



منظمة أفق للتنمية البشرية  
العراق - بغداد

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# TRANSITIONAL JUSTICE IN IRAQ

Memories and Future Prospects

- Ali Bakht
- Saad Sultan
- Hicham Cherkaoui
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## **About the Friedrich-Ebert-Stiftung (FES) Jordan & Iraq**

The Friedrich-Ebert Stiftung is a nonprofit organization that promotes social democracy. It was founded in 1925 as the political legacy of Germany's first democratically-elected president (Friedrich Ebert), and is Germany's oldest party-associated foundation.

The Friedrich-Ebert-Stiftung Jordan & Iraq aims to promote democracy and strengthen political participation, to support progress towards social justice and gender equality, and to contribute to fostering environmental sustainability, peace, and security in the region.

The Friedrich-Ebert-Stiftung Jordan & Iraq office also supports efforts to build and strengthen civil society and public institutions in Jordan and Iraq. Through its extensive involvement in civil society organizations and with groups across the political spectrum, it creates platforms for democratic dialogue, holds conferences and workshops, and publishes political analyses of current affairs.

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The Ufuq Organization for Human Development is an NGO, nonprofit, and public benefit organization. It aims to support human rights, achieve peaceful coexistence grounded in the principle of citizenship, promote cultural diversity, and foster peace through furthering development projects that help create pathways for the populations it serves to participate in and integrate into society. It also works to achieve justice in all aspects of the democratic transition process. The organization has its headquarters in Baghdad and works in all Iraqi governorates. It is registered with the NGO directorate in Iraq and with the European Union and adheres to international treaties and conventions on human rights, and to the principles of neutrality, independence, non-discrimination, teamwork, and gender balance in the organization.

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- Wrote various scholarly articles and studies and gave international lectures on the transitional stage, on the topics of legal reform, the right to the truth, the right to memory, and right to justice and redress
- Developed, along with other experts and specialists, new post-conflict approaches for directly including victims and survivors in the transitional stage and beyond

## Introduction

Given growing demands for justice following human rights violations, the international community has expanded the concept of justice from its traditional focus on courts and judicial proceedings, to new mechanisms known as “transitional justice.” Transitional justice seeks justice for societies in transitional periods, as they emerge from domestic upheaval or international conflict. This framework for justice depends on a certain awareness and understanding and has been defined as a set of judicial and non-judicial measures that different countries have employed in order to address legacies of gross human rights violations. These measures include legal prosecution, truth commissions, reparations programs, and various kinds of institutional reform.

During periods of transition, the government finds itself facing many challenges, including dealing with the elites from the old regime, such as high-level government employees, political party members, and those who had had influence or held security or military positions in the former regime. It also includes ways of addressing challenging economic issues such as debt, inflation, poverty, unemployment, and regional disparities, as well as promoting democratic values and looking for the best pathways to create new institutions to replace the old. This is a complex process that cannot be achieved through elections alone. There are three things that can happen after elections: a return to authoritarianism, superficial implementation of democratic processes, or a full democratic transition. A democratic transition requires various different elements and measures.

Transitional justice, democratic transitions, and fostering the societal engagement necessary for such transitions are difficult and complex processes. Transitional justice requires transitioning from an unjust status quo to a just one, which necessitates certain exceptional measures to deal with exceptional circumstances. In such situations, traditional

justice does not suffice. Democratic transitions are possible when the state chooses to set a path towards democracy and to break ties with authoritarian systems. The relationship between transitional justice and democratic transitions raises several key questions:

Does a democratic transition necessarily require transitional justice? If transitional justice fails, will the democratic transition fail too? In answering this question, it is clear that there cannot be a democratic transition without transitional justice. Likewise, the failure of transitional justice bodes ill for the democratic transition. This conclusion is drawn from literature on transitional justice and democratic transitions, as well as Egyptian and South African history. In the former case, a military government maintained its grip on power at the expense of transitional justice, while in the second scenario, a successful transitional justice process led to a successful democratic transition. The many different historical attempts at transitional justice demonstrate that its relationship with the democratic transition process has varied from one case to another.

If we take a regional example, such as the Iraqi experience with transitional justice, we find that this was an important case that deserves further examination, especially given the volatile human rights situation after the regime change in 2003. We-the Ufuq Organization for Human Development- in coordination with the Friedrich Ebert Stiftung, have examined this important case in which civil society was largely absent. Transitional justice has proved a controversial matter, especially with regard to identifying human rights violations, victims' right to reparations, and achieving justice and redress in Iraq. This study therefore aims to shed light on the issue of transitional justice in Iraq and how it compares with regional and international standards and cases. It calls for a comprehensive review of the legal procedures and the timeframes allotted to these procedures, as well as establishing academic centers and social networks to raise awareness and provide education to prevent these human rights violations from happening again. This study also aims to bring together UN, Iraqi government, and civil society efforts to record oral histories and preserve collective memory, to support institutional reform with regard to

both infrastructure and legislation, and to contribute to synthesizing these questions and presenting a final report on the outcomes of transitional justice.

This study includes four chapters. The first chapter addresses mechanisms for transitional justice in the international legal system, with particular attention to the mechanisms for uncovering the truth about human rights violations, prosecuting the perpetrators, providing reparations, and carrying out institutional reform. The second chapter of this book is divided into three main sections. The first section looks at regional and international experiences in establishing transitional justice mechanisms, focusing on four particular case studies: the South African Truth and Reconciliation Commission (TRC), the National Reconciliation Commission in Ghana, Guatemala's Historical Clarification Commission (CEH), founded to address "past human rights violations and acts of violence," and the Equity and Reconciliation Commission in Morocco (IER). The second section of this chapter examines Greece and Argentina as case studies for applying the principle of accountability and is divided into two parts. The first part looks at local trials held in Greece, and the second at the difficult path towards justice in Argentina. The third section looks at how Tunisia has tried to overcome corruption and authoritarianism. In order to evaluate how international legal frameworks and concepts were applied on the ground in Iraq, the third chapter looks at the legal and historical context of transitional justice in the Republic of Iraq. This third chapter includes three main sections. The first section looks at the historical and legal context of transitional justice in Iraq, while the second examines the decisions issued by the Coalition Provisional Authority and subsequent Iraqi interim governing bodies. The third section focuses on the ministries, agencies, and institutions that were put in charge of managing the transitional stage. The fourth chapter contains two sections. The first section looks at the Iraqi experience with transitional justice mechanisms, and the second looks at the social repercussions of this period. The book ends with a series of conclusions, recommendations, and potential outlooks for the future.

## Research Methodologies

This research draws upon several methodologies, including:

1. **Participatory Methodology:** This includes techniques such as rapid participatory appraisal, an emphasis on participation, and collective knowledge building. It is based on the understanding that the entities involved in these societal processes have important perspectives for building understanding of these social processes and dynamics, and therefore should not be dealt with as mere “sources of information.” This methodology requires more than analysis and data gathering by a team of experts. It also depends upon verifying the data through the participation of and consultation with relevant parties.
2. **Using both quantitative and qualitative data:** Statistical data was gathered when reliable information relevant to the analysis was available. When such statistical data relevant to analyzing these processes and dynamics was not available, or when it was not verifiable, the study drew upon alternative indices and forms of evidence using qualitative data instead.
3. **Using both theoretical and practical sources of information:** This applies to gathering information on procedures, situations, resources, and other factors (such as the goals of relevant parties, their expectations, etc.)  
  
This produced an analysis that not only gave a clear idea of the current state of the processes and dynamics of the social and political ramifications of transitional justice, but also provided data about potential developments and avenues for change. In this way, familiarity was gained with the various perspectives of relevant parties, and better understanding was obtained of the information.
4. **Self-knowledge:** Here we refer to how the intended sample group understands the question at hand, that they should be seen as a source of information and knowledge, and that their perspectives should be drawn upon in the study, as well their methodologies, as a complementary framework, both technically and epistemologically.

5. This study has drawn on various comparative methods, which have been applied together to try to describe and derive the necessary data from the main sources with regard to establishing a comprehensive legal, conceptual, and analytical framework to study the relationship between transitional justice mechanisms and strengthening human rights protections at the international level. It aims to compare many different international and national legal mechanisms and measures through regional and international case studies of transitional justice in post-conflict situations, and evaluating the effects of these mechanisms on society.

### **Means for Data Gathering**

The means for data gathering included:

- Surveys of the general public
- Focus groups using discussion guides
- In-depth individual interviews with relevant parties
- Analytical framework for gathering and organizing data
- Sessions to go over the research, i.e., for specialists to review the study materials





## Chapter 1

### **Transitional Justice Mechanisms in the International Legal System**

Hicham Cherkaoui

Concepts are the basis for developing subsequent theories. They give weight to the questions at hand, help clarify how particular analyses will make a contribution, and demonstrate the links between theoretical roots and practical applications. The new principle of transitional justice does not have a theoretical background that needs to be deconstructed in order to make connections between the abstract and the concrete. Concepts and principles are the bridge between the theoretical and the practical.

Political, legal, and human rights principles seem to be closely connected during post-conflict transitions to the extent that it is sometimes difficult to determine where one ends and the other begins. These principles are not part of any specific theoretical framework and do not have a clear definition with regard to their scope. All of these principles contribute to the “transition process” without providing clear parameters for how this should take place. Transitional justice mechanisms aim to establish stability, security, and democratic rule in the period following human rights violations, and are strengthened through establishing accountability, reparations, and addressing problems directly. Utilizing these mechanisms makes it possible to leave violence behind and establish constitutional and legal guarantees to prevent harm occurring to new victims, and to achieve peace, reconciliation, and the protection of human rights. This is important in light of the profound transformations taking place in the world today and given the serious political challenge that various countries are facing — namely, the question of democratic transition.

We will therefore endeavor in this chapter's two sections to examine transitional justice mechanisms as both principle and practice at the international level. Transitional justice mechanisms are among the new mechanisms in the international legal system that aim to identify legal and humanitarian resolutions for some of the political transitions that various countries have faced. The first section examines transitional justice mechanisms, from uncovering the truth to reparations, while the second focuses on reforming state institutions in order to ensure these violations do not happen again.

## **Topic 1: Transitional Justice Mechanisms: From Uncovering the Truth to Reparations**

The international community and some national governments have pursued various methods in order to stop violations through international criminal justice and continuing to fight to end impunity for those who have committed gross human rights violations. These methods have included trying to uncover the truth, seeking reparations, prosecuting perpetrators, and undertaking institutional reform. All of this is foundational to a culture of non-impunity.

### **Section 1: Uncovering the Truth**

Knowing what really happened to victims and uncovering the history of the country is the right of the country's citizens and the responsibility of the state. International law requires states that have ratified all of the relevant conventions on protecting human rights to carry out investigations into such violations.<sup>(1)</sup> Uncovering the truth is one of the main objectives for all those working to end impunity for perpetrators, because they believe the state and society cannot be built on anything but the truth.<sup>(2)</sup>

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(1) Louis Joinet, *Lutter contre l'impunité. Dix questions pour comprendre et pour agir* — édition la découverte, Paris: 2002, p. 21.

(2) Mr. Jose Zalaquett, a member of the National Commission on Truth and Reconciliation in Chile said: "The truth was considered as an absolute, unrenounceable value for many reasons: In order to provide

The right to reparations is a fundamental international right for victims of human rights violations. Countries must provide reparations, which goes beyond simply monetary or material compensation.

We will examine the mechanisms of and objectives for uncovering the truth in order to evaluate a set of international case studies, and will then turn to the philosophy and aims of reparations in nations that have addressed human rights violations in the past.

### **Subsection 1: Mechanisms and Goals of Uncovering the Truth about Violations**

Facing the past and uncovering the truth is a crucial part of the many possible steps that can be taken during reconciliation processes-whether personal, national, or political. Truth commissions have been given many tasks. In addition to searching for and uncovering the truth, they have also become initiatives adopted by governments to address crimes committed under the previous regime. They have subsequently led to other processes with regard to accountability, reparations, and reform programs.

The goals of establishing truth commissions differ from one country to another. Some are focused on national reconciliation and the country's need to turn over a new leaf. Others consider this to be a step towards prosecuting perpetrators of human rights violations, while still others see this as a means for a new government to distance itself from the old regime's practices, and usher in a new era in which human rights are respected.<sup>(3)</sup>

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for measures of reparation and prevention, it must be clearly known what it is that ought to be repaired and prevented. Further, society cannot simply black out a chapter of its history, however differently the facts may be interpreted. The void would be filled with lies or with conflicting versions. The unity of a nation depends on a shared identity, which, in turn, depends largely on a shared memory. The truth also brings a measure of social catharsis." From Zalaquett, Report of the Chilean National Commission on Truth and Reconciliation, 14; See al-Karama, p. 24.

(3) Dr. Abdel Razek Rawan, "Qira'a fi tajarib lijan al-haqiqa," al-Karama, p. 70.

## **I. Truth Commissions: Characteristics and Challenges**

One of the most common methods in recent years for uncovering past human rights violations has been what are called “truth commissions,” which have been set up when it is impossible to uncover the truth through fair and transparent judicial institutions that abide by the law and respect human rights.<sup>(4)</sup> These commissions were set up during moments of political transition from authoritarian rule to a less oppressive regime. There are many factors that both limited and strengthened these commissions and affected how they were established and how they functioned.

### **1. The Participatory Nature of Truth Commissions**

Every truth commission thus far has been formed under unique circumstances. Since 1974, there have been more than 25 official truth commissions in the world, operating under different names. In Argentina, Uganda, and Sri Lanka there were commissions on the disappeared; in Haiti and Ecuador there were truth and justice commissions; in Chile, South Africa, Sierra Leone, and Yugoslavia, truth and reconciliation commissions were formed. Most recently, the Commission for Reception, Truth, and Reconciliation was set up in East Timor.

These commissions had several shared characteristics, most importantly:<sup>(5)</sup>

- They were mostly temporary bodies that worked for a period of one or two years.
- They were officially appointed by the state and worked under the state’s auspices, and sometimes also under the auspices of the armed opposition, or as stipulated in the relevant peace agreement.
- They were non-judicial entities that had a certain degree of legal autonomy.
- They were usually formed during the transition process, i.e., during a peace process following a war, or during a transition from an autocratic to democratic government.

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(4) Dr. Abdel Hayy al-Mu’adhdhin. See his interview in *Al Ahdath Al Maghribia* after the “Concept of Truth” seminar organized by the Equity and Reconciliation Commission in Tangier (*Al Ahdath Al Maghribia*, issue 2071, 26 September 2004).

(5) Mark Freeman and Priscilla B. Hayner (International Center for Transitional Justice), “Truth-Telling,” in *Reconciliation After Violent Conflict: A Handbook 12244-* (David Bloomfield ed., 2002).

- They focused on past events.
- They investigated the specific kinds of violations committed over a period of time, rather than during a single historical event.
- Their work culminated in a final report that included their conclusions and recommendations.

Based on the previous experiences of truth commissions, it is clear that they are seen as more legitimate when their scope and tasks are clearly defined through active participation from many sectors of society. Although there is usually a need to move quickly during the transition process, it is important to try to build a strong base of support for these commissions from many sectors of society. In some countries, the government has set up truth commissions without consulting civil society and the relevant social movements.<sup>(6)</sup>

Truth commissions can be established through one of the following methods:

- Executive bodies can issue an order.
- Legislative bodies can pass a law.
- The armed opposition and the government can sign an agreement stipulating that the truth commission will be established (this can be followed by legislative or executive action, or not).

Often, the way in which the commission is established will have a direct effect on the efficacy and scope of its work. Additionally, most truth commissions gather much of their information in closed meetings between the members of the commission and the victims of the crimes who individually give their testimonies. This is known as hearing testimony, and usually the person testifying signs a statement of their testimony, which is important for at least two reasons. First, this is a step towards achieving the goal

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(6) For example, the truth commission in Guatemala tried for a long time to get backing from the religious organizations and advocacy groups that its work would rely upon. See Freeman and Hayner, p. 11.

of uncovering the truth about past events. Second, it offers victims an opportunity to break their silence and tell their tragic stories in a safe and understanding environment.

## 2. Challenges for Truth Commissions

The key moment in the work of truth commissions is when they finish preparing their final report and publish it. These final reports are the commissions' legacy and may be used as a reference in human rights education or in later criminal prosecution. However, the final report's impact depends on its contents as well as other factors, such the timing and method for publishing the report, the scope of its distribution, and to what extent it is covered in the media.

Although the form and content of the report may vary, the final reports generally include a section on the conclusions and recommendations of the commission, and sometimes also list specific individuals or institutions responsible for the human rights violations.<sup>(7)</sup> In addition to publishing these findings, the truth commission also usually makes recommendations about providing support to victims, addressing harms, and carrying out constitutional, legal, or institutional reforms to prevent such violations from happening in the future.<sup>(8)</sup>

It seems that truth commissions are one of the many mechanisms that countries can make use of during the transition process in order to strengthen democracy, human rights, and the rule of law. Some of the other elements that are included in transitional justice programs are trials, legal reform programs, restitution of rights, and reintegration into society.

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(7) Freeman and Hayner, p. 17.

(8) Unfortunately, the implementation of these recommendation has previously been and often remains one of the main areas of weakness for truth commissions, even when there is some level of compliance from the state in carrying out these recommendations (as was the case in El Salvador). It seems that the primary reasons for not implementing the recommendations are the lack of political will or lack of institutional capacity and funding. See Freeman and Hayner, p. 20.

## II. Objectives of Establishing Truth Commissions

Truth commissions consider truth-seeking to be a tool for accountability during the transitional phase. They help achieve transparency and accountability, and support the rule of law. One of the purposes of truth-seeking is to shed light on past harms for the sake of a more stable and democratic future. Other factors include: examining specific issues in preparation for further litigation, providing an opportunity for victims to speak about what happened to them, building a solid base of facts for reparations and redress programs through wide-ranging institutional reform, and setting a definitively new path for the future through officially acknowledging the violations or atrocities committed during this period.<sup>(9)</sup>

### Subsection 2: Reparations

Given widespread human rights violations, it has become necessary for governments to not only confront perpetrators but also to give victims their due rights by creating the appropriate conditions for protecting their dignity and achieving justice through reparations for the harms and suffering caused. This is connected to the right codified in international law since the beginning of the twentieth century. The Permanent Court of International Justice declared in 1928 that “it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.”<sup>(10)</sup> The international conventions protecting human rights, and especially the case law of the protection agencies charged with monitoring the implementation of these conventions, requires the state to provide reparations as part of its obligation to protect

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(9) For a discussion of why truth-seeking commissions are established, see *Dealing with the Past: Truth and Reconciliation in South Africa*, edited by Alex Boraine, Janet Levy, and Ronel Scheffer Rondebosch. Cape Town: IDASA (Institute for Democracy in South Africa), 1997.

(10) Permanent Court of International Justice, Judgment No. 8, *Chorzow Factory (Jurisdiction)* of 26 July 1927, p. 21. Quoted in: Karine Bonneau, “The Right to Reparations.” Statement made at the regional seminar of the International Federation of Human Rights (FIDH), the International Center for Transitional Justice (ICTJ), the Moroccan Association for Human Rights, and the Moroccan Forum for Truth and Equity in Rabat, 2527- March 2004, p. 26. See the website of the International Federation of Human Rights (FIDH), <https://www.fidh.org/IMG/pdf/Ma396f.pdf> (in French).

human rights. Louis Joinet, the UN Special Rapporteur on the Impunity of Perpetrators of Violations of Human Rights, stated that the state is responsible in cases of human rights violations to ensuring the right to reparations for the victims and ending impunity for perpetrators.<sup>(11)</sup>

Victims of human rights violations can also receive reparations through at least two other avenues:

- Administrative route: Receiving reparations from the state through recourse to the relevant authority
- Judicial route: Receiving reparations through courts of law

The objective of reparations varies widely, but may include: establishing symbolic status for the victims (either as groups or individuals); erecting a memorial to honor the victims of violations in collective memory; encouraging social solidarity with victims; providing a tangible response to demands to end injustices; and creating an appropriate climate for reconciliation through restoring victims' trust in the state. The principle of reparations is an obligation under international law,<sup>(12)</sup> and requires countries to protect human rights and basic freedoms, to prevent violations from occurring and to investigate if they do, to take the appropriate measures against perpetrators, to provide redress mechanisms to victims, and to ensure that anyone responsible for gross human rights violations is held responsible for their actions.<sup>(13)</sup> The right to reparations is part of international law, but these reparations can take many different forms. In this section, we will consider what reparations may include by providing examples from several different countries.

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(11) L. Joinet, United Nations document No. E/CN.4/sub.28/1997/

(12) Training unit from the International Center for Transitional Justice (ICTJ), Topic 5: Reparations for Victims, Preliminary Observations, p. 61. See [www.ictj.org](http://www.ictj.org)

(13) See United Nations document No. E/cn.4/sub.28/1993/, p.60.



