

ISSUE BRIEF

BRINGING TERRORISTS TO JUSTICE: *Prosecuting ISIL War Crimes and Terrorism*

JUNE 2021

THE SOUFAN CENTER

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KEY FINDINGS

- UNITAD has found “clear and convincing evidence” that the Islamic State in Iraq and the Levant (ISIL) attacks against the Yazidi community in Sinjar constituted genocide; additional details regarding war crimes and incitement to genocide in connection with mass executions at Tikrit Air Academy; and evidence of the repeated deployment of chemical weapons by the terrorist group.
- Globally, prosecutions for offenses committed by ISIL have faced a number of obstacles. These include the difficulty of obtaining evidence regarding the conduct of persons in conflict zones; practical challenges in collecting, processing, and storing digital evidence; obtaining it when it is held outside the prosecutors’ jurisdiction; how to access evidence when it is encrypted on electronic devices formerly used by terrorist entities; and how to analyze information that is extracted given the volume of data that can be involved.
- In seeking to address the challenges faced by national authorities in ensuring accountability for terrorist conduct, there may be a number of advantages to using the law on “core international crimes” rather than, or in addition to, counterterrorism law.
- At the global level, accountability for conflict-related sexual violence remains woefully inadequate. The cumulative approach may also bring a greater likelihood of accountability for sexual and gender-based crimes committed in the context of terrorism.
- The work of UNITAD, and some innovative solutions it has developed, may prove beneficial to domestic prosecutors within Iraq and beyond in a number of ways. These include the volume and range of potential evidence collected for states; the use of advanced technology to help take forward prosecutions under complex and challenging circumstances; and the innovative use of technologies to enable remote interaction with witnesses and victims.

- **Recommendations** include: states should continue to support the work of UNITAD and accelerate the pace of prosecutions; efforts to work with victims of ISIS crimes should be increased; states should explore all relevant legal instruments to ensure that terrorists are brought to justice; states

should consider cumulative prosecutions, where appropriate, using both counterterrorism law and the law on core international crimes; and there should be greater cooperation and collaboration, where feasible, between relevant international and UN entities.

INTRODUCTION

In his final briefing to the United Nations Security Council in May 2021, the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD), Karim A.A. Khan QC, highlighted their finding of “clear and convincing evidence” that ISIL attacks against the Yazidi community in Sinjar constituted genocide; additional details regarding war crimes and incitement to genocide in connection with mass executions at Tikrit Air Academy; and evidence of the repeated deployment of chemical weapons by the terrorist group.¹ Much remains to be done to turn these assertions by investigators into convictions, following fair trial, of those responsible. But these are undoubtedly significant developments for accountability.

While welcoming these landmark findings, it is useful to also take a step back and consider the implications of the work accomplished by UNITAD for broader international efforts to hold terrorists accountable for their crimes. In the spring of 2021, diplomats and experts at the UN focused on negotiating the biennial

review of the UN Global Counterterrorism Strategy, the UN General Assembly framework that provides normative and policy guidance to all states and approximately forty UN agencies, funds, and programs. September will mark the twentieth anniversary of the 9/11 attacks in the United States, which should trigger reflection by all stakeholders on what has and has not been achieved through multilateral counterterrorism since then. By the end of December, Security Council members will need to negotiate the renewal of two mandates for key UN counterterrorism bodies: the Counter-Terrorism Executive Directorate (CTED) and the Al-Qaida/ISIL “1267” Sanctions Monitoring Team, as well as the mandate of the Ombudsperson, through whom appeals regarding the 1267 sanctions mechanism can be made. All of this is occurring against the backdrop of the increasing risk of violence and terrorism posed by individuals and groups motivated by extreme right-wing ideologies and debates about whether the existing international framework is adequately equipped to address this development.²

¹ “Special Adviser Khan Briefs Security Council on UNITAD Investigations.” United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL, May 10, 2021. <https://www.unitad.un.org/news/special-adviser-khan-briefs-security-council-unitad-investigations>.

² Blazakis, Jason M., and Naureen Chowdhury Fink. “The International Far-Right Terrorist Threat Requires a Multilateral Response.” *Lawfare*, April 4, 2021. <https://www.lawfareblog.com/international-far-right-terrorist-threat-requires-multilateral-response>.

CHALLENGES IN PROSECUTING TERRORISTS

Globally, prosecutions for offenses committed by ISIL have faced a number of obstacles.³ One is the difficulty in obtaining evidence detailing the conduct of accused persons following their arrival in conflict zones in Iraq and Syria. Often, national investigators find that the trail of information regarding the activities of an individual will dry up following their entry into these areas, particularly during the time at which ISIL held territorial control.

