



EUROJUST

Eurojust Memorandum on Battlefield Evidence

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Criminal justice across borders



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Executive summary

The 2020 *Eurojust Memorandum on Battlefield Evidence* reports on the present possibilities and experiences of using battlefield evidence in criminal proceedings in the EU Member States and non-EU countries. This report was produced following a recommendation from the EU Counter-Terrorism Coordinator to update the first edition of the *Eurojust Memorandum on Battlefield Evidence*, which was published in June 2018. These reports are part of the European Union's efforts to strengthen information exchange in the field of counterterrorism, which include getting access to battlefield information and using it in investigations and prosecutions.

The report is based on replies to a questionnaire sent to national judicial authorities. It sets out the applicable legal framework and gives an overview of how battlefield information is obtained from military forces and other actors. The experiences of national authorities in using battlefield information as evidence are examined, as are the categories of battlefield evidence referred to by respondents. While the 2018 *Eurojust Memorandum on Battlefield Evidence* reported limited experiences of using battlefield evidence, the 2020 report shows that, during the past few years, several countries have used such evidence in their criminal proceedings against foreign terrorist fighters and other persons suspected of criminal offences during armed conflicts. The report also addresses challenges identified and ways to overcome them, as well as measures to strengthen information exchange.

Among the concluding remarks is an expression of Eurojust's continued engagement in this field. Eurojust will continue to facilitate exchanges of national experiences in terrorism and core international crimes cases and is committed to continued collaboration with Europol on these topics. Eurojust will also seek to continue its cooperation with the US authorities on battlefield information in a joint effort to enhance the use of such information as evidence in criminal proceedings.

List of abbreviations

CIJA	Commission for International Justice and Accountability
COI	Independent International Commission of Inquiry on the Syrian Arab Republic
EU	European Union
EU CTC	European Union Counter-Terrorism Coordinator
FBI	Federal Bureau of Investigation (US)
FTF	foreign terrorist fighter
ICC	International Criminal Court
IED	improvised explosive device
IIIM	International, Impartial and Independent Mechanism on Syria
ISIL (Da'esh)	Islamic State of Iraq and the Levant
MLA	mutual legal assistance
NGO	non-governmental organisation
NMEC	National Media Exploitation Center (US)
OGP	Operation Gallant Phoenix
SDF	Syrian Democratic Forces
TEDAC	Terrorist Explosive Device Analytical Center (US)
UN	United Nations
Unicef	United Nations Children's Fund
Unitad	United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL
US	United States of America
WEAT	Weapons and Explosives Analytical Tool

1. Introduction

Managing the threat posed by foreign terrorist fighters (FTFs) remains a priority for the EU. In the effort to strengthen information exchange in the field of counterterrorism, the importance of getting access to and using battlefield information in investigations and prosecutions is acknowledged at EU level ⁽¹⁾. In February 2019, the European Union Counter-Terrorism Coordinator (EU CTC) identified possible next steps to strengthen the use of battlefield information by law enforcement, by the judiciary and at the borders, and made a number of recommendations. Among these was an invitation to Eurojust to update the 2018 *Eurojust Memorandum on Battlefield Evidence* (the 2018 Eurojust Memorandum) ⁽²⁾. In addition to this recommendation, the EU CTC, at the High-Level Workshop on Battlefield Information of 10 July 2019, stated that Eurojust was best placed to collect examples of cases in which battlefield information has been used in civilian courts.

In response to this continued need to enhance the use of battlefield information, the 2020 *Eurojust Memorandum on Battlefield Evidence* (the 2020 Eurojust Memorandum) reports on the present possibilities and experiences of using this kind of evidence in criminal proceedings in the EU Member States and non-EU countries ⁽³⁾. While the 2018 Eurojust Memorandum reported limited experiences of using battlefield evidence, the 2020 report shows that, during the past few years, several countries have used such evidence in their criminal proceedings against FTFs and other persons suspected of criminal offences during armed conflicts. In some cases, courts have already rendered judgments, both at first instance and on appeal. Recently, courts have rendered convictions against FTFs for both terrorism and, to cover the acts of the FTFs in the conflict more broadly, core international crimes at least partly on the basis of battlefield evidence. Evidence from the battlefield, including photos depicting crimes committed against civilians or soldiers *hors de combat*, may prove particularly important in establishing such offences.

This initiative for a renewed mapping of experiences of using battlefield evidence in criminal proceedings fits into a broader effort to make better use of information obtained in conflict zones. For instance, in 2017, the United Nations Security Council called upon Member States, as well as the United Nations Office on Drugs and Crime and other UN entities ‘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, in accordance with domestic law and the obligations Member States have undertaken under international law, including information obtained from the internet, or in conflict zones, in order to ensure foreign terrorist fighters who have committed crimes, including those returning and relocating to and from the conflict zone, may be prosecuted’ ⁽⁴⁾.

Following this call, the United Nations Security Council Counter-Terrorism Committee Executive Directorate, in December 2019, launched *Guidelines to facilitate the use and admissibility as*

⁽¹⁾ Council of the European Union, Council doc. 7740/20, ‘EU threat assessment in the field of counter-terrorism: recommendations’, 6 May 2020.

⁽²⁾ The 2018 Eurojust Memorandum followed a similar call for measures in Council of the European Union, Council doc. 10880/17 (limited), ‘Strengthening military, law enforcement and judicial information exchange in counter-terrorism’, 11 July 2017, and Council of the European Union, ‘Strengthening military, law enforcement and judicial information exchange in counter-terrorism’, Council doc. 12347/17 (EU restricted), 19 September 2017.

⁽³⁾ The non-EU countries represented at Eurojust through a liaison prosecutor.

