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Session II, Contribution of Dr. Bibi van Ginkel, ICCT/Clingendael

Thank you Mr/Madam Chair,

Your Excellencies, distinguished ladies and gentlemen,

It is a great pleasure for me to share some insights with you that flow from a research project that the International Centre for Counter-Terrorism ([ICCT](#)) in The Hague is involved in. As we are discussing today the problem of foreign terrorist fighters, and in particular the criminal law respond to the problem, there is one issue in particular that prosecutors are struggling with as they are preparing their cases for court, and that is how to secure evidence to pass the thresholds for criminal behaviour and ensure conviction. Obviously, the prosecution strategy might be to build the indictment on various criminal acts, such as recruitment, incitement, membership of a terrorist organisation, preparatory or supporting activities for terrorist acts, in addition to the terrorist acts in destination countries like Syria and Iraq themselves. And even though the former are not always as easy to prove, it is by far the biggest challenge to prove actual participation of the foreign terrorist fighters in terrorist activities in the destination countries. This challenge relates in particular to the collection of evidence, but also to the arrest of the suspects if they are still in the destination countries, unless one would want to settle for trial in absentia. No or not many court cases have been conducted so far, in which one has dealt with this challenge, but this is what all prosecutors will be facing soon when trying to build their cases.

Given that fact, I would like to draw your attention to an area that might have been overlooked so far, but which offers great opportunities for improving effective prosecution of terrorist suspects in general, and possibly also foreign terrorist fighters in particular.

In close cooperation with UN CTED and also in close consultation with the EU Counter Terrorism Coordinator's office, ICCT has been conducting a research project on the role the military can play in collecting evidence and arresting suspects of terrorism in order to prosecute them before a criminal court in civil jurisdictions (as opposed to military tribunals).

Although, we are of the position that investigation and prosecution of terrorist crimes should best be fully dealt with by civil authorities, realities on the ground might on occasion render this very difficult or hardly impossible. Realities on the ground might make it very hard for civil authorities to conduct investigations, secure evidence or even arrest suspects, in case of conflict situations or situations in which the security risks are too high for civil authorities to operate in, or even in situations where there is a lack of local civil capacity to conduct these tasks.

In these situations, the military might play a role as they are engaged in a conflict, or because they are the ones best positioned to deal with the insecure situations at hand.

For this research project, we looked into the practical and legal challenges that might occur if military would play a role in the investigation of terrorist crimes, the collection of evidence, and possibly even the arrest and detention of suspects, before both evidence and suspects are handed over to civil

authorities for prosecution before a criminal court under civil jurisdiction. I need to stress this point, as we are here not talking about military tribunals.

There are various reasons why military can find themselves in the position to collect evidence or arrest suspects. This could be in a conflict situation, a non-conflict situation but with high security risks, or in a situation where the military operates because there is a lack of civilian capacity. A first scenario might occur when military personnel accidentally find themselves in the position to collect evidence or arrest suspects during the course of a military operation. A second scenario might occur when the military arrive after a terrorist attack has taken place, and they are the first responders. A third scenario might arise when it follows a deliberate operational goal to collect evidence or make an arrest, based on prior intelligence information.

In each of these scenarios, questions can be raised with respect to the role of the military when performing investigative and prosecutorial acts, and whether that is not contradicting their operational goals. So the first question to be asked with regard to what happens to the evidence collected or the arrests made, depends on the reason why the person was arrested or the evidence collected by the military. It could after all be, because a person is seen as a combatant during a conflict, and there for detained as a POW. In other situations the questions that can be raised include:

- Are the mandates under which the military are operating adequate for prosecutorial tasks?
- Is there a need to standardize proceedings?
- How can one preserve the integrity of the civilian prosecution/the integrity of the judicial proceedings if military evidence is brought into the court?
- How can one avoid the tendency to over-classify intelligence?
- How to deal with intelligence in court, while at the same time respecting the rights of the suspect?
- How to deal with the credibility and the security of the witnesses?
- How can one secure the chain of evidence, and the investigation of evidence?

