

Enforced Disappearances in Iraq: Attribution of Accountability to Government under International and Domestic Legal Framework

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Abstract

Enforced disappearances are among the most prominent strategies utilised by states or their functionaries for spreading terror in societies. They are no longer limited to being weapons in the hands of dictatorial regimes, but in fact have become an unfortunate by-product of internal conflicts used by opponents to achieve political gains. Over the course of six successive governments in Iraq, from 2005 to 2021, the deterioration of the security situation and the decline in the rule of law have contributed to the exacerbation of enforced disappearances. Using Iraq as a case study, this paper analyses the current international and domestic legal framework that deals with enforced disappearances to understand the responsibility of the Iraqi government for such crimes by governmental and non-governmental forces under the pretext of combating ISIS and protecting national security. The deliberate negligence of the Iraqi government is evident by the absence of tangible measures to prosecute and punish the perpetrators.

Introduction

Adolf Hitler's command, "*Nacht und Nebel*" (Night and Fog) in the winter of 1941,¹ represents the first roots of enforced disappearances as a phenomenon as thousands of people were picked up and sent to concentration camps with no legal recourse.² In the early 1960s, enforced disappearances were used by several Latin

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¹ Triffterer O and others, *Commentary on the Rome Statute of the International Criminal Court Observers' Notes, Article by Article* (Beck, C H 2015) 221.

² OHCHR, 'Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles - Article 6' (OHCHR 15 Nov 2018) <<https://www.ohchr.org/en/press-releases/2018/11/universal-declaration-human-rights-70-30-articles-30-articles-article-6>> accessed 10 Oct 2022.

American military regimes and dictators.³ Hundreds of thousands of people have been reported missing during past and present armed conflicts.⁴ An enforced disappearance is defined as:

[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.⁵

This tactic is one of the most serious offences under international law because it results in a continued violation of human rights.⁶ For the families of the victims, an enforced disappearance is a tragedy like no other. They are denied the right to know the whereabouts and fate of the forcibly disappeared person, precluding them from seeking any kind of remedy or justice. The consequences of enforced disappearances are more severe for children and women, who may suddenly find themselves helpless with no source of income and a lack of protection.⁷

Enforced disappearances are generally perpetrated against civilians and members of opposition groups.⁸ Under the international human rights regime, the

³ The dictatorships that ruled Brazil, Argentina, Chile, and Uruguay are responsible for the enforced disappearance of an enormous number of people. See Ariel E. Dulitzky, 'The Latin-American Flavour of Enforced Disappearances' (2019) 19 *The Chicago Journal of International Law* 423.

⁴ Tullio Scovazzi and Gabriella Citroni, 'The Struggle against Enforced Disappearance and the 2007 United Nations Convention' (M Nijhoff 2007) 4.

⁵ International Convention for the Protection of All Persons from Enforced Disappearance, art 2.

⁶ 'The General Assembly of the Declaration on the Protection of all Persons from Enforced Disappearance.' See also Federico Andreu-Guzmán, Katharine West and Jill Heine, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction* (ICJ, International Commission of Jurists 2015) 24.

⁷ United Nations General Assembly, UN Human Rights Council, Enforced or involuntary disappearances, UN Doc. A/HRC/14/L.19, 14 June 2010 <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/G10/143/22/PDF/G1014322.pdf?OpenElement>> accessed 22 Feb 2022.

⁸ Scovazzi T and Citroni G (n 4) 1.

act of enforced disappearance is considered a crime against humanity.⁹ Further, the international human rights treaty mechanisms consider enforced disappearance not only a serious violation of the rights and lives of victims but also of their relatives.¹⁰ The sudden disappearance of a family or community member, the non-availability of information about them, and the lack of any governmental or legal support mechanisms result in indelible suffering. The crime of enforced disappearance is rampant in Iraq, a country that continues to have one of the highest numbers of forcibly disappeared persons worldwide.¹¹

It is not an exaggeration to say that almost every family in Iraq has been affected by the crime of enforced disappearance.¹² The Ba’ath regime between 1968-2003 was notorious for employing the tactic of enforced disappearance. The Saddam Hussein regime committed widespread human rights violations. The state’s security services used killings, torture, and enforced disappearances to suppress opponents. Human Rights Watch estimated around 250,000 to 290,000 enforced disappearances during this period.¹³ A great number of Iraqi civilians were abducted due to their real or perceived political, ethnic, and religious affiliations.¹⁴ Even during the US-led invasion of Iraq in 2003, Iraqi citizens were forcibly disappeared and taken by the US-led coalition forces.¹⁵ Moreover, the successive Iraqi governments, which assumed power after the US forces left Iraq, have seemingly failed to address this issue, making enforced disappearances a source of widespread fear, discontent, and discord among Iraqis as they strive to live their everyday lives.

Following its invasion of the country, the US Army engaged in grave human rights violations in Iraq, committing widespread killings and enforced

⁹ ICPPED (n 5) art 5.