Evidence stemming directly from crime scenes, such as electronic devices seized from terrorist organizations, will often be essential for a successful prosecution (or as leads for additional investigations). However, there are significant practical challenges in ensuring these assets are collected and processed in a manner that allow for their onward use in criminal proceedings. State actors that are most commonly active in conflict zones—the military—are not usually trained to carry out this task, and doing so may not fit easily with their operational

priorities. There are also legal requirements around how that material is then stored, and its subsequent transfer from one state to another can be delayed if it goes through formal mutual legal assistance channels (and can raise legal challenges if it does not). Where the material has been classified because of how and where it was collected can create further delays before it can be used at trial.⁴

With respect to testimonial material, prosecutors face significant challenges in identifying and engaging with witnesses and survivors who remain in Iraq and Syria, many of whom are still in internal displacement camps. Even where possible to contact relevant individuals, investigators face a difficult and delicate task in supporting witnesses to come forward with their accounts in a manner that is sensitive to the trauma they have suffered as a result of their experiences.

A further common obstacle relates to digital and telecommunications evidence: how to obtain it when it is held by Communication Service Providers on servers based outside the prosecutors' jurisdiction; how to access it when it is encrypted on electronic devices formerly used by terrorist entities; and how

³ "Resolution 2396 (2017)." United Nations Security Council, S/RES/2396 (2017). [https://undocs.org/S/RES/2396\(2017\)](https://undocs.org/S/RES/2396(2017));

"2018 Addendum to the 2015 Madrid Guiding Principles." United Nations Security Council, S/2018/1177, para. 29. <https://undocs.org/en/S/2018/1177>.

⁴ "Abuja Recommendations on the Collection, Use and Sharing of Evidence for Purposes of Criminal Prosecution of Terrorist Suspects." Global Counterterrorism Forum. https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/2018/GCTF-Abuja-Recommendations_ENG.pdf?ver=2018-09-21-122246-523&tamp=1580219129062;

See also: "Non-Binding Guiding Principles on Use of Battlefield Evidence in Civilian Criminal Proceedings." The International Institute for Justice and the Rule of Law. <https://theij.org/wp-content/uploads/Non-Binding-Guiding-Principles-on-Use-of-Battlefield-Evidence-EN.pdf>.

to analyze information that is extracted given the volume of data that can be involved.⁵

These obstacles to securing reliable evidence impede efforts to ensure full accountability for the crimes committed, result in sentences that do not fully reflect the gravity of conduct, and are one factor influencing some states' reluctance to actively repatriate their nationals from Al-Hol and other camps in northern Syria.



Figure 1: Map of Iraq and Syria

UNITAD: CONTRIBUTIONS & INNOVATIONS

In this context, it is important to consider whether or how the work of UNITAD, and in particular the technological tools it has developed in support of its activities, can support international efforts to counter terrorism and bring terrorists to justice.

The connection may seem obvious: UNITAD was, after all, established (in response to Iraq's call for assistance from the international community) to investigate crimes committed in Iraq by ISIL, an entity that has been designated by the UN, regional entities, and many states as a terrorist organization and a threat to international peace and security.⁶ The UN Security Council resolution which established UNITAD in 2017 describes ISIL as such, and notes that states that hold ISIL members accountable for their crimes "could assist in countering terrorism and violent extremism that can be conducive to terrorism," including by stemming financing and the flow of international recruits to join ISIL⁷.

However, it does not give UNITAD a mandate to investigate *terrorist crimes per se*. Instead,

⁵ "UNODC and Partners Release Practical Guide for Requesting Electronic Evidence Across Borders." United Nations: Office on Drugs and Crime, February 1, 2019. <https://www.unodc.org/unodc/en/frontpage/2019/January/unodc-and-partners-release-practical-guide-for-requesting-electronic-evidence-across-boarders.html>.

⁶ Islamic State in Iraq and the Levant (ISIL), also known as Daesh, is internationally designated as a terrorist group, along with several regional affiliates, through the UN's Al-Qaida and ISIL/Daesh ("1267") Sanctions List. In the United States, ISIL was initially designated as a Foreign Terrorist Organization by the Secretary of State in December 2004 (as "Al-Qaida in Iraq"). Variations in terminology used include Islamic State (IS), Islamic State in Iraq and Syria (ISIS), and Daesh. While The Soufan Center customarily uses "ISIS," this Issue Brief instead uses "ISIL" in order to align with terminology used by UNITAD; see: UN Security Council Resolution 2170 (2014); and "Foreign Terrorist Organizations - United States Department of State." U.S. Department of State. <https://www.state.gov/foreign-terrorist-organizations/>.