⁽⁴⁾ United Nations Security Council, Resolution 2396 (2017) adopted by the Security Council at its 8148th meeting, on 21 December 2017 (S/RES/2396 (2017)).

evidence in national criminal courts of information collected, handled, preserved and shared by the military to prosecute terrorist offences ⁽⁵⁾.

The Council of Europe is also committed to improving use of this information and has established a Working Group on the Gathering of Evidence from Conflict Zones for the Purpose of Criminal Prosecutions, as part of its counterterrorism strategy (2018–2022) ⁽⁶⁾. The aim of the Council of Europe is to draw up a legal document providing guidance on how to gather battlefield evidence and present it in court during criminal proceedings in accordance with the principle of the rule of law. Eurojust acts as an observer to this initiative.

The US authorities have gained a lot of experience in collecting battlefield information and making it available to international partners. To assist states in their efforts to address some of the challenges in requesting and using battlefield information, the US authorities have issued *Non-binding guiding principles on use of battlefield evidence in civilian criminal proceedings* ⁽⁷⁾. As part of their engagement in this matter, the US authorities have sought to increase awareness and use of battlefield information in EU Member States and non-EU countries, in partnership with Eurojust. The common efforts continue through an initiative to enhance battlefield information searches. This initiative takes a proactive approach, with practitioners invited to provide input on which categories of battlefield information, such as travel records and photos of killings, their cases could profit from.

This report contributes to these and other ongoing initiatives by setting out the applicable legal framework and by giving an overview of how battlefield information is obtained from military forces and other actors. The experiences of national authorities in using battlefield information as evidence are examined, as are the categories of battlefield evidence referred to by respondents to a questionnaire sent to national judicial authorities. The report also addresses challenges identified and ways to overcome them, as well as measures to strengthen information exchange. Some concluding remarks are made at the end of the report.

⁽⁵⁾ https://www.un.org/sc/ctc/wp-content/uploads/2020/01/Battlefield_Evidence_Final.pdf

⁽⁶⁾ https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808afc96

⁽⁷⁾ <https://theijj.org/wp-content/uploads/Non-Binding-Guiding-Principles-on-Use-of-Battlefield-Evidence-EN.pdf>

2. Methodology and sources

The first *Eurojust Memorandum on Battlefield Evidence*, published as a Eurojust LIMITED document in June 2018, was drawn up on the basis of replies to a questionnaire sent to the Eurojust National Correspondents for Terrorism Matters and the contact points for the Genocide Network ⁽⁸⁾. Following the renewed recommendation of the EU CTC in 2019, Eurojust addressed a new questionnaire to the EU Member States, non-EU countries represented by a liaison prosecutor at Eurojust and the Genocide Network in December 2019. A total of 27 responses were received ⁽⁹⁾. Responses to the questionnaire were, in some states, jointly prepared by the national correspondent for terrorism matters and the contact points for the Genocide Network.

The analysis in this report is based on the responses received from national judicial authorities and does not represent a general Eurojust approach to the matter. As regards the analysis of responses, some additional sources were used for the purpose of clarifying a specific matter referred to by the respondent. For the introduction to the report, various documents of the Council of the EU were used, as well as documents produced by other international organisations. To offer additional insights into the case examples provided by the respondents, some documents retrieved from open sources were used.

There are no generally applicable definitions of the terms ‘battlefield evidence’ and ‘battlefield information’. When, for instance, the US authorities refer to materials collected by military forces in a combat zone, they refer to these as ‘captured enemy material’ or ‘collected exploitable material’, or CEM for short ⁽¹⁰⁾. Such materials may include both electronic data and physical items retrieved by military forces. Materials collected by military forces and used in evidence have also been referred to as ‘military evidence’ ⁽¹¹⁾. For the purposes of this report, the term ‘battlefield evidence’ and the more general term ‘battlefield information’ are used for materials that originate from a conflict area, including materials collected by other actors, such as non-governmental organisations (NGOs), UN entities, the International Criminal Court (ICC) and other organisations. The terms ‘battlefield evidence’ and ‘battlefield information’ may refer to both personal and non-personal data.

‘Battlefield’ is here understood as referring to any territory affected by armed conflicts, whether international or non-international. While the threat caused by FTFs or crimes committed by FTFs are often linked to the armed conflicts in Syria and Iraq, the concept of a battlefield is not limited to a specific conflict area. Respondents have indicated that information and documents collected by military forces in other conflicts, such as in Rwanda or Mali, have also been transmitted to judicial authorities for use in criminal proceedings. Accordingly, nothing in this report should be understood as defining or delineating the temporal or geographical scope of this term.

⁽⁸⁾ A total of 25 states replied: BE, BG, CZ, DK, DE, EE, EL, ES, FR, HR, IT, CY, LV, LT, LU, HU, NL, AT, PL, PT, SI, SK, FI, SE and CH.

⁽⁹⁾ BE, BG, CZ, DK, DE, EE, EL, ES, FR, IT, CY, LV, LT, LU, HU, NL, AT, PT, RO, SI, SK, FI, SE and UK, as well as ME, NO and CH.

⁽¹⁰⁾ US Departments of State, Justice and Defense, *Non-binding guiding principles on use of battlefield evidence in civilian criminal proceedings* (available at <https://theijj.org/wp-content/uploads/Non-Binding-Guiding-Principles-on-Use-of-Battlefield-Evidence-EN.pdf>).

⁽¹¹⁾ B. van Ginkel, ‘Prosecuting foreign terrorist fighters: what role for the military?’, International Centre for Counter-Terrorism Policy Brief, May 2016 (available at <https://www.icct.nl/wp-content/uploads/2016/05/ICCT-VanGinkel-Prosecuting-Foreign-Terrorist-Fighters-May2016-2.pdf>).