## **I. What do Reparations Include?**

Reparations have a long history in jurisprudence. They aim restore the situation to what it had been before the violations occurred, and to remove the effects of these illegal actions to the greatest extent possible, i.e., to restore the situation to what it might have been if the violation had never occurred.<sup>(14)</sup>

According to former UN Special Rapporteurs on the Right to Reparation to Victims of Gross Violations of Human Rights Theo van Boven and Cherif Bassiouni, reparation involves providing redress for past events and charting a path for the future. The goal of reparations should be promoting justice through redress of harms caused by violations.<sup>(15)</sup> Theo van Boven and Cherif Bassiouni have helped codify and more clearly define reparations in international jurisprudence and legal practice. Reparations include compensation, restitution, rehabilitation, satisfaction, and guarantee of non-repetition with regard to the period of authoritarian rule and human rights violations. The objective is for reparations to be dealt with within a more comprehensive framework of justice based in rebuilding at both the individual and societal level.

### **A. Material Reparations**

The UN has taken special interest in the horrors that survivors of Nazi concentration camps faced. In UN Economic and Social Council Resolution 303 (XIII) D of 19 March 1951, the council called upon the competent authority in Germany to consider providing reparations to the greatest extent possible to those who had suffered gross human rights violations. The German government expressed its willingness to do this.

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(14) It should be noted that human rights violations such as those infringing on the right to life and security of person are violations that cannot be righted through reparations, because it is not possible to restore the individual's state to what it had been before the violations occurred. The effects of such violations are lasting and cannot be easily undone, either for individuals or for society as a whole. See Karine Bonneau, p. 27.

(15) Rapport final du rapporteur spécial, M Cherif Bassiouni, Présenté en Application de la résolution 199933/ de la commission. Le droit à restitution, indemnisation et réadaptation des victimes de violations flagrante des Droits de l'homme et des libertés fondamentales. E/Cn.462/2000/ du 18 janvier 2000.

Article 68 of the American Convention on Human Rights addressed “compensatory damages,” while Article 63, paragraph 1, stipulated that the “consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”

There are also provisions for matters such as restitution of rights, compensation for victims of the crime, and providing support to victims, in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (adopted by General Assembly Resolution, 4034/ of 29 November 1985).

Additionally, Article 5 of the European Convention on Human Rights (ECHR) stated that “everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.” It therefore stipulates that the right to reparations after violations is an internationally recognized right.

The fundamental goal of reparations policies is to render justice, recognize victims and survivors, restore their dignity, rebuild trust among citizens and between citizens and state institutions, and foster social solidarity. However, reparation and compensation programs face major challenges, including regarding the need to determine the kinds of harms for which reparations can be made, including economic, physical, or psychological harms. There is also a need to determine the content and value of reparations due to each beneficiary, and whether the reparations should be based on harms suffered, present need, or both, as well as the means of evaluating the extent of the damages to victims. This includes determining the appropriate amount for reparations for those who have lost their sight, were victims of rape, or were physically tortured, as well as whether each individual or group is to receive the same amount regardless of differences in damages suffered, and how to distribute these reparations (as a single

lump sum, or in regular installments, and which agency would be responsible for the payments in either of the two cases.)<sup>(16)</sup>

Financial compensation can be provided as reparations for the harms arising from human rights violations, such as:<sup>(17)</sup>

- Physical and mental harm
- Pain, suffering, or emotional distress
- Loss of opportunities, including educational opportunities
- Loss of earnings or earning ability
- Medical or other rehabilitation expenses that can reasonably be expected
- Harm to property or business, including loss of income
- Harm to one's reputation or personal dignity
- Fees for legal aid or expert advice necessary to obtain relief

Human rights violations cannot all be addressed through financial compensation, because there is not enough money in the world to compensate for such harms as the loss of one's parents, children, or spouse. There is no sum that can sufficiently compensate for the horrors of torture or enduring psychological trauma. Therefore, reparations programs must discard anything that its designers or beneficiaries might see as an attempt to assign finite value to the lives of victims and the horrors they have undergone. Justice cannot be achieved until victims are viewed as individual citizens and social trust and solidarity are reestablished.<sup>(18)</sup>

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(16) Training unit from the International Center for Transitional Justice, Topic 5: Reparations for Victims, Preliminary Observations, p. 62, [www.ictj.org](http://www.ictj.org)

(17) Mr. Abdel Rahim al-Maadani, "Reparations," al-Karama, p. 67. See UN document E/CN.48/1993/, p. 61.

(18) Pablo De Greiff, "Reparation Efforts in International Perspective: What Compensation Contributes to the Achievement of Imperfect Justice," a report by the International Center for Transitional Justice, p. 31. See [www.ictj.org](http://www.ictj.org)

## **B. Restitution and Rehabilitation**

- Restitution: This refers to restoring the victim to the circumstances they would have enjoyed if they had not suffered the human rights violations in question, and restoring their due rights.<sup>(19)</sup> This includes restoring freedoms and rights they had been denied, as well as restoring their social status, family life, citizenship, right to return to their place of residence, and right to recover their position of employment. The Inter-American Court on Human Rights has demanded that states restore victims to their former position of employment, pay out salaries equivalent to those that the victim would have ordinarily received, remove any prior criminal record, and make retroactive retirement contributions into the victims' pension.<sup>(20)</sup>
- Rehabilitation: This involves giving the victims medical, psychological, legal, and social aid, including tangible benefits such as free school tuition for the victims' children, offering a free medical clinic for treating victims, and creating rehabilitation centers for them.

## **C. Satisfaction and Guarantee of Non-Repetition of Violations**

- Satisfaction: This includes reparations such as making the truth widely known and prosecuting and sentencing perpetrators. This requires repealing amnesty laws and undertaking symbolic actions, such as issuing official apologies, organizing commemorative events, establishing a center in victims' names, and turning detention centers into sites to honor victims' memories.<sup>(21)</sup>
- Guarantee of Non-Repetition: This involves measures and reforms carried out by the state to provide assurances to society that past violations will not reoccur. This can take place through requiring the state to monitor the armed forces with a civilian body, ensuring the independence of different courts, not involving

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(19) UN document E/CN.48/1993/, p. 61.

(20) Karine Bonneau, p. 28

(21) UN document E/CN.48/1993/, p. 62.

military courts in civil law cases, and ensuring the independence of the judiciary as a whole from both executive and military powers.

In the same vein, educational trainings should be organized for those working at different levels of state institutions, and for society as a whole. This raising of awareness is a crucial factor in establishing democracy and human rights in society.<sup>(22)</sup>

## **II. Reparations Programs in International Context**

Many countries around the world that have established truth commissions have set up reparations programs for victims of gross human rights violations. In this study, we have found that each country's situation varied tremendously due to different factors such as the particular historical moment, the type and scope of aid provided, the number of intended beneficiaries for these programs, and the kinds of crimes that the programs were trying to address.

The German program for providing reparations to Holocaust survivors is without a doubt the largest-scale program of its kind for financial compensation for human rights violations. It was launched in 1951 and is still ongoing. In addition, there are reparations programs in many other countries including Chile, which is a good case study in some of the challenges that countries have faced in implementing reparations programs. We will endeavor to examine these two particular cases, i.e., Germany and Chile, which have been used as a kind of international standard for other countries trying to develop national reparations programs.

### **A. Reparations for the Holocaust**

The reparations offered after World War II are considered to be a key historical example of reparations programs that have aimed to compensate victims of human rights

(22) Karine Bonneau, p. 29.

violations. In particular, the German reparations for Holocaust survivors has become an international model that other countries have since drawn from. It is in some ways typical of national reparations programs, but it is also the first example of reparations at the individual level. Since December 2001, the Federal Republic of Germany has paid out approximately 61.5 billion USD in reparations, including 37.5 billion dollars as required by the federal laws regarding individual reparations.<sup>(23)</sup>

The Luxembourg Agreement of 1952, a reparations agreement signed by the Federal Republic of Germany, the State of Israel, and a number of Jewish nonprofits, required Germany to issue national legislation on individual reparations.<sup>(24)</sup>

The Federal German Indemnification Act (BEG) established an individual reparations program for those who had been persecuted by the National Socialist German Worker's Party (the Nazis) due to their political views, race, or religion. Those seeking reparations needed to prove they had been persecuted through a set of official procedures. This was not a difficult standard to meet, given the hostility towards many groups under the Third Reich.<sup>(25)</sup>

The priority for reparation claims was given to those over 60 years of age, those suffering from illness, and persons with disabilities, specifically those whose earning capacity was reduced by at least 50% at the time during which the reparations applied, according to the specified categories of persecution.

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(23) The Federal Supplementary Law of 1953, the Federal German Indemnification Act of 1956, and the Second Law for the Amendment of the Federal German Indemnification Act (BEG Final Law) in 1965. Pablo De Greiff, p. 3.

(24) Pablo De Greiff, "Reparation Efforts in International Perspective: What Compensation Contributes to the Achievement of Imperfect Justice," a report by the International Center for Transitional Justice, p. 2; presented in an Arabic-language workshop on transitional justice held in Rabat on 1925- July 2004, p. 2. See [www.ictj.org](http://www.ictj.org)

(25) Pablo De Greiff, p. 4.

- Compensation for Life: The widows, children, and relatives of those who died in the Holocaust were entitled to submit a request for a pension as a result of the killing of the head of household, based on the amount paid to families of public employees who died during accidents in the course of their work. The German government paid around 3.5 billion dollars in reparations for loss of life in the period starting from December 2001.
- Compensation for Health: Claimants were entitled to receive health care in case of “not insignificant”<sup>(26)</sup> damage to physical or mental health. The 1965 law facilitated the process of proving the link between persecution and damage to their health, the onus of which fell on claimants. The German government has paid out around 21.8 billion dollars since December 2001 in health-related claims.
- Compensation for Damages to Freedoms: Claimants could receive reparations if they had been subject to the circumstances set forth in the law of 1953, Article 16, which included detention in a political or military prison, interrogation or correctional custody, forced transfer to a concentration camp, or participation in forced labor.

In 1956 this was expanded to include claimants who were forced to wear the Star of David or to live underground in inhumane conditions. The German government has paid about 1.27 billion dollars since December 2001 in compensation for claims of damages to freedoms.

- Compensation for Property, Assets, and Discriminatory Taxes: Claimants were entitled to seek compensation for damages to properties or assets lost due to boycotts, or from having to pay discriminatory penalties such as the Reich Flight tax. The loss of property had to have occurred as a result of the claimant fleeing or emigrating from Germany or losing their freedom. Since December 2001, the

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(26) In Article 15, paragraph 1 of the 1953 Law, “insignificant” applied to those harms that did not impair, and were not expected to impair in the future, the mental or physical capacity of the persecuted individual. See Pablo De Greiff, p. 33.

German government has paid almost 568 million dollars in compensation for property, assets, or taxes.<sup>(27)</sup>

This reparations program was the most costly in history. It is estimated that the German Ministry of Finance will have paid a further 20 billion dollars by 2030, when the last survivors of the Holocaust are expected to have passed away. This program is the largest of its kind in both size and scope and is also unique in raising a series of more complicated questions about reparations as a result of the extensive debates that have taken place throughout the program's operations about the best practices for and purpose of reparations.

#### B. Chile's Reparations Program

The military coup in Chile led by Augusto Pinochet on 11 September 1973 toppled the Allende socialist government, which had been democratically elected. The country then entered a period of absolute military rule that lasted until 11 March 1990. It took Chile almost 16 years to transition to a civilian government and to begin to examine the human rights violations that had occurred. Chile established the National Commission on Truth and Reconciliation by decree for this purpose, which called for uncovering the truth in order to achieve three main objectives:

1. Achieve national reconciliation
2. Prosecute perpetrators where possible, given that the judicial system was inherited from the dictatorship
3. Prepare a reparations program<sup>(28)</sup>

With regard to reparations for victims and their families, the Commission on Truth and Reconciliation proposed several kinds of reparations, including the following:

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(27) The United States District Court for the Eastern District of New York, regarding Holocaust Victim Assets Litigation (Swiss Banks), 11 September 2000. See <http://www.nyed.uscourts.gov/pub/rulings/1996665994/.pdf>

(28) Karine Bonneau, p. 35.



- Financial compensation: The National Reparation and Reconciliation Board paid the monthly salaries for the families of victims, using 537 dollars as the basic unit, which was then divided as follows:
  1. 40% of the salary (215 USD) to spouses
  2. 30% of the salary (161 USD) to the mother of the victim (or the father, if the mother was not present)
  3. 15% of the salary (80 USD) to the children of the victim until they reached 25 years of age, or for their whole lives if they had a disability
  4. 15% of the salary (80 USD) to the parent of any of the victim's children if there had been a common-law marriage, until the children reached 25 years of age, or their whole lives, if they had a disability. The families were also to receive a one-time lump sum equivalent to a year of the monthly salary (about 6500 USD)

At the beginning of 1991, the program distributed monthly salaries to 5794 persons, and by 1996, 1330 spouses, 1524 parents, 1405 children under the age of 25, 260 common-law spouses, and 89 disabled children-a total of 4609 survivors-had received reparations. By the end of 2001, there were still 3210 victims receiving support.<sup>(29)</sup>

This is in addition to many other forms of assistance such as exemption from obligatory military service, university scholarships, and vocational training grants for the children of victims.

In December 1996, there were 1021 people receiving educational benefits (scholarships or monthly stipends), including 158 primary and secondary school students and 863 university and vocational school students.

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(29) The costs of the program were distributed as follows: 707,280 USD for the first (one-time) installments the family received, in addition to 8,240,905 USD paid between 1992 and 2001 as part of the salary compensation program. See Pablo De Greiff p. 16.

The Chilean state paid out a total of 1,149,008 USD in several other reparations programs:

- Symbolic reparations: In addition to the personal reparations which were paid in monthly installments, there were other symbolic reparations measures at the collective societal level to contribute to providing psychological solace and relief to victims. President Patricio Aylwin publicly acknowledged the responsibility of the Chilean state in accepting the commission's report, which included 1800 pages in total. He also apologized on national television to the victims and their families on behalf of the Chilean state and asked the army to acknowledge its role in these violent acts. The report recommended establishing a memorial with the names of all the victims of human rights violations and establishing a public garden in honor of the memory of those who had lost their lives, so that it could serve as a space for remembering and drawing lessons from the country's history, as well as for enjoying and valuing life. The report also recommended that the 10th of December be celebrated annually as a national day for recognizing human rights around the country, with public marches and ceremonies in schools, and that there should be a memorial at the General Cemetery in Santiago, and a place of remembrance at the Villa Grimaldi.

This is because under the Pinochet regime, that garden had been a main site of torture and imprisonment. The Villa Grimaldi was transformed into a commemorative garden with two walls inscribed with the names of the people who had been killed or disappeared.<sup>(30)</sup>

In conclusion, Chile's efforts to carry out reparations were a very ambitious project. Although the salaries paid by the Chilean state were relatively modest, they have reached a large number of people.

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(30) An Introduction to Transitional Justice, p. 69.

With regard to the lessons learned from these efforts to provide reparations to victims in different international contexts, there are several points that should be mentioned:

1. There is not a single way of providing reparations to victims, and therefore it is generally better to choose mixed approaches that understand reparations as a means to deliver multifaceted and comprehensive justice. This is not limited to material and financial compensation, but through more fully addressing harms to victims via criminal prosecution and truth commissions.
2. Reparation procedures must set forth a path into the future, not back into the past. This means that there needs to be improvement in the victims' quality of life to the greatest extent possible, while recognizing and accepting that full redress of harms is impossible.<sup>(31)</sup>

## **Section 2: Prosecuting Perpetrators and Institutional Reform**

Prosecution in courts of law is considered to be a main objective of ending impunity for perpetrators of violations, according to international law. All countries are required to investigate human rights violations when they are committed and to impose punishments on those responsible. This can range from non-administrative sentences to extradition and prosecution, depending on the case. These general obligations have been ratified at the international level, and in many regional and international conventions. There are also many UN resolutions and statements, as well as dozens of decisions released by treaty bodies and supranational entities, such as the UN Commission on Human Rights, which has also affirmed these regulations.

These trials aim to reestablish trust between citizens about the rule of law. Successful trials can help those who have been subject to human rights violations in the past feel that the system is working and that it is worth continuing to build democracy. This

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(31) An Introduction to Transitional Justice, p. 65.

cannot be achieved without institutional reform that ensures that such violations will not be repeated in the future, and that the rights of citizens are protected by international bodies from any such violation or abuse. The reform must include creating political, legal, and administrative circumstances that guarantee human rights protections.<sup>(32)</sup>

For this reason, this section tries to address the objectives of criminal prosecution for perpetrators of human rights violations, as well as means of preventing such abuses from occurring in the future.

### **Subsection 1: Prosecuting Perpetrators of Human Rights Violations**

The question of impunity for perpetrators of human rights violations is one of the most complex issues that has been raised with regard to international and national approaches to the return to civil rule and end of military rule. This was also true for those countries that chose the uncertain path of democratization grounded in international legal human rights laws and basic principles, as set forth in the Rome General Peace Accords (GPA) of 1992, which held that criminal prosecution should be dealt with unambiguously. In other words, perpetrators had to be prosecuted without recourse to relaxed sentences or exceptional amnesties. There was not to be a statute of limitations for these perpetrators, in the view of international human rights law, which was a logical position, since these legal guidelines operate as general principles without adjustments for particular situations.<sup>(33)</sup>

In looking through the many different international experiences with criminal prosecution we can see the various purposes for which this principle of accountability has been applied in both international and national courts. Here we will examine some of the challenges these courts have faced.

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(32) Louis Joinet, *Question de l'impunité des auteurs des violations des droits de l'homme (civile et politique)*, p. 29.

(33) al-Karama, p. 21.

## **I. Types of Courts involved in Prosecution**

In order to achieve justice in these cases, the judicial system has several options for prosecuting crimes and ending impunity for perpetrators.

### **A. National Prosecution**

There are many examples of these courts during democratic transitions, i.e., in which national or local courts have been chosen for prosecution because these are the least costly to set up, allow for greater access with regard to victims, witnesses, and evidence, and often have greater local credibility and accountability than international courts. In reviewing these various examples from countries around the world, from western Europe after World War II, Latin America after the end of military dictatorships in the 1970s and 1980s, and eastern and central Europe at the end of the Cold War, we can make several observations about prosecution at the national and local level.

- Due to limited time and resources, most trials for perpetrators of human rights violations are not actually carried out.
- If the approach adopted by the prosecution is very harsh from the outset, this can quickly lead to a lack of general security and calls for amnesty.
- From a moral, political, and practical perspective, it is better to focus on the individuals who were most directly responsible for these crimes.
- There needs to be an agenda for the prosecution grounded in the needs of the victims and not the government's interests. This will help lend legitimacy to the prosecutors and avoid politicized trials.<sup>(34)</sup>

### **B. International Courts**

In 1993, in an unprecedented step taken at the end of the Cold War, the UN Security Council established an International Criminal Tribunal for the former Yugoslavia (ICTY). This was the first international tribunal for war crimes since the Nuremberg and Tokyo

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(34) S. Ratner and J. Abrams, *Accountability for Human Rights Atrocities in International Law*, 2nd edition. Oxford: Clarendon, 2001, p. 340.

military tribunals. After this, there were also an international military tribunal for Rwanda, and these two tribunals played an important role in affirming an international commitment to holding the perpetrators of human rights violations accountable. They were clearly successfully in prosecuting figures at the highest levels.<sup>(35)</sup> Establishing the International Criminal Court has helped combat impunity for many perpetrators of human rights violations.

### C. Mixed Courts

There has recently been a new phenomenon in criminal justice known as mixed courts, which work under the joint supervision of the national government and the United Nations. This strategy represents an effort to combine the benefits of national-level prosecution (such as geographic proximity to survivors and the positive effects on state institutions) with the benefits of international involvement (such as resources, employees, and security). Mixed courts have been utilized in Sierra Leone, are composed of local and international judges, and apply both national and international law.

It is likely that this mixed model will become more prevalent in the next few years because it offers a solution for national regimes that would benefit from international support in these procedures.

