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The Forever Crime: Ending enforced disappearance in Iraq



Cover photo:

An Iraqi woman shows a picture of her missing son to former prisoners released from US-run detention centres at a bus station in central Baghdad on 8 July 2006.

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1

Introduction

Iraq is known to have one of the highest numbers of missing people in the world. According to the International Commission on Missing Persons, the total number of those missing after decades of conflict is somewhere between 250,000 and 1 million. However, many of Iraq's missing are not the collateral damage of war – they have been forcibly disappeared.

Iraq's disappeared persons are victims of a crime that international law has only recently begun to grapple with. Today, enforced disappearance is understood as a phenomenon in which state actors deprive individuals of their liberty – through acts of abduction, arrest or detention – then refuse to acknowledge what has happened to them. In other words, they cause their victims to disappear without a trace. Disappeared persons may end up imprisoned and tortured or killed, but either way their fate is concealed from their families. This deprives victims from the protection they are guaranteed by law and causes long-term anguish for their loved ones.

Enforced disappearance has become a problem of massive proportions in Iraq, following decades of conflict and political violence.¹ The actors responsible have ranged from state security agents and foreign military forces to pro-government militias and other armed groups. All of Iraq's communities have been affected at some point. Even in the wake of successive political transitions, the practice continues to be prevalent, and the lack of effective legal remedies stands in the way of families seeking justice.

However, despite the scale of the problem, Iraq is now facing an unprecedented opportunity to address it. The end of the conflict with Islamic State in Iraq and Al-Sham (ISIS) has led to renewed calls for a political order grounded in the rule of law and respect for human rights, and an end to impunity

and corruption. Prime Minister Mustafa Al-Kadhimi, who came to office in May 2020 in the wake of widespread popular protests, has made vocal commitments to addressing human rights abuses, including enforced disappearances.

Furthermore, legislation proposing to criminalize enforced disappearance is now under consideration before the Iraqi parliament for the first time. Iraq was already among the first countries to ratify the International Convention for the Protection of All Persons from Enforced Disappearance, the main international instrument addressing the issue. By passing implementing legislation that treats enforced disappearances as an autonomous offence, Iraq has the potential to set a new precedent in the struggle against the practice and begin turning the tide on decades of impunity.

This report aims to inform the current discussion on ending enforced disappearance in Iraq by drawing on international practice. It begins by diagnosing the elements of the problem, placing Iraq's current challenges in historical perspective, before presenting practical recommendations for a comprehensive policy to end the legacy of enforced disappearance and prevent future occurrences. Although enforced disappearance is a complex and entrenched phenomenon, the experience of countries that have dealt with similar legacies provides a wealth of experience to inform the debate on the problem Iraq is facing today.

2

What is enforced disappearance?

In countries experiencing armed conflict, natural disasters or internal strife, it is common for people to go missing. However, what distinguishes enforced disappearance as a specific category of offence is the direct involvement of state actors in causing persons to vanish without a trace, and the deliberate obfuscation of their fate. This causes extreme pain and suffering not only for direct victims, but also their relatives and close friends.

Defining enforced disappearance

The Convention for the Protection of All Persons from Enforced Disappearance – the main international human rights treaty addressing the practice – defines enforced disappearance as follows:

[t]he arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.²

In other words, an enforced disappearance occurs when actors associated with the state deprive persons of their liberty, then refuse to disclose what has happened to them. Victims of enforced disappearances may be abducted, ille-

gally detained and tortured. Often, they are killed, but their bodies are buried in clandestine locations where they cannot be found or identified. This creates deep fear and uncertainty for victims as well as their close family members, who are left wondering about their fate. They might not know whether their loved ones are dead or alive; whether or where they are being detained; or whether they are being mistreated. Since the violation is perpetrated by state actors – the very authorities responsible for protecting and fulfilling human rights – a culture of impunity often thwarts attempts to seek justice.

It is clear that enforced disappearance typically entails the violation of a whole series of individual human rights. These can include, *inter alia*: the right to liberty and security of the person; the right to a fair trial and to judicial guarantees; the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment; the right to life; and the right to an effective remedy, including reparation.³ However, since the exact violations to which a disappeared person has been subjected are concealed – often indefinitely – victims and their families have

no recourse to the law. This is the rationale for the codification of enforced disappearance as a consolidated offence under international law, distinct from the individual violations it may involve.

More than other types of human rights violations, enforced disappearances affect two categories of victims: the direct victims (i.e. the disappeared persons) and the indirect victims (family members and others with a close connection to the disappeared persons). This is due to the extreme anguish and suffering that is caused by prolonged uncertainty about the fate of a loved one. Psychotherapists have found that the ambiguity associated with an enforced disappearance can ‘traumatize and immobilize grief and coping processes’, while the lack of closure prevents family members from moving on with their lives.⁴ Research evidence also shows that if relatives choose to accept that their loved one has died, they experience symptoms of guilt that make them feel as if they had killed the victim themselves.⁵ Both the European Court of Human Rights and the Inter-American Court of Human Rights have determined that the mental anguish associated with long-term uncertainty about the fate of family members can amount to inhuman treatment or torture.⁶

The distress experienced by indirect victims is often compounded by the response they receive from state authorities in the aftermath of the disappearance. In an effort to locate the disappeared person, relatives will often make repeated visits to state institutions. In the process, they may be met by uncooperative, disrespectful, or intimidating behaviour by state agents, who usually show little concern for helping to clarify the fate of the victim.⁷ The jurisprudence of the European Court of Human Rights emphasizes that it is precisely these responses from state authorities in relation to enforced disappearance cases that qualify family members as victims of their conduct.⁸

In addition to the psychological turmoil it causes, an enforced disappearance often also has significant material consequences for indirect victims. Households may be left without their breadwinner for an indeterminate period of time. In the absence of any documentary proof that the disappeared person has died, they may be unable to apply for social support schemes such as wid-

ows’ pensions.⁹ Women and girls, if they survive an enforced disappearance, may be affected by community perceptions that they have been subjected to sexual violence while detained, regardless of whether or not that was the case. The associated stigma can hinder their ability to get married and resume their normal lives.¹⁰

In sum, the practice of enforced disappearances creates a climate of uncertainty, fear and distrust that extends beyond the direct victims to societies as a whole.¹¹ As a result, it has been used as a tool by repressive governments to spread terror among the population, to extinguish political activism and to discourage resistance.

Mapping enforced disappearance globally

The use of enforced disappearance as an organized state policy is generally understood to originate in the Second World War with the issuance of the ‘Night and Fog’ decree by Adolf Hitler in 1941.¹² Rather than executing political opponents and those accused of offences against the German state – which the Nazi leadership feared would risk turning them into martyrs – Hitler ordered his forces to transfer victims from occupied territories to Germany and cause them to vanish without a trace. Those arrested under this decree were taken from their homes in the middle of the night, interrogated and tortured in detention centres, and eventually transferred to concentration camps in secret locations.¹³ Their families were not given any information about the whereabouts, which served the purpose of instilling uncertainty and anguish among them and discouraging resistance to Nazi policies.¹⁴

During the Cold War period, enforced disappearances were used widely by military governments across Latin America as a method of eliminating political opposition and spreading fear among the general population. Beginning in the 1960s, state intelligence agents or paramilitary groups targeted peasants, students, teachers, and political and religious leaders for disappearances.¹⁵ For example, in Argentina, an estimated 30,000 people were forcibly disappeared during the ‘Dirty War’ that lasted from 1976 to 1983.¹⁶ This began with a

notorious incident known as the ‘Night of the Pencils’, during which young students were taken away to clandestine detention centres where they were tortured, raped or killed over the course of several months.¹⁷ In Chile, during the military dictatorship of Augusto Pinochet (1973–90), 2,279 persons were recorded as disappeared.¹⁸ Some were killed and buried in unmarked graves, while others were thrown in the ocean, the river, or on the street.¹⁹ Guatemala’s Historical Clarification Commission (CEH) registered 6,159 victims of enforced disappearance over the course of the country’s decades-long civil war.²⁰

The Latin American experience was pivotal in shaping the current understanding of enforced disappearance; it was here that the term was coined by non-governmental organizations (NGOs) and activists who were rallying against the practice.²¹ It was also in Latin America that the first advances in criminalization and prosecution of enforced disappearance were made, following the collapse of the junta regimes across the region. These later went on to influence and guide the creation of policies and standards to confront the practice beyond the region.²²

Despite the progress achieved in Latin America, enforced disappearance remains a ubiquitous phenomenon across the globe, particularly in countries marked by armed conflict or dictatorship. Numerous recent wars have seen disappearances carried out on a large scale. Examples include the war in the former Yugoslavia from 1991 to 2001, and the Algerian civil war, where more than 7,000 people disappeared over the course of the fighting from 1991 to 2002.²³ The Syrian Observatory for Human Rights has documented tens of thousands of disappearances carried out by both state forces and armed opposition groups since the country’s descent into civil war in 2011.²⁴

Enforced disappearances are also committed by states in their overseas operations, particularly in the context of counter-terrorism policy. The ‘War on Terror’ declared by the United States and its allies in the aftermath of 9/11 saw the increased use of black sites, incommunicado detention, and extraordinary renditions – practices which often amount to enforced disappearances.²⁵ Western countries have also provided military, financial

and logistical support to states which commit similar violations against their own citizens accused of membership in terrorist groups, all in the name of fighting extremism.

