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Returnees and Accountability: an Inquiry Into the UN Evidence Collection in Iraq

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Summary

After the territorial disintegration of the Islamic State in Iraq and the Levant (ISIL),¹ European states are now confronted with bringing returnees to account for crimes committed in the conflict zones in Syria and Iraq. However, the frequent lack of quality and sufficiency of evidence poses a major challenge in the ability of European courts to prosecute terror suspected returnees.² The United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh / ISIL (UNITAD) is an organization that works systematically to collect and analyse evidence on-site in the areas of conflict in Iraq.³ UNITAD is a potentially interesting resource that can assist European courts with evidence in legal proceedings against suspected terrorist returnees. However, a recently concluded case in Finland raises questions about the organisation's ability to produce evidence with sufficient reliability to be used in European trials. This memo is intended to be knowledge-enhancing, primarily for readers who work with these or related issues.

¹ Hamidi-Nia, G., Wagner, T., Hedström, M., "Vi älskar döden som ni älskar livet", SVT, 2019: <https://www.svt.se/special/is-kalifatets-uppgang-och-fall/>

² See e.g. Jenkins, B.M., "Options for Dealing with Islamic State Foreign Fighters Currently Detained in Syria", 2019.: <https://ctc.usma.edu/options-dealing-islamic-state-foreign-fighters-currently-detained-syria/>

³ United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD): <https://www.unitad.un.org/>

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Accountability of ISIL-returnees

ISIL's decline and territorial disintegration means that Europe is confronted with the challenge of bringing terror-suspected returnees to justice. Calculations claim that 4000-5000 combatants of EU citizenship joined the conflict between 2011–2016, of which an estimated 1200-1500 have returned.⁴ Only a few of those who have returned have so far been prosecuted and/or sentenced in their home countries.⁵ There is still a lack of international consensus on how the process of accountability should be handled in issues regarding returnees.⁶ Sweden has been one of the main advocates for the establishment of an EU common judicial mechanism - a so-called "IS tribunal".⁷ However, former tribunals - the Rwanda Tribunal (ICTR) and the International War Criminal Tribunal for Former Yugoslavia (ICTY), for example - have proven to involve both costly and time-consuming processes.⁸ Another political challenge lies in the fact that an IS tribunal does not automatically mean that convicted criminals will serve their sentences in the region, which means that European countries may have to return their combatants regardless.⁹ The negotiations to establish an IS tribunal was opened during a conference in Stockholm in June 2019, but at the time of writing have not yet resulted in any concrete proposals.¹⁰ The US decision to leave Syria, and Turkey's invasion of the country's northern parts in the fall 2019, instead brought increased international pressure on European countries to return combatants.¹¹ EU governments have so far been reluctant to respond to these pressures.¹² The return of combatants is unpopular among the European population, especially after recent terrorist attacks in Europe were carried out by returnees.¹³ A French survey shows that 89% of respondents were against the repatriation of adult returnees, and 67% opposed the repatriation of children.¹⁴ Thomas Renard, a senior researcher at the Egmont Institute, believes that under current circumstances it may be "political suicide" for a European politician to advocate for the repatriation of combatants.¹⁵ On the other hand, many other concerned parties assert that the safest and most realistic option for securing accountability is to return those who have travelled to the conflict zones to their EU country of citizenship and prosecute them under the respective national terrorist laws.¹⁶ Christophe Paulussen and Tanya Mehra of the International Center for Counter-Terrorism (ICCT) argue that combatants who remain in the region risk not being prosecuted at all, which may eventually lead to their release. Furthermore, they

⁴ Radicalization Awareness Network (RAN). "Responses to Returnees: Foreign Terrorist Fighters and Their Families", 2017: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/ran_br_a4_m10_en.pdf

⁵ Kennedy, R., "What is Europe's approach to repatriating ISIS members?", Euronews, 2019: <https://www.euronews.com/2019/03/07/what-is-europe-s-approach-to-repatriating-isis-members-euronews-answers>

⁶ Dworkin, A., "Beyond good and evil: Why Europe should bring ISIS foreign fighters back home". European Council on Foreign Relations: 2019:

⁷ The Local, "Sweden calls for international tribunal to bring ISIS fighters to justice, 2019:

<https://www.thelocal.se/20190307/sweden-calls-for-international-tribunal-to-investigate-returning-isis-fighters>

⁸ Dworkin, A., "Beyond good and evil: Why Europe should bring ISIS foreign fighters back home". European Council on Foreign Relations: 2019:

https://www.ecfr.eu/publications/summary/beyond_good_and_evil_why_europe_should_bring_isis_foreign_fighters_home

⁹ Ibid

¹⁰ The Swedish Government, 2019: <https://www.regeringen.se/pressmeddelanden/2019/06/sverige-har-statt-ward-for-expertmote-om-tribunal/>

¹¹ Trump, Donald. 2019. Twitter: <https://twitter.com/realDonaldTrump/status/1096980408401625088>, Åkerman, H, Sjöpo: Finns IS-svenskar som kan skickas tillbaka. SR. 2019: <https://sverigesradio.se/sida/artikel.aspx?programid=83&artikel=7346839>

¹² Dworkin, A., "Beyond good and evil: Why Europe should bring ISIS foreign fighters back home". European Council on Foreign Relations, 2019.

