

INTRODUCTORY NOTE TO UNITED NATIONS
SECURITY COUNCIL RESOLUTION 2379
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[September 21, 2017]

Introduction

On September 21, 2017, the United Nations Security Council unanimously passed Resolution 2379 mandating the establishment of an Investigative Team to collect and preserve evidence for use in national courts of international crimes carried out by the terrorist group Islamic State in Iraq and the Levant (ISIL).¹ Resolution 2379 marks a growing trend in the United Nations' establishment of investigative mechanisms to support the domestic prosecution of international crimes, in lieu of referrals to the International Criminal Court or creation of ad hoc international or hybrid tribunals.

Background

Resolution 2379 arises from ISIL's armed activities in the territory of Iraq.² Beginning in 2003, ISIL's predecessor, Al-Qaeda in Iraq, launched terrorist attacks with the goal of seizing control of Sunni-majority areas of Iraq. Following the outbreak of armed conflict in Syria, the organization sought to incorporate territory in Syria and Iraq into a purportedly sovereign entity called the "Islamic State in Iraq and the Levant." In June 2014, ISIL expanded further when its leader, Abu Bakr al-Baghdadi, declared himself "*caliph*" and asserted authority over the entire Muslim world.³ ISIL's "caliphate" attracted an estimated 40,000 foreign fighters from 120 countries.⁴ At its height, ISIL controlled more than 100,000 square kilometers in Iraq and Syria, with an estimated population of 11 million people.⁵

In its Resolution 2249 (2015), the UN Security Council found that ISIL "constitutes a global and unprecedented threat to international peace and security." In addition to its terrorist attacks around the world, ISIL imposed a repressive regime over the territory it controlled, reportedly engaging in widespread and systematic violations of international human rights and humanitarian law. In its official policies and propaganda, ISIL promoted the use of torture, extrajudicial killings, sexual and gender-based violence, enslavement and slave trafficking, persecution of religious minorities, pillage of natural resources, and destruction of cultural heritage. In 2015, the Independent International Commission of Inquiry on the Syrian Arab Republic concluded that ISIL committed genocide through the killing, sexual enslavement, and forcible transfer of the Yazidis, an ethno-religious minority in Iraq and Syria.⁶

ISIL has declined since its peak in 2014 and 2015. Throughout 2017, Iraqi armed forces, supported by the Global Coalition to Counter the Islamic State of Iraq and the Levant, successfully ousted ISIL from its occupied territory, culminating in a declaration of victory in December 2017.⁷ Iraq's military victories, however, raised an unprecedented challenge in transitional justice: how to prosecute thousands of suspected ISIL members, including foreign fighters, held in Iraqi custody. On August 9, 2017, Iraq's Minister of Foreign Affairs Dr. Ibrahim al-Jaafari addressed a letter to UN Secretary-General António Guterres for circulation to the Security Council requesting international assistance in the criminal investigation of ISIL.⁸ On September 21, 2017, the Security Council unanimously adopted Resolution 2379, establishing the Investigative Team.

Resolution 2379

The resolution requests that the Secretary-General establish "an Investigative Team, headed by a Special Advisor" to support domestic efforts to hold ISIL accountable by collecting, preserving, and storing evidence in the Republic of Iraq of acts that may constitute war crimes, crimes against humanity, or genocide. On February 8, 2018, the Republic of Iraq approved the Terms of Reference for the operation of the Investigative Team⁹ and on March 31, 2018, the Secretary-General appointed British barrister Karim Asad Ahmad Khan QC as the Special Adviser and Head of the Investigative Team.¹⁰

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Under Resolution 2379 and the Terms of Reference, the Investigative Team has a limited mandate. Lacking prosecutorial or adjudicatory powers, it is solely mandated to (1) support *domestic* efforts to hold ISIL accountable by (2) collecting, preserving, and storing evidence (3) in Iraq (4) of acts that may amount to war crimes, crimes against humanity, or genocide (5) committed by ISIL (6) in Iraq. Although the Investigative Team is primarily mandated to assist Iraqi authorities, Resolution 2379 and the Terms of Reference contemplate that evidence collected by the Investigative Team may also be used in “criminal proceedings conducted by competent domestic courts, in Iraq and in third States.” Thus, third states exercising active or passive personality jurisdiction—or even universal jurisdiction, as in one recent case in Germany¹¹—may avail themselves of the evidentiary resources of the Investigative Team.

