

Iraq, forced displacement and the fight against the Islamic State

INTRODUCTORY TEXT: *Iraq has seen, since 2014, the rise and fall of the so-called Islamic State (ISIS). Hundreds of thousands of Iraqi civilians were killed or displaced during the conflict with ISIS. Allegations of abuse were made against both ISIS and Iraqi forces fighting against it. This article discusses alleged torture and ill-treatment, arbitrary detention, due process violations and enforced disappearances of detainees in Iraq.*

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

The UPR submission of Human Rights Watch

[Source: Human Rights Watch, "Iraq: UPR Submission November 2019", 2019; available at <https://www.hrw.org/news/2019/09/26/iraq-upr-submission-november-2019>]

Introduction

[1] Since Iraq's last UPR review in 2014, it has seen the rise and fall of the Islamic State (also known as ISIS). In its wake, hundreds of thousands of Iraqis have fallen victim to ISIS abuse, displacement because of fighting, and abuse at the hands of Iraqi forces in the context of counterterrorism operations. As battles have come to a close, the state has chosen to focus on harsh prosecutions and victor's revenge over transitional

justice and reconciliation efforts.

Justice for ISIS Abuses

[2] Since 2014, ISIS fighters captured and extrajudicially killed civilians, often targeting minorities, community leaders and Iraqi armed forces. They carried out dozens of explosive attacks on civilian populated areas. Under international law some of the brutal crimes prosecuted by ISIS since 2014 amount to war crimes [...]. Iraq has failed to pass legislation to make war crimes [...] specific offences under Iraqi law, though it noted a recommendation to do so in its last review in 2014.

[3] Iraqi judges have instead prosecuted ISIS suspects with the single charge of ISIS affiliation, under Iraqi counterterrorism legislation. The trials have generally been rushed, based on the sole basis of a confession, and did not involve victim participation. Authorities have done little to protect, gather, and use in criminal prosecutions evidence found at mass gravesites left by ISIS. The Iraqi government and Kurdistan Regional Government (KRG) have conducted thousands of trials of ISIS suspects without a strategy to prioritize investigating the worst abuses under Iraqi and international law.

[...]

[4] Recommendations

- Iraq's parliament should criminalize war crimes [...].
- All relevant Iraqi and KRG authorities should engage in discussions to develop a national strategy for ISIS prosecutions [...] The strategy should include public communications on all justice processes, and advocate for victims' participation;
- The judiciary should urgently develop a coordinated strategy to prioritize the prosecution of those who committed the most serious crimes by bringing charges for the full range of crimes committed, and with a clear role for victim engagement;

[...]

Arbitrary Detention, Due Process, and Fair Trial Violations

[5] In the context of the last four years of counterterrorism operations, Iraqi forces have arbitrarily detained hundreds of ISIS suspects [...] many of them for months. According to witnesses and family members, security forces have regularly detained suspects without any court order, arrest warrant, or other document justifying arrest and often did not provide a reason for the arrest.

[6] Authorities have systematically violated the due process rights of ISIS suspects and other detainees, such as guarantees under Iraqi law for detainees to see a judge within 24 hours, to have access to a lawyer throughout interrogations, and to have families notified of their detention and to be able to communicate with

them.

[7] Judges have also ignored claims made by foreign women charged with ISIS affiliation for having entered Iraq and lived in ISIS-controlled areas that their husbands brought them against their will. Children above the ages of nine have also been prosecuted for illegal entry into the country despite statements in court that their parents brought them to Iraq without their consent.

[8] In addition, security forces have arbitrarily detained protesters and journalists. [...]

[9] Despite requests, the government of Iraq has failed to release information on which security and military structures have a legal mandate to detain and interrogate individuals, and in which facilities.

[...]

[10] Recommendations

- Judges should ensure that all suspects benefit from the presumption of innocence, and their full due process rights including that defense lawyers have access to defendants from the moment of arrest, through detention and interrogation;
- Law enforcement should redouble efforts to ensure that defendants are brought before a judge within 24 hours of their detention;
- Prison authorities should ensure that all detainees have the right to communicate with their families;
- Authorities should make public which security and intelligence branches have a legal mandate to detain and interrogate, and where all detention facilities are located.

Torture and Other Forms of Ill-Treatment

[11] Detainees in Iraq have continued to give Human Rights Watch graphic accounts of torture during interrogations, in some cases leading to deaths in custody. These allegations are consistent with reports of widespread use of torture by Iraqi forces as a method to extract confessions instead of carrying out robust criminal investigations. In particular, authorities have detained ISIS suspects in overcrowded, and in some cases inhumane, conditions.

