



Iraq

Alternative Report

Alternative report submitted to the UN Committee on Enforced Disappearances (CED) in the context of the review of Iraq's follow up report

6 March 2020

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1 Introduction

The present report analyses Iraq's implementation in law and practice of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), ratified on 23 November 2010, in light of the Additional information submitted by the State under article 29 ICPPED (CED/C/IRQ/AI/1).¹ This analysis covers the period between the issuance of the Committee on Enforced Disappearances' last concluding observations (CED/C/IRQ/CO/1)² on 13 October 2015 and March 2020.

2 The practice of enforced disappearance

Iraq remains the country with the highest number of enforced disappearances in the world, with estimates ranging from between 250,000 and one million missing persons.³ The practice dates back to the late 1960s and peaked following the US-led invasion in 2003 and the fight against the Islamic State of Iraq and the Levant (ISIL). The Working Group on Enforced or Involuntary Disappearances (WGEID) records 16,419 outstanding cases for Iraq as of 22 May 2019.⁴ The authorities have failed to resolve most cases of disappearances, provide remedy to the relatives of missing persons and prosecute those responsible.

The problem of enforced disappearances remains prevalent, particularly in the context of counter-terrorism operations.⁵ Between 2014 and 2017, the Iraqi forces, including government-affiliated militias from the Popular Mobilisation Units (PMU),⁶ disappeared hundreds of individuals perceived to be, or who were actually of the Sunni faith and who were from or lived in areas that were under ISIL control.⁷ On 18 April 2019, MENA Rights Group and Al Wissam Humanitarian Assembly documented

¹ Committee on Enforced Disappearances, *Additional information submitted by Iraq under article 29 (4) of the Convention*, 1 August 2019, CED/C/IRQ/AI/1 (hereinafter follow up report of the State party).

² Committee on Enforced Disappearances, *Concluding observations on the report submitted by Iraq under article 29 (1) of the Convention*, 13 October 2015, CED/C/IRQ/CO/1 (hereinafter concluding observations).

³ Kilner, J. *Accounting for missing persons is vital for stability in a post-war scenario* – ICRC, 13 November 2009. Available at: <https://reliefweb.int/report/serbia/accounting-missing-people-vital-stability-post-war-scenario-icrc> (accessed 18 February 2020).

⁴ Human Rights Council, *Report of the Working Group on Enforced or Involuntary Disappearances*, 30 July 2019, A/HRC/42/40, p. 11.

⁵ Human Rights Watch, *Iraq: Secret Detention, No Recourse*, 27 September 2018. Available at: <https://www.hrw.org/report/2018/09/27/life-without-father-meaningless/arbitrary-arrests-and-enforced-disappearances-iraq> (accessed 18 February 2020).

⁶ On 19 December 2016, the PMU were incorporated into the Iraqi armed forces, and on 8 March 2018, a Prime Minister's decree formally included the group into the country's security forces (see *infra* section 5.2).

⁷ Iraq: Secret Detention, No Recourse, *op. cit.*

the cases of 192 Internally Displaced Persons (IDPs) who had been arrested by the Hezbollah Brigades at the **Al Razaza Checkpoint** in Iraq's Al Anbar Province. All 192 individuals – some of whom were minors at the time of their arrest – remain disappeared to date.⁸

On 1 October 2019, protests started in Baghdad and southern cities calling for improved services and more action to curb corruption. The demonstrations were met with excessive and unnecessary use of lethal force and live ammunition by Iraqi security forces. In this context, MENA Rights Group noted an increase in the number of abductions of peaceful demonstrators by state security forces and militias – most of which are affiliated with the PMU – acting with the authorisation, support, acquiescence or approval of the Iraqi Government.⁹ The High Commission for Human Rights (the Iraqi National Human Rights Institution) recorded 72 cases of enforced disappearance as of 7 February 2020.¹⁰ Some of the demonstrators who were released have reported having been tortured during their detention.

The United Nations Assistance Mission for Iraq (UNAMI) also found that “since the beginning of the demonstrations, Iraqi security forces arrested and detained thousands of demonstrators, typically without warrant and mostly without providing those arrested the means to contact their families or defence lawyers, prompting fears that those arrested were being held incommunicado or had disappeared.”¹¹

The cases of **Saba Al Mahdawi**¹² and **Ali Jasib Hattab Al Heliji**¹³ illustrate the protest-related enforced disappearances that we have been documenting since October 2019.

Ali Hattab is a human rights lawyer, who was representing several demonstrators arrested in connection with the anti-government October demonstrations. On 8 October 2019, he went to the southern city of Amarah to meet one of his clients. Shortly after arriving at the rendezvous point, he was arrested by members of the Ansar Allah al-Awfiya militia. Two days before his arrest, two armed men from the PMU came to his home to warn him to stop speaking out on Facebook about the killing of protesters and to stop accusing certain factions of the PMU of being responsible for these killings. When his relatives reported his abduction, local

⁸ For more information: MENA Rights Group, *192 internally displaced persons disappeared from infamous Al Razaza Checkpoint in Iraq in a single day*, 10 May 2019, <https://www.menarights.org/en/articles/192-internally-displaced-persons-disappeared-infamous-al-razaza-checkpoint-iraq-single-day> (accessed on 27 February 2020).