⁷ "Resolution 2379: Threats to international peace and security." United Nations Security Council, S/RES/2379 (2017). [https://undocs.org/S/RES/2379\(2017\)](https://undocs.org/S/RES/2379(2017)).

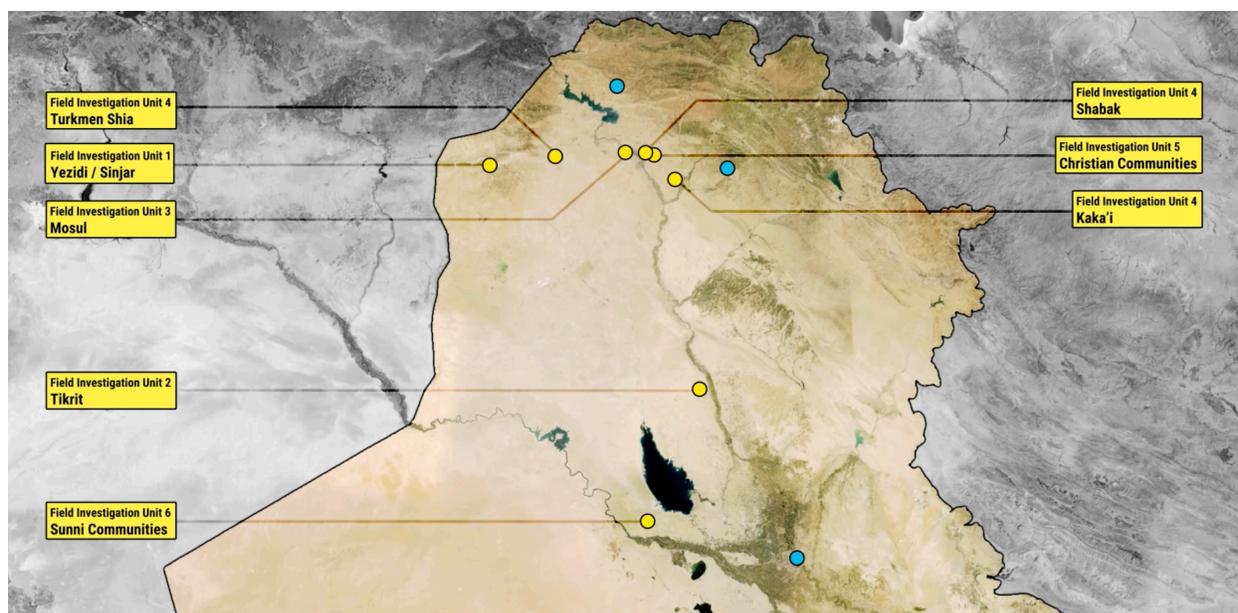


Figure 2: Map of UNITAD Investigation Locations. Source: UNITAD

the team’s mandate is to collect evidence of *genocide*, *war crimes*, and *crimes against humanity* perpetrated by ISIL. The resolution thus treads a careful line – UNITAD will operate in the context of counterterrorism efforts, but its own work is to focus on evidence of *other* crimes, rather than a focus on terrorist crimes. Reflecting this legal and political framework, the briefings of the Special Adviser and the six reports he has submitted to the Council have not referenced prosecutions for terrorist crimes.

Also notable is that survivors’ representatives (notably Nobel Peace Laureate Nadia Murad) have repeatedly called on the international community to ensure accountability of ISIL for *more* than terrorism—in particular, sexual and gender-based crimes and acts of

genocide.⁸ In its third report to the Security Council, UNITAD noted “the need for survivors of ISIL crimes not simply to be seen as victims of terrorism, murder or rape, but to have their suffering recognized as a crime against their communities, as a crime against the people of Iraq, and for the true scale and nature of ISIL criminality to be exposed through the presentation of incontrovertible evidence in fair trials”.⁹

There may be political benefits to focusing an investigation into the acts of ISIL on crimes other than terrorism, but it is also crucial to recognize the legal and practical consequences. Many states continue to frame the work of UNITAD as part of the international community’s counterterrorism efforts. At the same time, its work can seem

⁸ “Ms. Nadia Murad, Nobel Peace Prize Laureate on Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL (UNITAD) - Security Council VTC Briefing.” United Nations: UN Web TV, 2021. <http://webtv.un.org/watch/ms.-nadia-murad-nobel-peace-prize-laureate-on-investigative-team-to-promote-accountability-for-crimes-committed-by-daeshisil-unitad-security-council-vtc-briefing/6253524716001/?term=>.