¹⁰ ICPPED (n 5) art 18.

¹¹ ICRC, ‘Iraq: Hundreds of Thousands of People Remain Missing after Decades of War, Violence’ (ICRC 30 Dec 2020) <<https://www.icrc.org/en/document/iraq-hundreds-thousands-people-remain-missing-after-decades-war-violence>> accessed 6 Oct 2022.

¹² HRW, ‘Iraq: Human Rights Watch Submission to the Working Group on Enforced or Involuntary Disappearances’ 2020.

¹³ HRW, Justice for Iraq, Policy Paper, December 2002.

¹⁴ HRW, ‘Justice for Iraq a Human Rights Watch Policy Paper’ (HRW, December 2002) <<https://www.hrw.org/legacy/backgrounder/mena/iraq1217bg.htm>> accessed 6 Oct 2022.

¹⁵ GICJ, ‘Iraq Enforced disappearance A widespread challenge’ 5.

disappearances with impunity.¹⁶ During this time, US forces committed widespread killings and enforced disappearances with impunity. Detainees were held in prisons for long periods without any charges against them.¹⁷ With the withdrawal of US forces from Iraq and the ensuing fragile security and political situation, the second and perhaps the most dangerous phase of enforced disappearances began, with an unprecedented increase in their number.¹⁸

Between 2014-2017, ISIS carried out enforced disappearances of members of the Iraqi army, government officials, and political and tribal leaders who were residing in ISIS-controlled areas.¹⁹ It abducted about 6,500 women from the Yazidi minority²⁰ to force them into marriage and sexual slavery, and trafficked them to the *Sinjar* region in 2012.²¹ The expansion of ISIS in Iraq was offset by the growing power and influence of the Iraqi Shi'ite militias, signalling the rise of sectarian politics and escalating tensions between the Shia and Sunni groups. The Popular Mobilisation Force ("PMF"), a paramilitary organization consisting of around 67 armed factions mostly affiliated with Shi'ite ideology²² played a crucial role in fermenting sectarian tensions.

¹⁶ Harmeeet Sooden, *The US-led Coalition's Human Rights Record in Iraq*, August 2015.

¹⁷ International Federation for Human Rights (FIDH) and Global Policy Forum, 'Open letter to members of the Security Council concerning detentions in Iraq' 2008 <<https://www.globalpolicy.org/images/pdfs/0422detention.pdf>> accessed 10 Oct 2022.

¹⁸ UN Human Rights Council, 'Disappearances and missing persons in Iraq 2003-2013' A/HRC/22/NGO/157, 25 Feb 2013.

¹⁹ UNAMI and OHCHR, *Unearthing Atrocities: Mass Graves in Territory Formerly Controlled by ISIL*, Baghdad, 6 Nov 2018.

²⁰ Cetorelli V and others, 'Mortality and Kidnapping Estimates for the Yazidi Population in the Area of Mount Sinjar, Iraq, in August 2014: A Retrospective Household Survey' (2017) 14 *PLOS Medicine*.

²¹ Minority Rights, 'Yezidis' (Minority Rights Group 6 Feb 2021) <https://minorityrights.org/minorities/yezidis/> accessed 5 May 2022.

²² Mansour R Mansour F, 'The Popular Mobilization Forces and Iraq's Future' (*Carnegie Endowment for International Peace*, 28 April 2017) <<https://carnegie-mec.org/2017/04/28/popular-mobilization-forces-and-iraq-s-future-pub-68810>> accessed 25 Feb 2023.

Although PMF was established as a response to ISIS in Iraq, the group enjoyed an affiliation with the Iraqi army²³ due to its similar structure and ideology – which further contributed to the discord between the two religious factions.²⁴ The PMF was involved in forcibly disappearing dozens of the Sunni men and children who fled from conflict-ridden areas, only to end up in the hands of the PMF at security checkpoints, and their fate remains unknown.²⁵ They also carried out enforced disappearances in Fallujah and Ramadi of individuals suspected to be from ISIS.

The enforced disappearances were not limited to just the PMF, with the Iraqi and Kurdish security forces arresting individuals at security checkpoints and later denying their presence in detention centres or refusing to provide any information about their whereabouts.²⁶ Since 2016, the International Committee of the Red Cross (“ICRC”) has estimated the number of victims of enforced disappearances to be between 250,000 and 1 million.²⁷ Human rights organisations have lamented the absence of serious measures by the Iraqi government to punish the perpetrators of these crimes, including security officials and other non-governmental actors.²⁸

In 2018, the defeat of ISIS coincided with the emergence of a political and economic crisis that ignited protests across the country, resulting in a harsh response by the Iraqi government. The Iraqi security forces conducted

²³ Ceasefire Centre for Civilian Rights and Minority Rights Group International, *Civilian Activists under Threat in Iraq*, 2018. <https://minorityrights.org/wp-content/uploads/2018/12/MRG_CFRRep_IraqCiv_EN_Dec18_FINAL2.pdf> accessed 5 May 2022.