[...]

[12] Recommendations

- Iraq's High Judicial Council should issue guidelines on the steps judges are obliged when a defendant alleges torture;
- Judges should investigate all credible allegations of torture and the security forces responsible, and

order transfers of detainees to different facilities immediately after they allege torture or ill-treatment, to protect them from retaliation;

- Parliament should pass the draft Anti-Torture Law pending before parliament, which would require judges to order a medical examination of any detainee alleging torture within 24 hours of learning of the allegation;
- Iraq's foreign minister should urge parliament to ratify the Optional Protocol to the Convention Against Torture. Pending this ratification, the government should commit to setting up a National Preventative Mechanism that can inspect all detention centers in Iraq and set up effective complaint mechanisms for authorities and facilities involved in detention and interrogations;
- The heads of the federal intelligence agency, NSS and the new Minister of Interior, once appointed, should issue statements to their chain of command on the prohibition of the use of torture and their commitment to punish perpetrators;
- The Prime Minister should publicly condemn the use of torture by all law enforcement, security and military personnel.

Enforced Disappearances

[13] The International Center for Missing Persons, which has been working in partnership with the Iraqi government to help recover and identify the missing, estimates that the number of missing people in Iraq could range from 250,000 to 1 million people. Since 2014, Iraqi military and security forces have forcibly disappeared predominately Sunni Arab males in the context of counterterrorism operations, as well as in other cases. A range of military, security and intelligence actors have been responsible for the enforced disappearances, many of which took place at checkpoints or the homes of those disappeared. Despite requests from the families of the disappeared for information, Iraqi authorities have given none. Authorities have not responded to queries from Human Rights Watch as to which channels are available to families searching for loved ones. [...]

[14] Recommendations

- Iraqi authorities should establish an independent commission of inquiry to investigate all cases of enforced disappearances and custodial deaths nationwide at the hands of military, security, and intelligence forces across all official and unofficial detention facilities. The commission should:
 - be mandated to recommend cases for prosecution;
 - include working groups on data collection, legislative reform, and investigations into individuals' fate and whereabouts;
 - have the authority to recommend cases for prosecution and report publicly on its findings within one year;
 - establish a mechanism to compensate victims of enforced disappearance and their families; and e) establish a nationwide register of forcibly disappeared persons, or another streamlined mechanism to allow families to seek information about relatives disappeared and ensure the fulfilment of family rights to truth, justice, and reparations.

- The judiciary should promptly investigate existing allegations of enforced disappearances, locate and release those held illegally by military and security forces, and prosecute the perpetrators of enforced disappearances;
- The judiciary should prosecute law enforcement officers of all ranks, including those with superior authority, who are found to be responsible for enforced disappearances and punish commanding officers and others in a position of government authority who ordered or knew of these abuses.

Collective Punishment of Families of Suspected ISIS-Affiliates

[15] As ISIS has lost significant territory, the millions of people who lived for varying periods of time under the group have now returned to government-controlled areas. As this has happened, Iraqi families with perceived ISIS affiliation [...] have been denied security clearances required to obtain identity cards and all other civil documentation they may have lost during their time living under ISIS. This has impacted their freedom of movement [...].

[16] Denial of security clearances has also blocked families with perceived ISIS affiliation from being able to make claims to the governmental commission to compensate Iraqis affected by terrorism, military operations, and military errors; to bring court cases; or to challenge the seizure of property by Iraqi security forces or other local families. In Nineveh, families with perceived ISIS affiliation have also said they were sometimes denied access to humanitarian assistance, usually by community leaders.

[17] Lawyers providing legal services to ISIS suspects and their families, or those perceived to be, have reported that security forces threatened, and in some instances, detained, them for providing these services.

[18] Despite joint government and humanitarian efforts to facilitate the return of displaced persons to areas once held by ISIS, local decrees and other preventative measures prevented families with perceived ISIS affiliation from returning home to some areas, including in Anbar, Diyala, Nineveh, and Salah al-Din. In some instances, these families have been forced from their homes into camps by Iraqi armed forces or have been forced into secondary displacement. [...]

[...]

Freedom of Assembly and Expression

[19] On numerous occasions since 2014 Iraqi forces have used excessive force against peaceful protesters. In March 2018 for example, KRG security forces arbitrarily detained dozens of protesters and journalists at protests by civil servants demanding unpaid wages. Some protesters alleged security forces also beat them.