The scope of the Investigative Team is narrow. First, the territorial scope is limited to crimes committed within the Republic of Iraq. Other UN member states, in whose territory ISIL has committed criminal acts, must first seek the approval of the Security Council before requesting assistance from the Investigative Team.¹² Second, subject matter jurisdiction is limited to war crimes, crimes against humanity, or genocide. The Team lacks jurisdiction to investigate terrorism, human trafficking, or hostage-taking offenses that do not constitute one of these core international crimes. Third, and most controversially, *in personam* jurisdiction is limited to ISIL and its members; criminal acts committed by other state or nonstate parties to the conflict are beyond the reach of the Investigative Team.¹³

Operationally, the Investigative Team is tasked with taking witness statements, receiving documentation, and acquiring forensic evidence. All evidence is to be cataloged, analyzed, and stored systematically, through an uninterrupted chain of custody, and in accordance with international criminal standards.¹⁴

Conclusion

The establishment of the Investigative Team for Iraq marks the first step in a concerted, international approach to accountability for atrocity crimes committed by ISIL. The partnership between international investigators and Iraqi authorities offers a path to collect, preserve, and analyze the staggering quantity of evidence made available by ISIL’s loss of territory in Iraq—a daunting task for Iraqi authorities. At the same time, the Investigative Team holds the potential to overcome some of greatest challenges facing the Iraqi justice system: improving respect for detainees’ due process rights; encouraging prosecutors to charge ISIL suspects for international crimes, rather than for simple membership in a terrorist organization; and promoting a more survivor-centered approach to accountability, particularly with respect to sexual and gender-based violence and the persecution of religious minorities.

Beyond its immediate impact on Iraqi justice, Resolution 2379 stands out as part of a distinct trend in international criminal justice. In recent years, UN bodies have embraced the mandating of criminal investigative mechanisms as an alternative to Security Council referrals to the International Criminal Court under Article 13 of the Rome Statute or the establishment of ad hoc international or hybrid tribunals. With Resolution 2379, the Investigative Team for Iraq is the second in a trio of mechanisms: the International, Impartial, and Independent Mechanism for the Syrian Arab Republic, established by the General Assembly,¹⁵ and the investigative mechanism for Myanmar, established by the Human Rights Council.¹⁶

ENDNOTES

- 1 SC Res. 2379 (Sept. 21, 2017) [hereinafter Resolution 2379].
- 2 The “Islamic State” entity has undergone several iterations: Al-Qaeda in Iraq (2003–2006), Islamic State in Iraq (2006–2010), Islamic State in Iraq and the Levant (“ISIL” or “ISIS” (the latter based on the Arabic term for the Levant, “*al-sham*”)), and Islamic State (2014–present). Islamic State is frequently given the pejorative name “*Da’esh*” (دا عيش), derived from its acronym in Arabic. For ease of reference, this Introductory Note will use the acronym “ISIL.”
- 3 Analytical Support and Sanctions Monitoring Team, *The Islamic State in Iraq and the Levant and the Al-Nusra Front for the People of the Levant: Report and Recommendations Submitted Pursuant to Resolution 2170 (2014)*, ¶¶ 11–12, UN Doc. S/2014/815 (Nov. 14, 2015).
- 4 Karen Parrish, *Stopping Flow of Foreign Fighters to ISIS ‘Will Take Years,’ Army Official Says*, DoD NEWS (Apr. 6, 2017), https://www.army.mil/article/185550/stopping_flow_of_foreign_fighters_to_isis_will_take_years_army_official_says.