⁹ “Third report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/Islamic State in Iraq and the Levant.” UNITAD, S/2019/878 (2019), para. 101. <https://www.undocs.org/en/S/2019/878>.

insulated from broader UN and Security Council counterterrorism efforts with little overlap. This is often reflected in the way states approach the issue at the UN, as two very separate files, processes, and with different focal points in diplomatic missions. So to what extent might the work of UNITAD provide solutions to many of the challenges in bringing terrorists to justice, despite its broader mandate? A consideration of both substantive law and of evidence will help highlight several key points.

THE LEGAL FRAMEWORK: LOOKING BEYOND COUNTERTERRORISM LAW

The law on war crimes, crimes against humanity, and genocide (known as the “core international crimes”) has developed over a relatively long period—from 1907 treaties that prohibited certain means of warfare, supplemented by a series of widely-ratified treaties adopted in the aftermath of World War II—and has been clarified and elaborated by judgments of the Nuremberg Tribunal, the International Criminal Tribunals for Yugoslavia and for Rwanda, and now the International Criminal Court.

Counterterrorism law is more nascent. It has been formed through a series of treaties which criminalize certain methods (hijacking, bombing, etc.) associated with terrorism and, since 2001, a number of Security Council

resolutions which require all states to criminalize additional conduct, including the financing of terrorism and the travel of “foreign terrorist fighters.” Counterterrorism law has not gone through the same process of clarification and elaboration by international tribunals.

In seeking to address the challenges faced by national authorities in ensuring accountability for terrorist conduct, there may be a number of advantages to using the law on “core international crimes” rather than, or in addition to, counterterrorism law.

First, focusing on core international crimes avoids definitional problems. The absence of an international definition of terrorism—or, more accurately, the absence of a *single all-encompassing* definition of terrorism, since international law does define and criminalize various methods commonly associated with terrorism¹⁰—has often been discussed at length elsewhere. The principle of legality requires that an individual can only be criminally liable for conduct that was criminalized at the time of commission, and also that criminal law be clear, precise, and accessible. UN bodies have highlighted that, across all states and regions, domestic terrorist offenses are often vaguely framed, with imprecise terminology and open-ended phrases.¹¹ This can increase the risk of human rights violations and open counterterrorism laws up to instrumentalization in order to violate human rights. Definitional issues are far less challenging with respect to war crimes, crimes against humanity, and genocide: the material and mental elements

¹⁰ UNODC Treaties Database. https://sherloc.unodc.org/cld/v3/sherloc/treaties/search.jspx#?mv=treaties&c=%7B%22filters%22:%5B%7B%22fieldName%22:%22treaty.type_s1%22,%22value%22:%22International%22%7D,%7B%22fieldName%22:%22treaty.topics.topic_s%22,%22value%22:%22Terrorism%22%7D%5D,%22match%22:%22%22,%22startAt%22:20,%22sortings%22:%22%22%7D.

¹¹ “Global Survey of the Implementation by Member States of Security Council resolution 1373 (2001).” UNCTED, S/2016/49 (2016), paras. 397, 437. <https://undocs.org/S/2016/49>.

of those crimes in international law are well-established, and domestic law definitions of those crimes tend to be more consistent.

These points are particularly relevant to prosecutions in Iraq, where a revised counterterrorism law remains pending and so cannot form the basis for prosecution of ISIL crimes that have already taken place. Instead, Iraqi prosecutions of ISIL crimes as acts of terrorism would have to be brought on the basis of the 2005 Counter-Terrorism law (Act No. 13 of 2005), which had been subject to criticisms by UN human rights bodies for its broad definition of terrorism.¹² Iraq's domestic law on war crimes, crimes against humanity, and genocide *also* remains pending, though the same concerns with non-retroactivity do not arise with respect to the core international crimes, so this law could more easily be applied in relevant cases relating to ISIL.¹³

Second, there may be fewer elements to prove when using the law on war crimes. In a situation of armed conflict, much of the conduct that is criminalized in treaties and Security Council resolutions on terrorism would *also* constitute war crimes: where it involves violence that is directed at civilians or is disproportionate to the military advantage anticipated, employs weapons

that cause superfluous injury, or targets cultural property or places of worship.¹⁴ Whereas the terrorism legislation of many states also requires proof of an underlying ideological or political motivation, what matters for the purpose of prosecuting war crimes are the *methods* used, not the motivations.