⁹ Al Jazeera, *Iraq protests: Increase in number of disappearances*, 19 December 2019, <https://www.aljazeera.com/news/2019/12/iraq-protests-increase-number-disappearances-191219111900491.html> (accessed 20 February 2020).

¹⁰ France 24, *Nearly 550 killed in Iraq protest violence: commission*, 7 February 2020, <https://www.france24.com/en/20200207-nearly-550-killed-in-iraq-protest-violence-commission> (accessed on 6 March 2020).

¹¹ United Nations Assistance Mission for Iraq, Human Rights Special Report, *Demonstrations in Iraq – 2nd update*, 5 November - 9 December 2019, p. 5.

¹² UA 793/2019.

¹³ UA 785/2019.

security forces told them that they were not aware of his arrest. His fate and whereabouts remain unknown to date.¹⁴

Saba Al Mahdawi is a volunteer medic and human rights defender who was offering medical assistance to injured demonstrators. On 2 November 2019, she was heading home after attending a demonstration in Baghdad's Tahrir Square when she was suddenly abducted by unknown men. On 3 November 2019, the Iraqi Human Rights Commission, confirmed that she had been abducted the previous evening, but did not say who seized her. The Commission urged security forces to investigate the matter and other "organised kidnapping operations" that had been reported prior to Ms Al Mahdawi's abduction.¹⁵ She was eventually released on 13 November 2019.

Recommendations:

- Urgently investigate existing allegations of enforced disappearances, locate and release those held illegally by security forces and government-affiliated militia;
- Uphold the right to freedom of peaceful assembly and suspend all officials, pending full and impartial investigations, alleged to have abducted peaceful protestors;
- Recognise the CED's competence to receive individual and inter-State communications under articles 31 and 32 ICPPED.

3 Urgent action procedure

In its concluding observations, the Committee on Enforced Disappearances (hereinafter "CED" or "Committee") called upon the State party "to enhance its cooperation with the Committee within the framework of its urgent action procedure and to adopt all measures necessary to guarantee immediate processing".¹⁶

To date, MENA Rights Group has submitted 296 cases to the CED, regarding instances of enforced disappearances that occurred in Iraq, using the urgent action procedure. From 2012 to 18 April 2019, the Committee registered 162 cases of enforced disappearances.

We found that between 2016 and 2019, Iraq only responded to 24% of cases submitted. In their responses, the authorities stated that they have searched for the missing person within their databases, to no avail. When the authorities respond to the CED, they occasionally advise the victims' families to file domestic complaints,

¹⁴ For more information: MENA Rights Group, *Human rights lawyer Ali Jasib Hattab Al Heliji disappeared since arrest in Amarah on October 8, 2019*, 5 November 2019, <https://www.menarights.org/en/caseprofile/human-rights-lawyer-ali-jasib-hattab-al-heliji-disappeared-arrest-amarah-october-8-2019> (accessed 20 February 2020).

¹⁵ The New Arab, *Family of Iraqi activist 'abducted by masked men' appeals for help*, 4 November 2019, <https://www.alaraby.co.uk/english/news/2019/11/4/family-of-abducted-female-iraqi-activist-appeals-for-help> (accessed 20 February 2020).

¹⁶ Concluding observations, *op. cit.*, para. 8.

despite the fact that often relatives have already taken several internal steps without success. In the vast majority of instances, the Iraqi authorities failed to provide any information on the fate and whereabouts of the victim.

In its 2019 Annual Report, the Committee found that the Iraqi authorities do not respond systematically to the CED's urgent action requests,¹⁷ and noted that "(a) the State party does not provide any information on the activities undertaken to search for the disappeared persons or to investigate their disappearance; (b) the State party has at times provided information that does not relate to the events described in the urgent actions in question; and (c) in one urgent action, the State party asserted that the disappeared person had been located, whereas the family members and representatives reported that the person was still missing."¹⁸

The CED also highlighted that in some cases the State party puts forward that the disappeared persons were "terrorists" and that these cases could not be considered as enforced disappearance.¹⁹ With regard to the protest-related enforced disappearances that we brought to the attention of the Committee, we note that the State never clarified the fate and whereabouts of the missing persons in question and failed to respond systematically to the CED's correspondence. When the State party did respond to the information relayed by the Committee, it claimed that the "Committee on Enforced Disappearances has not examined the accuracy of information" while affirming that "many of recent cases contains false information, which causes confusion to the competent authorities in Iraq." However, the State party never provided any factual elements that would dismiss the allegations contained in the CED's correspondence.