## II. Objectives and Philosophy of Accountability

Many studies have explored the reasons for establishing criminal accountability. These tribunals have made it clear that accountability can replace the culture of impunity that allowed the violations to occur. This gives the survivors a sense of security and acts as a warning to anyone considering committing such violations in the future. It also

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(35) For example: the trial of Slobodan Milosevic, former president of Yugoslavia, and the conviction of Jean Kambanda, former prime minister of Rwanda, who was given a lifetime prison sentence for genocide and crimes against humanity. See *An Introduction to Transitional Justice*, p. 19.

provides some relief for the victims' suffering and helps to prevent victims resorting to vigilante justice methods (in which people take it upon themselves to avenge a crime).<sup>(36)</sup>

It is important to recognize that all mechanisms for administering justice in post-conflict circumstances aim to address two audiences, and that the success of these mechanisms ultimately depends on their capacity to be meet the goals of each of these audiences,<sup>(37)</sup> one of which is the international community. These efforts to establish justice in post-conflict environments:

1. Help clarify the scope of international legal jurisdiction, including with regard to determining the crimes, and rules for accountability.
2. Serve as a deterrent to individuals who might commit crimes or violations.
3. Shed light on the different contexts that led to the committing of various crimes.

Despite the tremendous importance of these objectives, the international community remains the secondary audience when it comes to rendering justice in post-conflict societies. This is because the primary audience are the people in the society that went through the conflict and against which these atrocities were committed. This audience includes the victims of human rights violations, the perpetrators of these crimes, and neutral parties. Through bringing these crimes to justice, the government sends a clear message that it will not tolerate human rights violations, and that those who committed such crimes will be held accountable in court.

Some countries that have tried to employ criminal prosecution against gross human rights violations have faced various obstacles that prevented full justice from being achieved.

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(36) Neil J. Kritz. *Progress and Humility: The Ongoing Search for Post-Conflict Justice* (a study presented in an Arabic-language workshop entitled "Transitional Justice," carried out in coordination with the International Center for Transitional Justice, and held in Rabat from 1925- July 2004), p. 4. See [www.ictj.org](http://www.ictj.org)

(37) Kritz, *Progress and Humility*, p. 5.

### A. Obstacles to Achieving Accountability

Holding perpetrators accountable requires respecting national laws and international treaties on human rights. Therefore, we find that many laws at the national level prevent the prosecution of human rights violations. The World Conference on Human Rights in 1993 stated that countries must get rid of legislation that enabled impunity for perpetrators of crimes and human rights violations such as torture. In order for perpetrators to be brought to justice, there must be a solid basis for the rule of law.<sup>(38)</sup>

In addition, the procedures for granting amnesty and forgiveness have been rejected at the international level by the Secretary-General of the United Nations, the UN Security Council, the United Nations General Assembly, the UN Human Rights Committee, the International Criminal Tribunal for the former Yugoslavia, and the Committee for the Prevention of Torture. There is also the issue of the statute of limitations, which is an obstacle to prosecution at the national level. However, this does not apply to serious crimes under international law, which have no statute of limitations.<sup>(39)</sup> In addition, there are administrative obstacles imposed by the agencies overseeing violations. These agencies may also prevent access to the state archives or destroy documents that would constitute key evidence in convicting those responsible for the violations.

In spite of these obstacles that have prevented the prosecution of these crimes, there are several international legal principles that have helped to end impunity.

### B. International Universal Legal Jurisdiction

This refers to the fact that, in accordance with longstanding international legal norms, any court can exercise its universal legal jurisdiction over crimes against humanity such

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(38) Khalil Ma'touq, "al-'Alaqa bayna al-nizam al-asasi li-l-mahkama al-jana'iyya al-dawliyya wa-l-anzima al-qada'iyya al-wataniyya," *al-Ra'i* (political publication of the Syrian Community Party), issue 19, June 2003.

(39) Louis Joinet. See F/CN.4/sub.220/1997/rev.1.2, October 1997, p. 26.



as organized murder on a large scale, torture, forced disappearance and displacement, and arbitrary detention on political grounds. International law also does not enable the leaders of countries to enjoy impunity from judicial prosecution, whether at the national or international level, if their actions are considered criminal under international law, including crimes against humanity.<sup>(40)</sup>

In May 1999, Amnesty International issued 14 principles on the effective exercise of universal jurisdiction, and stated that each country must ensure its legislation, policies, and practices align with these principles:<sup>(41)</sup>

- Crimes of universal jurisdiction: Countries must empower their national courts to effectively exercise universal jurisdiction and other forms of extra-territorial jurisdiction to address human rights violations that have been perpetrated, and to exercise the provisions of international humanitarian law.
- No immunity for persons in official capacity: National legal codes for national trials must guarantee the exercise of universal jurisdiction over any individual suspected or accused of committing gross human rights violations under international law, regardless of whether they were acting in an official capacity at the time that the alleged crime occurred, or at any later point in time.
- No impunity for past crimes: National laws must ensure the exercise of universal jurisdiction over grave crimes that violate international law, regardless of when they were committed.
- No statutes of limitation: National law must ensure that there is no statute of limitations on accusations against any individual who has committed crimes under international law.

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(40) "The Pinochet Case: Universal Jurisdiction and the Absence of Immunity for Crimes Against Humanity," Amnesty International, Document No. EUR/2199/, January 1999, p. 4.

(41) Amnesty International, Document No. OR5399/01/, p.10405-.

- Superior orders, duress, and necessity should not be permissible defenses: The national law must clarify that the national courts can only permit defenses that align with the provisions of international law for any person being tried for charges of committing grave crimes under international law. Superior orders, duress, and necessity should not be permissible defenses.
- National laws and decisions designed to shield persons from prosecution cannot bind courts in other countries: National laws on national courts must guarantee the ability to exercise universal jurisdiction over grave crimes under international law, in cases where the suspect or accused may try to evade justice, or from the national jurisdiction of another country.
- No political interference: Any decisions about starting or stopping the investigation or judicial proceedings in cases of grave crimes under international law must be issued only by the prosecution, must be subject to thorough and appropriate judicial review, must not impinge upon the independence of the prosecution, and must be made on purely legal grounds without any outside intervention.
- Grave crimes under international law must be investigated and prosecuted without waiting for complaints of victims or others with a sufficient interest: National law must affirm that international law requires national authorities to exercise universal jurisdiction in investigating grave crimes under international law, in cases where there are valid grounds to prosecute, without waiting for complaints of victims, or others with a sufficient interest in the case.
- Internationally recognized guarantees for fair trials: National law must ensure that the laws for criminal procedures for persons suspected or accused of committing grave crimes under international law are guaranteed all necessary rights, including the right to a speedy and fair trial, and that this is in full compliance with the provisions of international law and international

standards for fair trials. Additionally, all areas of government, including the police, public prosecution, and judiciary, must affirm that they will fully respect these rights.

- Public trials in the presence of international monitors: It is not enough that justice be carried out; this must take place publicly and openly. In other words, the competent national authorities must allow international governmental and non-governmental organizations to attend and monitor the trials of persons accused of grave crimes under international law.
- The interests of victims, witnesses, and their families must be taken into account: National courts must protect the victims, witnesses, and their families. During the investigation of crimes, the interests of particularly vulnerable victims and witnesses, including women and children, must be taken into account. Courts must also provide victims and their families with appropriate compensation.
- No death penalty or other cruel, inhuman, or degrading punishment: National law must guarantee that perpetrators of grave crimes under international law will not be put to death or subject to cruel, inhumane, or degrading punishments.
- International cooperation in investigation and prosecution: Countries must cooperate fully with investigation and prosecution carried out by the relevant authorities of other countries that are exercising universal jurisdiction over grave crimes under international law.
- Effective training of judges, prosecutors, investigators, and defense lawyers: National law should guarantee that judges, prosecutors, investigators, and lawyers receive effective training in human rights law, international human rights law, and international criminal law.

## Topic 2: Reforming State Institutions to Guarantee Non-Repetition of Violations

In the case of gross human rights violations, both state responsibility and individual criminal responsibility are incurred. This confers several further obligations under international law to ensure the right of victims to remedy, reparation, investigation of crimes committed, and prosecution of perpetrators in a fair trial (unless such actions would involve the same state infrastructure and institutions that had committed these violations). For this reason, many of the countries undergoing a democratic transition following autocratic rule have needed to enact institutional, legal, and political reforms so that the country can achieve its long-term political, economic, and social goals. Such steps are necessary in order to prevent this democratic system from collapsing in the future. During periods of conflict, human rights protocols are often suspended, and the normal workflows of most, if not all, state institutions, are disrupted. When the unrest ends, institutional reforms generally aim to remove the conditions that produced this period of conflict or repression, and to create the legal, political, and administrative conditions that guarantee the promotion and protection of human rights in order to ensure that these violations are not repeated. This must occur through the state signing and ratifying all relevant international conventions on human rights, and recognizing the jurisdiction of international courts, which in turn requires constitutional reforms that guarantee the protection of human rights and repeal emergency laws.<sup>(42)</sup>

This section considers the question of reform through restructuring state institutions that have previously been complicit in acts of violence or human rights violations, through preventing perpetrators of human rights violations from continuing to hold positions in public institutions.<sup>(43)</sup>

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(42) Members of parliament, human rights activists, and scholars have argued that in order to make a fresh start after a period of violations, it is necessary acknowledge these abuses and to work towards the non-repetition of human rights violations in the future. See “Nata’ij al-yawm al-dirasi al-mun’aqid bi-l-barlaman,” *Al Ittihad Al Ichiraki* (Morocco), issue 7721, 2 October 2004, p. 8.

(43) Training unit from the International Center for Transitional Justice (ICTJ), Topic 7: Reforming Corrupt Institutions: Preliminary Observations, p. 90. See: [www.ictj.org](http://www.ictj.org).

## **Section 1: Comprehensive Reform of State Institutions**

Peace agreements in post-conflict societies often address the possibility of establishing truth commissions in the future or holding court proceedings, but these agreements are often less clear regarding institutional reforms.<sup>(44)</sup>

However, without such reforms to institutions such as the national judiciary, parliament, and state security agencies, efforts to hold perpetrators accountable will almost certainly continue to fall short, and will therefore fail to create a positive impact for the general population.

### **I. Democratizing and Monitoring Institutions to Ensure Non-Repetition of Violations**

The path towards institutional reforms is often fraught. The internal relationships between various state agencies rarely allow for even a basic assessment for potential reforms. Reforming state security agencies requires reforming the army, police, judiciary, customs, immigration and border control, intelligence agencies, and many other related sectors. Efforts to change the institutional structures and approaches of one agency will necessarily affect many other agencies. The shift towards some kind of integrity and professionalism in these institutions must therefore be a gradual process that can begin to provide basic guarantees of non-repetition.

### **II. Reforming Police Agencies and Guaranteeing Equality of Responsibility**

During periods of conflict, police officers are often tasked with imposing order and are given a green light to commit political or ethnic human rights violations. State police officers may

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(44) Citizens who have learned to distrust the institutions of the army, police, and government will need to make a huge leap of faith in order to believe that any proceedings involving these institutions can really hold perpetrators accountable. If this is to happen, they will need to be convinced that the institutional cultures that permitted or enabled these human rights violations have definitively changed. See Training unit, Topic 7, p. 90.

collude with intelligence agencies to commit atrocities and breaches of human rights. This may include ignoring protected rights related to inspection, failing to abide by procedures for custody and detention, or engaging in beatings, torture, or even killing.

When the period of conflict or repression ends, the reform process should encourage the police to return to a mentality appropriate to a period of peace, and to realize that it is incumbent upon them to maintain high standards of professionalism to preserve the rule of law and protect human rights. However, this is not an easy matter. Reforms may also meet with resistance within the police apparatus, from officers or other officials who are afraid of losing their authority and facing consequences. They may therefore deny that there is any need for monitoring the agency or for outside intervention.

Building a police force built around professionalism, non-discrimination, and integrity will require adopting a comprehensive approach to institutional reform. In Bosnia, the plan to reform the police, as set forth by the international peacekeeping forces, included three main points. These were:<sup>(45)</sup>

- Restructuring the police after communist and paramilitary rule ended.
- Reforms: Applying new approaches for training, selection, and promotion.
- Democracy: Establishing a non-politicized, upright, and multi-ethnic police force held accountable for its actions.<sup>(46)</sup>

Effective and objective monitoring and oversight is crucial to ensure that new procedures are carried out properly. Indeed, it is better to create new institutions for this purpose,

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(45) Training unit, Topic 7, p. 91.

(46) In 2000, 88% of the police officers in Northern Ireland were Protestants, and only about 8% were Catholic. The Catholic population therefore did not feel that the Northern Ireland police force was operating in their best interests. This was addressed through initiatives that addressed this very lopsided representation, which helped restore citizens' trust in the integrity of the police forces. Training unit, Topic 7, p. 91.

such as bodies for civil monitoring, a national commission for human rights, a high-level institute for auditing, an office for grievances (to receive complaints filed against state officials and to carry out investigations), an anti-corruption office, and special clinics to offer legal aid to victims and those in need. There must also be programs and policies implemented to develop the fields of human rights, anti-corruption, and to establish shared citizenship across social strata. With regard to gender equality, we find that women are usually underrepresented, or entirely absent from certain institutions of power. Therefore, institutional change will be necessary in order to empower women. This may include education, skill building, employment, recruitment and representation, access to resources, justice, healthcare, counseling, resettlement, and retraining.

The UN has made sure to include women's units as consultants on its missions, including in East Timor, Kosovo, the Congo, Bosnia and Herzegovina, and Sierra Leone. It has taken measures to promote equality between men and women in local police forces, and to work towards creating new police forces.

The UN missions in Kosovo and East Timor also actively supported women's participation in governmental and administrative infrastructure and capacity-building, as well as the incorporation of women's perspectives in UN missions and civil society institutions.

## **Section 2: Perpetrators of Human Rights Violations Cannot Hold Positions in Public Institutions**

Reorganization is a crucial component of reforming corrupt institutions. New governments adopt such reforms as way of removing those responsible for major abuses from their positions in the public sector. Here we must distinguish between reorganization and purges, because the latter term has been used in the context of

eastern and central Europe to refer to laws and policies that involve mass dismissals from such positions, not on the basis of individual officials' track records but to purge groups based on party affiliation, political stances, or collaboration with a repressive intelligence agency.

Many laws for such "purges" have subsequently been criticized because they violated standards of basic decency and integrity through imposing collective punishment, failing to uphold the presumption of innocence until proven guilty, or other abuses.<sup>(47)</sup>

However, reorganization may help to reduce the likelihood of future violations or the continuation of ongoing violations, strengthen the people's trust in state institutions, and help overcome obstacles to judicial prosecution. This process will require adopting the appropriate mechanisms to achieve positive results.

### **I. Mechanisms for Reorganization**

Mechanisms for reorganization must align with the rule of law and standards of integrity. Likewise, the goal of reorganization must be corrective reform, not revenge. The people whom the mechanism intends to remove from their posts have the right to be informed in a reasonable manner of the accusations made by the mechanism, the right to appeal before an impartial body, and must be guaranteed a fair trial if they are convicted.

The reorganizing mechanism must have the authority to impose a set of penalties, including to issue an order to dismiss perpetrators from their posts, and to impose

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(47) If the state turns a blind eye to its past in the name of societal peace, this will result in complete impunity for the criminals. This is what happened in many Latin American countries during their transition periods. See Abderrahim Berrada, "Ma hiya al-ahdaf al-asasiyya li-munahadat al-iflat min al-'iqab?" *al-Ufuq al-Dimuqrati* (Morocco), issue 9, 9 May 2005, p. 15.



other penalties such as temporary suspension of their ability to work in the civil service, prohibitions on owning and using arms, reductions in pensions or other employment benefits, or issuing an order to return property or pay fines to the state. This reorganization and reform is a long-term process; it may take many years before it becomes clear to what extent the new laws and institutions have succeeded or not, which will be determined according to whether certain objectives have been accomplished.

## **II. Lessons on Institutional Reform**

One of the lessons learnt from past efforts to reform abusive institutions is that the quantitative and qualitative efforts to achieve reform cannot go beyond local capacities with regard to institutional infrastructure and human and financial resources. If it does, it could be counterproductive for the reform process, and could lead to the removal of persons in public office (especially those in the army, police, and intelligence agencies) who are likely to turn to criminal activity after losing their posts in state institutions.

Institutional reform must occur through a fair and transparent process and through drafting a democratic constitution that protects the rights of citizens through making all institutions of power responsible to the people and guaranteeing widespread popular participation. This includes involving non-governmental organizations and civilian populations in consultation on the development of institutional reforms. These institution reforms must also be linked to measures to reduce the likelihood of a return of previous circumstances, such as regular monitoring, maintaining precise records, and ending impunity for perpetrators of violations and abuses, in order to reassure the population of non-repetition in the future. If citizens do not have faith in these key reforms, then this tenuous process of reform will come to a halt.

In conclusion, the key objectives of ending impunity are uncovering the truth, providing reparations for harms, prosecuting perpetrators, and reforming institutions. This process is larger than the sum of its parts: reparations without truth-telling could be considered by its beneficiaries to be only an attempt by the state to purchase their silence and that of their families. Likewise, compensation for victims in the absence of institutional reform will limit possibilities for ensuring the non-repetition of violence, which could undermine the credibility of a democratic transition. Providing reparations without carrying out criminal justice procedures would similarly appear to victims as a superficial redress of harms without real justice being achieved. Justice will require each of these steps being taken in mutual cooperation with the others, and for all involved parties to help make up for the inevitable gaps in each other's approaches.

## Chapter 2

### **National Case Studies in Transitional Justice**

This chapter will examine three case studies of countries in the region and beyond in establishing mechanisms for transitional justice and accountability and dismantling corrupt and autocratic systems. The first section examines international experiences in setting up transitional justice mechanisms. The second section considers the cases of Greece and of Argentina in holding perpetrators accountable, and the third looks at the Tunisian experience in overcoming corruption and authoritarianism. It is important to learn from these previous episodes in the field of transitional justice and their attempts to comply with the standards that have been set forth. Delving into the experiences of other countries is very important for a country embarking on this process in determining how to address problems and overcomes challenges, and to pick up where others have left off, taking into account the specific political and cultural context of each country. Regional and international precedents play an importance role in accumulating regional knowledge in this field, and save time and effort for individuals and institutions that come after. This chapter will try to examine some of the key elements of these cases in their cultural and political contexts at both the institutional and structural level.

## **Topic 1: Regional and International Efforts to Establish Mechanisms**

Hicham Cherkaoui

A successful path towards transitional justice requires special attention to how the process and structures for the transition are established. How this occurs has varied from country to country according to the political context. There are cases in which these processes have been set up by the president or parliament, or by both together. We will look at several examples in three sub-sections that examine the South African Truth and Reconciliation Commission (TRC), the National Reconciliation Commission in Ghana, and Guatemala's Historical Clarification Commission (CEH),

### **Section 1: The South African Truth and Reconciliation Commission**

#### **I. How It was Established**

The South African Truth and Reconciliation Commission was established through mutual agreement between the president of the country and the president of the Senate, when Nelson Mandela announced the Promotion of National Unity and Reconciliation Act of 1995.

#### **II. Circumstances of Its Establishment**

- The preamble of the law set forth the political, constitutional, and humanitarian considerations that prompted the establishment of the commission.
- The objectives of the commission were affirmed in the preamble, including the provisions for its jurisdiction (see the following paragraph on subject-matter jurisdiction).

The historical circumstances leading to the establishment of the commission included: The Interim Constitution of South Africa of 1993 (Act 200 of 1993), which provided a historic step forward from the past injustices and conflicts under apartheid, towards new horizons grounded in recognizing human rights, democracy, and peaceful

coexistence between all citizens of South Africa, regardless of their race, ethnicity, social class, religious beliefs, or gender.

Uncovering the truth about past events, and motives for gross human rights violations that occurred, and openly stating these facts so that similar violations would not occur in the future.

Aiming to achieve national unity, prosperity, and peace for all citizens of South Africa, as set forth in the constitution, achieving national reconciliation between the citizens of South Africa, and rebuilding society.

### **III. Membership and Structure**

The commission in South Africa consisted of a central body and special committees.

#### **1. Composition of the Commission**

The commission was to consist of:

- No fewer than 11 and no more than 17 delegates
- The president of South Africa appointed the delegates in consultation with the Cabinet
- The delegates were chosen from among qualified, unbiased candidates who did not hold high-ranking political positions.
- No more than two people who did not hold South African citizenship could be chosen.
- The president's decision to appoint the delegates was published in the official gazette.
- The president appointed one of the delegates as chair of the commission, and another as their deputy.
- Any delegate was allowed to resign from their position at any time they chose, by submitting a written resignation to the president of the commission.

The president of the commission was allowed to remove any delegate from their post in the event of poor conduct, incompetence, or incapacity, as determined by the joint committee after receiving notice from the National Assembly and the Senate.

## **2. Special Committees**

The special committees worked under the supervision of the commission, i.e. as a branch of it. They submitted interim reports and recommendations to the commission, and upon completing their tasks would submit a full report on all their activities and decisions. These committees were:

### **A. The Human Rights Violations Committee**

This committee was composed of a committee head and two deputies (who were delegates appointed by the commission), as well as delegates in positions designated by the committee. The committee also selected some qualified South African citizens with experience in investigation and fact-finding.