Third, it is important to respond to the wishes and needs of communities impacted by the acts of terrorist organizations. As reflected above, many representatives of communities targeted by ISIL have been clear in their view that they have not been subjected simply to acts of terrorism but to crimes that targeted their community as a whole. Prosecutions for international crimes provide a forum in which the breadth and depth of such crimes can be fully explored and recognized before national courts, strengthening the basis for individual and collective healing, and laying the groundwork for future steps towards broader reconciliation and peace.

Alternatively, rather than focus on prosecutions using either counterterrorism law or the law on core international crimes, there is also the possibility of bringing prosecutions under *both* to ensure full accountability. This has already happened in

¹² "Concluding observations on the fifth periodic report of Iraq." Human Rights Committee, December 3, 2015, CCPR/C/IRQ/CO/5, paras. 9-10. <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsieXFSudRZs%2FX1ZaMqUUOS%2FZBrZ2ONbDPxzdQn7LCe97KNN%2BL3%2FujZOhfO64b%2BEfYcIILnreROQ4z%2Fj%2B2tGuKf%2B2%2FrsUOSm6ioTERIZEI13>.

¹³ "International Covenant on Civil and Political Rights." United Nations General Assembly (1967), Article 15(2). https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch_IV_04.pdf.

¹⁴ McKeever, David. "International Humanitarian Law and Counter-Terrorism: Fundamental Values, Conflicting Obligations." *International and Comparative Law Quarterly* 69, no. 1 (2020): 43–78. doi:10.1017/S0020589319000472.

a number of cases in Germany and other European countries.¹⁵ Prosecutions for simple membership in a terrorist group carries a relatively light sentence, often aggravating concerns in many countries that still-dangerous individuals may be released from prison too early. However, cumulative prosecutions that include, for example, the war crime of “outrages upon personal dignity,” pillaging, or the use of children in hostilities¹⁶ would carry more appropriate penalties, thereby addressing both legal and political concerns for many governments and communities.

The cumulative approach may also bring a greater likelihood of accountability for sexual and gender-based crimes. In resolutions 2331 (2016) and 2388 (2017), the Security Council recognized that sexual and gender-based violence (SGBV) and human trafficking can form part of the strategic objectives and ideology of certain terrorist groups and can be used to finance terrorism; the Security Council called on states to hold perpetrators accountable. The institution of sexual slavery

and human trafficking has been one of the enduring characteristics of ISIL, and survivors’ calls for accountability often highlight these acts.¹⁷ Although resolution 2331 allows states to designate terrorist groups and individuals under the 1267 sanctions regime for the perpetration of these crimes, no state has yet put forward a designation on this basis, or included these crimes as part of a proposed designation. In the short term, this action remains an opportunity for Security Council members to highlight the importance of recognizing these crimes and holding perpetrators accountable.

At the global level, however, accountability for conflict-related sexual violence remains woefully inadequate and may have further deteriorated as a result of the COVID-19 pandemic, which caused further delays in investigations, pre-trial hearings, and trials.¹⁸ In principle, such conduct could be prosecuted as acts of terrorism: after all, these are violent acts aimed at terrorizing or intimidating a population and so would fall within the terrorism laws of many states. In

¹⁵ “Cumulative Prosecution of Foreign Terrorist Fighters for Core International Crimes and Terrorism-Related Offences.” *Eurojust*, May 2018. <https://www.eurojust.europa.eu/cumulative-prosecution-foreign-terrorist-fighters-core-international-crimes-and-terrorism-related>.

¹⁶ *Ibid.*, 11-12, 16-20.

¹⁷ AlSaiedi, Abdulrazzaq, Kevin Coughlin, Muslih Irwani, Waad Ibrahim Khalil, Phuong N Pham, and Patrick Vinck. “Never Forget – Views on Peace and Justice Within Conflict-Affected Communities in Northern Iraq.” *Harvard Humanitarian Initiative*, June 2020. https://hhi.harvard.edu/files/humanitarianinitiative/files/neverforget_eng3.pdf?m=1604610598.

¹⁸ “Annual Report 2020.” United Nations Team of Experts Rule of Law/Sexual Violence in Conflict, 18. <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2021/05/annualreporttoesmall-1.pdf>.

practice, however, this rarely happens—not just with respect to the acts of ISIL but also those of Boko Haram¹⁹ and Al-Shabaab.²⁰ This has led to calls for legislative action, at both the international and domestic levels, to remedy this failing. Pending such changes, the law on core international crimes offers a greater prospect of successful prosecution.

