR, arts. 2, 10, 11 and 15 of the CAT, and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly resolution 43/173, annex).



*(see also Guideline 16).*

## ***27. Observing objective veracity***

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 does so with objective veracity. This pertains to both command and training, and as such, should be reflected by commanders in their conduct and clearly articulated in training and guidance provided to military personnel. The primary task of military personnel, in accordance with their mandate, is to fulfil their operational objectives. Those objectives will have primacy over prosecutorial objectives aimed at collecting information that can be used as both incriminating and exculpatory evidence in terrorist cases before national criminal courts (evidence that can thus help establish the guilt or innocence of individuals in terrorist cases). This requires that information be collected in a neutral and objective manner. Operational objectives might, however, make it particularly challenging for the military to meet such requirements. This may be the case, for instance, in a conflict situation in which military personnel might gather information for their own use (e.g., to protect their own lives) and the information might presume the guilt of the individuals whom they question. Such challenges to the neutral and objective gathering of information by the military may raise concerns regarding respect for the right to a fair trial of the suspect, including the right to be presumed innocent until proved guilty according to the law and the right not to be compelled to testify against himself or herself or to confess guilt. They may also raise concerns about the use of torture and other forms of ill-treatment to extract information and confessions. States are therefore advised to raise the military's awareness of these challenges and to enhance their ability to address them in accordance with applicable law, during skills training and, if possible, during operations that include a mandate for the collection of information for the purpose of submitting the information as evidence in court.



### **G5 Sahel Joint Force**

The strategic concept of operations of the G5 Sahel Joint Force (referred to in Security Council resolution 2359 (2017) and previously endorsed by the Peace and Security Council of the African Union) includes a police and civilian component. Under the conceptual framework for its structure and operation, the police component consists of a provost police unit, which is integrated into the military component of the Joint Force. All G5 Sahel States have provost brigades, which are military-police units of the National Gendarmerie. The brigades are responsible for policing within the Armed Forces, as well as for judicial policing (including criminal investigation). In the latter capacity, the brigades will be responsible for securing the crime scene, preserving and collecting evidence, conducting initial arrests, identifying witnesses, and ensuring the transfer of detainees and their detention in accordance with international standards. Detainees and collected evidence are transferred to the national specialized investigation units to facilitate the prosecution of terrorist offences before national courts.

## ***28. Issues to be considered by the military***

Where the military assists in the collection of information for possible use as evidence in civilian criminal-justice proceedings, the task will be affected by factors such as the governing legal framework; the operational situation; the degree to which prior planning has been carried out; the direction and instructions provided by the military chain-of-command; financial and technological factors; the types of military units deployed; where applicable, the degree to which civilian investigatory personnel have been made available and facilitated in the performance of their role; the logistical support provided to this task; and the level of training of the military personnel involved.

The involvement of military forces can differ from State to State. Some States may train and rely on a variety of military personnel: tactical level forces (e.g., special forces, frontline soldiers, guards at detention facilities), specialized personnel (e.g., intelligence, engineers) or task military

investigators (e.g., military police, gendarmerie)). In many cases, all such personnel may be involved in the collection of information that could be used as evidence in civilian criminal proceedings. In other instances, civilian law-enforcement officials or legal advisors may be integrated into the military operational structure to support military forces directed to perform evidence-collection. In other situations, States may choose to deploy specialized personnel on an as required, or ad hoc basis.

The following are some of the means that military forces either already have at their disposal, can develop, or can consider acquiring to perform an evidence-collection role during counter-terrorism operations:

- a. Use existing military police, gendarmerie and legal advisor capabilities;
- b. Train specialized military personnel in investigative and forensic techniques (e.g., military engineers, intelligence personnel);
- c. Acquire specialized equipment such as deployable forensic laboratories and biometric-detection equipment;
- d. Deploy civilian police, investigators, prosecutors or other experts and integrate them into the military force;
- e. Establish liaison with, and facilitate, remote prosecutorial assistance;
- f. Establish a communications platform, such as a hotline and/or app, to enable the military to obtain assistance from experts in evidence-collection;
- g. Establish a specialized, rapid-deployment civilian or military investigative team consisting of experts, investigators, forensic experts and prosecutors;

- 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.