[20] Protests that began in central and southern Iraq in July 2018 demanding improved access to water, jobs,

and electrical power turned violent in some areas, particularly in Basra, with Ministry of Interior forces injuring dozens of protesters, and killing a few through their excessive use of force when trying to disperse crowds and detain protesters. The protests in Basra continued through September, with violence increasing on both sides leading to protesters burning down buildings and leaving at least 15 dead.

[21] [...] [S]ince 2014, [Iraq] has [...] supported a recommendation to investigate killings and violence against journalists and hold perpetrators accountable. In very few instances have the authorities investigated incidents of attacks on journalists or protesters, and in no instance that Human Rights Watch is aware of, have Iraqi forces been punished for such crimes.

[22] Recommendations

- The judiciary should investigate all arbitrary arrests, excessive uses of force, and other attacks on journalists, protesters and activists and hold accountable perpetrators, including Iraqi forces and those in command control;
- The human rights and legal committees in parliament should conduct a comprehensive review of legislation to determine which laws need to be amended in order to fall in line with international standards.

Discussion

I. Classification and Applicable Law

1.
 - a. How would you classify the situation in Iraq after the fall of the Islamic State (IS)? Is there an armed conflict? If so, is it an international armed conflict (IAC) or non-international armed conflict (NIAC)? Who are the parties involved? Is IHL still applicable in November 2019? (GC I-IV, Arts 2 and 3; AP I, Art. 1; AP II, Arts 1 and 2)
 - b. Is IHL applicable to the case at hand? What about IHRL? If IHRL applies, do all the parties to the conflict have to respect such rules? Are derogations due to the exigencies of the situation admissible?
 - c. In a situation to which both IHL and IHRL apply, what is the relationship between these two bodies of law? How must it be determined whether IHL or IHRL rules prevail in the event of contradiction between them?
2. (*Paras 8 and 19-21*) Are the arrests of protesters and journalists and civil servants demanding unpaid wages governed by IHL?

II. Violations by ISIS

3. (*Para. 2*) Did the capture and extrajudicial killing of civilians, often targeting minorities, community leaders and Iraqi armed forces, necessarily violate IHL?

III. Forced Displacement

4.

a. What legal frameworks concerning displaced persons are applicable in Iraq? Do these legal frameworks bind all parties involved equally?

b. What does IHL have to say about displacement? Does it prevent it? Are all cases of displacement in armed conflict as such a violation of IHL? Do belligerent parties have an obligation to prevent displacement? (GC I-IV, Arts 2 and 3; AP I, Art. 1; AP II, Preamble; UN Guiding Principles of Internal Displacement, Introduction (3))

5. What is the legal difference between the terms “internally displaced persons” (IDPs) and “refugees”? Is this distinction relevant under IHL? Does IHL regulate the status of refugees and IDPs in armed conflicts? How would you classify the persons affected by the crisis in the case at hand under IHL? (GCI-IV, Arts 3; GC IV, Arts 4 and 44; AP I, Arts 50 and 73; CIHL, Rule 131; GC I-IV, Arts 2 and 3; AP I, Art. 1; AP II, Preamble; UN Guiding Principles of Internal Displacement, Introduction (2))

6. Legally, does it make a difference whether a group of displaced persons fled to escape from the hostilities or because they were forcibly expelled? (AP II, Art. 17; CIHL Rule 129; UN Guiding Principles of Internal Displacement, Introduction (2))

7. (*Paras 1, 15 and 18*) What is the difference between IHL and IHRL concerning the right to security and freedom of movement? Does IHL foresee the right of civilians to move about without restriction? Of IDPs more specifically? Does IHL require that internally displaced persons be granted access to safe locations? (UN Guiding Principles of Internal Displacement, Principle 14)

8. (*Paras 13 and 18*)

a. Do IDPs have a right to return to their homes? In all circumstances? Do your answers depend on whether the conflict is an IAC or a NIAC? May Iraq prevent families with a perceived ISIS affiliation from returning home to some areas? (CIHL, Rules 132 and 133; UN Guiding Principles of Internal Displacement, Principles 28 and 29).

b. Can Iraq restrict the freedom of movement of displaced individuals? Can it order their stay at displaced persons camps? Can security concerns such as suspected ISIS affiliates infiltrating communities of IDPs justify such acts? (AP II, Art. 17; CIHL, Rules 129 and 131; UN Guiding Principles of Internal Displacement, Principles 14 and 15)

c. If it was proven that some displaced persons were indeed affiliated with a terrorist group, would they lose the protection afforded to them by IHL? Does this depend on the nature of the affiliation? Family members? Close friends? Neighbours? In your opinion, what kind of affiliation is relevant under IHL? (AP II, Arts 4 and 13; CIHL, Rule 6)