3. Battlefield information as evidence

3.1. Legal framework

To map the possibilities of effectively using battlefield information as evidence in criminal proceedings, respondents to the 2019 Eurojust questionnaire were requested to state whether or not the applicable legal framework allows the use of information collected by military forces as evidence in criminal proceedings. In the 2018 Eurojust Memorandum, a similar question resulted in three broad and overlapping categories of replies. The respondents indicated that their national legislation (1) did not include any specific provision on the possibility of using such information, (2) allowed the use of certain types of evidence collected by the military or (3) did not set specific restrictions on the use of evidence collected by the military, as long as the evidence was admissible according to national law.

For the purpose of the 2020 Eurojust Memorandum, all 27 respondents set out the current state of their legislation on the use of battlefield evidence. There was a certain degree of diversity among the responses when it came to how the use of battlefield evidence was covered by national legislation. However, none of the respondents indicated that the use of battlefield evidence was explicitly prohibited by law. One respondent noted that all evidence must be collected by law enforcement authorities, not specifying whether this would exclude information gathered by the military. Another respondent stated that, while some types of evidence are prohibited, battlefield evidence is not among these. In a large number of countries, the legal framework allows a free production of evidence and a free assessment of the evidence by the court. Some respondents phrased this as there being no specific restrictions on the sources of evidence.

Several respondents referred to the **general conditions that must be fulfilled** for any information to be admitted as evidence. Information gathering must be done with **respect for the basic principles of criminal procedure and the legal system** in question. Respondents referred to conditions related to **human rights and a fair trial**, most importantly the inadmissibility of evidence obtained through torture. More specifically, one respondent noted that it was not permissible to use any methods aiming to influence the capacity for self-determination of a person involved in the proceedings or to alter his or her ability to remember or evaluate the facts, even with the consent of the person concerned. Another respondent pointed out that evidence must not be presented in a way that limits the defendant's **ability to challenge the evidence or present counter-evidence**.

Some countries indicated that, if these general conditions were fulfilled, battlefield evidence theoretically would be **admissible, after being scrutinised and assessed by the court**. This response was provided by some countries that do not have specific experience of using this kind of information. One country that has such experience explicitly stated that battlefield evidence was admissible in court.

Many respondents put forward additional considerations that would influence if and how battlefield evidence could be used. An aspect that applies to all information used in evidence and is of particular importance when evidence is gathered on foreign territory is the **reliability of the evidence**. One respondent referred to the **chain of custody and continuity** as part of the assessment of whether or not evidence was reliable. Another country held that evidence, in

general, was admissible if the collection and processing of the information were in accordance with the law and properly documented. It was also held that the evidence must be presented in a way that allows the court to evaluate the significance and sustainability of the evidence in question. One country pointed out that if the information was collected in accordance with the legislation of the foreign country in question this could constitute a sufficient guarantee of its suitability for use as evidence in criminal proceedings. Another respondent held that, because of its origin and the uncertain conditions in which the information had been collected, particular attention would need to be paid to compliance with the general principles imposed by national and international legal provisions, to **protect the individuals involved from arbitrariness**.

Several respondents provided additional insights into how the legislation in their countries deals with the fact that, often, battlefield evidence is not gathered by law enforcement authorities. For instance, in one country it is possible to use information transmitted by the armed forces, or by any other player in the conflict, to the judicial police forces. Some respondents noted that the fact that it was not the law enforcement authorities that had found or requested a piece of evidence was not a ground for rejecting such evidence. One of the respondents added that the military were not permitted to take over any police or judicial competence and that all legal safeguards had to be respected. It was also noted that, as evidence has no pre-established probative value, there might therefore not be any barrier to the use of information collected by the military. The **evidentiary value attributed to the evidence would be assessed by the court**.

Examples of information that could be used in evidence were given by some, such as a written document collected by the military, or a report or document drawn up by a member of the military forces. With regard to the latter example, the respondent stated that such a report could be used as documentary evidence and, if considered necessary, the author of the document might be heard as a witness and, subsequently, any **physical evidence revealed by the military might be seized**.

One respondent pointed out that **military authorities are not competent to investigate or prosecute** persons accused of terrorist offences or war crimes and, therefore, **information obtained by military authorities can only form the basis for investigations** by those national authorities that are competent to investigate such crimes. In some countries, the legal framework allows the use of information collected by military forces in certain situations, which are not limited to terrorist offences. In such situations, the military falls under provisions according to which civil servants/public legal persons, through their representatives, are required to document the commission of a crime and to notify the prosecution about it. One respondent noted that this requirement applied whenever civil servants/public legal persons have control competences in a specific field, or whenever the crime is committed in relation to their work, by the staff they employ or control, or by legal persons belonging to the national security or public order domain. Such persons must take any necessary measure to preserve the crime scene, to collect and preserve evidence, to catch the perpetrator, to search persons or vehicles and to present the evidence, without delay, to the prosecuting body. In addition, ship or aircraft **captains are entitled to conduct searches, to seize evidence and to catch in the act persons who commit offences on board**. However, measures that restrict the freedom of a person for more than a few hours must be taken by magistrates, while observing specific procedures, rights and guarantees.

Other respondents focused more on the transmission of the information than on the military as the collector of it. In this regard, one respondent indicated that, while its legal system did not have a hierarchical system of evidence, it had been held that **information provided by intelligence services did not have the same evidentiary value as other evidence**. Such information creates an opportunity to obtain certain types of information, in addition to information provided through testimonies, through hearings and by the police. It **can serve as a basis for initiating a criminal investigation** but is not a sufficient basis for prosecution. In another country, the evidentiary value that may be attributed to the evidence will depend on its origin, on whether or not the defence will be able to contest the evidence and also on whether it was transmitted as intelligence or through a mutual legal assistance (MLA) procedure.