- 5 Seth G. Jones et al., *Rolling Back the Islamic State*, RAND CORPORATION, xi (2017).
- 6 “*They Came to Destroy*”: *ISIS Crimes Against the Yazidis*, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 1–2, UN Doc. A/HRC/32/CRP.2 (June 15, 2016).
- 7 *Iraq Declares War with Islamic State Is Over*, BBC NEWS (Dec. 9, 2017), <https://www.bbc.com/news/world-middle-east-42291985>.
- 8 UN President of the SC, Letter from H.E. Dr. Ibrahim al-Jaafari, Minister of Foreign Affairs of the Republic of Iraq, to H.E. Mr. António Guterres, Secretary-General of the United Nations, UN Doc. S/2017/710 (Aug. 9, 2017), available at <https://en.calameo.com/read/005253664097abb2342ef>.
- 9 Terms of Reference of the Investigative Team to Support Domestic Efforts to Hold ISIL (Da’esh) Accountable of Acts that May Amount to War Crimes, Crimes Against Humanity and Genocide Committed in Iraq, established pursuant to Security Council Resolution 2379 (2017), available at <https://www.justsecurity.org/wp-content/uploads/2018/02/2018-02-09-TORs-UN-iraq-investigative-mechanism.pdf> [hereinafter Terms of Reference].
- 10 Secretary-General Appoints Karim Asad Ahmad Khan of United Kingdom to Head Team Investigating Islamic State Actions in Iraq, UN Doc. SG/A/1806-BIO/5091 (May 31, 2018).
- 11 Amal Clooney, *Arrest Warrant Against ISIS Militant in Germany Recognises Crimes Committed Against Yazidis as Genocide*, DOUGHTY STREET CHAMBERS (Feb. 20, 2017), <http://www.doughtystreetinternational.com/news/arrest-warrant-against-isis-militant-germany-recognises-crimes-committed-against-yazidis>.
- 12 Resolution 2379, *supra* note 1, ¶ 11.
- 13 Human Rights Watch has criticized Resolution 2379 for failing to authorize investigations of all parties to the conflict for grave crimes committed in Iraq, citing a “lack of impartial justice.” *Iraq: Missed Opportunity for Comprehensive Justice*, HUMAN RIGHTS WATCH (Sept. 21, 2017), <https://www.hrw.org/news/2017/09/21/iraq-missed-opportunity-comprehensive-justice>.
- 14 Terms of Reference, *supra* note 9, ¶¶ 5–10.
- 15 GA Res. 71/248 (Jan. 11, 2017).
- 16 UN Human Rights Council, Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar, UN Doc. A/HRC/39/L.22, ¶¶ 22–27 (Sept. 25, 2018).

UNITED NATIONS SECURITY COUNCIL RESOLUTION 2379*
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The Security Council,

Reaffirming its resolutions 1265 (1999), 1325 (2000), 1368 (2001), 1373 (2001), 1624 (2005), 1894 (2009), 2106 (2013), 2150 (2014), 2170 (2014), 2178 (2014), 2199 (2015), 2242 (2015), 2249 (2015), 2253 (2015), 2322 (2016), 2331 (2016), 2341 (2017), 2347 (2017), 2354 (2017), 2367 (2017), 2368 (2017), 2370 (2017) and its relevant presidential statements,

Reaffirming its respect for the sovereignty, territorial integrity, independence and unity of Iraq, in accordance with the purposes and principles of the Charter of the United Nations,

Recalling that the Islamic State in Iraq and the Levant (ISIL, also known as Da'esh) constitutes a global threat to international peace and security through its terrorist acts, its violent extremist ideology, its continued gross, systematic and widespread attacks directed against civilians, its violations of international humanitarian law and abuses of human rights, particularly those committed against women and children, and including those motivated by religious or ethnic grounds, and its recruitment and training of foreign terrorist fighters whose threat affects all regions and Member States,

Condemning the commission of acts by ISIL (Da'esh) involving murder, kidnapping, hostage-taking, suicide bombings, enslavement, sale into or otherwise forced marriage, trafficking in persons, rape, sexual slavery and other forms of sexual violence, recruitment and use of children, attacks on critical infrastructure, as well as its destruction of cultural heritage, including archaeological sites, and trafficking of cultural property,

Further recognizing that the commission of such acts which may amount to war crimes, crimes against humanity or genocide, is part of the ideology and strategic objectives of ISIL (Da'esh), and used by ISIL (Da'esh) as a tactic of terrorism, and that holding ISIL (Da'esh) members accountable, particularly those who bear the greatest responsibility, including in terms of leadership, which can include regional or mid-level commanders, and the ordering and commission of crimes, will further expose this, and could assist in countering terrorism and violent extremism which can be conducive to terrorism, including by stemming financing and the continued flow of international recruits to the terrorist group ISIL (Da'esh),

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Welcoming the considerable efforts of the Government of Iraq to defeat ISIL (Da'esh), and its letter to the Secretary-General and Security Council dated 9 August 2017 calling for the assistance of the international community to ensure that members of ISIL (Da'esh) are held accountable for their crimes in Iraq, including where those may amount to crimes against humanity (S/2017/710),