9. (*Para. 13*) Do Iraqi authorities have an obligation to give information about the disappeared persons to their families? (AP II, Article 5 (2) (b); CIHL, Rules 105, 116 and 117)

10. (*Paras 15-18*)

a. Is it lawful that Iraqi authorities screen persons who lived in a territory under IS control before giving them security clearances allowing them to move freely within Iraq?

b. What does “collective punishment” mean? How does it differ from the concept of reprisals? Are collective punishments prohibited by IHL? Are there any circumstances where the imposition of collective measures against persons who lived under enemy control may be justified? How are the IHL rules on collective punishment relevant to the facts of this case? (AP II, Art. 4 (2) (b); CIHL, Rule 103)

c. In your opinion, is the denial of security clearances and access to humanitarian assistance to Iraqi families with perceived ISIS affiliation a violation of IHL rules?

IV. Non-Discrimination and Non-Adverse Distinction

11. (*Para. 13*) Does IHL contain rules that prohibit discrimination based on religion or ethnicity? Is there a general prohibition of discrimination, or is it limited to the application of certain IHL rules? How do these norms differ from IHRL rules on non-discrimination? How does the IHL prohibition of adverse distinction relate to the present situation? (GC I-IV, Arts 3; CIHL, Rule 88)

12. (*Para. 16*) May Iraqi security forces seize the property of civilian families with perceived ISIS affiliation? If so, under what circumstances and to what ends? Is your answer the same for IACs and NIACs? (GC IV, Art. 33; CIHL, Rules 49-52)

V. Treatment of Civilians and Detention

13. (*Paras 5-10*)

a. (*Para. 5*) May the Iraqi authorities detain in a NIAC persons without any court order, arrest warrant, or other document justifying arrest and without providing a reason for the arrest?

b. When may civilians be detained in an IAC? In a NIAC? Is preventive detention of civilians permitted under IHL? For what reasons? What is arbitrary detention? May civilians be detained collectively as a security measure, or is an individual decision required for each civilian detained? May some civilians be detained simply because they are males of fighting age? (GC IV, Arts 41, 42 and 78; CIHL, Rules 88 and 99)

- c. What protections are available to detained civilians in this situation? Are they entitled to receive visits from family members? The ICRC? May they communicate with counsel? (AP II, Art. 5; CIHL, Rules 105, 124 and 126)
- d. In what circumstances may families be lawfully separated in conflict? Do they apply here? (CIHL, Rule 105)
- e. (*Paras 8 and 17*) Can lawyers providing legal services to ISIS suspects and their families, or those perceived to be detained solely for that? What about journalists covering their cases? (CIHL, Rule 34)

14. (*Paras 5-9*)

- a. Does IHL of NIACs provide rules as to the grounds and procedures under which a person may be detained? Does it regulate the treatment of detainees? Does it authorize belligerent parties to detain individuals? (AP II, Arts 4, 5 and 6)
- b. (*Paras 6 and 10*) Which procedural guarantees do civilian internees benefit from under IHL of NIACs? IHRL? Can suspects be detained without any court order, arrest warrant, or without being provided a reason for the arrest? Can civilians be detained for the mere fact that they're suspected of being affiliated to ISIS? Within the context of counterterrorism operations?
- c. Does IHL foresee a presumption of innocence as described in the recommendations in para. 10? Is it applicable to persons administratively detained for security reasons and is it violated by such administrative detention? (AP II, Art. 6 (2) (d))

VI. Torture and Other Forms of Ill-Treatment

15. (*Paras 11-12*) Under IHL, may physical violence be used as a method to extract confessions from a detainee? May it be used insofar as it does not reach the level of cruel, inhumane or degrading treatment, or torture? Does the obligation to treat protected persons humanely exclude all forms of physical violence? Psychological violence? (CIHL Rules 87 and 90)

VII. War crimes

- 16.
- a. (*Paras 2 and 12*) Explain the notion of war crimes and the 'grave breaches' regime in IHL. Do you think that some acts described above amount to war crimes?
 - b. Do States have an obligation to investigate alleged war crimes and prosecute the suspected perpetrators? What about the obligation to investigate allegations of torture? (GC IV, Art. 147, CIHL, Rules 156 and 158)