One respondent reported that most information collected by military forces in conflict areas was held by specialised services working in conjunction with foreign partners. To be brought into evidence in criminal proceedings, such **intelligence must be declassified** and needs to be **corroborated by other pieces of evidence**. This judicialisation of intelligence is already practised in this country, and cooperation mechanisms between the specialised services and the judicial police services, under the supervision of the national anti-terrorism prosecutor's office, have been set up. Information that is declassified is transmitted to the public prosecutor. Often, this transmission takes the form of a report summarising the information gathered during an intelligence mission and establishing the basis for the opening of a judicial inquiry, which must subsequently corroborate its content. In practice, this transmission should be made only when the specialised services concerned are able to guarantee the secrecy of the sources or even the techniques used to gather the information in question. While no legal difficulty has been identified in transmitting and admitting evidence that has been collected by the military in a conflict area, such transmission in legal proceedings is very rare.

Some respondents stated that any **transmission of evidence** in the possession of another state must be done **on the basis of the applicable MLA procedures**. As part of the applicable legal framework that may help in obtaining of battlefield evidence in the possession of another state, reference was made to Directive 2014/41/EU of the European Parliament and the Council of 3 April 2014 regarding the **European Investigation Order** in criminal matters ⁽¹²⁾.

⁽¹²⁾ Official Journal of the European Union, L 130 of 1 May 2014, p. 1–36.

3.2. Obtaining and using battlefield evidence

3.2.1. Obtaining information collected by military forces

In conflict areas, military forces can find themselves in a position where they are the first to collect information and materials that later may be used in evidence in criminal proceedings ⁽¹³⁾. To get a better insight into the extent to which and how battlefield information has been transmitted to and used by EU Member States and non-EU countries, respondents were requested to set out whether or not their judicial authorities had received battlefield information that had been collected either by national or by foreign regular military forces.

Seven respondents, including one non-EU country, confirmed that their judicial authorities had received information collected by foreign regular military forces. With regard to two other countries in which battlefield information had been used, the respondents were not in a position to provide a substantial answer, either because of a lack of information easily available in the relevant database used by the judicial authorities or because of secrecy regulations. One respondent noted that **information had been received from both national and foreign military forces**, more specifically the US authorities. Five respondents provided additional insights into the transmission of the information and some of them pointed to the role of the intelligence services in that transmission. In these countries, the judicial authorities received the information indirectly, through either the military or civil intelligence services, or both.

One of these respondents explained that battlefield information had been received from foreign regular military forces, mainly collected by the international coalition against the Islamic State of Iraq and the Levant (ISIL (Da'esh)). This information is usually shared with this Member State on the initiative of the international coalition. In this country, battlefield information is transmitted to the judicial authorities by the national intelligence services. The information is channelled through the military intelligence service and the civil intelligence service to the judicial authorities. Both services are designated as technical experts in all terrorism investigations and provide analysis and contextualisation of information that consists of what is known as raw material. Only information that has been declassified and put into context can be transmitted to the judicial authorities. Some information has been shared twice, through parallel channels, including through Interpol. The national authorities may also receive battlefield information following a request to a foreign authority. In cases in which there is a lack of evidence concerning the activities of an FTF, the law enforcement and judicial authorities may **check if battlefield information is available through the Federal Bureau of Investigation (FBI) legal attaché** or the **national intelligence services**.

One respondent explained that an information network existed that on several occasions had channelled information from foreign armed forces to the judicial authorities of this Member State. Such information had been transmitted in relation to the presence of FTFs in Syria who either were nationals of the Member State or had travelled to the conflict area from the Member State.

According to one respondent, information gathered by the armed forces in conflict areas constituted an important part of the evidence used in criminal proceedings in this crime area.

⁽¹³⁾ B. van Ginkel, 'Prosecuting foreign terrorist fighters: what role for the military?', International Centre for Counter-Terrorism Policy Brief, May 2016 (available at <https://www.icct.nl/wp-content/uploads/2016/05/ICCT-VanGinkel-Prosecuting-Foreign-Terrorist-Fighters-May2016-2.pdf>), p. 10.

This Member State has seen **cooperation with the US authorities** develop in this area, the aim being to feed the analysis reports of the intelligence services with information gathered by the US authorities. In addition to **transmission between intelligence services, sharing of this type of information is also done through police cooperation**. This concerns information held by analysis centres in the United States, such as the Terrorist Explosive Device Analytical Center (TEDAC) and the National Media Exploitation Center (NMEC), as well as Operation Gallant Phoenix (OGP), a multinational programme led by US Special Forces, which was set up to exploit and share intelligence on FTFs in the Iraq/Syria area ⁽¹⁴⁾. In this context, the **FBI legal attachés play a key role, as they centralise all requests for cooperation** and then seek the assistance of the relevant US services.

One Member State referred to cooperation with a UN peacekeeping mission and the military forces of another Member State, present in the relevant conflict area, to safeguard and obtain battlefield evidence.

3.2.2. Obtaining information collected by other actors

In recent conflicts, a variety of actors has been present in the conflict areas, including NGOs and UN peacekeeping missions. While the purposes of their presence in the area vary, these actors have gathered a large amount of information that may be used in criminal proceedings ⁽¹⁵⁾.

In reply to the question of if their judicial authorities have received battlefield information collected by actors other than regular military forces, nine respondents replied that they had. While one respondent gave a general affirmative answer to the question, several respondents either indicated which category of actor had provided the information or gave more detailed information on the actors with which their judicial authorities had cooperated.

The majority of the respondents referred to NGOs as their source of information from conflict zones. Some respondents did not specify which NGO had provided the information. One of these indicated that the **judicial authorities had made use of NGO reports**, not specifying whether these reports were obtained from the NGOs or were publicly available documents. The other explained that the **material received from NGOs related to core international crimes** and concerned the defendant in the case. The judicial authorities in a country that has not yet used information from NGOs is working on establishing cooperation with some NGOs in conflict areas. If an opportunity arises, the judicial authorities in this country will seriously consider the possibility of using such materials.