Moreover, we note that the urgent action procedure is seriously undermined by acts of reprisals directed against human rights defenders and NGOs engaging with this mechanism. Both the UN Secretary General²⁰ and a group of UN Special Procedure mandate holders²¹ have repeatedly expressed their concern about reprisals against members of Al Wissam Humanitarian Assembly, an NGO that documents cases of enforced disappearance in Iraq. In January 2019, MENA Rights Group requested the urgent intervention of the CED in the case of Riyadh Al Karawi, a volunteer with Al Wissam Humanitarian Assembly, who received death threats due to his work with the organisation.²²

Such acts of reprisals constitute a direct violation of article 24 (7) ICPPED, which guarantees "the right to form and participate freely in organizations and associations

¹⁷ Out of the 162 urgent actions registered by the CED from 2012 to 18 April 2019, no reply has been received in relation to 18 of the urgent action requests, even though four reminders have been sent.

¹⁸ General Assembly, *Report of the Committee on Enforced Disappearances*, 2019, A/74/56, para. 37

¹⁹ *Ibidem*, para. 38.

²⁰ UN Human Rights Council, *Cooperation with the United Nations, its representatives and mechanisms in the field of human rights - Report of the Secretary-General*, 13 August 2018. UN Doc. A/HRC/39/41, para. 28.

²¹ See Communications No. UA IRQ 1/2016 (15 April 2016) and IRQ 3/2018 (2 October 2018).

²² MENA Rights Group, *Iraqi human rights defender Riyadh Al Karawi*, 25 January 2019, <https://menarights.org/en/caseprofile/iraqi-human-rights-defender-riyad-al-karawi-subjected-reprisals> (accessed 20 February 2020).

concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance.”

Recommendations:

- Respond to all urgent actions sent by the CED;
- Abstain from reprisals against human rights defenders who document cases of enforced disappearances with a view of submitting them to the CED as part of the urgent action procedure.

4 Domestic legal framework on enforced disappearance

4.1 Gaps in the existing legislation

4.1.1 Separate offense

In its concluding observations, the Committee recommended that Iraq “adopts the legislative measures to ensure that [...] enforced disappearance is incorporated into domestic law as an autonomous offence, in accordance with the definition contained in article 2 of the Convention, and that the offence carries appropriate penalties which take account of its extreme seriousness.”²³

The State party has yet to implement the above recommendation. In its follow-up report, it acknowledged that the offense of “enforced disappearance” still does not exist under Iraqi domestic legislation. As they did in their initial report in 2015, the authorities argue that articles 322,²⁴ 324, 421, 423, 424, 425, and 426 of the Penal Code, and article 92 of the Criminal Procedure Code, criminalise certain acts (abduction, detention, arrest without a judicial warrant) incorporated in the definition of the crime of enforced disappearance.²⁵

4.1.2 Crime against humanity

Under article 5 ICPPED, the practice of enforced disappearance amounts to a crime against humanity when used in a widespread or systematic manner.

In its concluding observations, the Committee highlighted that the Iraqi Supreme Criminal Tribunal Act No. 10 does criminalise enforced disappearance as a crime

²³ Concluding observations, *op. cit.*, para. 14.

²⁴ Article 322 provides that any public official “who arrests, imprisons or detains a person in circumstances other than those stipulated by law” is liable to be imprisoned for up to seven years, or ten years if the offending official was wearing an official uniform without permission to do so.

²⁵ Follow up report of the State party, *op. cit.*, para. 19.

against humanity, but only in relation to offenses committed between 1968 and 2003,²⁶ limiting the court's temporal mandate.

The authorities have so far failed to expand the court's temporal mandate despite the fact that numerous cases of enforced disappearances have been perpetrated in Iraq, since 2003, by State officials, U.S. occupation forces, militias acting with the authorisation, support or quittance of the State, and armed groups.

Iraq has not yet become a party to the Rome Statute of the International Criminal Court nor the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

4.1.3 Criminal responsibility and appropriate sanctions

We are concerned that article 40 of the Penal Code establishes that an act is not an offense if a public official or public servant commits the act in implementation of an order from a superior which they are obliged, or feel obliged, to obey. We note that this provision is not in line with article 6 (2) ICPPED on the prohibition of invoking superior orders and does not meet the obligation to bring to justice to all those involved in the perpetration of enforced disappearances.

4.2 Draft law on the protection of persons from enforced disappearances

The State party claims in its follow up report that the Ministry of Justice has prepared a bill on enforced disappearance which takes into account the Committee's concluding observation.²⁷

In August 2017, the parliamentary committee on human rights began working on a draft law on the Protection of Persons from Enforced Disappearance (hereinafter "draft ED law"). The initial draft law is available on the website of the Iraqi Parliament.²⁸ However, on 30 June 2019, another version was introduced, and is currently pending before the Council of Representatives.²⁹ We note that the text differs from the version presented in the State party's follow up report³⁰ and fails to comply with the standards set out in the ICPPED.

4.2.1 Autonomous offense

Article 1 of the draft ED law defines enforced disappearance as:

²⁶ Concluding observations, *op. cit.*, para. 13.

²⁷ Follow up report of the State party, *op. cit.*, para. 23.