Although this topic seems to be new, when we started our research project we did look at comparable situations, such as the experiences that have been developed by national prosecutors when investigating the alleged criminal behaviour of military personnel of their own state in other regions due to violations of international humanitarian law or the Rules of engagement. In these situations one might need to deal with competitive jurisdictions. But ways to de-conflict could be found in Status of Forces Agreements if applicable to the situation. There has also been a steep learning curve with the counter-piracy operations, where military in fact operated in gigantic police operations to patrol the seas and arrest suspected pirates, who needed to be surrendered to national jurisdictions for prosecution. There have also been military operations that were focused on Evidence-based operations where cooperation between the military and local authorities was one of the key focus points in order to support the domestic legal system. And finally, the international criminal tribunals have worked with the military on many occasions in order to collect evidence and arrest suspects, and therefore have a lot of relevant experience for this particular topic.

In our research we address the complicated questions as to what legal regime might apply to these kind of activities of military. Would that be International human rights law or international humanitarian law in addition to the application of national legal regimes? What happens if

irregularities have occurred during the arrest or the detention? Would that render the case void? But also practical challenges stem from the insecure environment in which military operate, such as difficulties in sealing of the area, recovering bodies, immediate hearing of witnesses and so forth. Depending on the intensity of the conflict or the level of insecurity, as well as the operational goals of the military, the order of priorities might differ. In traditional theatre of active combat, military objectives prevail over prosecutorial objectives. In counter-insurgency operation, it is not always decided from the outset of the operation whether the operation objective or the prosecutorial objective has primacy. In military operation where the aim is to capture and prosecute (as opposed to capture or kill), the law enforcement goals will probably have primacy.

Although, I would like to stress once more that the rule of thumb should be 'as civilian as possible, and only as military as needed', we pointed out in our research that various situation might -for lack of other options- call for a role of the military to play in investigation and prosecution. To make sure that this can be done effectively and in full respect of the rule of law, I would like to make a couple of recommendations (which are more fully elaborated upon in the [research paper](#) that is available on the ICCT website):

1. Clear definitions and specification of instructions in the mandates is necessary. Including updating standard operating procedures. Adding law enforcement activities to the mandate of the military in certain situation that it is called for will render it easier to cooperate with civil law enforcement authorities or even prosecutors from international criminal tribunals. This was not done in the Libya case, where the UN Security Council issued both a mandate to the international coalition to use all necessary measures to prevent the civilian population from becoming a target, whereas the Security Council also gave a mandate to the International Criminal Court (ICC) to investigate and prosecute exactly those kind of crimes. The ICC would profit a lot from a linkage between the two mandates, in order to facilitate data being shared by the military with the prosecutors that is now automatically classified as confidential.
2. Military need to be offered adequate training to perform investigative and prosecutorial tasks, and this should also be reflected in standard operating procedures. This instruction needs to include proper training on how international law and human rights should be respected while performing these prosecutorial tasks, in order to ensure successful prosecution. Draft specialized manuals and training programmes for the military to help raise basic knowledge of evidence collection, witness questioning and respect for human rights when arresting and detaining suspects. And also, prepare minimal evidence collection kits for the military that can be used under all circumstances.
3. Set up effective communication lines and cooperation mechanisms between the different relevant actors during the operation and for future operations. This especially includes building relations with local authorities and police forces and prosecutors to ensure that local rules regarding evidence thresholds are known and respected.
4. Investigate whether intelligence collected by the military could have a dual use and also serve as evidence in court. And avoid over-classification of intelligence.
5. Set up rapid response investigation teams, embed investigative officers in the mission, and/or make use of military police officers with law enforcement powers.
6. Set up international and regional inter-agency and inter-institutional cooperation and consultation mechanisms to improve the effectiveness and success of the cooperation

between multiple stakeholders. This will also foster the sharing of good practices and could improve regional judicial cooperation through mutual legal assistance mechanisms.

To conclude, Mr/madam Chair, I wanted to share that after this first mapping exercise of the various practical and legal challenges that exist in situations where military play a role in collection of evidence and arrest of suspects, ICCT is now moving to the next phase in this project, in which we would like to conduct case studies to learn more about the experiences so far of the military with these kind of challenges. We look forward to working with countries to identify good practices, which will be instrumental for awareness raising and the development of training modules and instruction manuals. And hopefully, as we move forward, these insights contribute to enhancing the effectiveness and successfulness of the legal approach to addressing the problem of FTFs.

Thank you.