The NGOs referred to by some respondents were the Commission for International Justice and Accountability (CIJA) and Yazda, a global Yazidi organisation. One respondent indicated that the national anti-terrorist prosecutor's office **may receive evidence submitted by NGOs on their**

⁽¹⁴⁾ For a brief description of TEDAC and NMEC, see US Departments of State, Justice and Defense, *Non-binding guiding principles on use of battlefield evidence in civilian criminal proceedings* (available at <https://theij.org/wp-content/uploads/Non-Binding-Guiding-Principles-on-Use-of-Battlefield-Evidence-EN.pdf>).

⁽¹⁵⁾ See, for instance, the recognition by war crimes prosecutors of the need to consider all sources of evidence collected in a conflict area, including materials gathered by UN entities and NGOs, in *Conclusions of the 27th meeting of the Network for Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes*, The Hague, 6 and 7 November 2019, para. 6 (available at http://eurojust.europa.eu/doclibrary/genocide-network/genocidenetworkmeetings/Conclusions%20of%20the%2027th%20Meeting%20of%20the%20Genocide%20Network,%206-7%20November%202019/2019-11-Conclusions-27th-Genocide-Network-Meeting_EN.pdf).

own initiative but **may also request information from NGOs**, in particular by means of ‘requests for information’. In another country, the judicial authorities had requested and subsequently received documentation gathered by CIJA.

Another important group of actors mentioned by respondents are **UN entities and related organisations**. Some respondents referred to their cooperation with the International, Impartial and Independent Mechanism on Syria (IIIM) ⁽¹⁶⁾ or with the Independent International Commission of Inquiry on the Syrian Arab Republic ⁽¹⁷⁾. One respondent also referred to cooperation with Unicef and UN-related expert groups, and explained that the judicial authorities issued MLA requests to obtain evidence from these bodies. **The information transmitted is subsequently checked and corroborated.**

The same respondent also noted that at present there was no cooperation between the judicial authorities in this country and the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL (Unitad). This investigative team was established through Security Council resolution 2379 (2017) to support domestic efforts to hold ISIL (Da’esh) accountable by collecting, preserving and storing evidence in Iraq of acts that might amount to war crimes, crimes against humanity and genocide committed in Iraq. While this Member State, also a member of the Genocide Network, reported a lack of cooperation with Unitad until now, it should be noted here that at the 27th meeting of the Genocide Network on 6–7 November 2019 the members of the network expressed their appreciation for the opportunities for cooperation offered to them by Unitad ⁽¹⁸⁾.

The judicial authorities in one Member State **had received information from the ICC** in support of their case against two FTFs who were nationals of that Member State and had allegedly been involved in crimes committed on behalf of ISIL (Da’esh). This respondent pointed to the cooperation with the ICC while also noting that the information transmitted by the ICC had been based on open-source information.

With regard to the types of actors collecting information in conflict zones, one respondent reported on information transmitted to the judicial authorities by a television news channel. The evidence had been stolen from ISIL (Da’esh) by a defector and was provided to the news channel before being obtained by the police.

3.2.3. Use of battlefield evidence in judicial proceedings

Respondents were invited to explain if the information received from either military forces or other actors had been used as a lead or as a basis for investigation or prosecution, and whether or not court decisions had been rendered in such cases. To ensure that the mapping exercise covered all use of battlefield information, respondents were asked about both successful and unsuccessful use of such information, as a lead or as evidence.

⁽¹⁶⁾ Established on 21 December 2016 through UN General Assembly resolution 71/248.

⁽¹⁷⁾ Established on 22 August 2011 by the Human Rights Council through its resolution S-17/1.

⁽¹⁸⁾ Conclusions of the 27th meeting of the Network for Investigation and Prosecution of Genocide, Crimes against Humanity and War Crimes, The Hague, 6 and 7 November 2019, para. 7 (available at http://eurojust.europa.eu/doclibrary/genocide-network/genocidenetworkmeetings/Conclusions%20of%20the%2027th%20Meeting%20of%20the%20Genocide%20Network,%206-7%20November%202019/2019-11-Conclusions-27th-Genocide-Network-Meeting_EN.pdf).

Ten respondents reported the use of battlefield information in judicial proceedings. Several respondents confirmed that battlefield evidence had been successfully used in criminal proceedings and provided judgments or case examples.

Some respondents confirmed that battlefield information had been used in evidence without providing further information on whether or not a decision had been rendered. In one of these countries, the **information was used to determine the existence of an armed conflict** and the modus operandi of courts set up by the Free Syrian Army. Another respondent referred to the use of battlefield information in at least two cases and mentioned that investigations had been conducted on the basis of this information, which may be understood as meaning that this information led to the initiation of investigations. These investigations were still ongoing. In another Member State, the **battlefield information was corroborated by other evidence**, including the results of telephone interceptions, confession statements made by the suspect during a hearing by video-conference and other statements. No judgment had yet been rendered in that case.

The case examples provided show that some cases in which **battlefield evidence has been used successfully have led to convictions**. In one country, in which several judgments relying on battlefield evidence have been rendered, there were no direct admissibility issues. However, the court wanted other material in support of that collected on the battlefield. While the supporting material was in the end minimal, it was sufficient for the court to make use of the material from the conflict zone. In another country, at least one case in which battlefield evidence was used led to a conviction. The judicial authorities had received information on the role and specialisation of the defendant in ISIL (Da'esh), as well as on the previous experience of the defendant in 'fighting jihad'. Other investigations are ongoing in this country and it is anticipated that battlefield evidence will be used. In one of these cases, a court issued a ruling on the admissibility of an ISIL (Da'esh) registration form.