Another recent trend is the increasing degree to which non-state actors are involved in enforced disappearances. While military regimes were responsible for the bulk of disappearances seen in Latin America from the 1960s onwards, today it is not uncommon for non-state actors to bear the responsibility for a large share of the disappearances carried out in a given country. Drug cartels and other organized criminal groups are thought to be responsible for a significant share of disappearances in Mexico, where over 60,000 people have gone missing since 2006.²⁶ In Colombia, 46 per cent of disappearances carried out between 1970 and 2015 are attributed to paramilitary groups, and 19.9 per cent to guerrillas, compared with 8.8 per cent carried out by state agents.²⁷

International legal framework

International mechanisms to address enforced disappearance are relatively new. One of the first advances in this regard was the creation of the Working Group on Enforced or Involuntary Disappearances in 1980. The Working Group is a body of five experts mandated by the UN Human Rights Council to assist families in determining the fate or whereabouts of their family members who are reportedly disappeared. The Working Group undertakes country visits, communicates with governments concerning information and complaints received regarding alleged disappearances, and submits reports to the Human Rights Council.

This was followed by the passing of the UN Declaration on the Protection of all Persons from Enforced Disappearance in 1992. Although non-binding, the declaration was an important step in establishing a shared international consensus around the crime of enforced disappearance and identifying practices to address it.

The subsequent adoption of the International Convention on the Protection of all Persons from Enforced Disappearance in 2006 was hailed as a

significant achievement in the fight against the practice. It is the only binding UN human rights treaty that specifically addresses enforced disappearance as a violation in its own right and sets out the rights of individuals and corresponding obligations of states parties. At the time of writing, the convention had 63 states parties, including Iraq, and 48 signatories.

Implementation of the convention is monitored by a body of independent experts known as the UN Committee on Enforced Disappearance. It examines reports by states parties on a periodic basis and provides recommendations in the form of 'concluding observations'. It also receives and

considers individual and inter-state complaints, provided that the state party has recognized its competence in this regard.

Enforced disappearances also fall under the jurisdiction of the European Court of Human Rights and the Inter-American Court of Human Rights. When committed as part of a widespread or systematic attack directed against any civilian population, it is also one of the acts that can constitute crimes against humanity. It has been expressly recognized as such in the Rome Statute of the International Criminal Court (ICC), which establishes individual criminal responsibility for international crimes.²⁸

3

Enforced disappearance in Iraq: past patterns and current challenges

Iraq has a long history of enforced disappearance, which has unfolded over several distinct periods, and involved a diverse array of actors. Although once the domain of the state, the more recent rise of militias and non-state groups in Iraq has resulted in a proliferation of armed actors involved in enforced disappearance. As a result of this complex history, virtually all of Iraq's communities have been touched by the practice at some point.

The Ba'ath era (1968–2003)

Recent memory of enforced disappearance in Iraq is heavily coloured by the experience of the Ba'ath era (1968–2003), a period characterized by violent internal repression and widespread human rights abuses. Saddam Hussein and his inner circle oversaw the establishment of a one-party state, in which the Ba'ath party asserted its near-total dominance over political and civic life. Competing parties, particularly the Communist Party and the Islamic Dawa Party, were branded as internal enemies and brutally suppressed.²⁹ The Ba'athist state's complex security apparatus stifled dissent among the population through the widespread use of arbitrary detention, torture, and executions, as well as enforced disappearances.³⁰ According to Human Rights Watch, a staggering 250,000–290,000 people were forcibly disappeared during this period.³¹

These figures include an estimated 100,000 Kurds who were forcibly disappeared as part of Saddam Hussein's genocidal campaign in Iraqi Kurdistan.³² The majority of these were

men and boys who were rounded up during the 'Anfal' campaign from February to September 1988, when the Iraqi military swept through the highlands of Iraqi Kurdistan and detained anyone found in government-declared prohibited zones. Most of the victims were trucked to remote locations and executed.³³ In March of the same year, the Iraqi government attacked the town of Halabja with chemical weapons, causing the mass displacement of Kurdish civilians and the deaths of at least 3,200 people.³⁴ After an amnesty was issued in September 1988, many residents of Halabja returned from neighbouring countries, only to be arrested by Iraqi security forces and held in detention camps or prisons.³⁵

It should be noted that these violations took place in the context of a wider campaign of Arabization and demographic engineering over the 1970s and 1980s, which saw the destruction of nearly 5,000 Kurdish villages, mass evictions of families from Kirkuk and other multi-ethnic areas, and the forcible transfer of civilians to 'resettlement camps'.³⁶ Assyrians, Turkmen and other non-Arab minorities were also targeted by these policies.³⁷

Saddam Hussein also led Iraq into several regional wars, which increased the violence to which civilians were subjected. During the Iran–Iraq War, which lasted from 1980 to 1988, civilians on both sides of the borders were affected by the military operations and hundreds were disappeared.³⁸ The Iraqi government expelled over half a million Shi'a from Iraq on the presumption that they were loyal to Iran.³⁹ Approximately 50,000–70,000 men and boys, who were separated from their families prior to expulsion, were imprisoned and disappeared.⁴⁰ Then, in 1990, Iraq's invasion and occupation of Kuwait resulted in the arrest and disappearance of over 600 Kuwaitis and third-country nationals.⁴¹

Following the end of the Gulf War, members of the Shi'a population in southern Iraq staged an uprising against the Iraqi government. In response, government forces detained and disappeared thousands of Shi'a, including religious clerics and students. Many of them were summarily executed.⁴²

The 2003 US-led invasion and its aftermath

The Ba'ath era came to an abrupt end with the US-led invasion of Iraq 2003 and the removal of Saddam Hussein from power. Thus, the transition from the Ba'ath period was accompanied by a new period of violence. The conduct of US occupation forces in Iraq has been widely criticized for gross violations of human rights and acts amounting to war crimes.

Enforced disappearances are among the litany of abuses committed during this period. In the first five years of its occupation of Iraq, the US military captured at least 200,000 Iraqis, of whom 96,000 were held at some point in US-administered prisons.⁴³ In the course of fighting insurgency, the US-led coalition carried out the majority of detentions without a warrant and held detainees indefinitely without charge.⁴⁴ The US claimed that it was under no obligation to respect due process because it was carrying out detentions in the context of an armed conflict, and that the International Covenant on Civil and Political Rights did not apply outside of US territory.⁴⁵

While some detainees had been arrested for their involvement in insurgency operations, others were simply civilians who had been in the wrong place at the wrong time.⁴⁶ Coalition military intelligence officers told the International Committee of the Red Cross (ICRC) in 2003 that they thought between 70 and 90 per cent of the persons deprived of their liberty in Iraq had been arrested by mistake.⁴⁷ With the massive numbers of arrests taking place in the early stages of the invasion, detainees were registered haphazardly and not properly accounted for.⁴⁸

A 2004 report by the ICRC raised concern over the coalition's refusal to notify detainees' families of their arrest:

*In almost all instances documented by the ICRC, arresting authorities provided no information about who they were, where their base was located, nor did they explain the cause of the arrest. Similarly, they rarely informed the arrestee or his family where he was being taken and for how long, resulting in the de facto 'disappearance' of the arrestee for weeks or even months until contact was finally made.*⁴⁹

The report went on to decry the severe distress these practices caused for relatives of detained persons:

*Many families travel for weeks throughout the country from one place of internment to another in search of their relatives and often come to learn about their whereabouts informally (through released detainees) or when the person deprived of his liberty is released and returns home.*⁵⁰

Some detainees were held in official internment facilities, including Abu Ghraib prison in Baghdad, Camp Cropper near Baghdad airport, and Camp Bucca in the south near Umm Qasr. Camp Bucca was described as 'the world's largest extrajudicial internment camp'.⁵¹ At Abu Ghraib, the prisoners held included thousands of 'ghost detainees' placed there without registration by the CIA.⁵² In addition, the US ran a number of secret prisons, such as the 'H1' detention camp where CIA and UK intelligence officers reportedly operated.⁵³ Torture and ill-treatment were widespread and authorized in both official and secret detention sites in Iraq.⁵⁴

The full legacy of the US-led invasion is found not only in the direct conduct of American forces, but also in the long-term patterns of abuse by local forces they enabled. One of the most criticized decisions of the US-led occupation was the dissolution of the Iraqi army, accompanied by de-Ba'athification policies which saw large numbers of Sunnis dismissed from public sector positions. This created a security vacuum and fuelled the growth of militias. Meanwhile, the coalition formed new Iraqi military and police forces which it trained to carry out its counter-insurgency operations.⁵⁵ These developments plunged Iraq into a period of sectarian violence that took an enormous toll on the civilian population.