### **B. The Amnesty Committee**

This committee consisted of the committee head, deputy, and three other qualified members.

The president appointed the head of the committee, who was a judge, his deputy, and one other member. He then appointed two delegates as members of the committee after consultation with the commission.

### **C. The Reparation and Rehabilitation Committee**

This committee was composed of the committee head, deputy, and no more than five other members, and two delegates appointed by the commission. The committee appointed other qualified individuals, while the head and deputy were chosen from the two delegates appointed by the commission.

#### **IV. Jurisdiction, Responsibility, and Question of Amnesty**

##### **1. Temporal Jurisdiction**

The Act specified the temporal jurisdiction as the period beginning on 1 March 1960, continuing until the cut-off date given in the constitution. The temporal jurisdiction therefore included about 34 years.

##### **2. Subject-Matter Jurisdiction**

The commission had subject-matter jurisdiction under law for the period related to its aims and for cases regarding gross violations of human rights. On this matter, the following objectives were decided upon:

- Strengthen national unity and reconciliation in the spirit of mutual understanding that overcomes past conflict and division through:
- Developing as complete a picture as possible of the nature of, reasons for, and extent of gross human rights violations committed in the period from 1 March 1960 until the cut-off date. This included understanding various precedents, circumstances, factors, and contexts for these violations through holding investigations and hearings.
- Facilitating the process of granting amnesty for individuals who revealed the full truth relating to acts with political motives, and who complied with all requirements of the act.
- Finding out and then announcing what had happened to victims and where they were now, and restoring civil rights and human dignity to those victims, through giving them the opportunity to tell their own stories about the violations they had been subjected to, and by making recommendations on the reparation procedures for these violations.
- Preparing a report that gave as complete information as possible about the activities and outputs of the commission, including recommendations to prevent human rights violations in the future.

**Regarding gross human rights violations, the law focused on:**

- Human rights violations, including violations that were part of an organized pattern of abuse.
- The nature of, reasons for, and extent of gross human rights violations, including precedents, conditions, factors, context, motives, and perspectives that led to committing these violations.
- The identities of all the individuals, authorities, institutions, and organizations involved in these violations.
- Determining whether these violations were the result of intentional planning by the state, previous regime, or state agency; or by a political organization, liberation movement, or any other organization or individual.
- Determining who was responsible for the violations, whether political or non-political in nature.

With regard to gross human rights violations, the commission law stated that the human rights violations included:

- Killing, kidnapping, torture, or degrading treatment of any person
- Any attempt, conspiracy, instigation, or preparation made with the intent of committing a human rights violation, which arose from past conflicts, and which was committed between 1 March 1960 until the cut-off date, either in South Africa or abroad, and where the act, planning, approach, directive, or order to commit such a violation originated with any person acting under political motives.

**3. Determining Responsibility and the Question of Amnesty**

We mentioned in the section on the history of transitional justice that the South Africa experience occurred within a very specific context. In South Africa, the commission led by Archbishop Desmond Tutu was to determine responsibility for violations as follows:

- In South Africa, determining responsibility was combined together with the question of conditional amnesty.



- The South African experience approached the question of responsibility through a careful balance that included both the demands of a civil peace and also looked towards the future and to rebuilding, drawing on the powerful spirit of reconciliation between the different parties to the conflict and Christian religious principles.
- The act clearly laid out the question of responsibility: the preamble and the act itself stated that:
  - There is a need for understanding but not for vengeance.
  - There is a need for reparation but not retaliation.
  - There is a need for shared humanity (“ubuntu”) but not for victimization.
- Amnesty was an important part of reconciliation and a key mechanism for truth-telling.
- Given the role of amnesty in the South African approach, it is worth considering the specifics of how it was applied, keeping in mind the context and conditions for such procedures and their connection to the question of reconciliation. It should also be mentioned that amnesty in South Africa included individuals from both sides, i.e., state officials and members of the armed opposition movements.
- The preamble drew upon constitutional frameworks: “The Constitution states that in order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past.”
- As the act set forth, amnesty was to be conditional on the person’s intent and granted after truth-telling. The act stated that:
  - Amnesty was to be granted “in respect of acts, omissions, and offenses” after the claimant had made “full disclosure of all the relevant facts.”
  - The act made reference to actions that met the requirements and were “associated with political objectives,” which referred to “any act or omission which constitutes an offense or delict . . . associated with a political objective, and which was advised, planned, directed, commanded,

ordered or committed within or outside the Republic during the period 1 March 1960 to the cut-off date, by:

- Any member or supporter of a publicly known political organization or liberation movement on behalf of or in support of such organization or movement, bona fide in furtherance of a political struggle waged by such organization or movement against the state or any former state or another publicly known political organization or liberation movement;
- Any employee of the State or any former state or any member of the security forces of the State or any former state in the course and scope of his or her duties and within the scope of his or her express or implied authority directed against a publicly known political organization or liberation movement engaged in a political struggle against the State or a former state or against any members or supporters of such organization or movement, and which was committed bona fide with the object of countering or otherwise resisting the said struggle.”
- In order to determine whether an act, omission, or offense was associated with a political objective, the following criteria were used:
  - “The motive of the person who committed the act, negligence, or offense;
  - The context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;
  - The legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;
  - The object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;
  - Whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organization, institution, liberation movement or body of which the person who

- committed the act was a member, an agent or a supporter; and
- The relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued.” This did not include any act, omission or offence committed by any person who acted:
    - “For personal gain: Provided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the State or a former state, political organization or liberation movement, shall not be excluded only on the grounds of that person having received money or anything of value for his or her information, or
    - Out of personal malice, ill-will or spite, directed against the victim of the acts committed.”

Similarly, the act also addressed the question of amnesty in cases brought before court, or which had resulted in a judicial ruling. The act stipulated that:

- “If any person:
  - Has been charged with and is standing trial in respect of an offence constituted by the act or omission in respect of which amnesty is granted in terms of this section; or
  - Has been convicted of, and is awaiting the passing of sentence in respect of, or is in custody for the purpose of serving a sentence imposed in respect of, an offence constituted by the act or omission in respect of which amnesty is so granted, the criminal proceedings shall forthwith upon publication of the proclamation referred to become void or the sentence so imposed shall upon such publication lapse and the person so in custody shall forthwith be released.

- If any person has been granted amnesty in respect of any act or omission which formed the ground of a civil judgment which was delivered at any time before the granting of the amnesty, the publication of the proclamation shall not affect the operation of the judgment in so far as it applies to that person.
- Where any person has been convicted of any offence constituted by an act or omission associated with a political objective in respect of which amnesty has been granted in terms of this Act, any entry or record of the conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place: Provided that the Committee may recommend to the authority concerned the taking of such measures as it may deem necessary for the protection of the safety of the public.”

If the committee refused to grant amnesty to any person, then they were required to notify in writing the person who had applied for amnesty, as well as any victims of the act, omission, or offense in question, including why the application was denied, and whether any criminal or civil proceedings were suspended pending a decision on the application for amnesty.

If the application was rejected, the committee was required to inform the relevant court, and this court was not to draw any negative inference from the continuation of proceedings that were previously suspended pending a decision on an application for amnesty.

## **Section 2: The National Reconciliation Commission in Ghana**

### **I. How It was Established**

- On 9 January 2002, the Parliament of Ghana issued the National Reconciliation Commission Act, which created the National Reconciliation Commission.

## **II. Objectives of Establishing the Commission**

- The preamble of the act stipulated that the commission would “seek and promote national reconciliation among the people of this country by recommending appropriate redress for persons who have suffered any injury, hurt, damage, grievance or who have in any other manner been adversely affected by abuses and violations of their human rights arising from activities or in activities of public institutions and persons holding public office during periods of unconstitutional government.”
- The preamble also clearly stated that the goal of establishing the commission was to “seek and promote national reconciliation among the people of this country by establishing an accurate, complete and historical record of violations and abuses of human rights inflicted on persons by public institutions and holders of public office during periods of unconstitutional government.”

## **III. Membership**

- The commission was to consist of a chairman and eight members.
- The president was to appoint the chairman of the commission and the other members, in consultation with the Council of State.
- Members were able to resign and vacancies could be filled through the same method used to make the original appointment. The president could also remove members who failed to carry out their required duties.
- The members were to receive compensation as specified by the Minister of Finance.

## **IV. Temporal Jurisdiction and Duration of Mandate**

- The commission had temporal jurisdiction for the periods during which the unconstitutional government was in power, specifically:
  - from 24 February 1966 to 21 August 1969
  - from 13 January 1972 to 23 September 1979

- from 31 December 1981 to 6 January 1993
- The commission's temporal jurisdiction could be extended to cover the period from 6 March 1957 to 6 January 1993, if a request to this effect was made by any person who was subjected to human rights violations.
- The duration of the commission's mandate was 12 months. If the committee asked for an extension with good cause, the president could grant the commission an additional six months to carry out its work.

## **V. Subject-Matter Jurisdiction**

The National Reconciliation Commission Act also set forth the subject-matter jurisdiction of the committee and divided its tasks into six categories. These six objectives were to:

- Investigate human rights violations and abuses "relating to killings, abductions, disappearances, detentions, torture, ill-treatment and seizure of properties suffered by any person within the specified periods;
- Investigate the context in which and the causes and circumstances under which the violations and abuses occurred and identify the individuals, public institutions, bodies, organizations, public office holders or persons purporting to have acted on behalf of any public body responsible for or involved in the violations and abuses;
- Identify and specify the victims of the violations and abuses and make appropriate recommendations for redress;
- Investigate and determine whether or not the violations and abuses were deliberately planned and executed by the state or any person referred to in paragraph (b);
- Conduct investigations relevant to its work and or seek the assistance of the police and any public or private institution, body, or person for the purpose of an investigation;
- Investigate any other matters which it considers require investigation in order to promote and achieve national reconciliation; and

- Educate the public and give sufficient publicity to its work so as to encourage the public to contribute positively to the achievement of the object of the Commission.”

## **VI. Powers of the Commission**

The act granted the National Reconciliation Commission the following powers during its investigations, the most important of which were as follows:

1. “Access to any information and records that relate to the performance of the functions of the Commission;
  2. Visit any establishment or place in order to conduct investigations;
  3. Question any person in respect of a subject matter under investigation by the Commission;
  4. Require a person to disclose truthfully any information within that person’s knowledge relevant to a subject matter under investigation by the Commission;
  5. Require a person to furnish any information, produce any document or Article in whatever form which in the opinion of the Commission relates to an investigation under this Act and which is in the possession or control of that person.”
- In order to enforce the aforementioned powers, the act granted the commission powers of the police “for the purposes of entry, search, seizure and removal of any document or Article relevant” to the investigation.
  - The commission was also allowed to hold either public or private hearings, for its own reasons or at the request of the victim or party in question, during which it had the powers to examine any witness, issue subpoenas requiring a person to come before the Commission, and to prosecute any individual who refused to comply with its orders.
  - The person being questioned before the commission had the right to legal representation; the commission could also appoint a lawyer to represent a person if they did not have the financial means to do so themselves.

## **VII. Responsibilities and Obligations**

- The Ghanaian National Reconciliation Commission Act did not address the question of criminal liability for the acts considered to constitute gross human rights violations, or what should be done with the result of investigations carried out in connection to this matter.
- The act clearly provided for the protection and immunity of witnesses, and that it was not permissible to use incriminating evidence against the person in question in any civil or criminal court.
- The rules for confidentiality included a set of regulations by which each delegate and staff member working in the commission was required to abide, including that:
  - The cases brought before the commission were considered confidential.
  - It was not permissible to publish or disclosure any information that a member obtained in their capacity as a delegate of the commission.
  - Divulging any information related to the commission's work was considered a criminal offense subject to the corresponding penalties.

## **VIII. The Commission's Findings and Final Report**

- With regard to the final report, the act stipulated that the commission would submit a report to the president within three months of the conclusion of its work, containing the findings and recommendations of the commission. This report was to:
  1. "Provide proper documentation and establish the nature and causes of the serious violations and abuses of the human rights of persons;
  2. Provide an accurate historical record of matters investigated by the Commission;
  3. Identify the victims of violations and abuses of human rights;
  4. Recommend the appropriate response to the specific needs of each victim or group of victims;



5. Suggest measures to prevent and avoid the repetition of such violations and abuses;
6. Recommend reforms and other measures whether legal, political, administrative, or otherwise needed to achieve the object of the Commission;
7. Promote healing and reconciliation; and
8. The setting up of a reparation and rehabilitation fund.”

#### **IX. Administration and Finances**

- The president, after consultation with the Public Services Commission, was to appoint an administrative body according to the commission’s needs in order to carry out its functions.
- The administrative expenditures of the commission were to be funded from three sources: funds allocated by parliament or any other public fund, donations, and grants. The books of accounts were to be managed as determined by the Auditor General.

### **Section 3: The Commission to Clarify Past Human Rights Violations and Acts of Violence (CEH) in Guatemala**

#### **I. Establishment**

- The historic agreement signed on 23 June 1994 in Oslo, Norway, between the Guatemalan government and the Guatemalan National Revolutionary Unity (URNG) resulted in the “establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer.”
- The establishment of this commission involved the UN as a party to the process, in accordance with the provisions of the Framework Agreement of 10 January 1994, which stipulated that its implementation should be subject to UN verification.
- The agreement to form the commission was signed by four civilian political figures and three military figures representing the Guatemalan government, four members of the general leadership, four members of the diplomatic political committee, three advisors representing the Guatemalan National Revolutionary Unity, and by one person representing the UN as a moderator.

#### **II. Goal of Establishing the Commission**

- There were multiple goals for establishing the commission, which included the reasons it was initially established and other aims which came into focus during its jurisdiction.
- The purposes for establishing the commission, as set forth in the preamble to the agreement, were as follows:
  - That the modern history of Guatemala has been marked by grave acts of violence, disregard for the basic rights of the individual, and suffering that the Guatemalan people have endured as a result of armed conflict.
  - The people of Guatemala have a right to know the full truth about these unfortunate and painful events.

- Clarification of the truth will help prevent the repetition of these events and will strengthen the democratic process.

### **III. The Final Report**

Upon completing its work, the commission presented its final report to the president of Guatemala. This included:

- Findings of the work
- Recommendations for reforms and all necessary legal, administrative, and political procedures related to the commission's objectives
- An unbiased historical record of human rights violations that had taken place
- Measures to combat impunity
- Means of addressing the needs of victims, with regard to rehabilitation
- Strengthening the foundations for reconciliation
- Establishing mechanisms to ensure non-repetition of violations

### **IV. Requirements and Obligations**

The act stipulated various other requirements, including that:

- There would be a preparatory period of three months prior to the commission commencing work.
- The commission was to utilize the police when necessary to carry out tasks that fell within its jurisdiction.
- The commission was to utilize religious leaders to facilitate public hearings.
- Witnesses and victims were to be protected from harm when giving their testimonies, through ensuring security precautions were taken and confidentiality maintained, especially for women and children.
- Information and data were to be requested from governmental agencies and sources.
- Visits were to be made to centers and institutions to gather information.
- Information was also to be requested from foreign governments, and the commission was to seek support from the international community.

- Any attempt to falsify information would be prosecuted in high court.
- The commission was to present its final report to the president and the parliament; it would also be officially published.
- The government was to form a monitoring committee to carry out the recommendations of the commission; the government would also announce the findings within a period of 18 months.

## **Section 4: Equity and Reconciliation Commission in Morocco (IER)**

### **I. How it Was Established**

- 8 May 1990: The Consultative Council on Human Rights (CCDH) was established as a national institution in the field of human rights.
- 23 October 1991: Forcibly disappeared persons are released from secret detention centers where they had previously been held.
- 8 July 1994: A general royal pardon is announced for political prisoners; political exiles are allowed to return.
- 20 April 1998: The Consultative Council for Human Rights addresses the question of forced disappearances.
- 27 November 1999: The Moroccan Forum for Truth and Justice (FMVJ) is established (an NGO for victims of human rights violations). Driss Benzekri was elected to head this forum.
- January 2000: The commission begins to carry out independent arbitration on reparations for survivors of forced disappearance and arbitrary detention—the first stage of transitional justice.
- February 2000: The democratic transitional government, led by the former prime minister Abderrahmane Youssoufi, begins to settle cases of former detainees and political exiles.
- 11 November 2001: The National Symposium on Grave Human Rights Violations is held, in coordination with the Moroccan Association for Human Rights, the Moroccan Organization for Human Rights, and the Moroccan Forum for Truth and Justice.

- 10 December 2002: His Majesty King Mohammed VI appoints the new members of the Consultative Council for Human Rights: Mr. Omar Azziman (as chairman) and Mr. Driss Benzekri (as general secretary).
- 14 October 2003: The Consultative Council for Human Rights presents a draft proposal for establishing the Equity and Reconciliation Commission to the king.
- 6 November 2003: His Majesty King Mohammed VI ratifies the recommendations made by the Consultative Council for Human Rights regarding creating the Equity and Reconciliation Commission.
- 7 January 2004: His Majesty King Mohammed VI appoints the chairman and members of the Equity and Reconciliation Commission.
- 12 April 2004: The basic structure for the Equity and Reconciliation Commission is established.
- 30 November 2005: The Equity and Reconciliation Commission completes its work.

## **II. Establishing the Commission**

- Article 7 of the decree establishing the Consultative Council for Human Rights provided for the possibility of creating special committees on particular issues, and which would be composed of members from within the council and others. The Consultative Council for Human Rights drew upon this aforementioned Article, and after extensive debate that lasted for more than 8 months, it reached a consensus and made a recommendation to His Majesty the King Mohammed VI on establishing the Equity and Reconciliation Commission.

The king agreed to the recommendation made by the Consultative Council for Human Rights on 6 November 2003.

On 7 January 2004, the king appointed the chairman and members of the Equity and Reconciliation Commission, and gave a speech on the occasion, in which he said: "Morocco

has courageously dared to create its own model, which will enable it to make important gains in ensuring the continuity of its democratic constitutional monarchy” through the actions of “the people who do not run away from their past or remain captive to its problems.”

The Equity and Reconciliation Commission prepared its own act governing the commission that the king later ratified and added to, and which would function as Morocco’s truth, equity, and reconciliation committee, and this was published in the official gazette.

### **III. Membership**

- The Equity and Reconciliation Commission consisted of sixteen members in addition to the chairman, including one woman.
- A third of the commission’s members were civil and human rights leaders who had been working to address gross human rights violations for more than ten years. Another third were former political detainees or exiles.

### **IV. Temporal Jurisdiction**

The temporal jurisdiction for the commission started with the period following independence (1956) until the Independent Arbitration Commission for the Compensation of Victims of Forced Disappearance and Arbitrary Detention was formed (1999). This was the first stage of transitional justice in Morocco.

### **V. The Responsibilities and Subject-Matter Jurisdiction of the Commission**

The Equity and Reconciliation Commission began by carrying out the following tasks:

- Determine the scope and nature of gross human rights violations in their historical context, given human rights standards and the principles of democracy and the rule of law. This was to occur through carrying out investigations, hearing testimonies, consulting official archives, and gathering information and data from any entity that could help uncover the truth.

- Continue to search for forcibly disappeared persons whose fate was still unknown, make all efforts to gather missing information, find out what had happened, and identify appropriate solutions where deaths could be confirmed.
- Provide reparations for material and personal harm to victims or their kin after undertaking the necessary investigations.
- Endeavor to provide reparations for other harms that occurred to victims of forced disappearance and arbitrary detention, through making recommendations to address the need for psychological and physical rehabilitation, social reintegration where needed, and continue to resolve remaining administrative, employment, and legal problems, as well as cases related to property dispossession.
- Prepare a report that could serve as an official record of the findings of the investigations into these violations, present recommendations on preserving the collective memory of what had occurred, ensure the non-repetition of these violations in the future, and work to address the aftermath of the violations, including reestablishing social trust in the rule of law and protection of human rights.
- Develop and foster a culture of dialogue and establish the groundwork for reconciliation in order to support the democratic transition and the rule of law and respect for the principles of citizenship and human rights.

## **VI. Determining Responsibility in Accordance with the Equity and Reconciliation Commission**

- The commission's purview was not judicial, and therefore it was not responsible for investigating individual criminal responsibility regarding these violations.
- The commission limited itself to investigating the responsibility of state agencies for human rights violations.

## **Topic 2: Greece and Argentina: Case Studies in Accountability**

Hicham Cherkaoui

The Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights in 1966 included several powerful safeguards to protect basic human dignity. However, at the end of the 1960s and beginning of the 1970s, dreams of turning national independence into democracy began to evaporate, a situation which only became worse during the Cold War.