In one Member State, information gathered in conflict areas by armed forces represents a major type of evidence used in criminal proceedings. This information may be of a general nature or very specific and linked to a particular situation. It is used, in particular, **to clarify the nature and level of participation of nationals of this Member State in the operation of terrorist organisations** they have joined, as well as to specify the criminal activity of the groups concerned. Cooperation with the US authorities has been developing in this area. More than 150 documents from conflict zones, mainly collected by the US authorities, have been included in case files. Of these documents, 150 concerned nationals of this Member State. The **process of judicialising the information** was first tested through three experimental cases in 2018, after which seven other cases successfully followed the same process.

Another Member State indicated that the judicial authorities had used battlefield evidence that had been **transmitted with authorisation for use in criminal proceedings**. Representatives of **NGOs and of foreign security authorities have also provided information as witnesses**. In one case, the authenticity of a letter used in evidence was established through the witness testimony of FBI agents. In another case, military reports concerning a specific attack were essential for corroborating statements made by the defendant.

In addition to these experiences, one respondent referred to the use of information collected in the context of an armed conflict **for the purpose of civil proceedings**. Civil suits concerning

violations of the human rights of the families of missing persons later identified as having been killed during an armed conflict were brought against the government. To establish the exact circumstances in which these people were killed and their bodies collected, the government made use of witness testimonies and documents drawn up mostly by military examiners after the armed conflict had ended. Some of these documents were classified. The information was admitted into evidence and was considered important to establish that it was not possible/easy to follow formal identification procedures under the circumstances.

In cross-border criminal cases, evidence from another state is **often transmitted in execution of an MLA request, to ensure its admissibility**. With regard to the use of battlefield information in court, some respondents referred explicitly to the need for an MLA request. One respondent specified that, depending on the information requested, a spontaneous transmission of information might be sufficient or an MLA request might have to be issued. Another respondent gave an example of a case in which battlefield evidence from international partners, including the US authorities, had been requested through an MLA procedure. The evidence was declassified for use and was available at trial. To ensure that certain items of battlefield evidence identified were safeguarded, the judicial authorities in another country had to issue several MLA requests, both to the UN peacekeeping mission present in the conflict area and to the authorities of another state, which also had a military presence in the area.

3.2.4. Categories of battlefield evidence

The replies to Eurojust's questionnaire show that national authorities have used a variety of battlefield information in support of their criminal proceedings. While some of the information used consisted of data or materials actually collected in the conflict zones, a significant part of the evidence was made up of reports and other documentation that corroborated other information or described a specific situation in the armed conflict.

Evidence collected in conflict areas

❖ *Biometric data*

The authorities in one Member State received evidence that consisted of a fingerprint of an FTF who was a national of that state. The fingerprint was found on an improvised explosive device (IED). In another country, a person was stopped at the airport under the applicable terrorism legislation. Fingerprints and a DNA sample were taken, which were shared with the FBI and matched to prints on an FBI database for unidentified latent fingerprints found on components of an IED recovered from Afghanistan in 2012.

❖ *Unexploded IEDs and components of exploded IEDs*

Two respondents mentioned IEDs and fingerprints found on them. One of these respondents referred to the huge numbers of unexploded IEDs and components of exploded IEDs from (attempted) attacks that had been recovered by the US authorities, in particular in Iraq in the period 2005–2007 but also in Afghanistan. In the past few years, the Member State in question had been alerted by Blue Notices, requested by the US government and circulated by Interpol, to matches with latent fingerprints found on these devices.

❖ *ISIL (Da'esh) registration forms*

Several respondents indicated that their judicial authorities had received and used ISIL (Da'esh) registration forms. One respondent noted that such a form had been used as one source among other pieces of evidence to prove the membership of the defendant in ISIL (Da'esh). Another respondent indicated that lists concerning the enlistment of FTFs in Syria had been used to prove participation in the activities of ISIL (Da'esh). Some more details on the content of such a form were given by one respondent. In the case in question, the form contained the personal details of an FTF, as well as specific information on the role of the FTF within ISIL (Da'esh). Furthermore, his previous experience of 'fighting jihad' in Libya was stated on the form.

❖ *Letter describing potential terrorist plots*

In one Member State, the judicial authorities had made use of an electronic letter from a senior Al-Qaeda member to the then leader of Al-Qaeda, which contained a description of a series of potential terrorist plots in Europe and elsewhere. The letter also referred to a suspect who was a national of the Member State in question. The letter had been seized during a raid carried out by US military forces and was transmitted by the US authorities.

Respondents also mentioned the following pieces of evidence used in court:

- ❖ mobile phone data,
- ❖ credit cards,
- ❖ a national administrative document for job seekers,
- ❖ a payroll roster,
- ❖ a list of patients in a hospital,
- ❖ a notebook,
- ❖ a wedding invitation,
- ❖ a contract of marriage,
- ❖ a will.

Reports and other documentation used in evidence

❖ *'Detainee summary packages' and military reports*

'Detainee summary packages' regarding FTFs incarcerated by the Syrian Democratic Forces have been used by the judicial authorities in one Member State. These packages were provided by the US authorities and some of them included information collected from conflict zones. The US authorities discovered the information during raids, received it from partners, obtained it by questioning arrested fighters or gathered it through other channels. These packages were transmitted with permission to use the information in criminal proceedings.

The same respondent also referred to military reports concerning a specific attack, received through cooperation with the US authorities. This information was essential for corroborating statements by the defendant.

Another respondent gave the example of reports drawn up by a military police brigade in Mali, which were used to complement a report provided by the national intelligence services.

❖ *FBI report*

The FBI provided the authorities in one country with a Weapons and Explosives Analytical Tool (WEAT) report, a computerised record setting out the history of weapons and explosives recovered and subjected to forensic examination. This report set out the details of each exhibit, the circumstances of their finding, the procedures that they had been subjected to, who they had been handled by and where they had been moved to. Efforts were made to trace and take statements from those involved in the recovery and seizure of the devices. Because of the passage of time, it was not possible to trace every individual involved. However, the WEAT report provided a record and an application was made to the court to admit it as evidence.