During the worst period of violence from 2006 to 2007, tens of thousands of people disappeared off Iraq's streets. Some were spotted being piled into vehicles by security forces or militia members, never to be seen again.⁵⁶ Those targeted for disappearances included scientists, doctors, academics, military leaders and civil society activists.⁵⁷ Between 2006 and June 2007, some 20,000 bodies were dropped off at the Medico-Legal Institute in Baghdad; the majority of them could not be identified.⁵⁹ Families rarely came to the morgue to claim the bodies, fearing retribution from security services. The former head of the UN Assistance Mission for Iraq (UNAMI) Human Rights Office stated in February 2006 that most of the corpses arriving in the morgue at the time showed evidence of gunshot wounds or torture by drill-bits or burning cigarettes, likely carried out by Shi'a militias associated with the Ministry of the Interior.⁶⁰

Abuses continued after the withdrawal of US occupying forces. For example, in October 2011 Iraqi security forces launched a crackdown in Tikrit and several other governorates against alleged members of the former Ba'ath party. While the government announced the arrest of a total 655 Ba'athists, Iraqi NGOs put the number at over 2,000. Many of them were disappeared.⁶¹

The conflict with ISIS (2014–17)

The rise of the so-called Islamic State in Iraq and Al-Sham (ISIS), which took control of the city of

Mosul on 10 June 2014, launched Iraq into an internal armed conflict that would last more than three years. Enforced disappearances were among the atrocities unleashed upon people living in ISIS-controlled areas. Victims included individuals perceived to be critical of ISIS, individuals affiliated or previously affiliated with the government of Iraq, doctors, lawyers, journalists, tribal and religious leaders, and female political candidates.⁶² ISIS also carried out abductions and mass killings of members of the Iraqi army or security forces, such as the Camp Speicher massacre.⁶³

Ethnic and religious minorities were also targeted for violations amounting to enforced disappearance. Following its advance into the Yezidi-majority district of Sinjar on 3 August 2014, ISIS abducted thousands of women and girls for the purpose of forced marriage or sexual slavery, while men and boys were massacred and buried in mass graves.⁶⁴ It is estimated that around 6,800 Yezidis were abducted and around 3,100 killed over the course of a few days.⁶⁵ An estimated 3,000 are still missing.⁶⁶ Hundreds of Assyrian Christian and Shi'a Turkmen women were also abducted from areas under ISIS control, and the fate of many of them remains unknown.

However, the conflict with ISIS also led to the growth of Iraq's predominantly Shi'a militias, which also committed serious abuses. Following the collapse of the Iraqi army in Mosul, Grand Ayatollah al-Sistani issued a fatwa for men to join the fight to save their country. The result was the formation of the Popular Mobilization Forces (PMF), an umbrella organization of new and existing militias which fought alongside Iraqi armed forces in the war against ISIS. The PMF was brought under the control of the prime minister's office in 2015, and subsequently legally incorporated into the Iraqi army and given equivalent salaries and ranks.⁶⁷ However, in practice the government's control over the PMF militias is limited, as they each have an autonomous command structure and competing ideologies.⁶⁸

PMF units participated in military operations to retake major cities from ISIS and manned checkpoints and detention facilities across the country. In the process, they detained scores of mostly Sunni men and boys fleeing from areas controlled by ISIS. UNAMI and Office of the UN High Com-

missioner on Human Rights (OHCHR) have reported that in Anbar governorate, pro-government forces disappeared at least 1,000 mostly Sunni Arab men and boys over the course of military operations from 2015 to 2016. The individuals were taken from security screening centres set up in Fallujah and Ramadi districts to intercept individuals suspected of ISIS affiliation.⁶⁹ In December 2019, a mass grave containing 643 bodies was discovered just outside of Fallujah, in an area that had been under the control of the PMF.⁷⁰ It is believed that the bodies belong to men from the Muhamdah tribe, at least 600 of whom were disappeared by PMF fighters in 2016.⁷¹

The Kurdistan Regional Government (KRG) and its intelligence forces, the Asayish, are also implicated in abuses of individuals detained on suspicion of ISIS affiliation. According to Human Rights Watch, boys detained for alleged terrorist offences at the Women and Children's Reformatory in Erbil were not allowed to communicate with their families while in Asayish custody.⁷² The organization also documented the disappearance of more than 350 detainees in Kirkuk, mostly Sunni Arabs, who were held by the Asayish on allegations of ISIS affiliation during the period of KRG control of the city.⁷³

Screenings for potential ISIS affiliates intensified during operations to retake Mosul in 2017. Families fleeing the city were stopped at screening sites run by Iraqi, PMF, and Kurdish forces. Men and boys were separated from their families and their names checked against government 'wanted lists' of ISIS affiliates. However, names on the wanted lists included individuals who held non-combat roles with ISIS (such as cooks or drivers), individuals who were related to someone affiliated with ISIS, or people who had simply been accused by members of their community of belonging to ISIS. Moreover, due to the prevalence of similar names in Iraq, individuals could be detained simply for having the same name as someone on the list. Men and boys who did not pass the screening process were taken away without notice to their families and some were extrajudicially executed. Women who tried to inquire about the whereabouts of their detained male relatives reported that state authorities either denied holding them or refused to provide information.⁷⁴

The 2018 and 2019 protest movements

Since the end of the conflict with ISIS, security forces in Iraq have carried out renewed campaigns of enforced disappearances in response to the popular protests that have swept across the country. There have been two recent waves of protest in Iraq. The first emerged in Basra in July 2018 in response to water pollution, electricity shortages, and lack of basic services.⁷⁵ The second wave erupted in Baghdad and other cities from 1 October 2019 onwards. Both waves of protests were met with excessive force by security agents, including the use of live ammunition to disperse demonstrators, resulting in deaths and injuries.⁷⁶ On 11 September 2018 the OHCHR noted with concern that at least 20 people had been killed in the Basra protests and more than 300 injured.⁷⁷ As for the second wave, UNAMI and OHCHR recorded the deaths of 487 protesters and the injury of 7,715 others between 1 October 2019 and 30 April 2020, although civil society organizations documented higher figures.⁷⁸

Abductions and arbitrary detentions of protesters were also a prominent feature of both waves. Protesters were detained off the streets or when returning from protests, either by security forces or members of militias.⁷⁹ They were usually detained without a warrant, denied access to a lawyer, and unable to inform their families of their whereabouts for several days – factors which qualify some of the detentions as enforced disappearances.⁸⁰ Families of some missing protesters also visited police stations trying to locate their relatives, but received no information.⁸¹ According to UNAMI and OHCHR, 154 protesters and human rights activists were disappeared between 1 October 2019 and 21 March 2020.⁸²

Many human rights organizations have observed that these actions form part of a wider campaign of intimidation and silencing of dissent that has followed the end of the conflict with ISIS.⁸³ Protesters, activists and journalists critical of the government or who documented government abuses against protesters have received death threats or fallen victim to targeted assassinations, often believed to be carried out by PMF militias.⁸⁴

Disappeared for demonstrating: testimonies from Iraqi civilians

Ceasefire runs an online, civilian-led monitoring tool enabling Iraqi activists to securely report human rights violations.⁸⁵ Between 2018 and 2020, during periods of heightened protest activity, Ceasefire received numerous reports via the online tool of acts amounting to enforced disappearance.

In most of the cases, the disappearances were suspected to have been carried out by unknown armed groups. The specific targeting of peaceful demonstrators raises questions around the identity of those armed groups whose actions were seemingly in line with the government's stance on demonstrators. In most cases, reporting to authorities did not lead to locating the victim. As a result, many families and friends resorted to traditional media and social media campaigns in the hopes of finding their loved ones.

One such case, reported in January 2020, concerned a young man who was kidnapped on his way to Tahrir Square ('Freedom Square') in Baghdad:

A young man was kidnapped on his way to Tahrir Square, where he had been providing emergency first aid to injured protestors. He had been in

*direct confrontation with riot police on the front lines and worked while tear gas and live ammunition were being fired. His friends started a social media campaign to find him, reported his disappearance to the authorities, and searched for him in hospitals, but could not find him.*⁸⁶

Several of the disappeared were journalists by profession or had been involved in documenting and photographing the protests, such as this case reported in December 2019:

*An armed group kidnapped a young man who was a photographer covering events in Tahrir Square. He would regularly share photos of the protests on his Facebook page. His mother spoke to the media, starts a social campaign calling for his release, and searched for him in the hospitals and morgues, but at the time of reporting, she had not heard any news from him.*⁸⁷

In another case, also from December 2019, a female journalist was warned by an armed group not to attend demonstrations with her son, a photographer. A few days later, her son was kidnapped.⁸⁸ In a more extreme case reported in February 2020, a journalist, activist and father of three was abducted, killed and then thrown into the streets by an armed group.⁸⁹

Many of the disappeared protesters were women. In one case, two civil activist sisters who were abducted by an armed group for participating in demonstrations and providing logistical assistance to

demonstrators in Baghdad. *Two civil rights activist sisters were abducted by an armed group for participating in protests in Baghdad and volunteering to do logistical work, collect donations and buy essential supplies. They were beaten, threatened with death, and forced to signed papers saying that they would not take part in protests anymore.*⁹⁰

In another case, a university student providing first aid to injured demonstrators was abducted by an armed group and held in detention for ten days. She was threatened with death if she was seen participating in any future demonstrations.⁹¹

Minors have also been subjected to enforced disappearance. In a case communicated in late November 2019, a mother reported that her 16-year-old son had gone missing a week after graffitiing on his school wall 'for the people', a direct message of solidarity with demonstrators. The mother reported her son as missing to the relevant authorities and television channels, to no avail.⁹²

It has become standard practice for the government to refer to the perpetrators of abductions linked to the protests as 'unknown', at times accompanied by the announcement of an investigation. However, the testimonies of those who have survived abduction reveal that in nearly all cases the perpetrators were either units of the Iraqi police or other authorities, or militia members of the PMF.