The world witnessed gross human rights violations as many perpetrators operated with impunity from punishment. The question of impunity was not appropriately addressed by the United Nations until it had gotten out of hand, and after human rights organizations and regional and international humanitarian bodies had intervened in the wake of escalating protests, demands from families of victims, and human rights activism. This issue was not properly taken up at the international level until after the democratization efforts of the mid-1980s and early 1990s in some regions, most notably in Africa and Latin America.

According to international law, all countries are required to investigate human rights violations and to impose punishment on the perpetrators, which can range from non-administrative sentences to extradition and prosecution, depending on the case. These trials can help to restore trust among citizens about the rule of law, create specific or general deterrents, and express public condemnation for criminal behavior. They also offer a direct means of holding perpetrators accountable for their actions and achieving justice for victims. Greece and Argentina provide two case studies of how perpetrators of violations under former dictatorial regimes were brought to justice. These two cases serve as important references for those working to combat impunity.



## **Section 1: National Prosecution in Greece**

On 21 April 1967, a group of Greek army officers carried out a coup against the civil government, claiming that they were fighting the spread of communism. Between 1967 and 1974, political opposition was limited, the media was harshly censored, and public liberties were curtailed, while cleansing operations occurred in social institutions. Greece thus experienced several forms of human rights violations and Sweden, Norway, Denmark, and the Netherlands consequently filed complaints to the Council of Europe. Greece then withdrew from the Council of Europe to avoid being expelled for violating the European Convention of Human Rights. In 1974, democratic rule returned to Greece under Prime Minister Konstantinos Karamanlis. He began the process of addressing the legacy of military rule, through making strategic institutional changes, including placing the main state institutions under civilian oversight once again, and removing several thousand supporters of the previous regime from office, transferring them to different positions, or disciplining them.

Greece succeeded in prosecuting those who were most directly politically responsible for violations committed, as well as a large number of lower-ranking perpetrators of crimes. This occurred in August 1975, eight months after the election of Karamanlis as prime minister. There were 18 high-ranking officers from the former military government who were tried and convicted after being accused of high treason. With regard to crimes of torture, there were a total of 32 individuals from the military government (14 officers and 18 soldiers) who were prosecuted, and 16 were put to death.

This was followed by trials of other individuals from the army, navy, and police, two trials at the end of 1976, and finally the trial of the military officials from the former junta government who were responsible for the massacre of students at Athens Polytechnic, and who were sentenced to prison. In Greece alone, between 100 and 400 people were brought to justice after being accused of torture or human rights violations.

The question of the “Trial of the Torturers” was ignored in Greek politics for more than 14 years, and was not taken up again until 1990 when the conservative government tried to grant amnesty to seven of an original eight officers who were still serving their prison sentences. As a result of the ensuing public outcry and President Karamanlis’s refusal to sign the measure, the government quickly changed its stance.

### **Evaluating the Greek Case**

To begin, it should be noted that Greece previously had a highly active civil society with a significant degree of political and social activity that could support a criminal justice system. The new regime also benefitted from popular support and legitimacy, and support from members of the military apparatus who had not been involved in human rights violations.

There were three death sentences handed down, which were later converted into life sentences. The prevailing atmosphere was one of political accountability: a group of officers and soldiers who had committed violations were brought to justice through an expedited judicial process, instead of the two sides merely trading accusations.

The trials were open to the public and widely covered by the press, including the radio, television, and newspapers. The prosecution of these leaders in large, public trials was a means for the new Greek government to demonstrate that human rights violations belonged to the previous era of the military junta, and that the new government was fully committed to respecting human rights and the rule of law. The trials that received the most public attention were the trials of the military police for cases of torture, which had been practiced against any person who seemed to not support the dictatorship. The trial was a fitting way for victims to expose what the military regime had done to victims and perpetrators of torture.

One of the unique things about the Greek case is that the Greek army, after military rule ended, supported the prosecution of human rights violations in order to create a less authoritarian form of government. Furthermore, Karamanlis had begun to enact

gradual changes in order to attract supporters and ensure a stable, gradual tradition towards accountability. This approach successfully reassured the military apparatus of his intent while maintaining popular support for his efforts.

## **Section 2: The Difficult Path Toward Justice in Argentina**

In 1976, a group of military officers carried out a coup against Isabel Peron's government and established a dictatorship that curtailed public liberties, dissolved the parliament, amended the constitution, and removed most government officials from office. It practiced severe political repression and engaged in torture, extrajudicial killings, and detention without trial in illegal detention centers. This went beyond targeting members of left-wing guerrilla groups to include lawyers, journalists, writers, and human rights activists. The military regime lasted from November 1974 until December 1983, when civil government was restored through elections, and the questions of accountability and truth-seeking came to the forefront in order to end impunity for the perpetrators.

Argentina witnessed various kinds of human rights violations. The commission of inquiry appointed by President Raul Alfonsin found that the security forces were responsible for the forced disappearance of at least 8,900 people, that there was a network of 340 detention and torture centers, and that about 200 officers named by the committee had been involved in these violations. The members of the commission inspected these detention centers and secret graves, and kidnapped and disappeared persons who had survived gave their testimonies. This included those who had fled Argentina and gave their testimonies from Argentinian embassies around the world. The commission found that more than 1,500 people were still alive after enduring mistreatment in these detention centers, and they gave detailed accounts of the conditions and torture that they were subjected to.

There were 16 officers tried, including those from the military junta, and ten of these were charged with committing human rights violations.

In 1984, former President Videla was sentenced to death, along with naval military officer Emilio Massera, in a crucial case for the prosecution.

Despite growing calls to continue these trials and bring those responsible to justice, Alfonsín issued several laws ending the court proceedings under pressure from military officers.

The Full Stop Law (Ley de Punto Final) was passed, which designated a sixty-day period for any new cases to be brought for prosecution. Alfonsín also passed the Law of Due Obedience, which stipulated that all police and army officers had acted under orders and therefore could not be held accountable for their actions. This created a public outcry in Argentina and in the international community, because there were hundreds of army and police officers who thereby gained immunity from prosecution under this law. Ten years later, the law was challenged as unconstitutional, and in 1998 the National Congress repealed the Full Stop Law and Law of Due Obedience. It became possible again to bring charges against the officers, and to prosecute those whom President Menem had pardoned.

### **Evaluating the Argentinian Case**

In evaluating Argentina's path towards transitional justice, some have argued that criminal prosecution efforts in Argentina have not always served justice or democracy, in spite of the symbolic power of the trials that were held in the early stages of the civil government, the report published by the National Commission, and the mobilization of victims' families and civil society. The rulings on deaths and forced disappearances have helped in other lawsuits aiming to uncover the truth, which remains an urgent demand of victims and human rights activists.

When the civilian government introduced an amendment to the Code of Military Justice as a way of beginning to hold perpetrators accountable, there was pushback

from military leadership, including the deliberate obstruction of military trials. Even when these were turned into civil trials instead, an uprising occurred and threats were made against the government. The state was also under pressure from the World Bank, which demanded that the country address the problem of huge foreign debts that the new democratic regime had inherited from the dictatorship.

Addressing past human rights violations poses a challenge for fragile democracies, especially when they involve powerful persons from the former regime who may still hold sway over sectors of society. This is what happened in Argentina under the civilian government, as military figures continued to exercise their authority and influence to limit the scope of the prosecution and defend their impunity.

In spite of its relative success in prosecuting perpetrators, the Argentinean case highlights various challenges of this process, including balancing between peace and justice, particularly after the bloody military uprising of 1990. Such political calculations often require choosing between several less than perfect options. Building peace means that it is impossible to meet all demands, regardless of the worthiness of the principles that they are grounded in.

In sum, national-level prosecution, when possible, helps to combat impunity through strengthening state institutions in the long term, especially the police, public prosecution, and courts, and by affirming the rights of citizens to dignity and to see perpetrators held accountable. Additionally, it provides an opportunity to understand the social and political context in which the crimes occurred, and to achieve greater legitimacy in the eyes of citizens, instead of undertaking an international process which may be seen as “victor’s justice.”

### **Topic 3: Tunisia: Dismantling Corruption and Authoritarianism**

Karim Abdessalem

The Tunisian case is not exceptional, but it offers some important positive reflections as well as potential stumbling blocks for the process. In Tunisia, the political will for this process led to the formation of a new ministry, which sent a powerful message about the seriousness of the project. It also established a shared space for dialogue and cooperation between the different elements of civil society (syndicates, political parties, various social, cultural, religious, and economic entities, non-governmental organizations, and human rights groups). We were thus spared the lengthy debate that occurred in countries such as Morocco, which spent seven years engaged in negotiations.

For the first time in Tunisia, or anywhere, guidelines for participation were adopted which led to a new law of transitional justice through forming a National Dialogue Quartet, and through the involvement of relevant civil society organizations and the ministry that was formed. The drafting of the law took place after national and regional consultation and the extensive involvement of survivors. This generated a national dialogue about important issues related to transitional justice and stirred up a great deal of controversy. It created conversations about guarantees and protections, reparations for victims, and how to hold perpetrators accountable. Other questions discussed included the means of achieving effective redress for all parties, given that all Tunisians are due the same rights, and that victims' concerns should be central to transitional justice. It gave victims a platform to share their perspectives and fully participate, as a means of recognizing what they had endured. In this regard Tunisia went further than previous attempts at transitional justice, which were constrained by political or military factors that limited the role of victims.

After these difficult discussions on the objectives and mechanisms of transitional justice, the process of transitional justice began. There were high international and local expectations that it would be a process that would address the needs of all parties and produce a just peace—a new generation of transitional justice with integrated mechanisms and objectives that would form a comprehensive strategy to restore human rights at the national level. However, there were still conceptual challenges that often muddled the results of these efforts when a particular principle did not clearly align with a previous point of reference or model, or employ a clear definition. It adopted a liberal approach to democracy and human rights, leaving in place systems that existed prior to transitional justice.

There were growing calls for real change grounded in economic and social rights—justice in its most expansive meaning, including transitional justice. This vision went beyond a simple political transition that preserved existing systems and left those who had committed violations in power. It called for an end to negotiations with perpetrators of massacres, using a capitalist approach in which international players looked after their own interests. Here we also have the example of South Africa, where the political transition put on a show of change for an international audience, while Zulu townships of Soweto or Nkandla continued to suffer from the same policies of marginalization and exclusion. Multinational companies continue to brutally exploit both resources and populations. Claims of political success are made without considering social and economic repercussions, which renders transitional justice dependent on the same political interests whose violations they are trying to address, on both the national and international level. This is a far cry from enacting real political change based on the victims' needs or a political transformation grounded in social, and economic, and human rights.

Transitional justice thus remains mired in legal proceedings, including national, hybrid, or international courts, plans for legal reform, and recommendations that were never implemented. Nevertheless, we continue to look towards social and economic approaches to transitional justice that avoid the involvement of international experts and structures at the expense of rights-holders. Human rights violations must be examined in their social and economic context with an understanding the dynamics of such changes. We must go beyond centralized processes and instead create local approaches that address the underlying social concerns that produced the conflict. Additionally, dialogues and negotiations must not focus on governmental and official partnerships at the expense of the key parties. Previous negotiations of this kind have been controlled by government interests and the desire to keep the regime in power, and have reproduced the same practices in both the medium and long term.



## Chapter 3

### **The Historical and Legal Context for Transitional Justice in the Republic of Iraq**

Ali Bakhat

Iraq represents one of the most challenging cases of transitional justice. Although it has provoked a great deal of popular and academic debate, Iraq has remained at the periphery of international study in this field, except in particular contexts. Iraq has been working towards justice for 17 years, since the regime change in 2003, and has established multiple entities for reparations, restitution of property, and documentation, and made efforts to prosecute perpetrators of human rights violations, among other transitional justice mechanisms. The country has faced two main challenges in achieving transitional justice. The first relates to defining the time period in question, and the second to the deeds and actors involved. If we consider the time period for violations, there are three different stages during which violations occurred: the period prior to when the Ba'ath party came to power (1921 - 1968), the Ba'ath party era (1968 - 2003) the focus of transitional justice in Iraq- and the regime after 2003. For the first period, one of the most important incidents was the Simele Massacre in 1933, which was carried out by the Iraqi government against Assyrian minorities in northern Iraq during ethnic cleansing operations under Rashid Ali al-Gaylani between 811- August 1933. The massacre occurred in the village of Simele; there were also about 63 Assyrian villages looted in the district of Mosul (in what is now the Dohuk and Nineveh governorates). There were more than 3000 Assyrian Christians killed. In 1950, there was the forced emigration of Iraqi Jews, in what was known as Operation Ezra and Nehemiah, which involved 130,000 Iraqi Jews from the middle and upper classes of central and southern Iraq, as well as 20,000 Jewish peasants from Iraqi Kurdistan.

The third period of human rights violations following the regime change in 2003 (2003 -2020) involved the victims of the sectarian war that lasted from 2006-2008, the earlier victims of the occupation and post-occupation period, and victims of extremist movements in the western, southern, and central regions of the country. These violations did not stop in 2003: the waves of violence, killings, and oppression continued under new actors, while the occupation also led to the rise of ISIS, which threatened human rights. There were tens of thousands killed or forced to leave Nineveh, Anbar, Saladin, Diyala, and Kirkuk, while villages and districts were looted and their residents displaced. Religious and ethnic minorities were subject to the most severe harms: Yazidi, Turkmen, Shabak, Kaka'i, and Christian minority areas were destroyed, while women, children, and youths were killed in one of the most grave incidents of human rights violations in the modern era. These crimes were not limited to minority areas but also extended to majority-Arab or majority-Kurd villages and settlements that were under ISIS rule. It appears that these gross human rights violations in Iraq remain ongoing in various forms.

The protest movement of October 2019 was also indicative of the collapse of human rights in Iraq. During the protests, more than 800 demonstrators were killed, and thousands more were gravely injured, while hundreds of others were kidnapped or forcibly disappeared. Although the October protests led to the resignation of Adil Abdul-Mahdi, who served as prime minister from 25 August 2018 to 25 November 2019, activists continued to be targeted. Iraq has continued to experience kidnappings and killings without any truth-seeking proceedings for these incidents. Of the aforementioned three periods of time, transitional justice has so far only addressed violations from the Ba'ath party era (1968-2003), while the previous era of violations has been ignored. For the post-2003 period, there have been some steps taken such as compensation for victims of attacks by terrorist groups or the Popular Mobilization Forces, or who were targeted during the protest movement of October 2019. This

chapter will be divided into three sections: first, the historical and legal context for transitional justice in Iraq; second, the decisions issued by the Coalition Provisional Authority and subsequent interim governing bodies; and third, the ministries, agencies, and institutions created to oversee transitional justice in Iraq.

## **Topic 1: The Historical and Legal Context for Transitional Justice in Iraq**

This section will examine the historical and legal context for transitional justice in Iraq and how it has played an important role in more fully conceptualizing how the transitional justice process was set up and institutionalized. We will also examine certain turning points in the process of developing these institutions and procedures.

### **Section 1: The Historical Context for Transitional Justice in Iraq**

Iraq is not the only country in the world that has been subject to authoritarian rule, and which, after its collapse, faced the process of uncovering a dark legacy of gross human rights violations. Despite the gravity of these violations, and the fact that in 1991 the UN had assigned a special rapporteur from the UN Commission on Human Rights to monitor the state of human rights in Iraq,<sup>(48)</sup> the scope of the pushback and intimidation made it difficult to prove many of these violations before the Commission on Human Rights. The materials produced by the special rapporteurs for human rights in Iraq during their tenure, which lasted from 1991 to 2004, addressed the allegations of gross human rights violations, but stated that except for one instance the rapporteur had been unable to confirm the accusations. They noted in their ongoing reports to the UN General Assembly and to the Commission on Human Rights that there were ongoing concerns about the information on gross human rights violations in Iraq.<sup>(49)</sup> The General

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(48) See: Resolution of the UN Commission on Human Rights 741991/ from 19916/3/.

(49) See: Special rapporteur's report to the UN Commission on Human Rights on the state of human rights in Iraq, presented on 200116/1/ to the UN General Assembly.

Assembly viewed the observations and recommendations of the special rapporteur in light of the previous resolution issued during the Commission's 66th session in 1997, which clearly denounced the regime's actions. It condemned:<sup>(50)</sup>

- "The massive and extremely grave violations of human rights and of international humanitarian law by the Government of Iraq, resulting in an all-pervasive repression and oppression sustained by broad-based discrimination and widespread terror;
- Suppression of freedom of thought, expression, religion, information, association, assembly and movement through fear of arrest, imprisonment and other sanctions, including the death penalty;
- Summary and arbitrary executions, including political killings, enforced or involuntary disappearances, routinely practiced arbitrary arrests and detention and consistent and routine failure to respect due process and the rule of law;
- Widespread, systematic torture in its most cruel forms, and the enactment and implementation of decrees prescribing cruel and inhuman punishment, namely mutilation, as a penalty for offences and diversion of medical care services for such mutilations."

The Commission called upon the Government of Iraq at that time:

1. To abide by its freely undertaken obligations under international human rights treaties and international humanitarian law and respect and ensure the rights of all individuals, irrespective of their origin, ethnicity, gender or religion, within its territory and subject to its jurisdiction;
2. To bring the actions of its military and security forces into conformity with the standards of international law, in particular those of the International Covenant on Civil and Political Rights;

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(50) See: Resolution 217A, 1997, issued by the UN General Assembly.

3. To cooperate with United Nations human rights mechanisms, in particular by receiving a return visit by the Special Rapporteur to Iraq and allowing the stationing of human rights monitors throughout Iraq pursuant to the relevant resolutions of the General Assembly and the Commission on Human Rights;
4. To restore independence of the judiciary and abrogate all laws granting impunity to specified forces or persons killing or injuring individuals for any purpose beyond the administration of justice under the rule of law as prescribed by international standards;
5. To abrogate all decrees that prescribe cruel and inhuman punishment or treatment and to ensure that torture and cruel punishment and treatment no longer occur;
6. To abrogate all laws and procedures, including Revolution Command Council Decree No. 840 of 4 November 1986, that penalize free expression, and to ensure that the genuine will of the people shall be the basis of authority of the State;
7. To cooperate with the Tripartite Commission to establish the whereabouts and resolve the fate of the remaining several hundred missing persons, including prisoners of war, Kuwaiti nationals, and third country nationals victims of the illegal Iraqi occupation of Kuwait, to cooperate with the Working Group on Enforced or Involuntary Disappearances for that purpose, and to pay compensation to the families of those who died or disappeared in custody of the Iraqi authorities, through the mechanism established by the Security Council in resolution 692 of 20 May 1991;
8. To cease immediately its repressive practices aimed at the Iraqi Kurds in the north, Assyrians, Shi'ites, Turkmen, the population of the southern marsh areas, where drainage projects have provoked environmental destruction and a deterioration of the situation of the civilian population, and other ethnic and religious groups;
9. To put an end without delay to the enforced displacement of persons;

10. To cooperate with international aid agencies and non-governmental organizations to provide humanitarian assistance and monitoring in the northern and southern areas of the country;
11. To release immediately all Kuwaitis and nationals of other States who may still be held in detention;
12. To ensure equitable distribution without discrimination to the Iraqi population of the humanitarian supplies purchased with the proceeds of Iraqi oil, in implementation of Security Council Resolutions 986 (1995), 1111 (1997) and 1129 (1997) and the memorandum of understanding with the Secretary-General of May 1996 on this issue, and to cooperate with international humanitarian agencies for the provision without discrimination of relief to those in need throughout Iraq;
13. To cooperate in the identification of minefields existing throughout Iraq with a view to facilitating their marking and eventual clearing; and
14. To continue to cooperate in the implementation of Security Council Resolutions 986 (1995) and 1111 (1997) and to continue to facilitate the work of United Nations humanitarian personnel in Iraq by ensuring the free and unobstructed movement of observers throughout the country."

