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COUNCIL OF EUROPE COMMITTEE ON COUNTER-TERRORISM (CDCT)

Draft

Recommendation CM/Rec (202XX)XX of the Committee of Ministers to member States on the use of information collected in conflict zones as evidence in criminal proceedings related to terrorist offences

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Recommendation CM/Rec(20XX)XX of the Committee of Ministers to member States on the use of information collected in conflict zones as evidence in criminal proceedings related to terrorist offences

*(Adopted by the Committee of Ministers on xx
at the xx meeting of the Ministers' Deputies)*

Preamble

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater union among its members;

Recognising that terrorism, in all its forms and manifestations, constitutes one of the most serious threats to international peace and security;

Recalling that States and their competent authorities have the primary role and responsibility in preventing and countering terrorism as well as to hold its citizens criminally responsible for acts of terrorism in accordance with the rule of law;

Considering that by adopting the Council of Europe Counter-Terrorism Strategy (2018-2022) on 4 July 2018 ([CM/Rec\(2018\)6](#)), the Committee of Ministers agreed on the need “to bring suspected terrorists to justice and guarantee that they answer for their crimes, thus, ensuring liability and fighting impunity, in full observance of the rule of law”;

Recognising that to efficiently and appropriately handle criminal prosecutions of terrorist offences it is of key importance that in conflict zones information that may be used as evidence in criminal proceedings related to terrorist offences is collected in accordance with the principle of the rule of law and with national laws and regulations;

Being aware that some member States, having carried out criminal proceedings against individuals accused of having committed terrorist offences in conflict zones, have already gained significant experience on how to efficiently gather information and use it as evidence to prosecute terrorist offences, and those responsible for the commission thereof, and that it is vital to share this experience throughout Europe;

Considering that in several cases information collected in conflict zones for the prosecution of terrorist offences has turned into crucial evidence to efficiently handle criminal prosecutions concerning offences other than terrorism;

Recognising that the investigation and prosecution of suspected terrorism offences often have a transnational character making co-operation among member States necessary;

Being aware that in the prevention and suppression of terrorism, member States may never act contrary to their obligations under international law, including international human rights law, international humanitarian law and international refugee law;

Bearing in mind the provisions of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, “the Convention”), especially Articles 2 (Right to life), 3 (Prohibition of torture), 5 (Right to liberty and security), 6 (Right to a fair trial), 8 (Right to respect for private and family life), and 13 (Right to an effective remedy) of the Convention;

Having regard to the following Council of Europe conventions, recommendations and guidelines of the Committee of Ministers to the member States:

- the European Convention on Mutual Assistance in Criminal Matters (ETS No. 030) of 20 April 1959 and its two Protocols of 17 March 1978 (ETS No. 099) and of 8 November 2001 (ETS No. 182);
- the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 16 May 2005 (CETS No.198);
- the Convention on the Prevention of Terrorism of 16 May 2005 (CETS No. 196) and its Additional Protocol of 22 October 2015 (CETS No. 217);
- the Convention on Offences relating to Cultural Property of 19 May 2017 (CETS No.221);
- Recommendation [CM/Rec\(2005\)9](#) on the protection of witnesses and collaborators of justice;
- Recommendation [CM/Rec\(2017\)6](#) on “special investigation techniques” in relation to serious crimes including acts of terrorism;
- Recommendation [CM/Rec\(2018\)6](#) of the Committee of Ministers to member States on terrorists acting alone.

Having regard to and taking into account the following UN Security Council resolutions:

- Resolution 1373 (2001) on threats to international peace and security caused by terrorist acts;
- Resolution 2178 (2014) on addressing the growing issue of foreign terrorist fighters;
- Resolution 2322 (2016) on international law enforcement and judicial cooperation in relation to threats to international peace and security caused by terrorist acts;
- Resolution 2396 (2017) on addressing the threat of foreign terrorist fighters;

Having regard to the work carried out by the ad hoc Working Group established by the Council of Europe Committee on Counter-Terrorism (CDCT) in order to draft a recommendation of the Committee of Ministers to member States providing guidelines to member States on how to collect information that may be used as evidence and presented it in court during a criminal proceeding related to terrorist offences in accordance with the principle of the rule of law;

Recommends that the governments of member States:

- i. be guided in their legislation, policies and practice by the rules contained in the appendix to this Recommendation;
- ii. ensure that this Recommendation and the accompanying Explanatory Memorandum are translated and disseminated as widely as possible among competent State authorities and more specifically among those involved in the process of collecting information in conflict zones that may be used as evidence in criminal proceedings related to terrorist offences in accordance with the principles of the rule of law;
- iii. further strengthen international co-operation and domestic co-ordination on the collecting of information from conflict zones that may be used as evidence for the purpose of criminal prosecution of terrorist and other offences to enhance the exchange of information and best practices.