Progress and achievements to date

The legacy of enforced disappearance in Iraq clearly goes back many years, and patterns of impunity are deeply entrenched. Nonetheless, Iraq has made noteworthy progress over recent years in providing redress to victims of enforced disappearance and their families, particularly for violations that date back to the Ba'ath era.

Following the overthrow of Saddam Hussein, the Iraqi High Tribunal was formed to prosecute senior Ba'ath officials accused of war crimes, crimes against humanity, genocide, and other serious crimes. The statute of the Iraqi High Tribunal, which borrowed closely from the language of the Rome Statute of the ICC, listed enforced disappearance as one of the crimes against humanity for which the court had jurisdiction.⁹³ According to the Iraqi government, the Iraqi High Tribunal examined twelve cases involving senior Ba'ath officials and convicted perpetrators of enforced disappearance in five of those cases.⁹⁴ It should be noted that the proceedings of the Iraqi High Tribunal were vociferously criticized at the time both in Iraq and internationally.⁹⁵ Nonetheless, they had significant symbolic importance despite the limited number of convictions secured.

A larger number of victims of enforced disappearance have been reached through reparations programmes established by the Iraqi government since 2003. These include the Martyrs' Foundation Law No. 3 of 2006 and the Political Prisoners Law No. 4 of 2006, both of which apply to victims of the Ba'ath government and their direct relatives. The benefits provided under these laws include compensation, land and housing, debt relief, medical treatment, educational programmes and privileges, and priority in public service appointments. The KRG, in turn, passed Act No. 8 of 2006, establishing the Ministry of Martyrs and Anfal Affairs, and Act No. 9 of 2007, providing compensation and other services to victims of the Ba'ath era and their families.⁹⁶

Some progress has also been made in documenting crimes of enforced disappearance committed during the Ba'ath era, including through the excavation of mass grave sites. In 2006, Iraq enacted

Law No. 5 on the Protection of Mass Graves to protect mass grave sites from disturbance, regulate investigations, and set guidelines for the preservation of evidence.⁹⁷ Subsequently, a department devoted to mass graves was established, first within the Ministry of Human Rights but later moved to the Martyrs' Foundation. According to statistics given by an Iraqi official, as of October 2020 the government had identified 101 mass grave sites connected to the Ba'ath period across Iraq, of which 80 had been excavated, and 4,139 remains exhumed.⁹⁸ The Martyrs' Foundation also ran a national campaign to create a database of disappeared persons going back to 1968 and collect blood samples from their relatives.⁹⁹

However, the government has not achieved the same progress in addressing enforced disappearances committed outside the context of the Ba'ath period. Iraqi government documents present enforced disappearance as a tactic employed by the previous regime and by terrorist groups, with no acknowledgement of its ongoing commission by government forces and associated militias.¹⁰⁰ Although the Mass Graves Act was amended in 2015 to include 'crimes committed by terrorist and Ba'athist groups before and after 2003', this wording excludes the possibility that government actors or pro-government armed groups are involved in the same acts. Furthermore, the majority of gravesites attributed to 'terrorist groups' after 2003 have not yet been excavated.¹⁰¹

In addition, apart from a limited number of senior Ba'ath officials, perpetrators of enforced disappearance have not been prosecuted. Except for the statute of the Iraqi High Tribunal, enforced disappearance is not a prosecutable offence in Iraq. Instead, members of armed groups who have carried out these offences have usually been charged under the Anti-Terrorism Law of 2005. However, the broad provisions of this law make it subject to extremely discretionary interpretation, and individuals are often convicted for 'membership' of terrorist groups rather than their degree of actual participation in crimes.¹⁰² In addition, trials under the law have been rife with violations of international standards.¹⁰³ On the other hand, perpetrators belonging to state forces or pro-government militias have not been brought to justice at all. The judiciary is prone to interference from these actors, fostering impunity.¹⁰⁴

In 2010, Iraq became the twentieth state to accede to the International Convention for the Protection of All Persons from Enforced Disappearance. It ratified the convention by virtue of Law No. 17, which was published in the Official Gazette. Article 4 of the convention requires Iraq to enact implementing legislation that would make enforced disappearance an offence under its domestic criminal law.

Subsequently, there have been several attempts to

introduce legislation dedicated to enforced disappearance. In 2017, the Human Rights Committee of the Iraqi parliament came up with a draft law on enforced disappearance, which was presented for a first reading in parliament. Subsequently, in 2018, the Ministry of Justice drew up a separate draft law, which was reviewed by the State Council and forwarded to the Council of Ministers' Legal Department for further comments. At the time of writing, neither draft had been passed into law.



4

Addressing enforced disappearance in Iraq: critical policy priorities

One of the most immediate priorities for Iraq in the struggle against enforced disappearance is to pass dedicated legislation to address the practice. Although several draft laws have been presented so far, they have each been marked by significant shortcomings. This chapter gives an overview of the main aspects that should be covered when devising a comprehensive policy to address enforced disappearance, informed by international best practices.

Incorporation as an autonomous offence

An effective response to enforced disappearance requires states to incorporate the crime into their national law as an autonomous offence. Iraq's Penal Code No. 111 of 1969 (amended) criminalizes the offences of murder¹⁰⁵ and unlawful seizure, kidnapping and detention,¹⁰⁶ while the 2005 Anti-Terrorism Law punishes the kidnapping or prohibition of freedom of individuals or their detention for purposes 'that threaten security and national unity and promote terrorism.'¹⁰⁷ However, Iraq's domestic legislation does not specifically touch upon the crime of enforced disappearances nor does it fully cover all elements of the crime. Referring to multiple, separate offences may complicate the determination of an adequate punishment.

Iraq and other states parties to the Convention on Enforced Disappearances are expected to use a definition that agrees with the wording found in Article 2 of the convention when incorporating the offence into their domestic legislation.

The draft bill on enforced disappearances presented to the Iraqi parliament in 2017 included a definition of enforced disappearance as an autonomous offence, but did not include all elements of the crime found in the convention. However, a subsequent draft bill prepared by the Ministry of Justice contained a more comprehensive definition.

It should also be noted that Article 1(2) of the convention states that 'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.'¹⁰⁸ Recent experience has shown that, in the context of the conflict with ISIS, Iraqi authorities have used the fight against terrorism to justify practices that amount to enforced disappearances. As a result, Iraq should consider including the above-mentioned provision in its draft legislation to ensure that the prohibition of enforced disappearance is absolute.

State vs. non-state actors

In Iraq, as in many other conflict-affected states, a signifi-

cant share of enforced disappearances in recent years have been carried out by non-state actors. These actors have included groups designated as terrorist organizations by the Iraqi government, such as Al-Qaeda and ISIS, as well as a variety of militia groups whose degree of connection to the state security apparatus has varied over the years. Yet, draft legislation on enforced disappearance presented in Iraq thus far has been void of any mention of non-state actors. This not only fails to acknowledge their involvement in such acts, but limits the legal tools available to prosecute offences in this category.

In part, this omission is unsurprising given that the Convention on Enforced Disappearances itself contains a state-centric definition of the offence. This was a point of significant controversy during the deliberations that led to the adoption of the convention. The Russian delegation in particular was of the opinion that non-state groups should be included in the convention's definition of enforced disappearance, on an equal footing with actors associated with the state. However, Latin American delegations and NGOs, coming from a region with a history of military dictatorships, opposed the inclusion of non-state actors in the definition, arguing that it would dilute the responsibility of the state for such acts.¹⁰⁹

In the end, the compromise reached was to keep the convention's core definition limited to state perpetrators, while inserting a separate provision dealing with non-state actors (Article 3). This article requires states parties to take appropriate measures to investigate acts of enforced disappearance 'committed by persons or groups of persons acting *without the authorization, support or acquiescence of the State*' (emphasis added) and 'to bring those responsible to justice'.¹¹⁰ However, the language of this article is relatively weak and focused primarily on the obligation to investigate, without touching on the full range of responsibilities

that arise when enforced disappearance is committed by state actors. It is also the opinion of the Working Group on Enforced or Involuntary Disappearances that enforced disappearance is primarily a 'State crime'.¹¹¹

Nevertheless, some states have adopted legislation that does not distinguish between state and non-state actors, such as Colombia. However, this was criticized by the Working Group during its visit to the country in 2006. At the time, Colombia had prosecuted 179 cases of enforced disappearance in its courts, but not a single case involving government perpetrators.¹¹² As such, the inclusion of non-state actors in the definition seemed to be allowing the Colombian government to evade its responsibility for such acts. However, more recently there have been several high-profile cases involving army generals and other senior officers.¹¹³

Consequently, the solution most in line with international best practice is for Iraq to include a separate section in its draft law governing the treatment of enforced disappearances committed by non-state actors and specifying the measures to be taken for offences in this category. The definition of a non-state actor should follow the one given in the convention, or in other words 'persons or groups of persons acting without the authorization, support or acquiescence of the State'.