Again, the law for these crimes itself is clearer;²¹ and in practice prosecutions of such conduct as war crimes, crimes against humanity,²² or acts of genocide²³ have been more frequent in both international and domestic courts.²⁴ UNITAD has established a Gender Crimes and Children Unit to focus on such crimes and has developed a strategy on

how to obtain evidence of sexual and gender-based crimes in communities in which stigma may prevent survivors from coming forward. Interviews with survivors are guided by in-house psychologists from the Witness Protection and Support Unit. Iraq's adoption of a Yazidi Female Survivors Law in March 2021 has been hailed a landmark in transitional justice which recognizes crimes against multiple ethnic groups and provides survivors with concrete support through compensation, land, quotas of public employment, and rehabilitative measures.²⁵

¹⁹ Babington-Ashaye, Adejoke. "Prioritizing Accountability for Sexual Terrorism on the Global Peace and Security Agenda: An Assessment of the Way Forward from National Prosecutions of Sexual Terrorism by Boko Haram to Security Council Decisiveness." *Journal of Human Trafficking, Enslavement and Conflict-Related Sexual Violence*, 2020.

²⁰ Brouwer, Anne-Marie de, Eefje de Volder, Christophe Paulussen. "Prosecuting the Nexus between Terrorism, Conflict-related Sexual Violence and Trafficking in Human Beings before National Legal Mechanisms: Case Studies of Boko Haram and Al-Shabaab." *Journal of International Criminal Justice*, 18 no. 2: (May 2020). 499–516. <https://doi.org/10.1093/jicj/mqaa014>.

²¹ "Rome Statute of the International Criminal Court (last amended 2010)." UN General Assembly, 1998, ISBN No. 92-9227-227-6, available at: <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>; see also International Criminal Court (ICC), *Elements of Crimes*, 2011, ISBN No. 92-9227-232-2, available at: <https://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf>.

²² "Dominic Ongwen Declared Guilty of War Crimes and Crimes against Humanity Committed in Uganda." International Criminal Court, February 4, 2021. <https://www.icc-cpi.int/Pages/item.aspx?name=pr1564>.

²³ "Historic Judgement Finds Akayesu Guilty of Genocide." United Nations International Residual Mechanism for Criminal Tribunals, September 2, 1998. <https://unictr.irmct.org/en/news/historic-judgement-finds-akayesu-guilty-genocide>.

²⁴ "The Prosecution at National Level of Sexual and Gender-Based Violence (SGBV) Committed by the Islamic State in Iraq and the Levant (ISIL)." *Eurojust*, July 2017. https://www.eurojust.europa.eu/sites/default/files/Partners/Genocide/2017-07_Prosecution-at-national-level-of-sexual-and-gender-based-violence_EN.pdf; see also: Kather, Alexandra Lily, and Alexander Schwarz. "Intersecting Religious and Gender-Based Persecution in Yazidi Genocide Case: A Request for an Extension of Charges." *Just Security*, February 24, 2021. <https://www.justsecurity.org/74943/intersecting-religious-and-gender-based-persecution-in-yazidi-genocide-case-a-request-for-an-extension-of-charges/>.

²⁵ United Nations Team of Experts Rule of Law/Sexual Violence in Conflict, 35; see also: "New Iraqi Law 'Major Step' in Assisting ISIL's Female Victims but More Must Be Done." United Nations, April 21, 2021. <https://news.un.org/en/story/2021/04/1090322>.

SECURING THE EVIDENCE

Moving past questions of substantive law, ultimately the charges which domestic prosecutors can and cannot bring will depend on the evidence that is available to them. UNITAD was established in response to a request from Iraq, and Iraqi authorities are the primary intended recipients of the evidence gathered by the team. However, while some sharing of information has been supported in relation to financial crimes committed in support of ISIL, the full transfer of the evidence gathered has not yet happened, with the potential imposition of the death penalty by Iraqi courts remaining an obstacle. Nevertheless, the sharing of evidence with other states is also part of UNITAD's mandate, and so far, fourteen states have requested the team's assistance with ongoing proceedings.

The work of UNITAD, and some innovative solutions it has developed, may therefore prove beneficial to domestic prosecutors both within Iraq and beyond in a number of ways.