Appendix to Recommendation CM/Rec(20XX)XX

Chapter I – Scope and definitions

1. The aim of this recommendation is to guide member States in the effective use of information collected in conflict zones as evidence in criminal proceedings related to terrorist offences, while respecting international law, in particular the right to a fair trial, and relevant national law.

2. For the purpose of this recommendation,

- “evidence” means all information that comply with the legal rules of evidence of member States as set out in their domestic criminal law and apply to judicial proceedings to prove or disprove the alleged crime;

- “information” means the raw, original form of evidence and refers to material or immaterial objects collected in a conflict zone;

- “conflict zone” means an area affected by armed conflict or an area in an immediate post-conflict or a high-risk situation, where terrorist-related offences have been perpetrated.

Chapter II – Safeguards

3. In collecting information from conflict zones that may be used as evidence in criminal proceedings related to terrorist offences, member States should act in accordance with the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, “the Convention”), as well as other relevant international human rights standards. All measures taken under this recommendation should be proportionate and in accordance with the rule of law. No measure should be applied in a way that is discriminatory as regards sex, race, colour, language, religion, political or other

opinion, national or social origin, association with a national minority, property, birth or other status.

4. Member States should apply the general requirements of fairness contained in Article 6 of the Convention to all criminal proceedings, irrespective of the type of offence at issue. National security considerations may, in certain circumstances, call for procedural restrictions to be imposed in cases involving highly sensitive information. Nevertheless, even where national security is at stake, member States must ensure that measures affecting fundamental human rights, such as the right to a fair trial, are proportionate, lawful and necessary to achieve their protective function.

5. In assessing the overall fairness of criminal proceedings in relation to the prosecution of terrorist offences, the exceptional circumstances under which the information has been collected in conflict zones should be taken into account. In any case, irrespective of the seriousness of the charges, information obtained in breach of Article 3 of the Convention renders it inadmissible as evidence, entailing a violation of Article 6.

Chapter III – Information collected by military personnel

6. As information collected by military personnel in conflict zones that may be used as evidence can be crucial to effective criminal proceedings related to terrorist offences, member States should take all necessary measures in order to make such information admissible as evidence under national criminal procedure laws and regulations. However, activities related to the collection of information from conflict zones by military personnel should by no means impair the effective performance of their primary tasks.

7. As necessary, competent national authorities should consider developing legal frameworks or other relevant measures to enable military personnel to share information collected in conflict zones (including those relating to a chain of custody) that may be used as evidence in criminal proceedings related to terrorist offences in compliance with the right to fair trial. Where relevant, member States should also consider the development or adoption of evidence kits and checklists as appropriate.

8. Member States should, in accordance with relevant international and domestic law, develop appropriate systems for the purpose of preserving information collected by military personnel. Such information should be stored for a length of time sufficient to ensure its potential use as evidence in criminal proceedings related to terrorist offences.

9. Member States are encouraged to put in place mechanisms and procedures for reviewing and downgrading, as appropriate, the classification of information collected by military personnel in conflict zones. In doing this, member States should consider that, while sources and methods often require classification, the information as such does not and that raw collected material and objects, as well as information, including location, date, time and circumstances of the collection, should remain unclassified whenever possible.

10. Member States should develop procedures for the protection of classified information collected in conflict zones and, as appropriate, for the declassification of such information to be used as evidence in criminal proceedings related to terrorist offences. To this end, member States should consider making use of mechanisms ensuring the mutual trust and cooperation between all competent authorities and services involved.

Chapter IV – Information collected by intelligence services

11. As information collected by intelligence services in conflict zones that may be used as evidence can be crucial to effective criminal proceedings related to terrorist offences, member States should take all necessary measures in order to make such information admissible as evidence under national criminal procedure laws and regulations. To this end, whenever possible, extensive recourse to classification of information collected by intelligence services in conflict zones should be avoided and, in any case, classification should be periodically reviewed.

12. Member States should put into place mechanisms and procedures to enable the appropriate integration of information collected by intelligence services as evidence in criminal proceedings related to terrorist offences. Any such mechanisms and procedures should comply with fair trial guarantees, guarantee the protection of sensitive sources and methods of information gathering, and be applied in accordance with domestic probative evidentiary rules and applicable international law.

13. In accordance with previous successful experiences, in order to have recourse to intelligence information in criminal proceedings, member States should consider making use of relevant legal documents, such as permits, certification documents and reports, drafted directly by the relevant intelligence service and submitted to the law enforcement authorities in order to be placed in the file of the proceedings in relation to a prosecution of terrorist offences.

14. If the information collected in conflict zones is not declassified spontaneously by the intelligence service retaining it, member States should enable judicial authorities or law enforcement agencies to have a right to make requests for its declassification if possible.

Chapter V – Information provided by other sources

15. Where appropriate member States should give due consideration to the important role that other sources can play in the process of obtaining information from conflict zones potentially to be used as evidence in criminal proceedings related to terrorist offences. Amongst the relevant stakeholders, member States are encouraged to develop or strengthen their co-operation, where possible, with non-governmental organisations, experts, media outlets and private companies and contractors in order to use the information that they may have.