²⁸ The text is available here: <http://ar.parliament.iq/2019/06/30/%d9%82%d8%a7%d9%86%d9%88%d9%86-%d8%ad%d9%85%d8%a7%d9%8a%d8%a9-%d8%a7%d9%84%d8%a7%d8%b4%d8%ae%d8%a7%d8%b5-%d9%85%d9%86-%d8%a7%d9%84%d8%a7%d8%ae%d8%aa%d9%81%d8%a7%d8%a1-%d8%a7%d9%84%d9%82%d8%b3%d8%b1/> (accessed on 3 March 2020).

²⁹ MENA Rights Group obtained a copy of the amended draft ED law from the UNAMI.

³⁰ Follow up report of the State party, *op. cit.* paras. 24-26.

Any act of arrest, abduction or any form of deprivation of liberty by agents of the State officials or by persons or groups of persons acting with the authorization, support, knowledge or consent of the State and resulting in the deprivation of liberty of a person or the concealment of his fate or whereabouts.

We note that the above definition does not entirely align with the definition enshrined in article 2 ICPPED which includes the placement of a person “outside the protection of the law.” We also deplore that the draft ED law does not criminalise enforced disappearance as a crime against humanity when its practice is widespread and systematic.

Besides, the absolute character of the crime of enforced disappearances, prescribed by article 1(2) ICPPED, does not seem to be recognised in the draft ED law. There is no legal provision specifying that no exceptional circumstance of any kind, be it a state of war or the threat of war, internal political instability or any other state of emergency, can justify the use of enforced disappearances. This is particularly concerning insofar as the authorities regularly invoke the deteriorating security situation as a justification for human rights abuses. Such a provision should be incorporated into the law as a matter of priority.

4.2.2 Applicability of the law

Article 2 of the draft ED law sets out the applicability of its provisions, which currently appear to be limited to the direct victims and perpetrators of enforced disappearances. This is contrary to other provisions of the draft ED law, which establish obligations for other actors, including governmental and judicial bodies, in relation to the establishment of a database, the monitoring of disappearances, and the responsibilities of the Public Prosecution Service.

Furthermore, this article does not define who is considered to be a victim of enforced disappearance in light of the definition contained in article 24 (1) ICPPED, which states that a “victim’ means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.”

4.2.3 Criminal responsibility

Criminal responsibility is not explicitly set out in the draft ED law. Article 8 of the draft ED law states that “no orders or instructions issued by an official body may be invoked as a defence in any circumstances, should it be normal or exceptional.” If this provision rules out the defence of superior orders, we affirm that there is a risk of conflict with article 40 of the Penal Code (See *supra* section 4.1.3).

Under article 10 of the draft ED law, it is asserted that penalties apply to “whoever commits the crime of enforced disappearance or contributes to it” and whoever “deliberately refrained from informing the official authorities and was aware that one of his subordinates acting under his effective responsibility and control had committed the crime of enforced disappearance.” However, this does not capture all of the provisions set out in article 6 ICPPED, in particular its subparagraph (b).

4.2.4 Establishment of a database and freedom to seek, receive and impart information

In its concluding observations, the Committee expressed concern at the lack of accurate and disaggregated statistical information produced by the Iraqi authorities on disappeared persons.³¹

Article 4 of the draft ED law establishes a database with regard to the names of detainees and convicts. However, we note that it does not meet the minimum thresholds of information set out in article 17(3) ICPPED. We also note that this provision does not provide for information relating to detainees and convicts to be shared with individuals such as family members or legal representation of the detained person as prescribed by article 18 (1) ICPPED.

This provision would nevertheless be a step in the right direction as the State party still lacks a centralised record that is open to the inspection of detainees and their representatives, and which sets out the details of all detainees, including names, the dates they were detained, the date the legal authority for their detention expires, the legal basis for their detention, and when they were brought before a judge.³²

Article 5 of the draft ED law is insufficiently detailed, stating that government authorities “should monitor and collect information, establish a database, locate forcibly disappeared persons, and submit such information to judicial bodies.” We regret that the present article does not cover the right for any person with a legitimate interest to have access to such information as prescribed under article 18 (1) ICPPED.

4.2.5 Appropriate sanctions

Regarding the establishment of sanctions reflecting the gravity of the crime, article 11 states that “anyone committing the offense of enforced disappearance or contributes to it shall be liable to imprisonment for fifteen (15) years and a fine of not less than 25 million and not more than 50 million dinars.” Article 11 (2) of the draft ED law establishes that “the death penalty shall be imposed if the crime leads to the death of the disappeared person.”

While noting that the above provisions contain penalties that are commensurate with the gravity of the crime of enforced disappearance, we are concerned by the imposition of the death penalty under article 11 (2). It must be recalled that the CED recommends that “the offence [of enforced disappearance] carries appropriate penalties that take into account its extreme seriousness, while avoiding the imposition of the death penalty.”³³

³¹ Concluding observations, *op. cit.*, para. 11.

³² Iraq: Secret Detention, No Recourse, *op. cit.*

³³ Committee on Enforced Disappearances, *Concluding observations on the report submitted by Tunisia*, CED/C/TUN/CO/1, 25 May 2016, para. 15 (a).