¹³ The terrorist attacks in Paris in November 2015 and the attacks in Brussels 2016 were carried out by returnees. Renard, T., Coolsaet, R., "Losing control over returnees?" Lawfare, 2019: <https://www.lawfareblog.com/losing-control-over-returnees>

¹⁴ Odoxa, 2019: <http://www.odoxa.fr/sondage/djihadistes-francais-approuvent-massivement-jugement-lirak-ne-veulent-voir-leurs-enfants-revenir/>

¹⁵ Renard, T., Coolsaet, R., "Losing control over returnees?" Lawfare, 2019: <https://www.lawfareblog.com/losing-control-over-returnees>

¹⁶ Se e.g. Jenkins, C., "Options for Dealing with Islamic State Foreign Fighters Currently Detained in Syria", 2019, Cuyckens, H., Paulussen, C., 2019, "The prosecution of Foreign Fighters in Western Europe: The Difficult Relationship Between Counter-Terrorism and International Humanitarian Law"

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argue that the current strategy of detaining combatants in detention camps can lead to further radicalization.¹⁷ Belgium, Germany and the Netherlands are examples of countries that have, with some success, sentenced returnees under their respective national terrorist laws for crimes committed in the conflict areas.¹⁸ However, the number of prosecuted and convicted returnees is low in proportion to the number of European combatants believed to have travelled to Syria and Iraq.¹⁹



Figur 1

Photo: FOI/Shutterstock

The evidentiary basis

A contributing factor to why so few returnees have been sentenced is the weak evidentiary basis. Obtaining evidence is hampered by the fact that prosecutors and authorities rarely have direct access to the crime scenes.²⁰ A study has shown that the weak evidentiary basis has led German prosecutors to adopt strategies aiming at convictions for less serious crimes, such as "actively supporting" terrorist groups, rather than aiming at convictions for more serious crimes, such as terrorist murders, war crimes or crimes against humanity.²¹ According to some critics, this strategy is considered a short-term solution to the problem of curbing the threat that returnees can pose in the long term.²² Several countries, including Denmark and the United Kingdom, have tried to circumvent the weak evidentiary basis through legislation that allows the revocation of citizenship in the event of suspected terrorist

¹⁷ Mehra, T., Paulussen, C. 2019, "The repatriation of Foreign Fighters and Their Families: Options, Obligations, Morality and Long-Term Thinking": <https://icct.nl/publication/the-repatriation-of-foreign-fighters-and-their-families-options-obligations-morality-and-long-term-thinking/>

¹⁸ Bartunek, J., Blenkinsop, P., "Belgian foreign fighter sentenced 28 years for murder in Syria", Reuters, 2017: <https://www.reuters.com/article/uk-mideast-crisis-belgium-idUKKBN15S19Y>, Renard, T., Coolsaet, R., "Returnees: Who are They, Why are They (Not) Coming Back and How Should We Deal With Them?", 2018: http://www.egmontinstitute.be/content/uploads/2018/02/egmont.papers.101_online_v1-3.pdf?type=pdf

¹⁹ Kennedy, R., "What is Europe's approach to repatriating ISIS members?", Euronews, 2019: <https://www.euronews.com/2019/03/07/what-is-europe-s-approach-to-repatriating-isis-members-euronews-answers>

²⁰ Mehra, T., "Bringing Foreign Terrorist Fighters to Justice in a Post-ISIS Landscape Part III: Collecting Evidence from Conflict Situations", 2018.