1. *Reiterates* its condemnation of all violations of international humanitarian law, violations and abuses of international human rights law, and acts of terrorism, and *expresses* its determination that, having united to defeat the terrorist group ISIL (Da'esh), those responsible in this group for such acts, including those that may amount to war crimes, crimes against humanity, and genocide, must be held accountable;
2. *Requests* the Secretary-General to establish an Investigative Team, headed by a Special Adviser, to support domestic efforts to hold ISIL (Da'esh) accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group ISIL (Da'esh) in Iraq, to the highest possible standards, which should be addressed by the Terms of Reference referred to in paragraph 4, to ensure the broadest possible use before national courts, and complementing investigations being carried out by the Iraqi authorities, or investigations carried out by authorities in third countries at their request;
3. *Underlines* that the Special Adviser, while avoiding duplication of effort with other relevant United Nations bodies, will also promote throughout the world, accountability for acts that may amount to war crimes, crimes against humanity or genocide committed by ISIL (Da'esh), and work with survivors, in a manner consistent with relevant national laws, to ensure their interests in achieving accountability for ISIL (Da'esh) are fully recognized;
4. *Requests* the Secretary-General to submit to the Security Council, for its approval, within 60 days, Terms of Reference acceptable to the Government of Iraq in order to ensure the Team can fulfil its mandate, and consistent with this resolution, in particular paragraph 6, regarding the operation of the Investigative Team in Iraq;
5. *Underscores* that the Investigative Team shall operate with full respect for the sovereignty of Iraq and its jurisdiction over crimes committed in its territory, and that the Team's Terms of Reference shall specify that Iraqi investigative judges, and other criminal experts, including experienced members of the prosecution services, will be appointed to the Team to work on an equal footing alongside international experts, and further *underscores* that evidence of crimes collected and stored by the Team in Iraq should be for eventual use in fair and independent criminal proceedings, consistent with applicable international law, conducted by competent national-level courts, with the relevant Iraqi authorities as the primary intended recipient as specified in the Terms of Reference, and with any other uses to be determined in agreement with the Government of Iraq on a case by case basis;
6. *Emphasizes* that the Team should be impartial, independent, and credible and should act consistent with the Terms of Reference which set out the framework in which the Team will operate, the Charter of the United Nations and United Nations best practice, and relevant international law including international human rights law;
7. *Requests* that, after the Security Council has approved the Terms of Reference that are acceptable to the Government of Iraq, the Secretary-General undertake without delay the steps, measures, and arrangements necessary for the speedy establishment and full functioning of the Team, in accordance with the Terms of Reference, and notify it when the Team begins its work;
8. *Underlines* that the Team should ensure its Iraqi members benefit from international expertise on the Team, and make every effort to share knowledge and technical assistance with Iraq;
9. *Encourages* Member States, and regional and intergovernmental organizations, to provide appropriate legal assistance and capacity building to the Government of Iraq in order to strengthen its courts and judicial system;
10. *Calls* on all other States to cooperate with the Team including through mutual arrangements on legal assistance, where necessary and appropriate, and in particular to provide it with any relevant information as appropriate they may possess pertaining to its mandate under this resolution;
11. *Underlines* that another Member State in whose territory ISIL (Da'esh) has committed acts that may amount to war crimes, crimes against humanity, or genocide, may request the Team to collect evidence of such acts, but only

with the approval of the Security Council which may request the Secretary-General to submit separate Terms of Reference with regards to the operation of the Team in that State;

12. *Requests* the Team to cooperate, as appropriate, and consistent with its investigative functions in paragraph 2, with the Analytical Support and Sanctions Monitoring Team established pursuant to resolution 1526 (2004) and 2368 (2017) and with any other relevant monitoring bodies, and to work with other United Nations bodies within their respective mandates;

13. *Requests* the Secretary-General to establish, as a supplement to financing as an expense of the Organization, a trust fund to receive voluntary contributions to implement this resolution;

14. *Calls* on States, and regional and intergovernmental organizations, to contribute funds, equipment and services to the Team including the offer of expert personnel in support of the implementation of this resolution;

15. *Requests* the Special Adviser to complete the first report of the Team's activities, within 90 days of the date on which it commences its activities, as notified by the Secretary-General, and to complete subsequent reports every 180 days thereafter, and *requests* the Special Adviser to present these reports to the Security Council;

16. *Decides* to review the mandate of the Special Adviser and Team after a period of two years, with any further extension to be decided at the request of the Government of Iraq, or any other government that has requested the Team to collect evidence of acts that may amount to war crimes, crimes against humanity, or genocide, committed by ISIL (Da'esh) in its territory;

17. *Decides* to remain actively seized of the matter.