Enforced disappearance as a crime against humanity

The Convention on Enforced Disappearances requires states parties to take measures to recognize and address enforced disappearance as a crime against humanity. Article 5 of the Convention states that: 'The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.'¹¹⁴ Given that enforced disappearances of

civilians have been a feature of recent armed conflicts in Iraq, it is likely that some of these offences fall under the category of crimes against humanity and must be prosecuted accordingly.

However, it is not possible to prosecute the full range of these crimes under Iraq's existing legal framework. The only law in force currently that covers crimes against humanity is the Iraqi Supreme Criminal Tribunal Act No. 10 of 2005, enacted to try former Ba'ath party officials. Although enforced disappearance figures among the crimes against humanity enumerated in the statute, the tribunal only has jurisdiction over cases of offences committed between 1968 and 2003, and thus cannot address violations connected to the recent conflicts. Moreover, the tribunal only has jurisdiction over Iraqi nationals, and has not been able to prosecute members of foreign military forces accused of crimes against civilians, even if they were committed on Iraqi territory.¹¹⁵

In terms of other available frameworks, the ICC has jurisdiction over enforced disappearance as a crime against humanity, that is, 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.¹¹⁶ Many states parties to the Rome Statute of the ICC have criminalized crimes against humanity by enacting laws that incorporate the provisions of the Rome Statute into their domestic legislation.¹¹⁷ However, Iraq is not party to the Rome Statute and has thus far resisted calls to accept ICC jurisdiction.¹¹⁸ Thus, the only way for the ICC to have jurisdiction over crimes committed in Iraq would be for the UN Security Council to refer the situation to the ICC Prosecutor, which is unlikely.¹¹⁹

In the absence of ICC jurisdiction, the most logical way for Iraq to criminalize enforced disappearance as a crime against humanity is to make reforms to its own domestic legislation. One way this could be done is by inserting a provision in the enforced disappearance law specific to crimes against humanity. However, it could also be done by enacting a separate law governing the full range of international atrocity crimes that are not currently incorporated in the Iraqi penal code. Following the end of the conflict with ISIS, the government of Iraq has in fact been deliberating

legislation to cover war crimes, crimes against humanity, and the crime of genocide committed during the conflict. However, to ensure justice for all victims, it is important that any legislation governing crimes against humanity is not limited by perpetrator or by time frame. This would ensure any future violations would also be covered and would avoid repeating the shortcomings of the Iraqi Higher Tribunal.

Investigation and prosecution

Prompt, effective and impartial investigations are crucial to establish the facts and identify the perpetrators of enforced disappearance, as well to prevent future offences. This is recognized in Article 12 of the Convention on Enforced Disappearance, which requires states parties to vest investigative bodies with adequate powers and resources and to take measures to protect all those involved in the investigation.¹²⁰ International human rights standards now also recognize that investigations should be independent.

There is no specialized unit for investigating enforced disappearance in Iraq. As a result, it is often unclear where concerned persons should file a complaint, with multiple government authorities sharing responsibility for the issue.¹²¹ Although a unit for enforced disappearances has been established in the Ministry of Justice, it mainly carries out bureaucratic functions, such as providing written responses to urgent actions communicated by the UN Committee on Enforced Disappearance. Another body with the mandate to receive complaints is the Iraqi High Commission for Human Rights, but it lacks independence and authority and has been criticized as ineffectual in the investigation of enforced disappearances.¹²²

Reporting to the police or other security agencies is also problematic, particularly since these agencies are often directly or indirectly implicated in the commission of the offence. As a result, families of disappeared persons often do not file complaints out of fear of reprisals.¹²³ In addition, if a family is perceived to be associated with ISIS, they might be required to obtain a 'security clearance' from the National Intelligence Service or National

Security Service in order to file a complaint, but many are afraid to engage with these agencies.¹²⁴

Many countries have established independent bodies to investigate cases of enforced disappearance, given that the involvement of state officials in the crime often makes relying on existing mechanisms inadequate. For example, Colombia's Disappeared Persons Investigative Commission is headed by the Ombudsman.¹²⁵ Guatemala's Human Rights Ombudsman also has the mandate to investigate the fate or whereabouts of victims of enforced disappearance.¹²⁶ Bolivia and Argentina are two other countries with national commissions dedicated to disappeared persons.¹²⁷ Peru and Mexico have created special prosecutors' offices to investigate disappeared persons.¹²⁸

Given the obstacles identified in reporting enforced disappearances at present, Iraq should consider designating a specialized investigative body for the purpose, and set out the process for submitting a complaint clearly in its legislation. It is important that the investigative body has the authority to take action without a formal complaint, as required by Article 12.2 of the convention.

Dimensions of criminal responsibility

When it comes to prosecuting cases of enforced disappearance, Article 6.1 (a) of the convention requires states parties to assign criminal responsibility to 'any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance'.¹²⁹ In addition, Article 6.1 (b) requires states to recognize superior responsibility (also known as command responsibility). This means they must hold superior officers criminally responsible in situations where they knew or should have known that an enforced disappearance was being (or about to be) committed but failed to take the necessary measures within their powers to prevent or report the enforced disappearance.¹³⁰ The logic behind this form of criminal responsibility is that those in a position of authority have a heightened responsibility to prevent crimes from taking place.

On the other hand, those lower down in the chain of command cannot use orders from a superior as a defence for committing enforced disappear-

ance. Article 6.2 states that: 'No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance.' This is particularly important in Iraq, given that laws currently in force excuse public officials from punishment if they acted in accordance with orders. Article 40 of the penal code stipulates that an act is not an offence if a public official or public servant commits the act in implementation of an order from a superior whom they are obliged or feel obliged to obey.¹³¹

In an illustrative case from Chile, 33 members of the police and military were sentenced by the Supreme Court in March 2017 for their role in the enforced disappearance of 5 left-wing militants during the Pinochet era. Those sentenced included officials involved in the offence at all levels, from the director of the political police and the head of the Anti-Subversive Unit, down to the police officers who carried out the initial arrests, the pilot of the helicopter from which the victims were dropped, and the commander who authorized the use of the helicopter. Although some of the defendants argued that they were merely following orders, the court found that the operation involved so many illegal acts that this defence was not acceptable.¹³²

The first draft law on enforced disappearance considered in Iraq included the notion of superior responsibility. However, it accorded it a lesser penalty than other types of criminal responsibility, which does not reflect the logic of the convention. Imposing a heavier punishment on superiors is preferable both for symbolic reasons and for its deterrent effect on those in positions of authority.

Penalties

The imposition of appropriate penalties is essential to combat impunity, deter future perpetrators, and build trust in the justice process. In terms of penalties that reflect the severity of the offence of enforced disappearance, the Working Group considers prison sentences of 25–40 years to be a best practice.¹³³

However, states have the liberty to consider mitigating and aggravating circumstances when determining an appropriate penalty. In its draft legislation, Iraq has proposed a number of possible mitigating circumstances, including when a

person releases the disappeared person or reports the perpetrator, or when a perpetrator voluntarily submits him or herself to the competent authorities or provides information that leads to the rescue of the disappeared person. The inclusion of mitigating circumstances is important to encourage those who can help to end enforced disappearance or solve cases to come forward. Proposed aggravating circumstances include cases where the enforced disappearance leads to the death of the disappeared person or the offence is committed against a pregnant woman, a minor, a person with a disability, or a particularly vulnerable person.

It is natural that the existence of aggravating circumstances should engender a heavier penalty. Nevertheless, capital punishment should not be contemplated as this would contravene international standards, which require states to move towards the progressive abolition of the death penalty. It is therefore a matter of concern that both draft laws on enforced disappearance put forward in Iraq so far have proposed to administer the death penalty for cases of enforced disappearances that result in the killing of the victim. The UN Working Group on Enforced Disappearances deems the imposition of the death penalty 'excessive' even for the most serious cases of enforced disappearances.¹³⁴ The maximum punishment for enforced disappearances should be life imprisonment.

Barriers to justice

Barriers to justice are obstacles to an effective investigation and prosecution, and include amnesties, immunities, pardons, and statutes of limitations.

Statutes of limitations and non-retroactivity

Article 8(1) of the convention mentions statutes of limitations. While it does not completely prohibit the application of statutes of limitations to enforced disappearances, it encourages states to ensure that any statutes of limitations applied are understood as concerning only criminal proceedings; are of sufficiently long duration to reflect the seriousness of the offence of enforced disappearance; and commence from the moment when the offence of enforced disappearance ceases, not when it begins.