The turning point in addressing these violations came on March 3, 2004, when the special rapporteur for human rights in Iraq, Andreas Mavrommatis, held several important meetings with the first delegation from the new Iraq government, led by the Ministry for Human Rights as well as representatives from the Ministries of Justice and of Migration and Displaced. During these discussions, the special rapporteur received a report documenting human rights violations committed by the previous regime between 1979 and 2003, supported by key documents and evidence that had been collected by a team of specialized lawyers in the Ministry of Human Rights. There were also documents prepared by the Minister of Human Rights of the Kurdistan Region about mass graves. The special

rapporteur made comments indicating that he had been very successful in uncovering new information, particularly eyewitness testimony from survivors of executions, mass graves, brutal torture, the Anfal campaign, the Halabja chemical attack, the draining of marshes, forced displacement, beheadings, and disfigurement including mutilation of ear lobes or tongues, or tattoos<sup>(51)</sup> and forced Arabization. In his comments, the special rapporteur stated that this was further evidence of the crimes systemically committed under the previous regime, and that this revealed its unrivaled brutality, to the point that citizens were sent to be executed. The accounts given also revealed that the situation was much worse than what had been recorded in the reports previously made to the United Nations. It had been hoped that the special rapporteur would visit Iraq on 22 September 2003, but the bomb attack on the UN mission headquarters on 19 August 2003 by al-Qaeda terrorists, which killed the UN Special Representative for Iraq Sergio Vieira de Mello, prevented the rapporteur from carrying out this plan.<sup>(52)</sup>

Regarding the particular challenges of transitional justice in Iraq, we contend that there are two key factors to consider:

1. That the process of change had occurred through foreign military intervention, which placed the country under occupation, and legally under the control of the occupying power.<sup>(53)</sup>

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(51) See the resolutions of the Revolutionary Command Council, particularly: No. 59 of June 1994, on the cutting off of hands for crimes of theft, or execution if the accused was carrying a weapon or if the theft resulted in the death of a person; No. 92 of 21 July 1994 on the cutting off of hands for crimes of forgery; No. 109 of 18 August 1994 on tattoos after the cutting off of hands; and No. 115 of 25 August 1994 on the cutting off of ears as a punishment for deserting military service. See also Resolution No. 117 of 1994 prohibiting the removal of tattoos, and the resolution on the cutting off of tongues for those who insulted President Saddam Hussein, or his family.

(52) See the Secretary-General's note to the UN General Assembly on the situation of human rights in Iraq, A/58338/.

(53) In May 2003, the UN Security Council issued Resolution No. 1483 in which it referred to the US and UK as occupying powers in Iraq, which were therefore responsible for managing the country's affairs according to international law on the rights and responsibilities of occupying powers.

2. That the legal framework for transitional justice in Iraq has not been translated into a unified law that brings together the various strands of transitional justice in the country. Instead, there have been many different transitional justice institutions emerging without a shared point of reference. There have also been an increasing number of different laws and legislative bodies, either created by order of the occupying power or by resolution of the provisional Iraqi Governing Council.

If we consider the historical trajectory, we can see that although Iraq after 2003 was under the control of the US and UK as occupying powers, this period was also characterized by joint efforts with Iraqi opposition forces that had previously tried to topple the regime. Efforts were made to bring these groups into a united front and to work together during conferences held for the Iraqi opposition in London (the London Conference) and the Kurdistan Region (the Salah al-Din Conference). The outcomes of these meetings had a significant effect on the post-April 9 2003 era, and shaped key issues such as the future system of governance, the fate of security institutions and their staff, as well as the Iraqi military and army, executive institutions of the Iraqi state, armed militias, military and paramilitary organizations, syndicates and unions, and professional, social, and sports organizations, the question of accountability, administrative and judicial prosecution, reparations, and other matters.

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\* The London Conference was held from 1417- December 2002. There were 330 participants representing 51 political parties and movements, in addition to scholars, military figures, and religious figures of different ethnicities and sects. The Islamic Dawa Party and the Iraqi Communist Party did not attend the conference. The London conference was the largest Iraqi opposition conference since the Salah al-Din conference (in Erbil) in 1992 and the New York Conference in 1999. The conference was attended by US Ambassador Zalmay Khalilzad, and delegates from the UK, Iran, and Kuwait. There were six parties represented by the members of the preparatory committee: Ahmed Chalabi (Iraqi National Conference), Abdul Aziz al-Hakim (Islamic Supreme Council), Masoud Barzani (Kurdistan Democratic Party), Jalal Talabani (Patriotic Union of Kurdistan), Sharif Ali Bin al-Hussein (Iraqi Constitutional Monarchy), Ayad Allawi (Iraqi National Accord), and Abbas al-Bayati (Islamic Union of Iraqi Turkoman).



The political statement issued by the Iraqi Opposition Conference (the London Conference)\* stipulated the following points:

1. The gathered participants recognize the primary role of Iraqi national opposition, including its different branches and organizations, and the people it represents throughout Iraq.
2. Iraq is a democratic, parliamentary, pluralist, and federal state with a permanent constitution.
3. Islam is one of the foundational principles of the Iraqi state, and the provisions of Islamic law (shari'a) shall be a main source for its legislation.
4. Justice and the law must follow their course in all cases.
5. All sectors of Iraqi society must be involved in political decision-making.
6. There cannot be any form of local or foreign occupation or military rule.
7. Sectarian policies shall be eliminated, and the participants acknowledge the sectarian persecution that Shi'ites have suffered.
8. Oppressive practices against Kurds in Anfal, Halabja, and elsewhere are condemned.
9. Forced displacement and ethnic cleansing, especially against Feyli Kurds, is condemned.
10. The will of Kurds in choosing an acceptable form of political partnership with Iraqis will be respected.
11. Turkmen shall be treated with equality, and their national, administrative, and cultural rights shall be respected.
12. Equality for Assyrians must be guaranteed, including access to their national and cultural rights.
13. The crimes of the regime in destroying the marsh region of Iraq shall be acknowledged, and the welfare of its people must be ensured.
14. All unjust and discriminatory laws which target Kurds, Turkmen, and Assyrians, as well as sectarian laws targeting Shi'ites, must be frozen and then repealed.

15. The country must learn from what happened in Kurdistan and integrate Peshmerga forces into the Iraqi army.
16. Oppressive security entities shall be disbanded, and perpetrators of crimes must be prosecuted.
17. The Nationality Law shall be repealed, and a new law shall be issued without multiple categories of citizenship.
18. The Oil-for-Food program shall remain in effect, until it can be reexamined in light of relevant UN Security Council decisions.
19. Saddam's regime shall be held morally, legally, and historically responsible for its actions in the war against Iran and Kuwait.
20. The return of Iraqi immigrants and refugees shall be facilitated.

The Iraqi opposition conference in London created a blueprint for the transitional period for a post-Saddam Iraq and set out the necessary principles and institutions for the transitional stage. These included:

**First:** The transitional stage: The period starting from when the Coalition Provisional Authority was established after the fall of the regime and the elections held at that time, until democratic state institutions were established and a permanent constitution was ratified by the people, during a period not to exceed two years from the date when the Coalition Provisional Authority was established.

**Second:** General principles for institutions during the transitional stage:

- a) The people as the source of the institutions' power and the basis of their legitimacy.
- b) The independence, sovereignty, and unity of the Iraqi people and the land of Iraq.
- c) Separation of powers between three branches: legislative, executive, and judicial.
- d) Islam as the state religion, and one of the primary sources of its law.

- e) Democracy (including freedom of expression and the right to peaceful demonstrations) and political diversity.
- f) Adopting a federal system of government.
- g) The people of Iraq are composed of two main nationalities.
- h) Iraqis are equal before the law in their rights and responsibilities, freedom of religion and belief is guaranteed, and different doctrinal religious practices are to be respected.
- i) Rejecting and prohibiting violence or discrimination based on sectarian, religious, national, or ethnic grounds; preventing terrorism and exploitation in all its forms; creating a culture of national, ethnic, and religious tolerance.
- j) Establishing strong and equal relations with Arab and regional powers and allies, especially neighboring countries, so that Iraq can play an active role in the international community in a way that serves its own national interests and the peace, security, and stability of the region and world.
- k) Adhering to international treaties and charters on human rights, UN resolutions, the Arab League charter, and the Organization of the Islamic Conference.

**Third:** The National Transitional Council: The National Transitional Council shall be composed of representatives of different Iraqi national, religious, political, social, and geographic constituencies and groups, and from those with appropriate experience, in order to carry out legislative functions during the transitional period and shall monitor the actions of the executive authority.

**Fourth:** Sovereignty Council: The Sovereignty Council shall be composed of three leaders respected for their previous work in civil society building who are known to be of high moral character. This council shall carry out the tasks of the state's executive authority during the transitional period.

**Fifth:** Transitional government: A civilian coalition government that reflects the composition of Iraqi society and its political groups shall be established and shall include qualified individuals with the necessary experience who are known for their integrity and patriotism.

**Sixth:** Constitution for the transitional stage: The process of preparing a constitution for the transitional stage shall be overseen by a committee of experts.

**Seventh:** Drafting a permanent constitution

- a) The National Transitional Council shall oversee the formation of a special committee composed of scholars and legal experts with appropriate experience and qualifications, as well as politicians and religious jurists. The selected group shall represent the ethnic and national composition of Iraq as well as its various doctrinal and political affiliations. They shall draft a permanent constitution, which people will then ratify by referendum.
- b) The Iraqi people shall have the opportunity in a referendum to determine whether the political system should be a monarchy or a republic.

The actual course of events after the regime was toppled turned out to be slightly different. After 2003, the country fell under a US-UK occupation, and a senior civilian administrator (Paul Bremer) was appointed by the occupying power. This administrator had absolute legislative, executive, and judicial power over the country, along with a Cabinet composed of Iraqi ministers nominated by the Governing Council, who were given certain powers by the administrator. The nominated ministers were approved by the civilian administrator and were supported by a number of advisers from the Coalition Provisional Authority.<sup>(54)</sup>

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(54) See Coalition Provision Authority Regulation No. 6 of 2003 on approving Cabinet ministers working under the authority of the civilian administrator, in coordination with the rotating leaders of the Governing Council.

The civil administrator retained his absolute power until 31 May 2004, when the first post-2003 Iraqi government was established. The occupying power was involved in overseeing the government in accordance with UN Security Council Resolution 1483 of 2003 and 1511 of 2003, as well as 1546 of 2004, which granted the occupier broad powers to work with the interim government led by Prime Minister Ayad Allawi, who was in charge of both the legislative and executive authority.

The period of absolute rule of the civilian administrator Paul Bremer and the following period of transitional government created certain legal circumstances that continue to affect the work of the governments that came after, which had to grapple with its legal and social consequences.

The occupying power, represented by the civilian administrator, also carried out a review of the institutional frameworks of the Iraqi state, and created new institutions while dissolving others. It also issued new laws and suspended a number of other laws and Articles. Regulation No. 1, which was issued by the civilian administrator in 2003, stipulated in part 2 (regarding the applicable laws in force in Iraq) that:<sup>(55)</sup> “Unless suspended or replaced by the CPA [Coalition Provisional Authority] or superseded by legislation issued by democratic institutions of Iraq, laws in force in Iraq as of April 16, 2003, shall continue to apply in Iraq insofar as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order issued by the CPA.”

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(55) Regulation No. 1 gave the resolutions of the Coalition Transitional Authority precedence in the constitutional and legal system in Iraq.

## **Section 2: The Legal Framework for Transitional Justice Institutions in Iraq**

It is well-known that transitional justice cannot be brought about by international agreement alone. However, we have a set of international case studies at our disposal, of other countries that have emerged from periods of armed conflict or from under dictatorial regimes. Some of these processes have finished while others remain ongoing, although there is rarely consensus even on this question of when things are done, although resolutions and laws may state that the process has concluded. What is certain is that no society can overcome gross human rights violations until it deals with the legacy of its past. In this regard, transitional justice differs from other national approaches to rendering justice. Transitional justice is a set of exceptional processes adopted to address exceptional circumstances that cannot be addressed by national tools for justice.

The many diverse case studies in transitional justice demonstrate that its relationship with the democratic transition has varied from one country to another. It is not possible to talk about a single model for transitional justice, because the experiences and circumstances of each country differ. Some have prioritized institutional reform and democratic transition before holding perpetrators accountable, as was the case in South Africa, Chile, and others. In Chile, the choice was made to focus on the peaceful transition of power. By contrast, in Morocco, the focus was on truth-seeking and accountability, including reparations and prosecuting perpetrators of human rights violations. It should be noted that the Moroccan experience is something of an exception because the same regime accused of human rights violations was trying to undertake these reforms. In Argentina, such processes ended with the prosecution of some military leaders, while amnesty was extended to the majority who had been accused. The focus was on searching for the remains of the disappeared using the most effective and modern methods. In Rwanda, priority was given to prosecuting those involved in the genocide

through international criminal courts or regular national courts. At the same time, the country tried to pursue reconciliation between the victims and perpetrators, through asking pardon of survivors and taking other bold steps to reintegrate militants and those who held administrative responsibility for these acts back into the national economy. In this case, the focus was on reconciliation, institutional reform, and reparations for victims.

The UN's stance on transitional justice has been set forth in the Secretary-General's report on the rule of law and transitional justice in conflict and post-conflict societies, as presented to the Security Council in 2004.<sup>(56)</sup> This included standards for achieving transitional justice, such as the rule of law, expanding the scope of participation, and designing transitional justice mechanisms as part of a comprehensive strategy while avoiding any ambiguity that might hinder their implementation. The principle of transitional justice includes the full scope of operations and mechanisms related to efforts made by society to understand the legacy of past abuses in order to achieve accountability, justice, and reconciliation. This may include judicial and non-judicial mechanisms with differing levels of international involvement (or non-involvement), trials of perpetrators, reparation, truth-seeking, and constitutional reform.

The case of Iraq is reflective of the particularities of the Iraqi situation, including the sectarian, religious, ethnic, and national diversity of its population, as well as divergent political ideologies among opposition parties that accepted the regime change in 2003, and which have dominated the political scene since.

Iraq witnessed radical changes after the US and UK carried out a military intervention to remove the regime of former president Saddam Hussein, and became Iraq's occupying

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(56) See: UN document no S/6162004/.

powers by resolution of the UN Security Council.<sup>(57)</sup> Following this resolution, they issued Coalition Provisional Authority Order No. 1 of 16 May 2003, which was entitled “De-Ba’athification of Iraqi Society,” and dissolved much of the infrastructure of the Iraqi state, including its official entities and decision-making bodies. The subsequent order included an annex with a list of names of institutional structures that would be dissolved, including the legislative apparatus of the Iraqi state, the Revolutionary Command Council, as well as the Ministry of Defense and Ministry of Interior, the security apparatus, and many other institutions. The Coalition Provisional Authority then issued a series of decisions and orders that reestablished many of the official bodies of the Iraqi state, and also formed an advisory body to govern in coordination with the civil administrator of the occupying power. In this way, the transitional Governing Council was formed, which was given certain powers by the civilian administrator.<sup>(58)</sup>

The Iraqi model for transitional justice differs from other international cases described above in two main ways: 1) that the process of change occurred through foreign military intervention and 2) that the legal framework for transitional justice in Iraq did not take the form of a unifying law that brought together the different strands of transitional justice in Iraq.

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(57) In May 2003, the UN Security Council issued Resolution 1483 in which it referred to the US and UK as occupying powers in Iraq, which were therefore responsible for managing the country’s affairs according to international law on the rights and responsibilities of occupying powers.

(58) See: Memorandum No. 7 of the Coalition Provisional Authority.



## Topic 2: Decisions Issued by the Coalition Provisional Authority and the Interim Governments in Iraq

The occupying power left the amended Iraqi constitution (the constitution of 1970) in place, while stripping it of its precedence in the legal system: primacy was instead given to the resolutions and orders of the Coalition Provisional Authority, as set forth in Regulation 1. The Coalition Provisional Authority went on to issue a series of provisional orders, resolutions, and memoranda for Iraq, which included the following:

### Section 1: Orders for the De-Ba'athification of Iraqi Society

1. Order No. 1 of 16 May 2003 on the De-Ba'athification of Iraqi Society required that all members of the Ba'ath Party in high leadership positions be "removed from their positions and banned from future employment in the public sector" and "evaluated for criminal conduct or threat to the security of the Coalition."<sup>(59)</sup>
2. Order No. 2 of 23 May 2003 on the Dissolution of Entities expanded the De-Ba'athification policy to include institutional entities listed in the order's Annex. The order required the dissolution of these entities and included the possibility of adding other institutions to the list in the future.<sup>(60)</sup>

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(59) This was not the first legislation of its kind in the Iraqi legal system. After the revolution of 1958 and the coup of Abd al-Karim Qasim, the same approach was adopted in Law No. 2 of 1958 for reorganizing the government, which removed a significant number of governmental employees from office for reasons related to their political beliefs. The Ba'ath party did the same thing following its first coup in 1963 which overthrew the Abd al-Karim Qasim government. At this time, another law to reorganize the government was issued (No. 48 of 1963).

(60) The list of entities and institutions to be dissolved by the order (the "Dissolved Entities") included the following:  
the Ministry of Defense, the Ministry of Information, the Ministry of State for Military Affairs, the Iraqi Intelligence Service, the National Security Bureau, the Directorate of National Security, the Special Security Organization, all entities affiliated with or comprising Saddam Hussein's bodyguards, to include the Murafaqin (Companions) and al-Himaya al-Khasa (Special Guard); the following military organizations: the army, the air force, the navy, the air defense force, and other regular military services, the Republican Guard, the Special Republican Guard, the Directorate of Military Intelligence, the Al

3. Order No. 4 of 25 May 2003 on the Management of Property and Assets of the Iraqi Ba'ath Party, which specified which assets were affected, suspended all future financial obligations of the Ba'ath Party, required those in possession of funds to turn them over, and imposed a punishment on those who refused to do so.
4. Order No. 5 of 25 May 2003 on the Establishment of the Iraqi De-Ba'athification Council, which set forth the tasks of this council, including:
  - To identify the Ba'ath Party's properties and assets, the location and current status of all properties and assets, including "those owned by Iraqi Baath Party officials and members, and any methods of concealment or distribution adopted to avoid detection";
  - To determine "the identity and whereabouts of those Iraqi Baath Party officials and members involved in human rights violations and exploitation against the Iraqi people";
  - The "details of any criminal allegations that may be made against Iraqi Baath Party officials and members";
  - "Any other information relevant to the Order for the De-Ba'athification of Iraqi Society, issued by the Administration of the Coalition Provisional Authority on May 16, 2003 . . . and the Order on the Management of Property and Assets of the Iraqi Baath Party."
  - That the Council would advise the Administrator of the following matters:
    - a) The most efficient and equitable means of eliminating the structure and means of intimidation and patronage of the Iraqi Baath Party;
    - b) A means of identifying and classifying Iraqi Baath Party officials and members;

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Quds Force, and the Emergency Forces; the following paramilitaries: The Saddam Fedayeen, Ba'ath Party Militia, Friends of Saddam, and Saddam's Lion Cubs (Ashbal Saddam); other organizations: the Presidential Diwan, the Presidential Secretariat, the Revolutionary Command Council, the National Assembly, the Youth Organization, the National Olympic Committee, the Revolutionary, Special, and National Security Courts and all other organizations subordinate to the dissolved entities.

- c) The most efficient and equitable means of reclaiming Iraqi Baath Party property and assets; and
  - d) Individuals who the Council considers should be exempt from Order for the De-Ba'athification of Iraqi Society issued by the Administrator of the Coalition Provisional Authority on May 15, 2003.
5. Order No. 100 of 2004, which transferred the powers of the Coalition Provisional Authority, including the powers of the civilian administrator stipulated in the CPA orders above regarding de-Ba'athification, to the interim government, effective 31 May 2004.

## **Section 2: Orders on the Organization of the Iraqi Judiciary**

The Coalition Provisional Authority decided, as set forth in Order No. 35 of 2003,<sup>(61)</sup> to create a new framework for judicial institutions, namely the Council of Judges of Iraq which would oversee the judiciary and public prosecution in Iraq and operate independently from the Ministry of Justice. The Council was responsible for the following:

- Administrative oversight of the judiciary and public prosecution, with the exception of the Supreme Court.
- Investigating accusations of professional misconduct and incompetence of members of the judiciary or public prosecution and taking the necessary disciplinary or administrative action against them.
- Nominating persons for posts in the judiciary or public prosecution and recommending their appointment.
- Promoting judges and public prosecutors and developing their skills.
- Appointing or reappointing judges and public prosecutors to positions in the judicial system according to the Law of Judicial Organization No. 160 of 1979 and the Law of Public Prosecution No. 159 of 1979.

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(61) Coalition Provision Authority Order No. 35 of 2003 was abrogated by Law No. 112 of 2012.