## Annex 1: Target audience for each guideline

<b>Guideline</b>	<b>International policymakers</b>	<b>National policy-makers</b>	<b>Law-enforcement and criminal-justice authorities</b>	<b>International judicial / police organizations</b>	<b>Military</b>
<b>1. Evidence collection for criminal-justice purposes by the military should be considered as the exception</b>	*	*	*	*	*
<b>2. Observing the key principle of the rule of law</b>	*	*	*	*	*
<b>3. Respecting IHL and IHL</b>	*	*	*	*	*
<b>4. Promoting cooperation between criminal-justice actors and the military in the lawful collection of information that may be used as evidence</b>		*	*	*	*
<b>5. Introducing procedures to ensure the admissibility as evidence of information collected by the military, with appropriate safeguards</b>		*			
<b>6. Ensuring that there is a national legal framework allowing the military to assist in the collection of information that could be used in civilian criminal-justice proceedings</b>		*			*
<b>7. Developing policies, SOPs and other instructions</b>	*	*	*	*	*
<b>8. Promoting inter-agency communication, cooperation and coordination</b>		*	*	*	*

<b>9. Increasing usability and ensuring traceability of information obtained by the military</b>			*	*	*
<b>10. Sharing information multilaterally</b>	*	*	*	*	*
<b>11. Sharing information bilaterally</b>		*	*	*	*
<b>12. Legal safeguards for storing information in databases</b>		*	*	*	*
<b>13. Clarifying from the outset which State has jurisdiction, where appropriate</b>		*	*		*
<b>14. Consider concluding arrangements for operations with the consent of the troop-receiving State</b>		*			*
<b>15. De-conflicting competing jurisdiction and distribution systems, where appropriate</b>		*	*		*
<b>16. Raising civilian criminal-justice actors' awareness of the circumstances under which the military is operating</b>			*		*
<b>17. Developing evidence grids</b>			*	*	*
<b>18. Considering special circumstances when questioning victims and witnesses</b>			*		*
<b>19. Questioning terrorist suspects</b>			*		*
<b>20. Right to a fair trial and the availability of officers and witnesses to testify in court</b>			*	*	*
<b>21. Use of intelligence as evidence in court</b>		*	*		*

<b>22. Addressing reliability and admissibility issues relating to Military Evidence</b>			*		
<b>23. Ensuring arrest and detention in accordance with the rule of law</b>		*	*		*
<b>24. Respecting the chain of custody throughout different circumstances</b>			*		*
<b>25. Developing evidence kits and checklists</b>			*	*	*
<b>26. Skills training</b>			*		*
<b>27. Observing objective veracity</b>					*
<b>28. Issues to be considered by the military</b>	*	*	*	*	*

## Annex 2: Glossary of terms

- *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.
- *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.
- *Conflict, conflict-related situations*: this term includes both international and non-international armed conflicts under international law.
- *Criminal-justice actors*: in the context of the present Military Evidence Guidelines, this term refers to civilian law-enforcement officials, investigators, prosecutors and judges.
- *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.
- *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.
- *Evidence grids*: tables/schemes detailing the specific requirements for admissibility of evidence in different States.
- *High-risk situations*: situations of high insecurity, 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-risk situations might include, inter alia, a State or region in which a state of emergency applies or a State or region that is plagued by, or under the control of, a terrorist organization. The terms *high-risk situations*, *exceptional situations / cases / circumstances*, *particular situations* and *insecure situations / environment* are used interchangeably in the present Military Evidence Guidelines.
- *Information*: information can entail, among other things, physical objects (e.g., hard copy documents, cell phones, weapons or explosive devices), statements from witnesses and suspects, electronic and forensic information, and intelligence. Information collection is followed by identification, handling, preservation and sharing of the information with relevant stakeholders. Information used in legal proceedings is called evidence.
- *Intelligence*: the product resulting from the collection, evaluation, analysis, integration, and interpretation of all available information that is immediately or potentially significant for planning purposes.
- *Mandates*: include “*international legal mandate*” which is international legal ground permitting military forces from one State to lawfully operate on the territory of another; and “*national legal mandate*”, which is a national legal authorization for the military to assist in law-enforcement tasks. The present Military Evidence Guidelines refer to the latter.
- *Military*: armed forces of a State, as understood under international law.
- *Military operation*: organized activities carried out by the military.
- *National criminal court*: in the context of the present Military Evidence Guidelines, this term refers to a civilian court, established by law, competent, independent, impartial, and



with jurisdiction to try criminal offences. In the present Military Evidence Guidelines, the term *court* refers to a national criminal court.

- *Post-conflict situation*: situation in which open warfare has come to an end and which may remain tense and unstable for a considerable time.
- *Powers*: the mandate to carry out activities.
- *Terrorism (crime/offence)*: in the context of the present Military Evidence Guidelines, this term refers to crimes as described in the relevant international counter-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).
- *Troop-contributing/troop-sending States*: States that provide the troops who operate on the territory of the troop-receiving State.
- *Troop-receiving/Host States*: States receiving the troops that will operate on their territory.