²⁴ EASO, *Iraq: Targeting of Individuals*, 2019 <https://www.ecoi.net/en/file/local/2003960/Iraq_targeting_of_individuals.pdf> accessed 5 May 2022.

²⁵ UNAMI and OHCHR, ‘Enforced Disappearances from Anbar Governorate 2015–2016: Accountability for Victims and the Right to Truth’ Baghdad, 2020.

²⁶ Amnesty International, ‘The Condemned: Women and Children Isolated, Trapped and Exploited in Iraq’ London, 2018.

²⁷ HRW, ‘Iraq: Human Rights Watch Submission to the Working Group on Enforced or Involuntary Disappearances’ 2020.

²⁸ OHCHR, ‘Statement of the UN committee on enforced disappearances upon the conclusion of its visit to Iraq’ Nov 2022.

indiscriminate killings and detentions, resorting to enforced disappearances to intimidate protestors and opponents.²⁹

Presented with this bleak situation in Iraq with thousands of forcibly disappeared people, it seems that the first step to addressing the problem of enforced disappearances is to reach a comprehensive understanding of the legal framework related to the issue of missing persons. To apply this understanding to the Iraqi national law in a way that enables the elimination of enforced disappearance and redress for its victims, and to achieve the objective of this research, various primary and secondary sources, which are available in English and Arabic, will be used.

Legal Framework for Prohibiting Enforced Disappearances

Enforced disappearances essentially deprive victims of any legal rights, not just through their confinement but also by concealing any information about them while denying any connection to their disappearance.³⁰ United Nations General Assembly Resolution No. 133/47 of 1992³¹ was the first tool that dealt with enforced disappearances, which reflected the international community's position on the matter.³² Even though the term "enforced disappearance" was not included in this resolution, it did include a description of the content of the crime and its victims.³³ It formed the basic nucleus of the first binding international convention for enforced disappearance. Within the American countries, The Inter-American Convention on Enforced Disappearance, signed in 1994,³⁴ was the first internationally binding instrument addressing the practice, which highlighted its systematic nature, the burden of evidence, the extent of government duty to uphold

²⁹ Amnesty International, 'Iraq: The road to justice – a long way to go' Submission for the UN Universal Periodic Review (UPR), 34th session of the UPR Working Group, November 2019.

³⁰ ICPPED (n 5) art 2.

³¹ UNGA, Res. 47/133, Supp. (No. 49) at 207 U.N. Doc. A/47/49 18 Dec 1992 <<http://hrlibrary.umn.edu/resolutions/47/133GA1992.html>> accessed 14 July 2022.

³² Nikolas Kyriakou, 'An Affront to the Conscience of Humanity: Enforced Disappearance in International Human Rights Law' (thesis European University Institute 2012) 84.

³³ Para 2 of art 1 of the Declaration on the Protection of all Persons from Enforced Disappearance states "Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families."

³⁴ The Convention signed and ratified by The Organization of American States.

and safeguard human rights, and the implications surrounding forced disappearances.³⁵

In order to achieve a comprehensive understanding of the legal framework that prohibits enforced disappearances, it is important to analyse international humanitarian law, international human rights law, international criminal law, and Iraqi law to understand the position of international law on this crime and the shortcomings in the existing Iraqi law.

I. International Human Rights Law

Iraq has signed the International Convention for the Protection of All Persons from Enforced Disappearance (“ICPPED”).³⁶ According to the ICPPED, “the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law.”³⁷ ICPPED prohibits enforced disappearances and obligates member states to end this practice, reveal the fate of the forcibly disappeared, and prosecute the perpetrators of these crimes when committed without the “authorisation, support, or acquiescence” of the government.³⁸ Under ICPPED, signatory states are obligated to formulate national laws prohibiting enforced disappearances.³⁹ In addition, it talks about taking necessary measures to deter this crime.⁴⁰

ICPPED prohibits secret detention and places an obligation on state parties to regulate detention issues and the deprivation of liberty through legislation.⁴¹ Furthermore, states are under an obligation to establish an updated database that includes information about the detainees.⁴² This information must be made available to anyone who has a legitimate interest in obtaining it.⁴³ The convention

³⁵ Reed Brody and Felipe Gonzalez, ‘Nunca Mas: An Analysis of International Instruments on Disappearances’ (1997) 19 Human Rights Quarterly 365.

³⁶ Iraq joined the ICPPED under Law No. (17) of 2009.

³⁷ ICPPED (n 5) art 5.

³⁸ ICPPED (n 5) art 4–15.

³⁹ ICPPED (n 5) art 3.

⁴⁰ ICPPED (n 5) art 4, 6, 8, and 12.

⁴¹ ICPPED (n 5) art 17.

⁴² ICPPED (n 5) art 17.3 and 21.