²¹ Heinke, D.H., "German Foreign Fighters in Syria and Iraq: The Updated Data and its Implications", 2017": <https://ctc.usma.edu/german-foreign-fighters-in-syria-and-iraq-the-updated-data-and-its-implications/>

²² Institute of World Politics, 2019. "Returning Foreign Terrorist Fighters in Germany: An Assessment of the Threats and Strategy Options: <https://www.iwp.edu/active-measures/2019/09/08/returning-foreign-terrorist-fighters-in-germany-an-assessment-of-the-threat-and-strategy-options/>

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offenses.²³ These measures have been heavily criticized for violating international law.²⁴ Moreover, Paulussen believes that the strategy to revoke citizenships only acts as a short-term solution. This is because countries only "export risks" from one geographical location to another.²⁵

UNITAD

The access to evidence is hence crucial for the ability to demand accountability in legal national proceedings against returnees. An interesting development in this area are the mechanisms established by the UN, which work with evidence gathering on behalf of the member states. The United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh / ISIL (UNITAD) has since 2017 been mandated to gather and analyse evidence from the conflict zones in Iraq.²⁶ UNITAD has until recently been in a build-up phase, but declared in November 2019 that they are now in a "fully operational phase."²⁷ UNITAD's working methods include the collection of forensic, digital and physical evidence through interrogation of perpetrators and witnesses, DNA analyses, mass grave excavations and investigations of crime scenes.²⁸ UNITAD's ambition is to link the collected evidence with individuals in order to provide evidence that can be used as a basis for prosecution.²⁹

UNITAD is funded by Member States through the UN General Assembly but also receives grants through bilateral cooperation with individual member states. The UK and Qatar are mentioned by UNITAD as the main bilateral financiers.³⁰ In January 2020, Denmark donated USD 800,000 (SEK 7.6 million) to UNITAD, earmarked to finance a mentoring program for UNITAD's forensic staff.³¹ EU recently donated \$ 3.5 million EUR (approx. SEK 38 million) for a project aimed at supporting the digitization of databases containing evidence.³² In addition, Finland, France, Germany and Sweden contribute personnel resources in the form of experts and police.³³

UNITAD's primary function is to assist Iraq's legal processes in demanding responsibility for the crimes committed in the country against the Iraqi population.³⁴ However, a secondary function is to assist law enforcement agencies in other countries in need of evidence.³⁵ In Finland, a legal process against two ISIL supporters suspected of participating in the so-called "Camp Speicher Massacre" in 2014 was recently concluded. According to Finnish prosecutors, evidence gathered by UNITAD was

²³ Thomsen, D., "Danmark har tagit tillbaka det första passet – nu är IS-terroristen "SK" inte längre dansk", SVT, 2019: <https://www.svt.se/nyheter/utrikes/danmark-har-tagit-tillbaka-det-forsta-passet-nu-ar-is-krigaren-sk-inte-langre-dansk>, The Guardian, "UK can strip terror suspects of citizenship, European judges rule", 2019: <https://www.theguardian.com/uk-news/2017/mar/09/terror-suspects-british-citizenship-european-ruling>

²⁴ Wayne, N., Forbes, I., Tomalin, C., Eccleston, S., and Schabas, W., "Shamima Begum citizenship decision sets a dangerous precedent", 2019: https://www.theguardian.com/uk-news/2019/feb/21/shamima-begum-citizenship-decision-sets-a-dangerous-precedent?CMP=share_btn_tw

²⁵ Paulussen, C., "Countering Terrorism Through the Stripping of Citizenship: Ineffective and Counterproductive", 2018: <https://icct.nl/publication/countering-terrorism-through-the-stripping-of-citizenship-ineffective-and-counterproductive/>

²⁶ S/Res/2490, 2019: <http://unscr.com/en/resolutions/doc/2490>. International Impartial and Independent Mechanism (IIIM) har sedan 2016 ett liknande FN-mandat i Syrien. A/Res/71/248, 2016: <https://undocs.org/A/RES/71/248>

²⁷ 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, 2019, s. 7: <https://reliefweb.int/sites/reliefweb.int/files/resources/N1936247.pdf>

²⁸ Ibid, s. 9.

²⁹ Ibid.

³⁰ Ibid, s. 20.

³¹ Reliefweb, "Denmark and UNITAD sign agreement to enhance investigative and forensic capacity in Iraq" 2019: <https://reliefweb.int/report/iraq/denmark-and-unitad-sign-agreement-enhance-investigative-and-forensic-capacity-iraq-enar>

³² Reliefweb, "The European Union and UNITAD sign agreement to support digitization of evidence of ISIL crimes in Iraq", 2019: <https://reliefweb.int/report/iraq/european-union-and-unitad-sign-agreement-support-digitization-evidence-isil-crimes-iraq>

³³ 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, 2019, s. 7.

³⁴ Ibid, s. 4.

³⁵ Ibid, s. 16.