1. Order No. 15 of 2003, which created a judicial review committee to investigate the suitability of judges and public prosecutors to continue in their posts. The committee also had the capacity to remove them from office, which had not been the case under the Law of Judicial Organization No. 160 of 1979. Section 2 of Order No. 15 had suspended any provisions of the previous law that were in conflict with the order, or the resolutions of the Coalition Provisional Authority, its top advisors, or the Judicial Review Committee. Order No. 15 was later abrogated by Order No. 100 of 2004, as per section 3, part 6, but all of the resolutions and orders related to appointment and removals remained in legal effect after power was handed over to the interim government under Prime Minister Ayad Allawi on 30 June 2004, in accordance with the Law of Administration for the State of Iraq for the Transitional Period (the transitional constitution).
2. Law No. 1 of 2003, which was the Law of the Supreme Iraqi Criminal Tribunal and was issued by the Governing Council under civilian administrator Paul Bremer.<sup>(62)</sup> The legality of setting up the tribunal was later established by the Law of Administration for the State of Iraq for the Transitional Period.<sup>(63)</sup>

The law established the jurisdiction of the tribunal, which was to apply to every Iraqi citizen residing in Iraq and accused of committing one of the crimes set forth in Articles 11, 12, 13, and 14 of the law, if the crimes had been committed between 7 July 1968 and 1 May 2003 in the Republic of Iraq, or elsewhere, and which included the following crimes:<sup>(64)</sup>

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(62) This law was abrogated by Law No. 10 of 2005.

(63) See: Article 48 of the Law of Administration for the State of Iraq for the Transitional Period of 2004.

(64) Iraqi criminal law did not previously contain provisions criminalizing genocide, war crimes, or crimes against humanity, which were included in the law establishing the Supreme Iraqi Criminal Tribunal, which amended the existing Iraqi criminal code, although this was limited by the tribunal's temporal jurisdiction- which extended from 17 July 1968 until 1 May 2003 but did not include any crimes committed after this set period of time.

- Crimes of genocide
- Crimes against humanity
- War crimes
- Violations of Iraqi law as set forth in Article 14 of the aforementioned law.<sup>(65)</sup>

3. Order No. 13 of 2003 created the Central Criminal Court, which was a special court that would operate independently, as per the second section of the order, which stated that the court did not have jurisdiction on any case that it was not assigned by the Coalition Provision Authority. It was not connected to the Supreme Judicial Council at the time it was established, and this council did not have the legal authority to nominate judges or public prosecutors for the court. The first section of the aforementioned law stated that:

- “There shall be established a Central Criminal Court of Iraq (hereinafter “the CCCI”), which shall sit in the city of Baghdad and in such sessions in other locations in Iraq as provided for in this Order. The CCCI shall have national jurisdiction over all matters set forth in Section 20.
- The CCCI shall consist of two chambers:
  - o an Investigative Court; and
  - o a Felony Court.”

The second section of the order stated that this Investigative Court shall:

- Be composed of a single judge, who would exercise the jurisdiction of the investigative courts according to the Iraqi Law on Criminal Proceedings No. 23 of 1971 (amended) and any further amendments issued by the Coalition Provisional Authority in the form of orders or implementing memoranda.
- Have the jurisdiction to investigate criminal cases it was assigned by the head of the Coalition Provisional Authority.

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(65) See: Article 10 of the aforementioned law.

- Not have the jurisdiction to examine civil cases, except victim compensation claims requiring reparations, nor would it have jurisdiction on any case that was it was not assigned by the Coalition Provisional Authority.

Pursuant to Article 18 of this order, the court was granted jurisdiction in cases of terrorism, organized crime, governmental corruption, and other acts of criminal intent, including “acts intended to destabilize democratic institutions or processes, [and] violence based on race, nationality, ethnicity, or religion.” It also had jurisdiction over any cases assigned to it by the head of the Coalition Provisional Authority, who transferred his powers with regard to this court to the head of the Supreme Judicial Council as per Coalition Provisional Authority Order No. 100 of 2004,<sup>(66)</sup> which rendered the court part of the judicial system after the Coalition Provision Authority was disbanded.<sup>(67)</sup>

4. Order No. 30 of 2005, the Law of the Federal Supreme Court, issued by the Interim government under Ayad Allawi, handed over provisional ruling authority in accordance with Order No. 100 of 30 June 2004 by the head of the Coalition Provisional Authority. Article 4 of this order stated that the Federal Supreme Court would oversee the following matters:
  - Adjudicate disputes that occur between the federal government, regional governments, governorates, municipalities, and local administrations.
  - Adjudicate disputes related to the laws, resolutions, orders, directives, or regulations issued by any relevant entity, and overturning any of the above that contravene the provisions of the Law of Administration for the State of Iraq for the Transitional Period, as pursuant to requests from the court, an official entity, or claimant.

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(66) Pursuant to section 3, paragraph 4, of this law, the court was linked to the Supreme Judicial Council and was subject to the law establishing the Council and the laws regulating judicial affairs in Iraq, in accordance with Articles 46 and 47 of the Law of Administration for the State of Iraq for the Transitional Period.

(67) The court is now linked to the presidency of the federal court of appeals in Rusafa, Baghdad, and has jurisdiction over all criminal cases as well as what has been mentioned above regarding serving public interests.

- Consider appeals against the rulings and decisions issued by the Administrative Court.
- Hear cases brought before it in its capacity as an appellate court whose jurisdiction is determined by federal law.

Legislative Order 30 of 2005 did not include provisions regarding the Constitutional Court, which had been established by Law No. 159 of 1968 and which remained in effect without amendment or abrogation.<sup>(68)</sup> However, this court had never actually been convened, although the legal provisions to do so existed.

### **Section 3: Orders and Resolutions Issued by or Relating to the Iraqi Penal Code**

Under international humanitarian law, the occupying power cannot modify the Penal Code of the country it is occupying except in specific contexts,<sup>(69)</sup> and the jurisdiction of the occupying power was limited to enacting new penal laws in cases in which it was necessary to do so for the public benefit. The occupying power's capacity to prosecute protected persons for acts they had committed prior to the occupation was also severely limited to cases involving violations of laws and customs of war.<sup>(70)</sup>

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(68) The law was published in the Iraqi Official Gazette No. 1659 of 12 February 1968. Article 1 of the Law of the Constitutional Court No. 159 of 1968 stipulated that the high constitutional court was to be presided over by the chief justice of the Iraqi Court of Cassation, or whomever was appointed in his absence, and was to include: the head of the Financial Regulatory Authority; the head of the Shura Council; three permanent judges from the court of cassation; three top state officials, who were to be of the rank of director-general or higher; four alternate members, two of whom had to be judges from the Court of Cassation, and two top state officials of the ranking specified above, who were to be appointed by the Council of Ministers, upon the recommendation of the Minister of Justice. Their appointments were to be made by republican decree, and if matters required further interpretation of legal texts, the relevant minister was to appoint an additional temporary member for the entity that requested the clarification. The law also stated that members of the court should be appointed for three years subject to renewal except for the head of the Financial Regulatory Authority, the head of the Shura council, and the additional temporary members. Finally, the law stipulated that the headquarters of the Constitutional Court shall be located at the headquarters of the Court of Cassation, and the court clerk of the latter would also be responsible for the affairs of the former.

(69) See: Annex to the Hague Convention of 1907, Article 443; Fourth Geneva Convention, Article 64.

(70) See: Fourth Geneva Convention, Article 70.

During the rule of the Coalition Provisional Authority, and the interim Governing Council (which both worked under the auspices of the civilian administrator and during interim government of Ayad Allawi, who came to power on 30 June 2004 and held both executive and legislative powers) there were many orders and resolutions issued with the effect of law, and which amended or abrogated many provisions of the Military Criminal Procedure Law. Some of these resolutions helped to address some of the violations of human rights that had occurred during the previous era, or the illegal arrangements that needed to be rectified during the transitional stage, such as:

1. CPA Order No. 7 of 2003, which suspended some the Articles of the existing Penal Code,<sup>(71)</sup> the most important of which was suspending the death penalty. This suspension did not last long: it was brought back into force later, but more narrowly than under the previous regime. Execution was the most common penalty applied before 2003, although the regime did not release the real number of persons who had been executed. When the special rapporteur for human rights in Iraq, Andreas Mavrommatis, had asked about the number of executions carried out during 2000-2001-, the regime had told him there had only been 299 executions; this was shown to be false after the regime was toppled.<sup>(72)</sup> The death penalty was not only used in cases of serious felonies but also for relatively minor crimes. For example, the punishment for openly insulting the President of the Republic of Iraq or anyone acting on his behalf, the Revolutionary Command Council, or the National Council, with the intent of instigating unrest against the government was execution and the confiscation of moveable and immovable assets. This was in accordance with Revolutionary

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(71) It suspended Article 200 of the Penal Code, which criminalized belonging to any political organization while being a member of the Ba'ath Party, and which had been punishable by execution, and also suspended Article 225 of the Penal Code, which dealt with insulting the president or anyone acting on his behalf.

(72) See: Report of the Special Rapporteur on Human Rights in Iraq, Andreas Mavrommatis, dated 22 August 2002.



Command Council Resolution No. 840 of 1985, and Resolution No. 122 of 1986, which provided for the execution of anyone who committed a forgery of a foreign passport, or of documents issued by the competent Iraq authorities in order to financially benefit in such a way as would harm the national economy. Revolutionary Command Council Resolution No. 315 of 1990 also stipulated that hoarding foodstuffs for business purposes was a criminal offense and act of sabotage that jeopardizes national security, and anyone who committed this offense as set forth in the first paragraph was subject to execution and confiscation of their moveable and immoveable assets. Revolutionary Command Council Resolution No. 322 of 1990 stipulated that anyone who committed the crime of theft within the administrative boundaries of Kuwait City, al-Nida, or Jahra (during the Iraqi occupation of Kuwait) was subject to execution. Revolutionary Command Council Resolution No. 341 of 1990 stipulated that sheltering in a foreign country with the intent of hiding from the authorities was considered a crime of espionage. The evidence suggests that the Iraqi Penal Code includes more than 50 Articles that stipulated execution as the punishment.

2. CPA Order No. 31 of 2003, which included a long list of modifications to the Iraqi Penal Code and for the first time adopted the punishment of lifetime imprisonment instead of execution in many of its Articles. These modifications included Articles pertaining to cases of rape and kidnapping; damage to public facilities, infrastructure, or the oil sector; and vehicle larceny. The order also amended the Criminal Procedure Code and prevented the release of persons accused of a crime whose punishment was life imprisonment during the pretrial detention period.
3. CPA Order No. 91 of 2004 on the Regulation of Armed Forces and Militias. The purpose of this order was to gain control of arms used outside the scope of the state, through integrating militias and armed groups that had opposed the regime into military and security agencies and departments. There were screening and

inspection programs established for this purpose which imposed penalties on militias and groups that violated the imposed restrictions in relation to the committee's decision to deny reintegration to militias and groups operating outside the law. The order also amended the text of Article 135 of the Penal Code in adding affiliation with illegal militias or armed extremist organizations as an aggravating circumstance and criminal offense under the Iraqi Penal Code (Articles 194 and 195).<sup>(73)</sup>

4. CPA Order No. 3 of 2003 on Weapons Control, which stipulated that possession of arms was limited to the state and prohibited their unauthorized distribution<sup>(74)</sup> and also specified penalties for those who were found to have committed violations of the provisions of the order.<sup>(75)</sup>
5. CPA Order No. 25 of 2003<sup>(76)</sup> on the Confiscation of Property Used in or Resulting from Certain Crimes.

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(73) Article 194 of the Iraqi Penal Code stipulated that anyone who organized, led, or was involved in the leadership of any armed organization that attacked a segment of the population, aimed to obstruct law enforcement, seized property, forcibly seized funds held by the state or group of people, or resisted the public authorities while bearing arms, was subject to execution. If a person had joined such an organization but was not involved in founding it and did not hold a leadership position in the organization, this was punishable by lifetime imprisonment, or a shorter prison sentence. Article 195 also stipulated that attempting to instigate civil war or sectarian fighting by arming civilians or encouraging them to take up arms against each other, or otherwise instigating violence, was punishable by lifetime imprisonment. If the violence had actually been carried out, then this was punishable by death.

(74) Section 4, paragraph 4, of the order stated that "other than by Coalition Forces and duly authorized Iraqi security forces whose duty position requires the carrying of concealed weapons in the course of their duties, the carrying of concealed weapons is prohibited."

(75) Section 6 stipulated the penalty in case of failing to comply with provisions of the code. It stated (1) Any unlicensed firearm, or firearm sold in any public market, was subject to confiscation by Coalition forces or other competent authorities, and (2) any person in possession of an unlicensed firearm was considered to be acting in violation of the order and was subject to arrest and prosecution. In the case of a conviction, the relevant authorities could issue a sentence of up to a year in prison and a fine equivalent to 1000 USD.

(76) This order was later abrogated by Law No. 11 of 2009.

6. CPA Order No. 10 of 2003, and its implementing memorandum, on the Management of Detention and Prison Facilities, which ended the militarization of detention facilities and prisons, and addressed the matter of facilities for prisoners under 18 years of age. It stipulated that these institutions should operate separately from the Ministry of Interior, Ministry of Labor and Social Affairs, Directorate of General Security, the Intelligence Service, the Special Republic Guard, and the Special Security Organization, and instead placed these institutions under the auspices of the Ministry of Justice. The earlier provisions that contravened this order were abrogated. This order based all of its Articles on the UN Standard Minimum Rules for the Treatment of Prisoners.
7. Resolution No. 3 of 2004, which was issued by the interim government and which marked a step back from the position of the Iraqi government and Coalition Provisional Authority. This included stances that met with opposition from the international community, Europe, and the UN, particularly regarding executions, after this was reintroduced into the Penal Code (Law No. 111 of 1969) as punishment those who committed one the following crimes:
  - Crimes that jeopardized state security, as stipulated in Articles 190 and 191, paragraph 3 of Article 192, Articles 193, 194, 195, and 196, and paragraphs 1 and 2 of Article 197; crimes that represented a public threat or used pathogenic microorganisms as stipulated in Article 349 and paragraph 1 of Article 351; crimes constituting a breach of the safety of public transit and transportation as stipulated in Articles 354 and 355 of the Penal Code; crimes of murder as stipulated in Article 406; crimes related to trading or dealing in drugs and kidnapping of persons, as stipulated in Articles 421, 422, and 423 of the Penal Code, and the amended paragraph (b) of Article 285 and 286 of the Criminal Procedure Code No. 23 of 1971. This enabled the use of the death penalty after it was approved by the prime minister and ratified by the Presidency Council.

## **Section 4: Orders and Resolutions Related to Employment Conditions of State Employees**

1. CPA Order No. 30 of 2003 as amended by Law No. 31 of 2007<sup>(77)</sup> dealt with the employment conditions of state employees. The aforementioned order represented a major shift in guidelines for the conditions of state employment and its salary scale. The order removed many of the rules for appointment and employment set forth in the Civil Service Law, and significantly increased salaries from what they had been under the previous regime. Although the order had some positive effects, it was also misused by different Iraqi governments until 2008, which were able to get people into high leadership positions in public office by taking advantage of a loophole in the order that allowed for the appointment of persons without considering the candidate's previous service and qualifications.
2. Law No. 24 of 2005 (amended), on the return of politicians previously dismissed from office, and Regulation No. 1 of 2009 issued by the interim government. This law aimed to provide fair redress for an important group of victims of crimes and violations perpetrated by the previous regime. This included providing material compensation and other reparations for harms resulting from the crimes and violations they had suffered, including exclusion from public office, education, and discrimination suffered as a result of this. The first and second Articles of the law stipulated that those who had been previously dismissed for political, ethnic, religious, or sectarian reasons should be given employment again in the state, public sector, or mixed sector (which included civilian and military posts as well as internal security). This applied to those who had been removed from their positions during the period from 17 July 1968 until 9 April 2003. This included:

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(77) Order No. 30 of 2003 was abrogated by Law No. 22 of 2008 on the Salaries of State and Public Sector Employees.

- Those who left their positions due to voluntary or forced emigration outside Iraq.
- Those who were detained or arrested by the previous regime.
- Those who were forced into retirement before the legal retirement age.

The provisions of the law included those who were imprisoned or detained for the aforementioned reasons during the period of time set forth in the first paragraph of the first Article of the law, and who as a result were:

- Unable to complete their secondary or university studies.
- Unable to obtain a position, or to take up a position that they had previously been appointed to prior to being imprisoned, detained, or arrested.
- Not appointed, despite having a permanent contract with the state, public sector, or mixed sector.

The law stipulated that the length of imprisonment, detention, or time out of office following dismissal should be taken into account, along with later periods of active service, in determining promotion, raises, and retirement. The retirement age was also raised to 68 for those covered under this law, rather than 65 as was the case for regular employees. It also allowed those who had already reached retirement age at the time the law was promulgated to receive a pension, or if they had died, the pension was granted to their descendants.

During the first years of the occupation, Iraqi ministries witnessed a huge influx in the number of state employees because of the large number of beneficiaries of this law and other laws related to transitional justice, which included direct victims (those imprisoned or killed under the previous regime) and their relatives up to the fourth degree. This was because the policy of exclusion under the previous regime had also applied to fourth-degree relatives.

## **Section 5: Orders and Resolutions on the Law of Political Parties and Entities**

The Coalition Provisional Authority issued Order 97, the Political Parties and Entities Law, which ended the period of one-party rule in Iraq and established the principle of political pluralism. Section 6 of this law suspended any provision of Iraqi law that was inconsistent with the order to the extent of such inconsistency. It abrogated the provision in Iraqi law that had made forming a political party a criminal offense, and ended the one-party system that had been adopted by the previous regime in the early 1970s. This system had permitted some non-Ba'ath political activity to occur, on the condition that it was not taking place within the armed forces. However, parties at that time were required to join an entity called the National Progressive Front, and the law stipulated that participation in any political organization or party that did not join the Front was punishable by death, according to Revolutionary Command Council Resolution No. 176 of 24 February 1974. It classified participation in an unregistered political organization, i.e. operating outside the National Progressive Front,<sup>(78)</sup> as an act of sabotage against state security. Ba'ath party members themselves could also be deprived of their rights and subject to the death penalty if they decided to cut ties with the party or join any other political group, or if they had concealed other political activities prior to joining the Ba'ath party.

Resolution No. 107 of 1974 stipulated that anyone who belongs or belonged to the Arab Socialist Ba'ath Party was to be put to death if they intentionally concealed previous political activity or party ties, or if it was proven that they had other such ties or were working for other interests while being a member of the Ba'ath party.

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(78) The previous regime adopted a system of one-party rule, which was based on the existence of several political parties with a single party as the most powerful, and which led a coalition of the other parties, after approving a general program of work. However, within the context of this coalition, coordination with the ruling party only occurred through the National Progressive Front, and the National Action Charter. In 1978, the Front was disbanded and the Ba'ath party was the only party on the political scene for two years, until the Front was reestablished under the same conditions in 1980.

This was done through making new members sign a pledge acknowledging that they understood the consequences if any of these clauses applied to them. Members of the Ba'ath party could not change their political affiliation by cutting ties with the party and joining another party for any reason. Resolution No. 145 of 1977 stipulated that any person who belonged or belongs to the Ba'ath party and then, after cutting ties with the party, joins any other political party or group or works for any other interest, was subject to execution. The same punishment applied to those who had previously, or were currently trying to recruit members of the party to other organizations. According to Revolutionary Command Council Resolution No. 111 of 1978, the death penalty applied to anyone who tried to recruit a current or previous member of the Ba'ath party to any political party or group.

By contrast, the aforementioned order of the Coalition Provisional Authority stipulated that there would be equality before the law for all political parties, and that political organizations previously formed outside Iraq, or that were in the process of being formed after 2003, had the right to participate in Iraqi political life according to the conditions stipulated in the aforementioned order, the most important of which were:

- a. "No political entity may have or be associated with an armed force, militia or residual element as defined in CPA Order No. 91, Regulation of Armed Forces and Militias within Iraq;
- b. No political entity may be directly or indirectly financed by any armed force, militia, or residual element;
- c. No political entity may put forth any candidate who fails to meet the applicable legal criteria;
- d. Political entities must abide by all laws and regulations in Iraq, including public meeting ordinances, prohibitions on incitement to violence, hate speech, intimidation, and support for, the practice of and the use of terrorism;

- e. Political entities must operate pursuant to the code of conduct that will be promulgated by the Commission-such code must include, among other things, the requirements in Section 4(3)(d) of this Order;
- f. Political entities other than individuals certified as political entities must promulgate a statute to govern their organization and operation, including the method or process for selecting leaders and candidates, and this statute must be available to any member of the public upon request;
- g. Political entities, to compete freely and openly in an election, are free to form coalitions to aggregate interests, and to build a campaign for candidates around coalitions of such interests; and
- h. Political entities must strive, to the extent possible, to achieve full transparency in all financial dealings. In this regard, the Commission may issue regulations with respect to financial disclosure.”