❖ *Summaries of statements*

On a few occasions, the judicial authorities in one Member State have used summaries of examinations conducted by the armed forces, following the arrest of individuals suspected of terrorist acts. For instance, in the context of a terrorism investigation, summaries of the statements made by the defendant during his detention by US forces in Afghanistan were transmitted to the judicial authorities of this Member State by the US authorities. The statements could not be transmitted in their entirety, owing to requirements on defence secrecy under US legislation. The summaries were included in the case file of the proceedings opened in the Member State.

❖ *Witness statements and situational reports*

The judicial authorities in one Member State have made use of witness statements and reports from NGOs to describe the situation in the armed conflict.

❖ *Open-source information*

One respondent stated that the judicial authorities had received information from the ICC that concerned two FTFs who were nationals of the Member State in question. The materials transmitted were based on open-source information.

3.3. Challenges and best practice

3.3.1. Identifying challenges and ways to overcome them

Over the past few years, the judicial authorities have become better acquainted with the possibilities of using battlefield evidence in criminal proceedings. Their experiences have allowed the authorities to identify the challenges that this type of evidence brings with it. Over time, lessons can be drawn from the use of battlefield evidence.

In general, obtaining and using evidence in cross-border cases can be more challenging than in domestic cases. In reply to the questionnaire, one respondent presented a non-exhaustive list of legal challenges that judicial authorities face in cross-border cases that involve battlefield evidence, including:

- ❖ obtaining evidence from the battlefield, given the ongoing conflict;
- ❖ requesting an MLA;
- ❖ taking witness statements;
- ❖ ensuring continuity/chain of custody;
- ❖ converting intelligence into evidence;
- ❖ establishing jurisdiction for offences;
- ❖ gaining knowledge of the conflict.

The respondent specified that the **challenges concerning MLA requests** are due to the lack of a functioning criminal justice system in Syria. Obtaining witness statements is problematic, as these have to be taken in accordance with international criminal law standards, to maximise the possibility of their being admissible in future legal proceedings. The witness in question should give informed consent to share the information, documentation and evidence in his or her possession with the court or tribunal. As regards the challenge of gaining an understanding of the conflict, this includes an understanding of the roles of various groups and individuals involved, and in particular the role of women.

Others referred to the same or related challenges, often concerning the **transformation of information into evidence in a timely manner**, ensuring its admissibility and weight. A country that started prosecuting FTFs *in absentia* at an early stage of the conflict and rendered the first convictions in 2015 did not receive the information sought in time for it to be used in evidence. In one case, the first instance judgment had been rendered before the relevant battlefield evidence was obtained. The conviction in this case was upheld on appeal; however, the **battlefield evidence could not be considered by the court of appeal, as it constituted a new element**. In another country with experience in ensuring that battlefield evidence can be used in court, the judicial authorities consider it **crucial to find out which information is reliable**. In their opinion, the best way is to analyse the organisation that provides the information and its methods of obtaining evidence. Another respondent gave an example of **the challenge of identifying the details of an incident** related to discovered IEDs. In this example, obtaining evidence of an individual's involvement in the incident would make it possible to bring charges

of (attempted) murder. While membership in a terrorist organisation is subject to a **statute of limitation** in this country, this is not the case for (attempted) murder.

One respondent anticipated serious **admissibility issues if the material from the battlefield contained statements by witnesses or defendants** and would be very reluctant to use this as evidence. As long as the **information consisted of seized or found materials**, such as notes, documents, telephones or laptops, **no serious admissibility issues** were expected. Furthermore, with regard to the admissibility of information provided by NGOs, this same distinction could be made between statements, on the one hand, and seized materials, on the other. With regard to witness statements, another respondent noted the **challenge of witness protection**. In the country in question, in the event of testimony taken by an NGO in the conflict area, the judicial authorities must, as part of their investigation, conduct or have conducted a new examination of the witness. In this context, the judicial authorities inform NGOs of two important conditions. First, the **consent of the witness to the transmission of his or her testimony to a judicial authority** is needed and, second, the witness needs to be informed of the protection regime from which he or she can benefit in that country in question. Such witness protection might consist of, inter alia, anonymity and in camera proceedings.

Some countries with experience in using battlefield evidence emphasised the challenges related to **classification, or over-classification**, of information originating from conflict zones. When it comes to information collected by the military, stringent secrecy rules may apply. According to one respondent, there is a tendency to over-classify battlefield information, as information about secret operations taking place, and/or details about the location and timing of such operations, can be a threat to military operations. In a judicial system based on written procedures, declassification of the information retrieved from the battlefield is an absolute necessity. To overcome this difficulty, **declassifying raw material or raw data is now a standard procedure**. Information that provides context for this raw material may be classified; however, declassification can be requested through the intelligence services, or the FBI legal attaché if the information was transmitted by the US authorities. **Providing context for raw material is considered very important**, as the evidentiary value of the information that at the beginning of the process is considered a lead will increase the more context can be provided for it. For this reason, the intelligence services in this country now provide more context for raw material from the beginning, rather than following a request from the judicial authorities.

Another respondent explained that a **methodology for declassification** had been put in place. After dialogue with the judicial authorities, the Ministry of Defence now takes the initiative to declassify information relevant to proceedings and draws up a note for each case file containing elements likely to be of interest to the judicial authorities. These notes are subsequently transmitted to the security services for the purpose of integration into the judicial process. The security service draws up reports on the basis of these notes, which describe the context in which the materials were discovered, and specifies the elements that are useful for getting to the truth of the matter.