⁴³ ICPPED (n 5) art 18.1.

also acknowledges the right of every individual who has been directly impacted by a crime to know about the missing person, the circumstances of their detention, and the results of investigations in this regard.⁴⁴

The Convention also compels states to provide compensation to the victims.⁴⁵ The Committee against Torture in its commentary on Article 14 of the Convention against Torture (“CAT”) also recommended providing compensation to victims of torture for the crime of enforced disappearance.⁴⁶ CAT also requires states to determine the legal status of forcibly disappeared persons as well as the processes associated with property and family rights.⁴⁷

The Committee on Enforced Disappearances (“CED”) keeps track of ICPPED implementation⁴⁸ through approved reporting mechanisms. The parties must submit an initial report, which is reviewed by the committee, which then submits its final observations and oversees and follows up on whether the member states are implementing the committee’s recommendations.

In June 2014, Iraq submitted its first report to CED, which requested that it provide more information and clarification on Iraqi compliance with ICPPED.⁴⁹ In 2020, after reviewing the additional information, CED called for the prohibition of enforced disappearances through appropriate provisions in Iraq’s legislation. Additionally, CED required Iraq’s government to guarantee that no one would be held in secret detention.⁵⁰ In 2020, CED expressed its concerns about the continued

⁴⁴ ICPPED (n 5) art 24.1.

⁴⁵ ICPPED (n 5) art 24.4 and 24.5.

⁴⁶ CAT, General comment No. 3 ‘on the implementation of article 14 by States parties’ CAT/C/GC/3 (2012) <<https://www.ohchr.org/en/documents/general-comments-and-recommendations/catcg3-general-comment-no-3-2012-implementation>> accessed 22 Oct 2022.

⁴⁷ ICPPED (n 5) art 24.6.

⁴⁸ CED is the body of independent specialists which supervises the implementation of ICPPED by the Signatory states (OHCHR) <<https://www.ohchr.org/en/hrbodies/ced/pages/cedindex.aspx>> accessed 22 Feb 2022.

⁴⁹ OHCHR, ‘Consideration of reports submitted by States parties under article 29, paragraph 1, of the Convention’ 26 June 2014.

⁵⁰ UN HRC ‘Iraq: UN Committee Urges End to Impunity for Enforced Disappearances’ 2020 <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26550&langID=E>> accessed 22 Feb 2022.

enforced disappearances in the majority of Iraq.⁵¹ Impunity from prosecution and punishment is a permanent feature of enforced disappearances in the country. Under ICPPED, CED enjoys broad powers within the framework of monitoring enforced disappearances. It has the right to ask member states to take appropriate and urgent measures to locate victims.⁵² It also has the right to visit member states.⁵³ CED was allowed to visit Iraq, but Iraq did not agree to Article 31 regarding additional procedures for individual complaints or the procedures between countries included in Article 32.⁵⁴

ICPPED is not the only international instrument dealing with enforced disappearances. Basic human rights relating to enforced disappearances are protected under the International Covenant on Civil and Political Rights (“ICCPR”), by virtue of which member states are under an obligation to impose and respect those rights.⁵⁵ CAT also contains similar obligations.⁵⁶ Although Iraq has ratified ICPPED, ICCPR, and CAT,⁵⁷ Iraqi national law lacks legal provisions criminalising enforced disappearances. Iraq has not enacted any legislation in response to Articles 16, 17, and 18 of ICPPED, which require member states to adopt national legislation to ensure the implementation of its provisions. On the other hand, according to Article 61(4) of the Iraqi Constitution,⁵⁸ international conventions do not have legal superiority over Iraqi national legislation. Therefore, ICPPED also does not have any legal superiority over Iraqi law. Additionally, in practice, Iraqi judges are bound only by the provisions of Iraqi national legislation and not by the provisions of international conventions ratified by Iraq, especially those regarding criminal justice⁵⁹ until such an international treaty is ratified and

⁵¹ OHCHR, ‘Enforced Disappearances: UN Committee to Hold Special Online Dialogue with Iraq’ (3 Sep 2020) <<https://www.ohchr.org/en/statements/2020/09/enforced-disappearances-un-committee-hold-special-online-dialogue-iraq>> accessed 7 Oct 2022.

⁵² ICPPED (n 5) art 30.

⁵³ ICPPED (n 5) art 33.

⁵⁴ OHCHR, (Treatybody.internet) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=82&Lang=EN> accessed 8 Oct 2022.

⁵⁵ ICCPR, art 5 and 9.

⁵⁶ CAT, art 2.

⁵⁷ Iraq ratified ICPPED on 23 Nov 2010, ICCPR on 25 Jan 1971 and CAT on 7 Jul 2011.

⁵⁸ Art 61(4) of Constitution of Iraq 15 Oct 2005.