Iraq does not recognize statutes of limitations in the context of criminal proceedings, and therefore provides greater protection than is required by the convention.¹³⁵ However, non-retroactivity is a basic principle of Iraqi criminal law, which means that no one can be held guilty or punished for a criminal offence if it was not criminal at the time it was committed. Article 19(10) of the Iraqi Constitution states that: 'Criminal laws shall not have retroactive effect, unless it is to the benefit of the accused.'¹³⁶

It has been widely established that the crime of disappearance is a 'continuing' offence, meaning that it remains ongoing as long as the fate and whereabouts of the disappeared person have not been clarified.¹³⁷ As a result, applying a recently enacted law to prosecute ongoing cases which began before the law entered into force does not violate the principle of retroactivity. The fact that the disappearance continues after the law's entry into force gives judicial authorities the competence and jurisdiction to prosecute.¹³⁸

To ensure that the non-retroactivity principle does not stand in the way of prosecution, the future law on enforced disappearance in Iraq should include an article defining the continuing nature of the crime of enforced disappearance and specifying that the offence ends only when the fate of the victim has been clarified.

An example of good practice in this regard is the Philippines' Anti-Enforced or Involuntary Disappearance Act of 2010, which contains a provision stating that: 'An act constituting enforced or involuntary disappearance shall be considered a continuing offense as long as the perpetrators continue to conceal the fate and whereabouts of the disappeared person and such circumstances have not been determined with certainty.'¹³⁹

Amnesties

Amnesties are often implemented at the end of armed conflicts to promote reconciliation between actors who participated in hostilities. However, under international law the application of amnesties should not extend to international crimes including war crimes, crimes against humanity or genocide, or to gross violations of international human rights law. This includes enforced disappearances.¹⁴⁰

Unfortunately, in several conflicts around the world, the passing of amnesty legislation after the end of hostilities has served to inhibit prosecution for offences of enforced disappearance, allowing perpetrators of these violations to enjoy long-term impunity. For example, at the conclusion of the Algerian civil war, a Charter of National Reconciliation was passed which not only granted amnesty to state agents and insurgents who committed crimes during the war, but also prohibited criticism or denigration of state activity during the conflict. As a result, there have been no trials for enforced disappearances or other serious abuses committed during the war.¹⁴¹ Argentina and several other Latin American countries also passed amnesty laws which initially barred judicial proceedings into human rights violations committed during the military dictatorships. However, in 2005 Argentina's Supreme Court declared the amnesty laws unconstitutional, which paved the way for prosecutions of enforced disappearance.¹⁴²

Iraq passed a General Amnesty Law in 2016, widely understood as a measure to defuse Sunni-Shi'a political tensions by providing for the release of Sunnis who had been arrested for political reasons.¹⁴³ The General Amnesty Law contains a series of exclusions, but does not explicitly refer to enforced disappearances – except for a reference to the crimes listed in Supreme Iraqi Criminal Court Act No. 10 of 2005 (which only applies to Ba'ath-era violations).¹⁴⁴

Iraq should consider including a line in its draft law on enforced disappearances explicitly prohibiting the application of amnesties to this crime. Good examples in this regard are Guatemala, which in its National Reconciliation Law of 1996 excluded enforced disappearances from the crimes covered by amnesty,¹⁴⁵ and the Philippines, which included a provision in its 2010 law on enforced disappearance stating that perpetrators of the crime would not be able to benefit from special amnesty laws or similar measures.¹⁴⁶

Detention procedures and registers

Legal safeguards governing the process of detention are crucial to prevent the occurrence of en-

forced disappearance. Safeguards include the prohibition of secret detention; the identification of the authorities and places of detention; the right to communicate with family members, a lawyer, and consular authorities (for foreign nationals); access to judicial authorities; and the right to habeas corpus.

Iraq already has many of these safeguards written into law. Article 19 of the Constitution prohibits unlawful detention as well as imprisonment or detention in places not designated for that purpose.¹⁴⁷ The same article guarantees the right to a defence in all phases of investigation and trial and requires that preliminary investigation documents be submitted to a judge within 24 hours of any arrest.¹⁴⁸ Article 92 of the Code of Criminal Procedure states that 'no one may be arrested or apprehended except pursuant to a warrant issued by a judge or a court and in accordance with the conditions established by law'.¹⁴⁹

However, these procedures are frequently disregarded in practice. Arrests are often made without warrants or with warrants that are issued after the individual has spent several days in detention.¹⁵⁰ The 24-hour deadline is rarely adhered to and many people are held in detention for days or weeks before being brought before an investigating judge.¹⁵¹ Detainees are also often denied access to a lawyer during the preliminary investigation and their families are sometimes not informed of their place of detention until after the investigations are complete.¹⁵² These patterns have been exacerbated by the proliferation of armed actors responsible for core security functions since the conflict with ISIS. PMF militias have been given control of airports, checkpoints, and border crossings across Iraq,¹⁵³ and often carry out detentions without judicial oversight.¹⁵⁴

Individuals detained on accusations of terrorism are particularly prone to abuses of due process. The Counter-Terrorism Law No. 13 of 2005 does not provide any procedural guarantees and arrests under the law are often made without warrants.¹⁵⁵ Iraq's Minister of Justice told Human Rights Watch in 2017 that suspects detained under the law had no right to communicate with their families during the investigation period.¹⁵⁶ In addition, lawyers are often not allowed to be present during the interrogation of terrorism suspects.¹⁵⁷

There are few consequences for security actors who carry out arbitrary detentions. This is despite the fact that Article 322 of the penal code specifies a punishment of up to seven years' imprisonment for 'any public official or public servant who arrests, imprisons or detains a person in circumstances other than those stipulated by law'.¹⁵⁸ The prison sentence can be increased to ten years 'if the offence is committed by a person wearing an official uniform without authority to do so, or who uses a false identity or who produces a counterfeit warrant claiming it was issued by a legitimate authority'.¹⁵⁹ Articles 323 and 324 also specify prison sentences for public officials who impose punishments on convicted persons more severe than what is imposed by law, or who admit persons to custodial facilities without an order from a competent authority.¹⁶⁰ However, according to a civil society organization documenting enforced disappearances in Iraq, there is little evidence of any court cases being brought against security officials in connection with these articles.¹⁶¹

Secret detention

Both the federal government of Iraq and the KRG officially deny the existence of secret detention facilities.¹⁶² However, information from civil society organizations and statements from some senior government officials confirm the widespread use of secret prisons across the country. In 2008, a member of the Iraqi parliament told journalists that there were 420 secret prisons in Iraq.¹⁶³ Reportedly, most army, police, security and militia units run their own secret facilities.¹⁶⁴ The head of the Human Rights Committee of the KRG parliament has also confirmed the existence of secret detention facilities in the region.¹⁶⁵

As a result of the conflict with ISIS, many detention centres were destroyed, which increased the use of unofficial facilities. For example, the Ministry of Interior reportedly converted several civilian homes into detention facilities in Ninewa.¹⁶⁶ In July 2018, the National Security Agency, linked to the office of the prime minister, admitted to operating a secret detention facility in east Mosul where more than 400 people were held.¹⁶⁷

Registers of detained persons

Accessible and reliable records of persons in state custody are another important safeguard against enforced disappearance. For this reason, Article

17 of the convention requires states parties to keep registers of detained persons, which should include such information as the identity of the person deprived of liberty, details concerning his or her state of health, the authority responsible for supervising the deprivation of liberty, and, in the case of release or transfer, the date and time of the latter.¹⁶⁸

There is no centralized, nation-wide, register of detained persons in Iraq. Responsibility for prisons and detention centres falls under several ministries: the Ministry of Justice, the Ministry of Defence and the Ministry of Interior.¹⁶⁹ As documented by civil society organizations, families of detained or disappeared persons must often make visits to a number of different authorities to try to locate their relatives. These include police stations, detention centres, local courts, the Central Criminal Court, the Ministry of Interior, the Muthanna Airport prison (controlled by the Iraqi army), the High Commission for Human Rights, the National Security Advisory, or the Ministry of Health.¹⁷⁰ The multiplicity of actors involved in carrying out detentions in Iraq means that a detained person could be held in any number of places.¹⁷¹ Although some family members are able to access the detention register kept at the Iraqi Central Criminal Court, this register only includes the names of those who have been brought before a judicial authority, and people are often unable to find the names of their detained relatives on the list.¹⁷²

The Iraqi High Commission for Human Rights has noted that most prisons keep manually numbered and classified records which are easily manipulated.¹⁷³ In addition, records are not kept in consistent formats across different detention centres, with some locations using electronic registration and some only printed records.¹⁷⁴ The Iraqi High Commission for Human Rights also notes that the information kept by the security agencies of the KRG is not linked to the databases of the federal government.¹⁷⁵