First, the volume and range of material gathered provides an invaluable archive of potential evidence for states. These include internal ISIL payment logs and immigration records; witness testimonies; call logs and other digital material extracted from the thousands of recovered laptops, external hard drives, and mobile phones; autopsy reports following the excavation of mass grave sites; photographic and video evidence; and satellite imagery. 3-D laser scans

collected from key crime scenes in Iraq, including mass execution sites and locations used to hold and process those subject to sexual slavery, can also assist national investigators in bringing the crime scene to the courtroom.

Second, the use of advanced technology to organize and fully exploit this material creates important opportunities to take forward prosecutions under complex and challenging circumstances. This includes a project supporting the digitization of all existing documentary evidence held by Iraqi authorities; the use of geolocation technology based on images of victims and perpetrators to corroborate testimonial evidence; enhanced decryption capacity; and artificial intelligence and machine learning techniques (developed in cooperation with Microsoft) to rapidly exploit multimedia files and identify relevant objects, faces, and locations.²⁶ Machine redaction and translation of video files, recently integrated into the suite of technological tools drawn on by UNITAD, has the potential to significantly enhance the ability of investigators to search against video assets depicting crimes committed by ISIL.

Third, innovative use of technologies has enabled remote interaction with witnesses and victims. *Shuhud* is a trilingual web-based, mobile-friendly reporting tool²⁷ which facilitates access for those in remote areas of Iraq, whose statements can then be analyzed by UNITAD and trigger further investigations as appropriate. In another notable example, eight witnesses to alleged ISIL crimes were questioned by Finnish judges via video-link from the UNITAD office in Baghdad, including

²⁶ "Harnessing Advanced Technology in International Criminal Investigations: Innovative Approaches in Pursuit of Accountability for ISIL Crimes." United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL. <https://www.unitad.un.org/content/harnessing-technology-publications>.

²⁷ "Shuhud." UNITAD. <https://www.unitad.un.org/content/shuhud>.

ISIL detainees made available through cooperation with Iraqi authorities.²⁸ Though this initiative did not lead to a conviction in that case (as the totality of evidence produced by prosecutors still did not meet the standard of proof required), such measures could be replicated in the future and may help mitigate practical and legal obstacles to domestic courts' adjudication of conduct committed thousands of miles away, as well as ongoing logistical challenges arising from the pandemic.

Fourth, the support provided by UNITAD to Iraqi authorities to enhance their own capacity to collect and store evidence relating to ISIL crimes could have a lasting impact on the ability of Iraq to engage with and support prosecutions globally. Ongoing projects include the provision of support to Iraqi authorities in the collection of forensic evidence from key crimes scenes, the structuring and archiving of evidence in line with international standards, and the development of case-files relating to international crimes committed by members of ISIL.

Some open questions remain, not least whether all the material gathered by UNITAD will be admissible at trial. The team has sought to follow international best practices in gathering and storing evidence, but whether evidence can ultimately be relied upon will be decided by domestic courts in individual countries. Different legal systems

have different rules on evidence, and defense counsel can be expected to raise challenges on issues including chain of custody, hearsay, authentication of the material gathered, efforts made to gather exculpatory evidence, and so on.²⁹

That said, above and beyond the prosecutions that will follow these specific investigations or utilize this particular evidence, the development of innovative investigative techniques and the capacity-building measures taking place (which should strengthen the criminal justice capacities of Iraq and its ability to engage in international judicial cooperation with third party states) could bring long-term benefits to domestic efforts to prosecute a range of crimes.

This will depend, in part, on avoiding the traditionally siloed bureaucratic, legal, and political approaches to the related issues of terrorism, core international crimes, SGBV, and victims of armed conflict. Such silos exist within states—in capitals and within diplomatic representations. They also exist within the United Nations. The Security Council resolution establishing UNITAD called for the team's cooperation with the 1267 Monitoring Team; the first UNITAD report highlighted the importance of coherence with other UN entities;³⁰ and in principle both CTED and the UN Office of Counter-Terrorism could play a role in disseminating the good practices developed. References to these other UN entities have been few and

²⁸ "Fourth report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant." UNITAD, S/2020/386, para. 83. <https://undocs.org/S/2020/386>.

²⁹ Cryer, Robert. "The UN Guidelines on 'Battlefield' Evidence and Terrorist Offences: A Frame, a Monet, or a Patchwork?" *Just Security*, August 21, 2020. <https://www.justsecurity.org/72094/the-un-guidelines-on-battlefield-evidence-and-terrorist-offences-a-frame-a-monet-or-a-patchwork/>.