In its follow-up report, the State party explains that article 6 draft ED law provides aggravating circumstances where the following constitute part of the offense of enforced disappearance:

1. The death of the person subjected to enforced disappearance;
2. If the offence is committed against a pregnant woman, a minor or a female with disabilities;
3. If the offence is perpetrated in conjunction with: (a) Physical or mental torture or any form of coercion of the person subjected to enforced disappearance; (b) The rape of the person subjected to enforced disappearance or an act that causes such person to have a miscarriage or a permanent disability.

We note that the above aggravating circumstances do not appear in the latest version of the draft ED law excepting the first (the death of the person subjected to enforced disappearance). Despite the vulnerability of certain persons in Iraqi society, such as pregnant women, minors, seniors, and persons with disabilities, the opportunity has not been taken to ensure that the enforced disappearance of such vulnerable categories constitutes an aggravated circumstance as envisaged under article 7 (b) ICPPED.

4.2.6 Competent courts

Article 7 (2) of the draft ED law wording is vague, stating that “the Public Prosecution Service should initiate cases of enforced disappearance before the competent courts”. Furthermore, it is not clear what the basis for initiating such cases would be, whether or not a formal complaint would need to be made or whether the provision of information by any party would be sufficient.

4.2.7 Associated crimes

Article 9 of the draft ED law states that “all acts of arbitrary arrest, detention or deprivation of liberty that lead to the crime of enforced disappearance are prohibited.” This article does not set out the measures required to prevent the occurrence of enforced disappearances, nor does it establish penalties for the offences of arbitrary arrest, detention or deprivation of liberty that lead to the crime of enforced disappearance. Furthermore, the vagueness of the wording of this article could lead to uncertainty as, for example, it is unclear what the distinction between “detention leading to enforced disappearance” and “enforced disappearance” would be.

4.2.8 Compensation

Article 13 of the draft ED law states that victims of enforced disappearance shall be referred to civil courts with regard to compensation claims. However, requiring victims to pursue such claims in civil courts has several negative implications. The ability to make a claim for compensation before criminal courts is vital to ensuring justice which protects the anonymity of victims, minimises the exposure of victims to a potentially re-traumatising process, and does not expose victims to civil legal fees.

Under article 429 of Iraq’s Civil Code, the applicable statute of limitation with regard to a claim for compensation is 15 years. Article 17 of the Declaration on the

Protection of all Persons from Enforced Disappearance states that “statutes of limitations, where they exist, relating to acts of enforced disappearance shall be substantial and commensurate with the extreme seriousness of the offence”. We believe that the hearing of compensation claims relating to enforced disappearances by civil courts could result in the application of an inappropriate statute of limitations, contrary to article 17 of the Declaration.

Recommendations:

- Amend the current definition of enforced disappearance in the draft ED law to ensure compliance with article 2 ICPPED;
- Provide for the establishment of databases which meet the minimum thresholds of information set out in article 17(3) of the ICPPED;
- Amend the draft ED law to (i) ensure the right to information protected under article 18 (1) ICPPED, and (ii) protect individuals and organisations making enquiries in accordance with article 18 (2) ICPPED;
- Establish the conditions under which orders of deprivation of liberty may be given and set out the rights of detained persons in adherence to article 17 ICPPED;
- Provide clarity as to which court shall have jurisdiction over cases relating to enforced disappearance;
- Explicitly establish in national law that where an enforced disappearance appears to have taken place as a part of a widespread or systematic practice of disappearance, it will be deemed to constitute a crime against humanity and will be tried as such;
- Ratify the Rome Statute of the ICC.

5 Measures to prevent enforced disappearance

5.1 Lack or non-appliance of legal safeguards

In its concluding observations, the Committee recommended that Iraq “adopt all the measures necessary to ensure that no person is held in secret detention, including by guaranteeing that all persons deprived of liberty are afforded, de jure and de facto, since the outset of their deprivation of liberty all the fundamental legal safeguards provided under article 17 of the Convention and other human rights treaties to which Iraq is a party.”³⁴

Iraqi legislation contains some legal safeguards to prevent the practice of enforced disappearance. However, they are not comprehensive and are often disregarded in practice.

³⁴ Concluding observations, *op. cit.*, para. 29.

Article 19 of the Iraqi Constitution mandates that authorities submit preliminary documents to a competent judge within 24 hours of arrest, a period that may be extended once. In addition, article 37 (b) states that “no person may be kept in custody or interrogated except in the context of a judicial decision”.

Article 19 (4) of the Constitution provides that arrested persons have the right to mount a defence, which is inviolable and guaranteed in all phases of investigation and trial. Similarly, article 8 (1) of the Coalition Provisional Authority (CPA) Memorandum No. 3 (2003) provides any person accused of a felony the right to access a lawyer while in detention during all stages of proceedings.

The Code of Criminal Procedure (CCP) contains additional safeguards applicable to persons deprived of liberty. Article 92 of the CCP states that the “arrest or apprehension of a person is permitted only in accordance with a warrant issued by a judge or court or in other cases as stipulated by the law.”³⁵ Article 322 of the Penal Code punishes, with up to seven years of imprisonment, any law enforcement official who arrests, imprisons or detains a person in unlawful circumstances.