⁵⁹ Al-Hijami, ‘The authoritativeness of the international treaty before the Iraqi judge’ (Supreme Judicial Council, 8 Aug 2021) <<https://www.sjc.iq/view.68708/>> accessed 25 Feb 2023.

published according to the provisions of the Iraqi Constitution.⁶⁰ This makes the ratification of ICPPED by Iraq ineffective and without any legal value.

II. International Humanitarian Law

International Humanitarian Law (“IHL”) specifically applies to the situation of armed conflict, whether international or non-international. IHL treaty mechanisms do not make specific reference to enforced disappearances. However, this does not mean that enforced disappearances are not prohibited in situations of armed conflict. The IHL treaties prohibit enforced disappearances; the most prominent are the four Geneva Conventions⁶¹ and the rules of customary international law.⁶² The families of any individuals missing or forcibly disappeared during armed conflicts must be informed of their whereabouts.⁶³ The United Nations Security Council requires revealing the fate of those arbitrarily detained and informing their families about their places of detention.⁶⁴ Iraq is a party to the four Geneva Conventions of 1949 and its Additional Protocol I (“AP I”).⁶⁵ Thus, their provisions bind the Iraqi government.⁶⁶

Furthermore, enforced disappearances constitute a violation of Customary International Law (“CIL”). Rule 99 of CIL prohibits arbitrary deprivation and lays down the “prohibition of torture and cruel or inhuman treatment.” Rule 89 of CIL deals with provisions relating to the detention of persons in disputes of an international character, such as registration, information transfer, and visits, which are enshrined in the prohibition of enforced disappearances.⁶⁷ In the context of

⁶⁰ Constitution of Iraq, art 61(4) read with art 73(2) and art 80 (6).

⁶¹ Common art 3 of the Geneva Conventions demands the humane treatment of all persons detained by the enemy. They are not discriminated against or subjected to harm and explicitly prohibit murder, mutilation, torture, cruel, inhuman and degrading treatment, hostage-taking, and unfair trial.

⁶² Rule of customary international law 98 and Rule 123.

⁶³ Geneva Convention IV, art 136 and 141; Additional Protocol art 32 and 33.

⁶⁴ UNSC, Res 2474 (2019) S/RES/2474. <<https://daccess-ods.un.org/tmp/5555756.68811798.html>> accessed 22 Oct 2022.

⁶⁵ Iraq ratified the Geneva convention on 14 Feb 1956 and AP I on 1 Apr 2010.

⁶⁶ Constitution of Iraq, art 61(4) read with art 73(2) and art 80 (6).

⁶⁷ Chapter 37, ‘Persons Deprived of Their Liberty’ Customary IHL - persons deprived of their Liberty <https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v2_cha_chapter37> accessed 22 Feb 2022.

internal armed conflicts, customary IHL requires each of the parties to the conflict to keep a record of everyone who has been detained.⁶⁸ To ensure respect for everyone's family life,⁶⁹ the member states, including Iraq, must also commit themselves to taking necessary measures to keep the relatives of victims informed.⁷⁰ Therefore, it is evident through these rules that IHL prohibits enforced disappearances.

Furthermore, Resolution 2474 of the United Nations Security Council⁷¹ relates to the protection of disappeared persons in warfare by providing adequate guidelines to the Member States on enforced disappearances. It must be noted that this Resolution does not impose any binding commitments on governments.⁷² Thus, it cannot compel states to respect their obligations to protect victims of enforced disappearances.

III. International Criminal Law

ICPPED requires Iraq to have a national law to prohibit enforced disappearances in compliance with current provisions of international criminal law. It refers to enforced disappearance as a widespread or systematic practice⁷³ constituting a crime against humanity that must be punished under relevant international law. Therefore, it is imperative that member states consider enforced disappearance a crime against humanity when it is committed as part of a widespread or systematic attack following the provisions of the Rome Statute.⁷⁴ Iraq is not a signatory to the Rome Statute, but it has ratified the ICPPED, which provides for the classification of enforced disappearance as a crime against humanity. Therefore, Iraq is under an obligation to classify it accordingly.

⁶⁸ ICRC, Customary IHL - Rule 123. Recording and Notification of Personal Details of Persons Deprived of their Liberty, 2005 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule123> accessed 22 Feb 2022.

⁶⁹ ICRC, Customary IHL - Rule 105. Respect for Family Life.

⁷⁰ ICRC, Customary IHL - Rule 117. Accounting for Missing Persons.

⁷¹ UNSC Res 2474 (2019).

⁷² Ibid.

⁷³ ICPPED (n 5) art 5.

⁷⁴ Rome Statute, art 7.