³⁰ "First report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant." UNITAD, S/2018/1031, paras. 69-84. <https://undocs.org/S/2018/1031>.

far between in the more recent UNITAD reports, however. Moreover, as the files are often covered by different diplomats and experts, there is often little dialogue and exchange between the requisite policy leads. It remains to be seen whether these silos prevent those with a stake in counterterrorism from taking full advantage of the work of UNITAD.

In concluding his remarks, Special Adviser Khan noted the (rare) consensus within the Security Council in support of UNITAD and urged the Council to maintain that support so that the progress could be sustained.³¹ There is much about the establishment and work of UNITAD that is rare, if not unique, and it provides an important opportunity for the international community to reaffirm their commitment to accountability for war crimes and terrorism, prevention of genocide, and sexual violence in conflict. However, there are risks that this initiative will lose political and financial support in the face of resource constraints exacerbated by the pandemic and waning political attention following the destruction of the territorial caliphate.

The contributions of UNITAD to ensuring accountability for the crimes of ISIL, before the courts of Iraq and other states, are already clear. The longer-term benefits that its work can bring in addressing current and future iterations of terrorist groups in different regions are yet to be fully realized, making it essential that its work continue. States cannot hope to deter future terrorist groups and prevent atrocities if perpetrators of these crimes cannot be brought to justice.

RECOMMENDATIONS

1. **States should continue to support the work of UNITAD**, and wherever possible, accelerate the pace of domestic prosecutions. Although there will be increased focus on resource constraints, largely owing to the impact of COVID-19, and there will be emerging and pressing security challenges, it is vital that the crimes committed by ISIS are recognized by the international community and that perpetrators are held accountable.
2. **There should be increased efforts to work with victims of ISIS crimes**, affected communities, and civil society organizations to ensure that their perspectives and experiences are not overshadowed by the focus on individual ISIS crimes or perpetrators. The UN Office of Counter-Terrorism and should ensure that its work to support victims of terrorism includes the means of increasing access to resources and support for those affected by ISIS crimes; this should also include work with entities like UN Women and UNICEF to ensure that measures to repatriate, or prosecute, rehabilitate, and reintegrate, individuals associated with ISIS take sufficient account of the particular needs, roles, and priorities of affected women and children.
3. **States should explore all relevant legal instruments to ensure that terrorists are brought to justice** and that perpetrators of war crimes, sexual violence, and genocide are brought to justice. For example, states should consider more actively using

³¹ “Security Council Arria Formula Meeting Highlights UNITAD Innovation and Partnership as Model for Accountability Efforts Globally.” UNITAD, May 20, 2021. <https://www.unitad.un.org/news/security-council-arria-formula-meeting-highlights-unitad-approach-model-international>.

Security Council Resolution 2331 to increase the number of individuals designated under 1267 sanctions for sexual violence and human trafficking that supports terrorism.

4. **States should consider cumulative prosecutions, where appropriate, using both counterterrorism law and the law on core international crimes**, in order to ensure full accountability, including with respect to sexual and gender-based violent crimes.

5. **There should be greater cooperation and collaboration, where feasible, between relevant international and UN entities**, including states, the UN Office of Counter-Terrorism, the Counter-Terrorism Executive Directorate (CTED), the UN Office of Drugs and Crime (UNODC), the 1267 Sanctions Monitoring Team, and UNITAD. In particular, for example:

A. CTED, UNODC, and UNOCT could facilitate the sharing, between states, of various state experiences and good practices in using evidence gathered by ISIL in domestic trials;

B. CTED, UNODC, and UNOCT could help ensure that states are aware of the innovative investigative/analytical practices developed by UNITAD and the potential application to relevant domestic prosecutions;

C. The 1267 Monitoring Team, UN Women, and UNICEF could ensure that reporting on the ISIL threat continues to highlight the differential impacts of ISIL crimes on men, women, and children and share country-specific analysis with CTED and UNITAD as relevant.

The Soufan Center (TSC) is grateful to members of UNITAD for taking the time to speak with us about their work and for sharing their expertise and insights. The analysis and views in this Issue Brief solely reflect the views of TSC.



THE SOUFAN CENTER

ABOUT TSC:

The Soufan Center (TSC) is an independent non-profit center offering research, analysis, and strategic dialogue on global security challenges and foreign policy issues, with a particular focus on counterterrorism, violent extremism, armed conflict, and the rule of law. Our work is underpinned by a recognition that human rights and human security perspectives are critical to developing credible, effective, and sustainable solutions. TSC fills a niche role by producing objective and innovative reports and analyses, and fostering dynamic dialogue and exchanges, to effectively equip governments, international organizations, the private sector, and civil society with key resources to inform policies and practice.