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"decisive" for the case being tried in the Finnish High Court.³⁶ The case is unique as it is the first time that evidence from UNITAD has been used in a European national court.³⁷ UNITAD assisted the Finnish prosecutors through the identification of, and contact with witnesses who could then be heard via video link.³⁸ However, according to UNITAD's guidelines,³⁹ the witnesses remained anonymous. UNITAD justifies the anonymisation by claiming that the exposure of the witnesses should be limited, since they jeopardize their own security through their testimony.⁴⁰ UNITAD also assisted with written witness interrogations and with analysis of telecommunication data.⁴¹ Turku High Court chose to free the accused terrorists of all of charges due to the lack of sufficient evidence. The fact that the witnesses were kept anonymous as well as ambiguities in the written testimonies were considered to affect the credibility of the witnesses.⁴² In its latest quarterly report of November 2019, UNITAD states that, in addition to the Finnish trial, they are assisting three other national legal processes.⁴³ It is not specified which countries are intended.

UNITAD: Future challenges

Since the turn of the year, increased interest in the organisation has been discernible, both through donations such as in the cases of Denmark and the EU, and through legal cooperation such as in the case of Finland. However, challenges remain. The fact that the gathering of evidence is carried out by a UN organization, and not a state actor, has prompted discussions about the applicability of the evidence contributed by UNITAD. UNITAD emphasizes in its latest quarterly report that their working methods "correspond to international standards."⁴⁴ The decision by the Finnish High Court to acquit the defendants in the "Camp Speicher" case, however, is an indication that the organization does not yet meet the requirements of reliability and transparency required for European trials.⁴⁵ The anonymity of the witnesses was considered particularly problematic for the credibility of the Finnish prosecution. Future measures involving restrictions on the anonymity of witnesses would probably benefit prosecutors but should only be taken with the utmost care for the witnesses' safety in mind. In addition to witness testimonies, UNITAD is actively seeking other forms of evidence, such as forensic data in the form of fingerprints and DNA analyses, as well as physical evidence from mass graves and crime scenes. The above mentioned donations aimed at strengthening forensic work, as well as expanding the organization's digital capabilities, can speed up the process of including other forms of evidence to supplement the testimonies. In previous European prosecutions against returnees it is

³⁶ Langh, S., "Är barettsmannen den ena brodern? Snart faller en unik IS-dom i Finland – tvillingar misstänks ha deltagit i en massaker" 2019: <https://svenska.yle.fi/artikel/2020/02/02/ar-barettmannen-den-ena-brodern-snart-faller-en-unik-is-dom-i-finland-tvillingar>

³⁷ 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, 2019, kap. V.

³⁸ Ibid, s.10.

³⁹ Ibid, s. 10-11.

⁴⁰ Ibid, s. 10, MTVUutiset, "Hovioikeus hylkäsi kaikki irakilaiskaksosten syytet Isis-joukkomurhasta", 2020 <https://www.mtvuutiset.fi/artikkeli/hovioikeus-hylkasi-kaikki-irakilaiskaksosten-syytteet-isis-joukkomurhasta/7743746#gs.45qbv1>

⁴¹ 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, 2019, s. 16.

⁴² Pippo, M., "Äbo hovrätt friar de irakiska tvillingbröderna från alla åtal", 2020: <https://www.hbl.fi/artikel/abo-hovratt-friar-de-irakiska-tvillingbroderna-fran-alla-atal/>, MTVUutiset, "Hovioikeus hylkäsi kaikki irakilaiskaksosten syytet Isis-joukkomurhasta"

⁴³ 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, 2019, s. 16.

⁴⁴ Ibid, s. 8.

⁴⁵ For a comprehensive discussion regarding how interstate organizations can contribute with evidence in national prosecutions against returnees, see Mehra, T.: "Bringing Foreign Terrorist Fighters to Justice in a Post-ISIS Landscape Part III: Collecting Evidence from Conflict Situations", 2018: <https://icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-iii-collecting-evidence-from-conflict-situations/>.

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forensic evidence in the form of fingerprints, as well as physical evidence in the form of member registers and ID documents, that have resulted in convictions.⁴⁶



Figur 2.

Photo: FOI/Shutterstock

In summary, geopolitical developments in Syria and Iraq, in tandem with a stagnant European political will to cooperate through international tribunals, means that EU states will inevitably be tasked with trying returnee citizens in their own courts. Given this situation, combined with a weak evidentiary basis, UNITAD is one of the few actors who, through direct access to crime sites in Iraq, have the potential to provide new evidence in the prosecutions against returnees. The Finnish prosecution may be a sign that the evidence does not yet meet the standards required for conviction in European courts. It should be noted, however, that the organization, which was formed in 2017, has until recently been in a build-up phase which means that its full capacity is probably not yet realized.

⁴⁶ Mehra, T.: Bringing Foreign Terrorist Fighters to Justice in a Post-ISIS Landscape Part III: Collecting Evidence from Conflict Situations”, 2018.