16. Member States are also encouraged to consider the information that can be provided by victims of terrorist offences, as well as witnesses, collaborators of justice and defendants.

17. Member States should ensure that the information provided by other sources is assessed by the appropriate competent national authorities on a case-by-case basis and in accordance with the relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) and national law.

18. Member States should adopt appropriate measures to protect victims, witnesses and collaborators of justice against intimidation and retaliation. When formulating their internal legislation and reviewing their criminal policy and practice, member States should take into account the principles and measures appended to the Council of Europe Recommendation Rec(2005)9 of the Committee of Ministers to member States on the protection of witnesses and collaborators of justice.

Chapter VI – Chain of custody and risk of alteration

19. Member States are encouraged to develop and provide relevant stakeholders with clear policies and procedures on how to preserve the chain of custody, ensure traceability and preclude any risk of alteration of the information collected in conflict zones.

20. In the case of missing links in the chain of custody, if appropriate, member States are encouraged to take measures, legislative or otherwise, to ensure that it can be used as evidence through proper corroboration process, if necessary. In developing such measures, member States should consider engaging with the judiciary to notify it of the exceptional circumstances under which relevant stakeholders collect information in conflict zones and providing for the possibility to corroborate critical evidence through additional evidence.

Chapter VII – Use of information collected in conflict zones for the prosecution of offences other than terrorism

21. Where appropriate, member States are called upon to make full use of the information collected in conflict zones that may be used as evidence to prosecute suspected terrorists for offences other than terrorism.

22. In making the assessment of what is most efficient in terms of ensuring justice, member States should pay particular attention to the prosecution of acts prohibited under international humanitarian law.

Chapter VIII – Co-ordination within States

23. Member States should ensure, to the greatest extent possible, that relevant policies and mechanisms are in place for efficient co-ordination between competent State authorities for the purpose of sharing effectively the information collected in conflict zones during the investigative and prosecutorial phase.

24. Member States should ensure that national relevant stakeholders, in particular prosecutorial and judicial authorities, are promptly informed when information collected in conflict zones is available and useful in the framework of criminal proceedings related to terrorist offences. To this end, member States are encouraged to facilitate the exchange of information between competent State authorities, including by implementing or using as models existing mechanisms, such as steering committees, information platforms and inter-ministerial working groups.

25. While recognising that the collection of information in conflict zones for the purpose of being used as evidence in criminal proceedings related to terrorist offences is not a primary task for military personnel, member States should provide adequate training to officials involved in the process of collecting such information in order to improve its utility. When necessary, this training should raise awareness of relevant criminal legislation in connection with the admission and use of evidence in criminal proceedings, the value of criminal prosecution, human rights' safeguards and the impact on military operational aspects. Member States are encouraged to consider involving policymakers and practitioners with extensive knowledge in the field of gathering evidence in counter-terrorism cases.

26. In order to make effective use of information collected in conflict zones as evidence in criminal proceedings, member States should engage with law enforcement and judicial authorities, military services and intelligence services, as appropriate, to improve their understanding and knowledge of the unique nature of the evidence at stake and the exceptional environment in which relevant stakeholders operate in conflict zones. As appropriate, member States are invited to consider facilitating such collaboration by conducting joint training involving relevant State authorities.

Chapter IX - Co-operation between States and with international organisations

27. Member States should ensure that relevant legislation and mechanisms are in place to provide the largest possible measure of mutual legal assistance in criminal prosecutions of terrorist offences. Member States should increase efforts to enact, review and improve their existing arrangements for mutual legal assistance, in particular through the effective implementation of relevant international instruments and standards, notably those of the Council of Europe, including the European Convention on Mutual Assistance in Criminal Matters (ETS No. 030) and its two Protocols.

28. Member States should identify and develop, where necessary and appropriate, multilateral and bilateral agreements to enhance inter-State co-operation. In the absence of such agreements, member States are encouraged to co-operate according to applicable principles of international law, notably that of reciprocity.

29. Member States are encouraged to make better use of available international networks and data sharing systems enabling the exchange of information on information collected in conflict zones which may be useful as evidence in criminal proceedings related to terrorist offences.

30. Member States should ensure that co-ordination and co-operation mechanisms are equally efficient for sharing information collected in conflict zones for the purpose of being used as evidence in criminal proceedings related to offences other than terrorism.

31. On the basis of their best experiences, member States are encouraged to consider establishing, if necessary, a common set of guidelines on the effective use of information collected in conflict zones as evidence for the purpose of criminal prosecution of terrorist offences.

Chapter X – Review of the recommendation

32. This recommendation and its implementation shall be assessed regularly, and in the light of any significant developments in the relevant area and, if necessary, the recommendation should be reviewed and revised accordingly.