Under article 123 of the CCP, police may detain suspects only after a court-issued arrest warrant and must bring suspects before an investigative judge within 24 hours in order to mandate their continued detention. Before the investigation starts, the investigative judge must inform the accused of his or her right to be represented by an attorney under article 123 of CCP.

It must be noted that the CCP contains no obligation to present an arrest warrant, the accused should be merely informed of its existence at that time. Security forces with the power of arrest operating under the direct supervision of the Prime Minister’s Office (e.g. the Baghdad Operation Command and Counter Terrorism Unit), may arrest individuals prior to obtaining a warrant.³⁶

Although article 13 of the Kurdistan Region of Iraq (KRI) Anti-Terror Law stipulates that accused persons should be treated fairly in accordance with the law during interrogation, including through the provision of a lawyer, the Federal Anti-Terrorism Law No. 13 of 2005 does not contain any fair trial rights and procedural guarantees. Arrests conducted under the Anti-Terrorism Law tend to be carried out without warrants.³⁷ It has also been reported that the warrants are usually being issued by the judge after the arrest.³⁸

The 24 hours deadline set out in article 123 of the CCP is frequently exceeded in practice and many detainees are held for days or weeks in detention before being seen by an investigating judge, particularly in terrorism-related cases. Human Rights

³⁵ Under article 122 of the Code of Criminal Procedures, arrests may be carried out in the absence of a warrant where: “a) the offence was committed in front of witnesses or b) if the person has escaped after being lawfully arrested by the authorities; c) the person has been sentenced in his or her absence to a penalty restricting his or her freedom; or d) the person is found in a public place in a clear state of intoxication or confusion or has lost his or her reason.”

³⁶ UNAMI/OHCHR, *Report on the Death Penalty in Iraq*, October 2014, p. 11.

³⁷ U.S. Department of State, *Iraq 2018, human rights report*, p. 13.

³⁸ Report on the Death Penalty in Iraq, *op. cit.*, p. 12.

Watch has found that terrorism suspects in Baghdad typically saw a judge between 10 and 20 days after arrest. Others waited months or even years to be brought to court.³⁹

Following a country visit in 2018, the Special Rapporteur on extrajudicial, summary or arbitrary executions found that “the Criminal Procedure Code appears to be set aside for those charged under the Anti-Terrorism Law, thereby denying defendants their fair trial rights and due process guarantees. This includes the right to be informed upon arrest of the reasons thereof and the charges brought, access to legal representation from the moment of arrest, the right to have arrest and detention status reviewed by an independent and competent judge in a timely manner, and the prohibition of torture to extract a confession.”⁴⁰

5.2 Secret detention

In its concluding observations, the Committee urged the authorities to guarantee that “[p]ersons deprived of their liberty are held solely in officially recognized and supervised places of deprivation of liberty.”⁴¹

The State party affirms that “there are no undeclared secret headquarters or secret detention facilities and all prisons operated by the Iraqi Corrections Service are open for visits from international and human rights organization.”⁴²

Article 19 (b) of the Iraqi Constitution prohibits unlawful detention and imprisonment in places not designated for that purpose. However, we remain extremely concerned that secret and *incommunicado* detention remain widespread.

In 2016, both the government and the Kurdistan Regional Government (KRG) operated secret detention facilities, according to international observers and to the head of the KRG parliamentary Human Rights Committee.⁴³

In July 2018, the National Security Agency (NSS), an Iraqi intelligence agency reporting to Iraq’s prime minister, admitted detaining more than 400 individuals in a secret detention facility in east Mosul, despite not having a clear mandate to do so.⁴⁴

MENA Rights Group has also documented cases of abductions, leading to enforced disappearances, carried out by militias of the PMU in the contexts of the war against ISIL and the crackdown on peaceful protestors.

³⁹ Human Rights Watch, *Iraq: Judges Disregard Torture Allegations*, 31 July 2018, <https://www.hrw.org/news/2018/07/31/iraq-judges-disregard-torture-allegations> (accessed 24 February 2020).

⁴⁰ Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on her mission to Iraq*, 5 June 2018, A/HRC/38/44/Add.1, para. 47.

⁴¹ Concluding observations, *op. cit.*, para. 29 (b).

⁴² Follow up report of the State party, *op. cit.*, para. 80.

⁴³ United States Department of State, *2016 Country Reports on Human Rights Practices - Iraq*, 3 March 2017, p. 8.

⁴⁴ Human Rights Watch, *Iraq: Intelligence Agency Admits Holding Hundreds Despite Previous Denials*, 22 July 2018, <https://www.hrw.org/news/2018/07/22/iraq-intelligence-agency-admits-holding-hundreds-despite-previous-denials> (accessed 24 February 2020).