Consequently, the establishment of a harmonized, nation-wide register of detained persons should be a priority for Iraq in the struggle to combat enforced disappearance. Both of the draft laws on enforced disappearance presented in Iraq so far made provisions for the establishment of such a register, but lacked important details, such as the

authority responsible for overseeing the register and obtaining the information from the relevant ministries. The draft laws also lack clarity on access to the register. Article 18 of the convention requires states to ensure that parties with a legitimate interest in the information contained in database, such as relatives of the person deprived of liberty, their representatives or their counsel, are able to access this information, either in part or in whole.¹⁷⁶

Iraq should also facilitate visits by independent observers to its detention centres, both to examine the records being held and to inspect the general conditions of the facilities. The Iraqi government claims that all prisons in Iraq and the Kurdistan region are open to visits from international and human rights organizations.¹⁷⁷ However, Iraqi civil society organizations maintain that in practice they are not granted access to these centres.¹⁷⁸ The Iraqi High Commission for Human Rights also states that although it has the legal mandate to carry out visits to detention centres without prior permission from the responsible authorities, it has been prevented from carrying out such visits until approvals were obtained.¹⁷⁹

Search for and return of remains

The convention requires states parties to take appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.¹⁸⁰ It is often the case that enforced disappearances end in the killing of the victims, while their remains are destroyed or buried surreptitiously. This leaves relatives in a state of prolonged anguish, being unable to mourn their loved ones or give them a dignified burial until their remains are found. To alleviate this burden on families, search mechanisms should operate expediently, regardless of the status of any criminal proceedings.

There is no unified search mechanism in Iraq for missing or disappeared persons, which, as detailed in previous sections, forces families to visit many different institutions when trying to locate their relatives. The enforced disappearance unit in the Ministry of Justice has been given the re-

sponsibility of replying to urgent action requests communicated by the UN Committee on Enforced Disappearances on behalf of disappeared persons. However, its responses so far have shown that it has taken little real action to search for those persons. Despite Iraq having the highest number of urgent actions registered with the committee, the unit only responded to 44 per cent of requests submitted.¹⁸¹ The responses the unit gave lacked real information, merely stating that the disappeared person's name had not been found in their database, without providing any details on efforts made to search for the person or investigate the case.¹⁸² The unit has also responded to some urgent actions by saying the cases in question were 'terrorists' and therefore not enforced disappearances, or by accusing the committee of submitting false and inaccurate information.¹⁸³

There are other government departments which share part of the mandate in searching for disappeared persons, including the Mass Graves Department in the Martyrs Foundation. In addition, the Ministry of Justice is reportedly working to establish a national hub for missing persons, in cooperation with the International Commission on Missing Persons (ICMP).¹⁸⁴ Given that there is overlap between missing and disappeared persons, particularly in the aftermath of conflict, it may make sense for both categories to fall under the responsibility of one central body. The important thing is for the body to have a clear mandate and operating process to avoid relatives having to undergo a complex bureaucratic journey to report a missing or disappeared person, as is currently the case.

Other countries emerging from conflict have established similar mechanisms. Following the end of the conflict in the former Yugoslavia, governments reached agreements to search for and identify victims of the conflict and return their remains. These initiatives operated primarily with a humanitarian focus, and as a result, 80 per cent of those who disappeared during the conflict were identified.¹⁸⁵ Similarly, in Colombia, the 2016 peace agreements led to the establishment of the Search Unit for Disappeared Persons, which was given a 20-year time limit to complete its task. The Search Unit's mandate includes all persons who disappeared or went missing during the conflict, regardless of whether state or non-state actors were responsible.¹⁸⁶

It is important that any search mechanism created is endowed with sufficient funding, human resources and technical expertise to allow it to complete its task effectively. In Mexico, although the country's General Law on Disappearance created search commissions at both the national and state level, the lack of funding of the local commissions led to negligence in carrying out their operations. For example, families of the disappeared would revisit sites the commission had already searched to find remains that had not been exhumed. This made things worse for relatives, as 'the carelessness with which the government had treated the remains added to the brutality with which criminals had killed their victims'.¹⁸⁷

The excavation of mass graves requires particular technical resources, including forensic and explosive hazard management expertise, if the gravesite is contaminated. The experience of Iraq's Mass Graves Department thus reflects a need for increased resources to be dedicated in this regard. In 2018, UNAMI/OHCHR reported that the Mass Graves Department had only 43 members of staff, lacked necessary equipment and storage space, and was in need of basic supplies such as gloves and masks.¹⁸⁸ The Medico-Legal Institute has estimated that, based on the rate of progress thus far, it would take 800 years to finish excavating Iraq's mass graves.¹⁸⁹ In addition, in most cases, the Mass Graves Department carried out the majority of its work without engaging with investigative or judicial processes.¹⁹⁰ Without further investment and systematization of this work, critical evidence from mass graves sites could be lost or destroyed, undermining families' right to truth and justice.

Reparations

Reparation is a right of victims who have suffered serious violations of international law, and is a measure meant to redress both the physical and psychological harm they have suffered. Reparations aim to correct wrongs that not only affect those directly victimized, but also their relatives, communities and, more widely, the societies in which they live. They are both a measure of victim-oriented justice and a means to prevent future violations, by requiring the state and/or the perpetrators to pay for the wrongs committed.¹⁹¹ Both direct and indirect victims have a right to

reparation. This is recognized in Article 24(1) of the convention, which clarifies that the term 'victim' includes 'the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance'.¹⁹²

States parties to the convention are required to provide five forms of reparation to victims: restitution, compensation, rehabilitation, satisfaction (including apology, acknowledgement, restoration of reputation); and guarantees of non-repetition (such as legislative and institutional reforms).¹⁹³ Rehabilitation is particularly important in cases of enforced disappearances, as victims may require access to adequate health services for a prolonged period of time both for physical and mental health issues. Satisfaction also takes on heightened importance given the obstruction of the truth involved in the commission of an enforced disappearance, and could include measures such as public memorials or other means of honouring victims and their stories.

When asked about reparation during a dialogue with the UN Committee on Enforced Disappearance in October 2020, the Iraqi delegation referred to existing reparation laws in Iraq – namely, Law No. 2 of 2016 (the Martyrs' Foundation Law) and Law No. 20 of 2009 (the Law on Compensating Victims of Military Actions, Military Mistakes and Terrorist Actions).

However, it must be noted that neither of these laws refers explicitly to enforced disappearance. Law No. 2 of 2016 only covers the families of victims who were killed by the Ba'ath regime, and thus would not cover survivors of disappearances or those whose deaths have not been established. Law No. 20 of 2009 covers the missing and abducted, but does not specifically refer to the disappeared. In relation to missing persons, the Committee on Enforced Disappearance has expressed concern over the fact that regulations in Iraq mean that a person reported as missing may be declared dead once four years have elapsed.¹⁹⁴

The committee considers it inappropriate to presume the death of a disappeared person until his or her fate has been clarified, and has encouraged Iraq to instead set up a procedure to obtain a declaration of absence, allowing relatives to regularize their legal situation in relation to social

welfare, financial matters, family law and property rights.

Moreover, existing reparation laws in Iraq are heavily focused on compensation. Compensation is undoubtedly important, given the financial burden that is borne by those affected by enforced disappearance, particularly women and dependents left without a breadwinner. However, in the absence of other forms of reparation, compensation delivered in isolation can be perceived as 'blood money', particularly if the circumstances surrounding the disappearance have not been clarified and perpetrators have not been brought to justice.¹⁹⁵ Brazil's Commission for the Family Members of the Persons Killed or Disappeared for Political Reasons has criticized the government's compensation programmes for families, calling them attempts to 'close the book on the past without revealing the facts of what happened'.¹⁹⁶

Several states provide measures of reparation to victims of enforced disappearance that go beyond compensation. For example, Colombia provides victims with support from the state in areas such as education, health, housing, employment programmes and income generation.¹⁹⁷ In pursuit of the right of satisfaction, it has established a Centre for Historical Memory and arranged homages, celebrations and monuments concerning victims of enforced disappearances.¹⁹⁸ Chile extends various forms of reparation to the relatives of victims, including study grants for children aged up to 35, exemption from compulsory military service, and counselling and support.¹⁹⁹ Tunisia's draft law on enforced disappearances upholds the right to rehabilitation by providing victims with access to free treatment in all public health structures.²⁰⁰

If Iraq intends to deliver reparation to victims of enforced disappearance through existing frameworks, these laws need to be amended accordingly to make explicit reference to enforced disappearance. Otherwise, the right of victims to obtain reparation should be included in any draft law on enforced disappearance being considered. The law should specify clearly how Iraq will discharge its obligations in respect of compensation as well as the other forms of reparation recognized in the convention, including restitution, rehabilitation, satisfaction, and guarantees of non-repetition.

The right to truth

The Convention on Enforced Disappearances is the first human rights treaty that explicitly establishes the right to truth. This is found in Article 24 (2), which states that: 'Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.'²⁰¹ The right to truth takes on particular importance in cases of enforced disappearance given the patterns of denial that characterize them and the uncertainty and anguish this causes for victims and their families. However, the mere recognition of the right to truth is not enough; states need to take appropriate measures so that victims can exercise the right effectively.