Iraq's Domestic Law

Unlike ICPPED, Iraq's domestic law does not have provisions criminalising enforced disappearances.⁷⁵ A draft bill titled "The Protection of Persons from Enforced Disappearance" was initiated in the Parliament in 2017 but is yet to be enacted. The bill's extended delay is mainly due to the pressure exerted by influential government agencies and personalities involved in the crimes of enforced disappearances.⁷⁶ These politically dominated personalities and groups create obstacles in the path of laws aiming to regulate, prosecute, and punish the crime of enforced disappearance.⁷⁷

Certain provisions of Iraq's law can be invoked in relation to enforced disappearances. The country's Constitution affirms that security and freedom are the rights of every individual.⁷⁸ It also prohibits unlawful detention, torture, and other cruel treatment.⁷⁹ It forbids arrests in places other than those authorised for that purpose.⁸⁰ Moreover, the current Iraqi Penal Code criminalises acts that may lead to enforced disappearances.⁸¹ Therefore, it is forbidden to detain people without any legal basis, and it is also forbidden to detain them in places other than those designated for detention to ensure the oversight of the arresting authority and prevent abuses that occur during this period. Penalties are increased if they are committed by an official in uniform as this entails a violation of the confidence that citizens give to state officials.⁸²

The Iraqi Constitution obligates law enforcement officials to present arrestees before a court within 24 hours of the arrest.⁸³ Under the current legislative

⁷⁵ ICPPED (n 5) art 1.

⁷⁶ Muhammad Al-Salami, the head of the Citizenship Association for Human Rights, said in an interview conducted on Al-Ghad channel on 19 Sep 2021 <<https://www.youtube.com/watch?v=3JHEh24zD-w>> accessed 22 Oct 2022.

⁷⁷ Ibid.

⁷⁸ Constitution of Iraq, art 15.

⁷⁹ Constitution of Iraq, art 19 (12) (a) and art 19 (13).

⁸⁰ Constitution of Iraq, art 19 (12) (b).

⁸¹ Iraqi Penal Code, arts 421–429.

⁸² Iraqi Penal Code, art 322.

⁸³ According to art 19 Thirteenth of the Constitution of Iraq, the accused is to be brought before the investigating judge within a period not exceeding 24 hours.

framework, no one can be arrested without charges for a period greater than 24 hours; this is significant to prevent enforced disappearances. Where detention turns into enforced disappearance is when the deprivation of liberty is accompanied by a failure to recognise this deprivation.⁸⁴ However, it appears that these rules are often disregarded since individuals are detained for a long time without any investigation, and arrest warrants are issued many days after the actual arrest.⁸⁵

Iraq's Penal Code does not specifically mention enforced disappearance as a crime. Nevertheless, Article 322 states that "any public official who arrests, imprisons, or detains a person in circumstances other than those stipulated by law" shall be punished with imprisonment of up to seven years. The imprisonment increases to ten years if the same individual carries out an illegal arrest again in contravention of Article 322. Article 323 also provides that "any public official or agent who, while being aware of the violation of his duty to the law, punishes a convicted person or orders him to be punished by a penalty greater than that imposed on him by law or by a penalty to which he has not been sentenced, is punishable by detention."⁸⁶

The Iraqi Penal Code provides a penalty of imprisonment for every official employee who performs the task of guarding places designated for the detention of persons without legal basis, or if the employee refuses to release the person for whom an order of release has been issued.⁸⁷ The punishment will be increased if the official has any connection with the arrest of the person or deprives him of his liberty without any legal basis.⁸⁸ The Iraqi Criminal Procedure Code also stipulates that detention must follow a court ruling or any other procedure as stipulated in law.⁸⁹

⁸⁴ *Yrusta v. Argentina* [2016] no 1/2013.

⁸⁵ MENA Rights Group, 'Iraq: Alternative Report' 2020.

⁸⁶ Iraq Penal Code No. 111 of 1969, art 322.

⁸⁷ Iraq Penal Code (n 86) art 324.

⁸⁸ Iraq Penal Code (n 86) art 421.

⁸⁹ Iraqi Criminal Procedure Code No. 23 of 1971, art 92.

I. The Iraqi Draft Bill on Combating Enforced Disappearances

The Iraqi draft law to combat enforced disappearances does not meet any international human rights standards because of many serious gaps, which will be discussed in this section. The definition of enforced disappearance in the draft law is limited to “victims and perpetrators”, meaning that it only covers people who are directly involved in the crime of enforced disappearance. This definition is inconsistent with Article 24 of ICPPED which provides that the definition of enforced disappearance shall extend to direct victims, perpetrators, and other individuals who suffer harm as a direct result of enforced disappearances.⁹⁰ Importantly, the draft law does not designate enforced disappearance as a crime against humanity. This indicates a lack of political will to combat enforced disappearances. The Iraqi High Criminal Court Law No. 10 presently restricts authorities to classifying widespread and deliberate enforced disappearances as crimes against humanity, only to the instances committed between 1968 and 2003 i.e., during the Al Ba'ath period. It explicitly excludes the crimes committed after 2003.⁹¹ The draft bill also does not stipulate enforced disappearances as “part of a widespread or systematic attack on a civilian population.”⁹²

Article 6(1)(b) of the ICPPED explains the concept of command responsibility, under which the commander is responsible for an enforced disappearance not only when he orders its commission, but also when he knew or should have known that the enforced disappearance was about to be committed and he did not take the necessary measures to prevent this crime. The expansion of the commander's responsibility provides a greater guarantee that this crime will not occur. In contrast, the responsibility of the commander in the Iraqi draft bill seems narrow,⁹³ which considers that the commander is responsible only when he orders the commission of an enforced disappearance. Narrowing the commander's responsibility in this way allows the continuation of this crime and enables the commander to evade responsibility.