The Popular Mobilisation Units (PMU) is an umbrella organisation composed of various militias that supported the Iraqi armed forces during the fight against ISIL. In February 2016, Prime Minister Al Abadi issued Order No. 91, officially incorporating the PMU as an “independent military formation” within Iraq’s security forces under the Prime Minister’s command. On 26 November 2016, the parliament passed a law formalising Order No. 91. Until then, PMU groups operated extra-legally but with the support and acquiescence of the Iraqi government. On 8 March 2018, another Prime Minister’s decree further confirmed the PMU’s inclusion into the country’s security apparatus.⁴⁵

In practice, the central government faces challenges in exercising effective control over certain units of the PMU.⁴⁶ During the reporting period, militias affiliated with the PMU regularly carried out arrests and held individuals in secret places of detention, without any judicial oversight.

Finally, it has been reported that the destruction of official detention facilities during the war against ISIL led to the use of temporary facilities; for example, the Ministry of Interior reportedly held detainees in homes rented from local residents in Ninewa Governorate.⁴⁷

The Committee also recommended Iraq to guarantee that:

[a]ll deprivations of liberty, without exception, are entered in uniform registers and/or records which include, as a minimum, the information required under article 17 (3) of the Convention; (e) Registers and/or records of persons deprived of liberty are filled out and updated promptly and accurately and are subject to periodic checks and, in the event of irregularities, the officers responsible are adequately sanctioned; (f) Any person with a legitimate interest can have prompt and easy access anywhere in the territory to at least the information listed in article 18 (1) of the Convention.⁴⁸

The cases we have documented indicate that when relatives of the disappeared manage to have access to detention records available at the Iraqi Central Criminal Court or certain detention facilities, it is nearly impossible for them to find the name of the person missing or his place of detention (see *infra* section 5.3).

5.3 Exhaustion of domestic remedies

In its concluding observations, the Committee urged Iraq to guarantee that “[a]ny person with a legitimate interest can have prompt and easy access anywhere in the territory to at least the information listed in article 18 (1) of the Convention.”⁴⁹

We note that families in Iraq usually undertake some of the following steps when searching for their missing relatives: go to the police station and provide information

⁴⁵ Reuters, *Iraq’s Shi’ite militias formally inducted into security forces*, 8 March 2018 <https://www.reuters.com/article/us-mideast-crisis-iraq-militias/iraqs-shiite-militias-formally-inducted-into-security-forces-idUSKCN1GK354> (accessed 2 March 2020).

⁴⁶ Iraq 2018, human rights report, *op. cit.*, p. 24.

⁴⁷ *Ibidem*, p. 15.

⁴⁸ Concluding observations, *op. cit.*, para. 29 (d) (e) (f).

⁴⁹ Concluding observations, *op. cit.*, para. 29 (f).

about their missing relative; go to detention centres and check if the name of their relative is in the database; go to the Central Criminal Court where they have a central database with the name of all detainees; go to the Human Rights Section of the Office of the General Investigator at the Ministry of Interior and submit a request there to obtain information on the fate and whereabouts of their missing relative; go to the Muthanna Airport prison which is controlled by the 56th brigade of the Iraqi army and submit a request to search for the name of their relative in their database; go to the High Commission for Human Rights and submit a request to try to locate their missing relative; go to the counter-terrorism department of the National Security Advisory (which falls under the authority of the Prime Minister); go to the local court (depending on the province); go to the Department of Forensic Medicine in the Ministry of Health, in case the relative might have been found deceased.

The cases that we have documented reveal that in the overwhelming majority of cases, the steps taken by the families of victims never lead to a clarification of the fate and whereabouts of the missing persons. The Central Criminal Court cannot be considered as an effective remedy for families of victims of enforced disappearance insofar as its database only includes individuals who have been presented before a judicial authority. Furthermore, some relatives of missing individuals do not file complaints because they are afraid of reprisals.⁵⁰ In light of the above, we assert that the domestic remedies are ineffective in practice.

Recommendations:

- Ensure that the detention of suspects is carried out pursuant to article 123 CCP, requiring a court-ordered arrest warrant and bringing detainees before a judge within 24 hours;
- Ensure that families of detainees are informed within a reasonable period of time of the time and place of arrest and the place of detention;
- Ensure timely access to a lawyer from the very outset of deprivation of liberty;
- Ensure greater control and oversight over the Popular Mobilisation Units;
- Ensure that persons deprived of their liberty are held in officially recognised and supervised places of deprivation of liberty;
- Dismantle any illegal places of detention.

6 The search for disappeared persons

6.1 Lack of sufficient capacity to secure the excavation of mass graves

The State party has an obligation under article 24 (3) ICPPED to “take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.”

⁵⁰ Iraq: Secret Detention, No Recourse, *op. cit.*

In its concluding observations, the Committee urged the State party to “redouble its efforts in order to ensure that all persons who were forcibly disappeared and whose fate is not yet known are searched for and located without delay and that, in the event of death, their remains are identified, respected and returned.”⁵¹

As a result of the mass killings that Iraq experienced during Saddam Hussein’s regime, the sectarian violence that followed, and the widespread violence committed by ISIL, an estimated one million persons have been buried in hundreds of mass graves across the country.⁵² Some 114 mass graves, linked to the most recent conflict, have been discovered so far in areas previously under the control of ISIL, containing the bodies of an unknown number of individuals. Some of these mass graves may contain bodies of victims of enforced disappearances.