3.3.2. Measures to strengthen information exchange

Respondents were requested to elaborate specifically on good practice that has been put in place to strengthen the exchange of battlefield evidence, both as regards the transmission of information by those who collected it, and among those national authorities that receive or process it, including security services and immigration authorities. In the 2018 Eurojust Memorandum, respondents referred to, for example, the integration of law enforcement representatives into military forces. This included special investigators and prosecutors embedded in military units and representatives of law enforcement authorities escorting military forces. Training of the armed forces in the collection of evidence was also considered a useful possibility. A dedicated national centre was mentioned as a means of improving communication between law enforcement and judicial authorities with the national military forces. Where cooperation with local authorities existed, informing these local authorities of the need for battlefield information was considered useful.

In 2020, some respondents gave examples of information exchange at international and national level, while others made general reference to existing internal and external cooperation. Several countries have obtained battlefield information from the US authorities and it was mentioned that cooperation on this matter has developed in recent years. In this regard, information exchange between OGP and the national military authorities was mentioned.

International level

To ensure that the information of most relevance to terrorism investigations is obtained, one country has a **law enforcement presence in conflict areas**, including in Iraq and Turkey. Counterterrorism police liaison officers have built, and continue to build, **operational relationships with their law enforcement counterparts and other authorities** including border protection and military forces, as these are expected to come into possession of information relevant to ongoing investigations. Moreover, law enforcement officers are embedded in the intelligence and information exchange facilities of the international coalition against ISIL (Da'esh), to work alongside national and foreign military partners to strengthen the handling and sharing of relevant information coming out of the battlefield. This country also continues to **deploy experienced prosecutors overseas to assist diplomatic missions**. Law enforcement liaison officers ensure that battlefield evidence collected by a third party meet the required standards for admissibility in the national judicial processes. In addition, work continues, internally and with international partners at multilateral and bilateral levels, to **standardise battlefield evidence collection processes** to better support the prosecution of individuals involved in terrorism and/or war crimes, wherever those crimes have been committed.

One respondent replied that there are no specific provisions on this issue. However, in this country there is generic best practice that imposes an obligation on the national authorities to **transmit potentially relevant information** to the judicial police forces of the country concerned, in particular **through Europol**. This allows for verification and analysis of the data, with the aim of making it usable in the context of a national investigation.

With regard to information exchange with other actors that collect information in conflict areas, a country with experience in using battlefield information is conducting **discussions with Unita**

and IIIM on how to establish good practice. In another country, the national prosecutor's office, which handles terrorism and core international crimes cases, has been working, and continues to work, towards **establishing exchange and bonds of trust with NGOs working in conflict areas** that have direct access to evidence. Important relations are therefore being developed through annual consultations, informal meetings, participation in thematic meetings, etc.

National level

While there may not always be a legal requirement to improve information exchange in this field at the national level, several countries have **established channels of communication between the law enforcement authorities and the judicial authorities**, as well as **between the law enforcement authorities and the military justice authorities and/or regular military forces**. One respondent mentioned that although there is no established practice when it comes to communication among law enforcement, judicial authorities and military forces, the prosecution service is entitled to request information from the national security service, if such information is necessary for carrying out the tasks of the prosecution service.

In another country with experience in the use of battlefield evidence in court, good practice had been established over the past 2 years to overcome difficulties in information exchange between military forces and law enforcement. A significant challenge used to be the risk of dispersion of information. This risk existed because intelligence services and the judicial/law enforcement services are separate services. As the main goal of foreign partners is to share information for the benefit of judicial proceedings, the same pieces of information were shared with different services, which caused dispersion of the information and duplication of work for the authorities. To resolve this issue, **one single procedure for sharing and exchanging information** was put in place. The military intelligence services now serve as the single point of entry, after which the information is transmitted to the civil intelligence service and, finally, to the federal judicial police and the office of the federal prosecutor.

Some respondents also referred to good practice related to counterterrorism measures in general. In one country, **regular meetings are held among competent ministries and other authorities on FTFs**, and focal points have been established within the competent authorities. In addition to holding regular meetings and joint training programmes on counterterrorism matters, one Member State has established a **cooperation group, which encompasses multiple national authorities**, for the purpose of countering terrorism.

4. Concluding remarks

- The experience of national authorities in obtaining and using battlefield evidence has increased over the past years. Courts in several Member States have rendered convictions in cases in which significant evidence originated from the battlefield.
- The use of battlefield evidence is not excluded under national law. Many respondents indicated that, to ensure admissibility, the general conditions for admissibility of evidence must be met, such as the right to a fair trial.
- Judicial authorities have received and used battlefield information transmitted by both national and foreign military forces, as well as by NGOs and UN entities. The evidence consisted of both electronic data and physical items, as well as situational reports and other documentation.
- While battlefield evidence has been obtained through spontaneous transmission, MLA procedures may be needed to ensure admissibility in some legal systems.
- With experience, solutions have been found to certain challenges in this field, including declassification of raw data as a standard procedure. Providing context for raw material is considered helpful by some, as is establishing a methodology for declassification of battlefield information.
- Challenges remain, including those related to obtaining battlefield evidence in a timely manner, (over-)classification of information, and battlefield evidence consisting of statements by witnesses or defendants.
- Eurojust will continue to monitor developments in this area by analysing Eurojust's casework and convictions of terrorist offences, including cases in which battlefield evidence was used.
- Eurojust also facilitates exchanges of national experiences both in terrorism and in core international crimes cases, including among national correspondents for terrorism matters and within the Genocide Network.
- Eurojust is committed to continuing collaboration with the European Counter Terrorism Centre at Europol and its Analysis Project on Core International Crimes, to enhance cooperation and coordination of Member States' efforts to identify, investigate, prosecute and sanction individuals, networks and groups involved in committing terrorist offences and/or core international crimes.
- Eurojust will also continue its cooperation with the US authorities on battlefield information, including as part of a joint effort to enhance searches of stored battlefield information and provide guidance on the categories of information that will be useful for criminal proceedings.



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