⁹⁰ ICPPED (n 5) art 24.

⁹¹ Michael Newton, ‘The Iraqi High Criminal Court: Controversy and Contributions’ (2005) 88 *International Review of the Red Cross* 399.

⁹² Iraqi Draft Bill, art 2.

⁹³ Draft Bill (n 92) art 9.

Furthermore, Article 6(2) of ICPPED states that “no order or instruction from any public authority, civilian, military, or other, may be invoked to justify an offence of enforced disappearance.” Here another gap emerges in the current draft bill, which absolves subordinates of responsibility when the action is in response to their commander’s order – when they are obligated to obey the order, or they feel obligated to obey it.⁹⁴

Another shortcoming of the draft bill is that it does not adequately lay out the mechanisms for the administration of justice. The draft states that cases of disappearance “will be brought by the public prosecutor before the competent courts.”⁹⁵ It does not mention the specific court which will have jurisdiction under this law, and further does not expressly exclude recourse to military courts. The draft also does not expressly rule out the application of the statute of limitations. Given the seriousness of the crime and the risk of retaliation, which means that it may take some victims time to file complaints, the application of any statute of limitation can have a harmful effect on victims' rights to a remedy. Additionally, it provides insufficient measures for reparation. The draft, falling short of the requirements laid out in Article 17 of ICPPED, also neglects to mention the information that should be mentioned in the context of establishing a database on forcibly disappeared persons.⁹⁶ In another departure from ICPPED, the draft bill also fails to grant any rights to the relatives and lawyers of the forcibly disappeared to obtain information about the place and conditions of detention.

⁹⁴ Iraq Penal Code (n 86) art 40 “There is no crime if the act is committed by a public official If he commits the act in performance of an order from a superior which he is obliged to obey or which he feels he is obliged to obey.”

⁹⁵ Draft Bill (n 92) art 22.

⁹⁶ Art 17(3) of ICPPED obligates state parties to maintain a database of persons deprived of their liberty. The state party should record the identity of the detained person, the place and time of his detention, the authority that ordered his detention, and the health status of the detainee. The states are also committed to registering deaths during the detention, circumstances, and causes of death, and the date of the release of the detainee, and in the event of transferring the detainee to another destination, the states are committed to determining the new destination and the date of its transfer.

II. The Responsibility of the Iraqi Government for the Crimes of Enforced Disappearance.

The ICPPED is the first universally legally binding instrument regarding enforced disappearances.⁹⁷ It was adopted due to the urgent need and demands of the families of the disappeared and human rights organisations around the world to end the crimes of enforced disappearance. This convention is binding on all signatories. Responsibility for enforced disappearances committed by non-state armed actors can also be attributed to the state of Iraq under the rules of attribution as established in international law.⁹⁸

The Articles drafted by the International Law Commission in 2001 (“RSIWA”) are considered the basic secondary rules⁹⁹ which deal with state responsibility in accordance with international law and which have been relied upon by human rights bodies.¹⁰⁰ According to these Articles, the state is responsible for illegal acts under international law,¹⁰¹ and even those committed by actors who are not affiliated with state agencies when these actors practice their actions based on instructions or orders from a government agency.¹⁰² The government is also responsible for the actions of non-state actors when the state recognises and adopts these behaviours.¹⁰³

With the increase of enforced disappearances for decades in Iraq and the escalation of voices calling for the release and disclosure of the fate of the forcibly

⁹⁷ OHCHR, ‘Reporting under the International Convention for the Protection of All Persons from Enforced Disappearance’ (2022) 8.

⁹⁸ RSIWA, art 8 and 9. Rule 149 Customary IHL. “A State is responsible for violations committed by its organs, including its armed forces.”

⁹⁹ Primary rules establish legal obligations and prohibitions, while secondary rules govern the process of enforcing those obligations. In this context here, primary rules include ICPPED, Convention against Torture (CAT) art 2, UDHR Art 9, And International Covenant on Civil and Political Rights, art 7.

¹⁰⁰ Ineke Boerefijn, ‘Establishing State Responsibility for Breaching Human Rights Treaty Obligations: Avenues under UN Human Rights Treaties’ (2009) 56 Netherlands International Law Review 167.

¹⁰¹ Art 4 and 7 International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001.

¹⁰² ILC Draft Articles, art 5 and 8.