States that have witnessed enforced disappearances on a large scale have sometimes set up truth commissions to establish the historical record concerning those violations. One of the earliest examples was Argentina's National Commission on the Disappearance of Persons, set up in 1983. In its final report, entitled *Nunca Más* ('No More'), the commission found that 30,000 people had been disappeared during the country's 'Dirty War' from 1976 to 1983.²⁰² Another example is Chile's National Commission on Truth and Reconciliation (the 'Rettig Commission') which received 3,550 complaints over the course of its work from 1990 to 1991, including 979 cases of enforced disappearances. As a result of the commission's work, the president made an official apology and families of the disappeared received individual letters.²⁰³

Many of the measures already mentioned in this report, such as investigation and prosecution, search for and exhumation of remains, and the creation of registers of disappeared persons, contribute to clarifying the fate of disappeared victims and can therefore be understood as advancing the right to truth. In addition, the draft law on enforced disappearance drawn up by Iraq's Ministry of Justice proposed a series of measures that, if implemented, will further fulfil this right. For example, the Department of Combating Enforced Disappearance is required to keep a register of disappeared persons; to inform the public of the results of investigations; and to issue an annual report providing statistics about the number

of cases processed, persons identified and burial places investigated.

Other states have taken further measures to increase public access to information related to cases of enforced disappearance. In particular, Colombia has set up several publicly accessible and searchable platforms connected to its National Missing Persons Register. Members of the public can go online and search by name or by identity document number for deceased persons who have been registered as missing. In addition, the LIFE (Statistical Forensic Information Location)²⁰⁴ platform is a geo-reference system that contains disaggregated figures on missing persons, unidentified corpses, causes of death, and persons who have undergone forensic examination. Finally, the HOPE (Let's Make Sure They Can be Found)²⁰⁵ platform is an electronic mural made up of photographs of missing persons, designed to in-

crease public awareness of cases of forcibly disappeared persons and facilitate their identification and return.²⁰⁶

Another way to centre direct and indirect victims in the truth-seeking process is to promote the right of victims to participate in relevant judicial proceedings. Colombia's Constitutional Court has upheld the right of victims to intervene at any stage of the criminal investigation and proceedings, not only to ensure they obtain the reparations they are owed, but also to exercise their right to truth.²⁰⁷ In contrast, UNAMI, which is engaged in the monitoring of domestic court hearings related to the conflict with ISIS, has noted that attendance of victims at these trials is limited.²⁰⁸ By publishing the dates and times of court hearings in advance and publicizing them to victims, Iraq could enhance the role of judicial proceedings as a setting for public truth recovery.

5

Conclusion and Recommendations

The time is now ripe to end enforced disappearance in Iraq. The practice has been allowed to go on for decades, leaving countless families in limbo. Without a doubt, the roots of the problem are deep, embedded as they are in patterns of impunity, corruption, and lack of respect for the rule of law. However, experience from around the world has shown that even the most egregious records of human rights abuses can be overturned when the political will exists.

Iraq has already taken a number of commendable steps forward in this regard, including ratifying the Convention on Enforced Disappearances and redressing the legacy of violations committed during the Ba'ath period. However, to reach the full scope of victims who have suffered from this crime, Iraq must ensure that no perpetrators, past or present, are able to escape from justice.

In the wake of the protests, Iraq's new government should hold true on its stated commitments to human rights and transparency, taking advantage of this moment of transition and popular momentum to enact decisive measures to bring the legacy of impunity for enforced disappearance to an end. Given the number of people who have been touched by this crime, the results of such measures will extend beyond direct victims to benefit society as a whole.

Recommendations

To the Government of Iraq:

- Without further delay, pass a law criminalizing enforced disappearance as an autonomous offence, ensuring that the law is fully compliant with the Convention for the Protection of All Persons from Enforced Disappearance and other human rights treaties.
- Undertake the necessary legal reforms to criminalize enforced disappearance as a crime against humanity, regardless of the date of the offence or the affiliation of the perpetrator.
- Designate a specialized unit or institution for investigating cases of enforced disappearances within Iraq's jurisdiction, even in the absence of a formal complaint.
- Fairly prosecute all perpetrators of enforced disappearances in accordance with the law, whether they are affiliated with the state or non-state groups.
- Mandate that all security forces adhere to the detention procedure set out in the Iraqi Criminal Procedure Code, including by ensuring all detainees have access to a lawyer and are brought before an investigative judge within 24 hours of arrest.
- Guarantee the right of detainees to communicate with their families and inform them of their place of detention.
- Prosecute actors who carry out arbitrary detention in line with Articles 322–324 of the Iraqi penal code.
- Facilitate visits to detention centres by the Iraqi High Commission for Human Rights, non-governmental organizations, and international monitoring bodies.
- Establish a centralized register of all persons detained in Iraq, and put in place a clear procedure to regulate access to the register of detainees by parties with a legitimate interest in the information contained therein.
- Shut down all unofficial or secret detention sites, or convert them to official detention centres.
- Establish a central mechanism for searching for all missing and disappeared persons in the country and ensure it is endowed with resources commensurate with the scale of the task.

- Ensure evidence uncovered through mass grave excavations is submitted to judicial investigating authorities to enable prosecutions.
- Establish a simplified procedure for reporting a missing or disappeared person and publicize it broadly.
- Recognize the competence of the Committee on Enforced Disappearance to receive individual and inter-state communications under Articles 31 and 32 of the Convention for the Protection of All Persons from Enforced Disappearance.
- Promptly inform family members when the fate of disappeared persons is established, and in the case of death, take measures to ensure the dignified return of remains.
- Provide direct and indirect victims of enforced disappearances with access to the full range of reparations to which they are entitled, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.
- Amend Law No. 20 of 2009 to explicitly include enforced disappearance as a violation eligible for compensation.
- Take measures to further the individual and societal dimensions of the right to truth, including by creating public historical records and memorials dedicated to victims of enforced disappearance.

To the international community:

- Ensure that any military operations in Iraq are conducted in line with the laws of war and human rights, especially with regard to the treatment of detainees.
- Prosecute members of foreign forces and their superiors when found responsible for acts of enforced disappearance committed in Iraq.
- Suspend military and intelligence assistance to Iraqi security units involved in enforced disappearance until such allegations are satisfactorily investigated.
- Undertake regular monitoring visits to detention facilities.
- Encourage a country visit by the UN Working Group on Enforced Disappearances to Iraq.
- Offer support and technical assistance to mass grave excavation efforts.
- Provide reparations to victims of enforced disappearance carried out by foreign military or intelligence forces.

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The Forever Crime: Ending enforced disappearance in Iraq

In brief

Enforced disappearance is understood as a phenomenon in which State actors deprive individuals of their liberty, then refuse to acknowledge what happened to them. Disappeared persons may end up imprisoned, tortured or killed, but in all cases their fate is concealed from their families. This deprives victims from the protection they are guaranteed by law and leaves their loved ones in a state of prolonged anguish and uncertainty. The result is a climate of fear and distrust that extends beyond direct victims to societies as a whole.

Enforced disappearance has become a problem of massive proportions in Iraq, following decades of conflict and political violence. The actors responsible have ranged from state security agents and foreign military forces to pro-government militias and other armed groups. All of Iraq's communities have been affected at some point. Even in the wake of successive political transitions, the practice continues to be prevalent, and the lack of effective legal remedies stands in the way of families seeking justice.

While the Government of Iraq has achieved significant progress in providing remedies to victims of Ba'ath-era disappearances and their families, it has yet to take full responsibility for the large number of enforced disappearances committed more recently by state security forces, pro-government militias, and other armed groups. Part of the obstacle lies in the fact that enforced disappearance is not a prosecutable crime in Iraq at present. The International Convention for the Protection of All Persons from Enforced Disappearance, which Iraq ratified in 2010, requires the government to enact implementing legislation that would make enforced disappearance an offence under its domestic criminal law.

However, a comprehensive policy to address enforced disappearance must do more than simply criminalize the offense. It must also tackle the wide range of factors that have contributed to decades of impunity and secrecy around the practice and deprived families of their right to the truth. This requires ending practices of arbitrary and secret detention; establishing an independent investigative body capable of carrying out prompt, effective and impartial investigations; preventing the application of amnesties and other barriers to justice in enforced disappearance cases; designating unified reporting and search mechanisms for missing and disappeared persons; ensuring that all victims have access to reparation; and taking measures to commemorate the disappeared and centre their families in the truth-seeking process.

This report recommends:

- Passing a law criminalizing enforced disappearance as an autonomous offense, ensuring that the law is fully compliant with the Convention for the Protection of All Persons from Enforced Disappearance;
- Designating a specialized unit or institution for investigating cases of enforced disappearances within Iraq's jurisdiction, even in the absence of a formal complaint;
- Suspending military and intelligence assistance to Iraqi security units involved in enforced disappearance until such allegations are satisfactorily investigated;
- Providing direct and indirect victims of enforced disappearances with access to the full range of reparations to which they are entitled, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

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