Following her country visit, the Special Rapporteur on extrajudicial, summary or arbitrary executions raised concern that many mass grave sites lack necessary protection, leaving them exposed to the elements and subject to uncontrolled excavations.⁵³

In addition, the Mass Graves Directorate of the Iraqi Martyr’s Foundation – a government body charged with opening, inspecting and identifying mortal remains and documenting what was found – lacks both the necessary human and material resources to carry out its work. This includes insufficient storage space, a lack of the basic equipment necessary to carry out excavations (such as gloves and masks), outdated equipment, and only 43 staff members.

As a result of chronic shortages, the Medico-Legal Institute estimates that, at the current rate of progress, it would take professionals working on mass grave excavation in Iraq 800 years to complete their tasks.⁵⁴ We fear that there is a high risk that criminal evidence is being lost during excavations due to the lack of effective and reliable evidentiary and scientific standards.

6.2 Legislative framework concerning mass graves

6.2.1 Law on the Protection of Mass Graves and its 2015 amendments

In 2006, Iraq enacted Law No. 5 on the Protection of Mass Graves, which is dedicated to the protection of mass graves “that resulted from crimes committed by the past regime.” It aimed to protect such sites from unauthorised disturbance, to provide for investigations, to preserve and protect evidence so as to identify victims, and to identify perpetrators.

In its 2015 concluding observations, the CED regretted not having received clarification on whether the law was amended to make it applicable to mass graves

⁵¹ Concluding Observations, *op. cit.*, para. 34.

⁵² Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on her mission to Iraq, *op. cit.*, para. 77.

⁵³ *Ibidem*, para. 78.

⁵⁴ *Ibidem*.

dating from 2003 onwards.⁵⁵ The same year, the law was amended to expand the temporal jurisdiction to crimes committed after 2003 and to specify what the “protection, inspection and investigation” of mass graves entails.⁵⁶ Indeed, article 1(2) specifies that the law applies to mass graves created as a result of crimes committed under the “Ba’athist dictatorship” and terrorist groups “before and after 2003”.

However, we remain concerned that the law does not cover crimes allegedly committed by government forces, despite reports of acts of punishment against civilians of the Sunni faith (see *supra* section 2), and executions of ISIL fighters *hors de combat*.

6.2.2 Draft Speicher Law

The CED has called on the authorities to “adopt the measures necessary to ensure the swift entry into force of the amendment to the Protection of Mass Graves Act (Act No. 13 of 2015), as well as the effective implementation of the legislative framework concerning mass graves”.⁵⁷

On 29 April 2019, the legal committee, and the martyrs, victims and political prisoners Committee of the Parliament, proposed a new draft law to address the events at Camp Speicher, titled “The rights of the martyrs of the crime of Airbase ‘Speicher’” (the “Speicher Law”).⁵⁸ In June 2014, thousands of individuals were killed after ISIL attacked Speicher military training camp close to Tikrit in Iraq. In addition, many of the victims who were accused of desertion and abducted by government forces, remain disappeared to date.

The text in its current version is extremely flawed and fails to adequately guarantee justice for all victims. Article 1 of the Speicher Law, defines all victims of “the crimes committed by Daesh” as martyrs, whether or not their remains have been found. The law fails to define “martyr” and assumes *prima facie* that all Speicher cadets have been executed by the group, despite evidence that some individuals remain in secret detention following their arrest by government forces.⁵⁹

Moreover, the definition of victim in the Speicher Law is not in line with the one provided for in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Indeed, principle 8 defines victims as:

[P]ersons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their

⁵⁵ Concluding Observations, *op. cit.*, para. 33.

⁵⁶ Law No. 13 of 2015, Affairs and Protection of Mass Graves, amending the Law on the Protection of Mass Graves (2006).

⁵⁷ Concluding Observations, *op. cit.*, para. 34.

⁵⁸ Available at: Iraqi Parliament, <https://bit.ly/2IUOwKD>, (accessed 25 February 2020).

⁵⁹ Article 1 reads: “[t]he victims of the crime of Airbase ‘Speicher’ that took place in the Salah Al Din Governorate in June 2014 and which was committed by Daesh are martyrs, whether those whose remains have been found, or those who are missing and their remains have not yet been found”.

fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

This definition is expanded by article 9, which provides that “[a] person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim”. As a result, the definition of victim in the Speicher Law is overly restrictive and creates unequal treatment before the law between victims of ISIL and victims of other parties.

The House of Representatives adopted the draft law on 11 July 2019. The text was signed by the president on 5 August and was published in the Official Gazette on 26 August 2019.

Recommendations:

- Establish an independent commission of inquiry to investigate all cases of enforced disappearances;
- Strengthen the Mass Graves Directorate’s capacities to enable it to carry out its mandate;
- Bring domestic legislation into line with international standards, including through amending both the Law on the Protection of Mass Graves and the draft Law on the Rights of the martyrs of the crime of Airbase Speicher.