¹⁰³ ILC Draft Articles, art 11.

disappeared, the Iraqi government claims that enforced disappearances are an issue of the past and avoids recognising this as an ongoing crime.¹⁰⁴ The Iraqi government ignores the fact that government agencies or groups linked to the state, in addition to the armed Shi'ite militias, have practised and are currently practising enforced disappearances in a systematic, persistent, and widespread manner under the cover of combating terrorism and eliminating ISIS sleeper cells.¹⁰⁵ This is in violation of Security Council Resolution No. 1456 of 2003, which requires the state to respect its human rights obligations when taking any measures aimed at combating terrorism.¹⁰⁶

Additionally, CED expressed in its report on Iraq its growing concern about human rights violations committed against persons deprived of their liberty under the Federal Anti-Terrorism Act of 2005 and suspected terrorists. These individuals were arrested without a court order and not allowed to contact a lawyer while being questioned by the police or other security forces, and their relatives were not informed of any information about their whereabouts.¹⁰⁷ On the part of the Iraqi government, there is a deliberate omission to take action aimed at putting an end to the violations committed by the security forces, counter-terrorism forces, the PMF, and other armed non-state actors.¹⁰⁸ The Iraqi government is obligated under international human rights law to prosecute those responsible for enforced disappearances. This can be done by conducting comprehensive and prompt investigations into violations of enforced disappearances committed by governmental and non-governmental persons, targeting the right to life and detention without legal basis, and subjecting them to prosecution under the law.¹⁰⁹

¹⁰⁴ GICJ, Iraq Enforced disappearance A widespread challenge, (2015) 5.

¹⁰⁵ Ibid 5.

¹⁰⁶ UNSC Res 1456 (2003) S/RES/1456. adopted on 20 Jan 2003, in Annex 6 stresses that States must guarantee that whatever step is taken to fight terrorism meet with all their commitments under international law and should adopt such steps in consistent with international law, in specifically, IHL, IHL and international refugee law. Tullio Scovazzi and Gabriella Citroni, 'The Struggle against Enforced Disappearance and the 2007 United Nations Convention' (M Nijhoff 2007) 60.

¹⁰⁷ United Nations CED (2020) CED/C/IRQ/OAI.

¹⁰⁸ Local Police and SWAT, Prime Minister's Forces, Iraqi Hezbollah, Iraqi Popular Mobilization and Badr militia.

¹⁰⁹ UNCHR, 'Report of the independent expert to update the set of principles to combat impunity' 2005 E/CN.4/2005/102/Add.

Furthermore, the Iraqi government is also obligated under ICPPED to work on locating the whereabouts of the forcibly disappeared, returning them if they are alive, and revealing the fate of the deceased. In addition, there is a need to criminalise enforced disappearances through the formulation of a law that defines enforced disappearance as an independent crime violating basic human rights. Iraq should also consider the need to amend the law on enforced disappearance so that it is consistent with Articles 2, 3, 6, and 7 of ICPPED and other international law instruments. Iraq must also abide by the provisions of Article 5 of the Convention, which defines enforced disappearance “as a crime against humanity.”

Conclusion

It seems clear that enforced disappearance is a grave crime that threatens international law and human rights. Countries should take serious and decisive steps to combat it. The enforcement of international law related to enforced disappearances is no longer sufficient, especially since it is not in practice. States should not be satisfied with meeting the minimum requirements of the provisions of ICPPED, given that the provisions may not comply with other international law obligations. This has been realised by the drafters of ICPPED as this Convention has indicated many times that it is permissible to adopt standards more stringent than those found in the convention. For Iraq to fulfil its obligations – as a member state of ICPPED and other instruments of international law – it must conduct urgent investigations into cases of enforced disappearance, identify illegal places in which victims are held by security forces and armed militias, and punish the perpetrators. It must also prosecute the military and security leaders known to be involved in ordering complicity to commit the crimes of enforced disappearances. In addition, it is essential to provide information about the fate of the forcibly disappeared, reveal the circumstances of their deaths, and return their bodies to their relatives. It is also important to follow the basic standards of international law when accusing detained persons of whom there is evidence of having committed crimes. Moreover, there should be emphasis on the release of others who did not commit crimes, as well as providing compensation for persons detained without legal basis. The Iraqi government should ensure the implementation of ICPPED with the potential of contributing to changes in the existing legislation in the country. Thus, it is important to ensure that Iraq fulfils its commitments by considering enforced

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disappearances as an independent crime under the Iraqi Penal Code and imposing deterrent penalties against its perpetrators. Besides, there is a need to remove Article 40 of the Iraqi Penal Code, which states that there is no crime if the act is committed by an employee, or a person charged with public service in the implementation of the order of his superior. Iraq must respect Article 6 of ICPPED regarding the command responsibility to become more comprehensive and consistent with the provisions of international law. Finally, in the aftermath of the Corona pandemic, the Iraqi government must not invoke precautionary measures to suspend visits and access to persons detained in Iraqi prisons.