## **Section 6: Orders and Decisions Related to Civil Society**

The previous regime, like all dictatorships, tried to maintain a monopoly over sources of power and authority in society. When it finally managed to overcome its political opposition through containing it within a single political party, it also placed the limited structures for civil society under the auspices of the state. Therefore, it is not possible to talk about a real civil society in the pre-2003 period. For example, within the bounds of the federal government’s authority, there was only a single human rights organization that alone was to represent Iraq’s civil society in regional and international forums. This organization changed its structure after 2003 in order to adapt to the new legal context. However, opposition forces were very active in establishing civil society organizations abroad to expose the regimes’ practices. The same was true for syndicates, trade unions, and cooperatives, which were formed in accordance with particular laws, and which also challenged the regime at home and abroad. The abovementioned organization



was dissolved by the Coalition Provisional Authority order on the De-Ba'athification of Iraqi Society, which included a list of dissolved organizations in the annex to the order. The Coalition Provision Authority addressed the legal framework for civil society legally through two primary tracks:

**Track 1:** The creation of a new legal framework that included the right to form civil society organizations working in Iraq, as well as a system that would allow international and foreign organizations to register and work in Iraq. The Coalition Provisional Authority issued Order No. 45 of 27 October 2003 which was amended by Order No. 61 of 23 February 2004.<sup>(79)</sup> Using these two orders as a legal framework, Iraq registered more than 5,000 local, foreign, and international organizations to work in Iraq.<sup>(80)</sup> In accordance with Order No. 45 in the Ministry of Planning and Development Cooperation, an office for registering non-government organizations was established, whose assets and liabilities were later fully disconnected from the Ministry of Planning and Development Cooperation, and instead linked with the General Secretariat of the Council of Ministers, and placed under the auspices of the Minister of State for Civil Society Affairs.<sup>(81)</sup>

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(79) The two orders abrogated national law, namely, the law structuring the work of non-governmental organizations (No. 12 of 2010), issued by the Council of Representatives on the last day of its first parliamentary session. The Presidential Council ratified the new NGO law on 2 March 2010; the law went into effect on 7 April 2010 and was published in the Official Gazette.

(80) Iraq experienced an explosion in the number of civil society organizations. By October 2007, there were 5,669 organizations operating in different parts of Iraq. According to government data, these organizations served diverse purposes, including human rights advocates, human rights awareness, and advocacy groups for particular sectors of society, such as women, children, and persons with disabilities, among others. After the NGO law (No. 12 of 2010) went into effect, organizations were required to align their activities with the provisions of the law. By 2017, the number of non-governmental organizations numbered 3,094 with different specializations, according to Ministry of Planning statistics.

(81) This separation occurred in accordance with Governing Council Resolution No. 16 of 2005, which amended Order No. 45 of 2003. The position of minister of civil society affairs was later removed, and the NGO Registration Office became the entity responsible for this sector in accordance with Law No. 12 of 2010.

**Track 2:** Arranging the affairs of syndicates, trade unions, and cooperatives using special laws and restructuring their administrative councils using a democratic approach with certain verification procedures for candidates, in accordance with the order for the De-Ba'athification of Iraqi Society. The Governing Council issued Resolution No. 3 of 2004 for this purpose. The resolution stipulated the following:

- I. The administrative councils of unions, syndicates, professional organizations, and associations, excepting charity organizations, shall be dissolved.
- II. Temporary administrative councils for unions, syndicates, professional organizations, and associations shall be established to oversee the process of preparing general elections for the organizations' permanent councils, according to the law and their rules of procedure.
- III. The organizations' administrative councils mentioned in the first clause of the resolution have legal responsibility for the organizations' funds and may make legal inquiries into any loss of funds until they these can be turned over to the interim councils that shall take their place.
- IV. The Financial Regulatory Authority shall monitor and verify the finances and accounts of the organizations covered by this resolution.
- V. The chairmen and members of former administrative councils who fall under the criteria of the resolution for the De-Ba'athification of Iraqi Society may not be nominated for the new administrative councils.
- VI. The Committee for Civil Society Affairs in the Governing Council shall oversee the formation of the interim councils and then prepare for new elections according to the elections law enacted by the Governing Council.
- VII. The relevant ministries and agencies are responsible for the implementation of this resolution.
- VIII. This resolution shall be effective and in force from the date it is issued.

During the years 2003, 2004, and 2005, there was a lack of real political participation from Iraqi civil society in developing the legal frameworks for the transitional stage. The activities of the few existing civil society organizations were mostly limited to those established by opposition forces abroad, which tended to represent the perspective of those opposition groups.

### **Topic 3: Ministries, Agencies, and Institutions Responsible for Managing the Transition**

This section examines the ministries, agencies, and institutions created to manage the transitional justice process in Iraq. The first part of this section considers the entities that were created to address the violations that occurred, using transitional justice mechanisms, and the second deals with the new frameworks that were created during the transitional justice process.

#### **Section 1: Transitional Justice Entities Created to Address Violations**

These are the entities created to address violations that occurred during period of Ba'ath party rule (1986-2003). The entities were given a set period of time for addressing these violations and to return affairs to how they had been before these violations occurred. We will briefly examine a few entities:

##### **Subsection 1: The Accountability and Justice Commission**

The beginnings of a transitional justice system began to emerge when the civilian administrator of the Coalition Provisional Authority issued Order No. 1 of 2003 on the De-Ba'athification of Iraqi Society. This order focused on a series of non-judicial measures that were to be taken against Ba'ath party elements and perpetrators of human rights violations, namely by excluding them from political life, public office, and from positions of authority in the state apparatus. After this order was passed,

a De-Ba'athification Commission was formed by Resolution No. 21 of 2003 of the transitional Governing Council, which was replaced by Law No. 10 of 2008, and the De-Ba'athification Commission was renamed the National Commission for Accountability and Justice. This was the first institution for transitional justice in Iraq. The Law of Administration for the State of Iraq for the Transitional Period (the interim constitution) stipulated the forming of this commission in Article 49.<sup>(82)</sup> It was also included in the constitution that went into effect in 2005.

### **Subsection 2: The Iraq Property Claims Commission**

The Coalition Provisional Authority Regulation No. 12 of 2003 created the Iraqi Property Claims Commission.<sup>(83)</sup> The Coalition Provisional Authority and Governing Council had been compelled to quickly form this commission in order to address the enormous legacy of Ba'ath party violations, namely those relating to the movable and immovable assets of victims. There were many different kinds of appropriation of property that had occurred under the former regime, and many reasons why this had occurred. This included what was laid out in Revolutionary Command Council resolutions on the outright confiscation of land, as well as rulings on land appropriation in the context of prison or death sentences handed down by special courts for political reasons, or arbitrarily, during criminal proceedings in normal courts. Still others occurred through appropriation of property for the public benefit, through criminal fraud, via the Law of Eminent Domain No. 12 of 1981, or from expropriation to create demographic change.

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(82) Article 49 of the Law of Administration for the State of Iraq for the Transitional Period stipulated that the establishment of national commissions such as the Commission for Integrity, Commission for the Resolution of Real Property Disputes, and the De-Ba'athification Commission was sanctioned, as was the establishment of other commissions after the law went into effect. Members of these national commissions were to continue their work after the law went into effect, taking into consideration what was set forth in Article 51.

(83) Order 12 was abrogated by the Law of the Commission for the Resolution of Real Property Disputes (No. 62 of 2006), which was in turn abrogated by Law No. 13 of 2010, which is still in effect.

There were other instances of land appropriation related to the regime's decisions to remove nationality from some Iraqis who were killed or expelled from the country, who were accused of being pro-Iran. This was the case with the Feyli Kurds, who were included in the Revolutionary Command Council Resolution No. 666 of 1980 on rescinding of nationality and forced emigration, and Iraqi Jews who had their nationality rescinded pursuant to Law 1 of 1950.<sup>(84)</sup> For political reasons, this law is still in effect, along with other laws pertaining to this situation.<sup>(85)</sup> Under Resolution No. 1293 of 1975, Iraqi Jews were allowed to return to Iraq and enjoy all their rights as Iraqi citizens, and the Iraqi government would ensure that Jews received their full constitutional rights, including equality and the right to live in peace without discrimination. However, the Law of Nationality (No. 26 of 2006) voided this resolution of this substance by contradicting it in Article 14, which held that previously rescinded nationality shall be restored, with the exception of Iraqi Jews.<sup>(86)</sup> There was also the case of Arabs whose held a Gulf nationality but owned property within Iraq. Most of the properties had been confiscated during the first and second Gulf wars.

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(84) Law No. 1 of 1951 stipulated that the Council of Ministers could rescind Iraqi nationality from Iraqi Jews who chose to leave Iraq permanently after signing a special form before an official appointed by the Minister of the Interior. If the person in question left Iraq or tried to leave illegally, they would have their nationality revoked by decision of the Council of Ministers. If the person had previously left Iraq illegally it was considered the same as leaving Iraq permanently, if they had not returned during the two-month period since the law had gone into effect, and their nationality was likewise removed at the end of that period. The Minister of the Interior could order the deportation of anyone who had their nationality removed in accordance with the first and second Articles, unless the person could prove sufficient need to reside in Iraq temporarily, due to legal or judicial necessity or in order to preserve the rights of undocumented persons. This law was to remain in effect for a year from the date it originally went into force and could be suspended at any time during this period through a royal decree published in Official Gazette.

(85) See: Law No. 12 of 1951 and Resolution No. 5 of 1951.

(86) Article 14 stipulated that if an Iraqi person lost their nationality, and that as a result their minor children also lost their nationality, then the children shall have their nationality restored upon their request, if they returned to Iraq and resided there at least one year. They were considered Iraqi from the date of their return. However, those who had their nationality rescinded under the provisions of Law No. 1 of 1950 and No. 12 of 1951 could not have their children's nationality restored in this way.

Article 22 of the Coalition Provisional Authority regulation designated the groups that could seek restoration for their property and specified the period of time to which the order applied. It stipulated that any natural or juridical person had the right to file a request with the Iraqi Property Claims Commission, provided that the claim met the following conditions:

First: That the provisions of this law applied to property that met the conditions during the period from 17 July 1968 until 9 April 2003, which included claims that:

A.

1. "Arose between 17 July 1968 until 9 April 2003, inclusive;
2. Involves immovable property, assets affixed to immovable property, easements, or servitudes ('real property') or an interest in real property;
3. That was confiscated, seized, expropriated, forcibly acquired for less than full value, or otherwise taken, by the former governments of Iraq for reasons other than land reform or lawfully used eminent domain. Any taking that was due to the owner's or possessor's opposition to the former governments of Iraq, or their ethnicity, religion, or sect, or for purposes of ethnic cleansing, shall meet this standard; or

B.

1. Arose between March 18, 2003 and June 30, 2005, inclusive;
2. Involves real property, or an interest in real property;
3. That was confiscated, seized, expropriated, forcibly taken for less than full value, or otherwise acquired and/or reacquired as a result of the owner's or possessor's ethnicity, religion, or sect, or for purposes of ethnic cleansing, or; by individuals who had been previously dispossessed of their property as a result of the former Ba'athist governments' policy of property confiscation."

Prior to the formation of the De-Ba'athification Commission, the Coalition Provisional Authority issued Regulation No. 4 of 24 June 2003, which created the Iraqi Property Reconciliation Facility. This regulation was later rescinded by Regulation No. 8, which gave the Governing Council the authority to create an Iraqi Property Claims Commission.

Annex No. 12 of 2004 was added to Regulation No. 8 in order to establish the Iraqi Property Claims Commission to oversee the resolution of property disputes through just legal avenues, and to support voluntary resolution of conflicts. In 2006, this set of orders and regulations were abrogated, and the Law establishing the Commission for the Resolution of Real Property Disputes was adopted (No. 2 of 2006), which was in turn abrogated by Law No. 13 of 2010, which is the law currently in effect. Article 3 of this law applied to:

- a) Property that had been confiscated for political, ethnic, religious, or sectarian reasons.
- b) Property that had been expropriated without compensation in violation of legal procedures.
- c) Property of the state taken without any compensation, or with only symbolic compensation, by the officials of the former regime, or which was allocated to them.
- d) Cases of appropriation which occurred by decision of judiciary committees under the Law of the Commission for the Resolution of Real Property Disputes (No. 2 in 2006).
- e) Property that had been seized by order of the former regime, or by resolution of the (dissolved) Revolutionary Command Council, and which violated the law, or through ex post facto application of the resolutions issued under the Law of Commission for the Resolution of Real Property Disputes (No. 2 of 2006).

Second: Properties that had been confiscated as part of agricultural reform laws or restitution proceedings in certain governorates were excluded from the provisions of paragraph (b) in the first clause of this Article.

The Law of Administration for the State of Iraq for the Transitional Period provided for the formation of the Commission in Article 26, and also adopted the Constitution of the Republic of Iraq in Article No. 136. The Iraq Property Claims Commission was therefore the second institution of transitional justice established in Iraq.

### Subsection 3: The Supreme Iraqi Criminal Tribunal

Long before the regime was toppled, there had been discussions about setting up the tribunal. Opposition groups had previously indicated their intention during the London and Salah al-Din Conferences to prosecute human rights violations committed under the previous regime. The US had also long been committed to the opposition's goal of establishing an international criminal tribunal in Iraq. However, Iraq had not been party to the Rome Statute under the previous regime. The general feeling was therefore that it would be better to set up tribunals at the national level, rather than special, hybrid, or international courts. During this process, many graves were unearthed, and documents from the previous regime fell into different hands and were taken outside of the country, which undermined the Iraqi public's trust regarding why the occupying power and opposition forces were setting up these tribunals. Some of these documents were later discovered, exposing the names of undercover intelligence and security agents, or investigating officers who had committed the gravest crimes. This led to popular acts of retribution outside the court system, until the religious authority (marja') Ali al-Sistani intervened and issued a number of fatwas against such acts.<sup>(87)</sup> This prompted the Coalition

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(87) Grand Ayatollah Ali al-Sistani, a Shi'ite marja', was asked the following questions, and issued the following legal opinions (fatawa):

1. Question: Many of the cronies of the old regime had a direct or indirect role in harms committed against the people. These are some of the questions we would like to have answered. If it has been confirmed that such a person had a direct role in the killing of innocents, either by their own admission or otherwise, is it permissible to engage in retribution (qisas)?

Answer: Retribution is only permissible for the deceased's kin after the crime has been proven in a court of law. This is exclusively the right of the person's relatives, and it is not permissible to do so until a ruling on the matter has been issued by a judge (qadi).

2. Question: In the case of a person who, based on a written report against some believers, had a primary role in their execution, is it permissible for the deceased's kin to kill this person, compel them to leave the city, or something similar?

Answer: It is not permissible to take such punitive measures. The matter must be delayed until a court of law can examine the case.

3. Question: If a person was important member of the former Ba'ath regime, or cooperated with the security agencies of the regime, is this sufficient cause to kill this person?



Provisional Authority and the Governing Council to expedite the process of forming the Supreme Iraqi Criminal Tribunal to prosecute the top figures from the previous regime. Committees composed of five judges<sup>(88)</sup> were set up to carry out the judicial proceedings. One of the committee members, the international lawyer Salem Chalabi, prepared a draft law for establishing the tribunal based on a model that had been prepared by international legal expert Cherif Bassiouni, though many amendments were made to this initial draft.<sup>(89)</sup>

On 10 December 2003, Coalition Provisional Authority Order No. 48 authorized the transitional Governing Council to form an Iraqi Special Tribunal for prosecuting members of the previous regime. Law No. 1 of 2003 established the Iraqi Criminal Tribunal for Crimes Against Humanity, which was later abrogated by Law No. 10 of 2005, which established the Supreme Iraqi Criminal Tribunal. The latter was issued by the National Assembly in accordance with the Law of Administration for the State of Iraq for the Transitional Period (2004). The jurisdiction of the tribunal was addressed in Article 1, paragraph 2, which stated that the tribunal's jurisdiction applied to every natural person, Iraqi or non-Iraqi, who was residing in the country and had been accused of committing one of the crimes

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Answer: No, it is not sufficient. This falls within the purview of a court of law, so you must wait until such a court is formed.

4. Question: After the fall of the regime, a huge number of documents from the security agency fell into the hands of some believers. Is it permissible to publish the names of the regime agents and collaborators contained in these documents?

Answer: No, it is not permissible to do that. You must hold onto this information and give it to the relevant agency that has jurisdiction in these cases.

5. Question: Some of those whose names have come up as collaborators with security agencies have claimed that they only collaborated under coercion. Is it permissible to denounce them before it has been confirmed whether they acted of their own free will?

Answer: No, it is not permissible to denounce them until it is confirmed, except in certain cases where higher interests are at stake.

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(88) The five-person committee consisted of the judge Dara Nur al-Din, the judge Wael Abdul Latif, the lawyer Ahmed Shaya al-Barrak, and the international lawyer Salem Chalabi.

(89) See: Report of the International Center for Transitional Justice on the establishment of the Supreme Iraqi Criminal Tribunal and its first trials.

listed in Articles 11, 12, 13, or 14<sup>(90)</sup> of this law, if the crime had been committed between 17 July 1968 and 1 May 2003 in the Republic of Iraq or elsewhere. These crimes included:

- a. Crimes of genocide
- b. Crimes against humanity
- c. War crimes
- d. Violations of Iraqi law as stipulated in Article 14 of this law

Article 26 of the Law of Administration for the State of Iraq for the Transitional Period provided for the establishment of the tribunal, as did Article 134 of the current Iraqi constitution of 2005. The tribunal was therefore the third institution of transitional justice in Iraq.

#### **Subsection 4: The Martyrs' Foundation**

The Martyrs' Foundation was another institution of transitional justice in Iraq. It was established through Law No. 3 of 2006 for those who had lost their lives as a result of the violations committed by the previous regime. This law set out a new legal definition for martyrs that differed from earlier definitions used in the Iraqi legal system.<sup>(91)</sup> Article 5, paragraph 1, defined martyr as any Iraqi citizen who lost their life due to their opposition to the former regime as a result of their political beliefs or affiliations, or aid or support rendered to the opposition, and which occurred through direct or indirect action taken by the regime, or due to imprisonment, torture, genocide, chemical weapons, crimes against

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(90) See Article 11 of the law establishing the tribunal, which lists the acts that constitute crimes of genocide; Article 12, which lists the acts that constitute crimes against humanity; Article 13, which lists the acts that constitute war crimes; and Article 14, which specifies the crimes that violate Iraqi law.

(91) The definition of martyr was limited under Iraqi law to what was included in the legal codes on military retirement and the law of service and retirement for internal security forces. Those who were considered to be affiliated with either of these two institutions were, under the (dissolved) Revolutionary Command Council resolutions No. 1564 of 1980 and No. 1400 of 1983, also classified as martyrs with the same rights as martyrs defined under the aforementioned laws with regard to civil employees, Popular Army militias, or night watchmen. Resolution No. 1564 was abrogated by Coalition Provisional Authority Resolution No. 12.

humanity, ethnic cleansing, or forced displacement. Based on this definition, there came to be two categories of martyrs: those who were victims of war and security operations, and those who were victims of the previous regime. According to this definition, the Martyrs' Foundation only served the victims of the previous regime. In the Kurdistan Region, the equivalent institution was the Ministry of Martyrs and Anfal Affairs, which replaced the Martyr Foundation, which was created under Law No. 4 of 1997. The latter was abrogated through the aforementioned federal law (No. 3), and which was in turn replaced by Law No. 2 of 2016 (the Law establishing the Martyrs' Foundation). This law expanded the legal definition of martyr to include a third additional categories of martyrs in Iraq, namely victims of the Popular Mobilization Forces victims of terrorism, and victims during the war with ISIS. As a result, it no longer functioned exclusively as an institution of transitional justice.

Articles 3 and 4 of the law set forth the objectives of the institution and scope of intertemporality. It stipulated the following:

- I. Aid shall be provided to families of martyrs, including social and economic welfare support, in addition to financial and symbolic compensation commensurate with the sacrifice made by the martyr.
- II. Suitable work and study opportunities should be provided to members of martyrs' families, according to their qualifications; they shall be given priority for such positions.
- III. Programs and other forms of assistance shall be provided for families of victims in legal, economic, social, financial, health, and educational issues, among others.
- IV. The values of martyrdom, sacrifice, and redemption in society shall be promoted through:
  - a) Holding cultural, artistic, and media activities.
  - b) Building monuments and museums and naming public institutions after martyrs.
  - c) Requiring all ministries and their staff, as well as institutions and associations not connected with ministries, to issue guidelines to facilitate procedures for martyrs' families.

- V. The sacrifices of martyrs, the suffering of their families, and the violations and crimes committed against them shall be highlighted through various activities and events.
- VI. National, regional, and international agencies shall acknowledge the martyrs' sacrifices and the injustices that they and their families have suffered, and issue a UN resolution criminalizing the Ba'ath party.
- VII. The resources of the investment authority shall be developed so that its revenue can be used for the purpose of providing aid and support to families of martyrs.

According to Article 4, the provisions of the law apply to the following:

- a. Cases of martyrdom that occurred between 8 February 1963 and 18 November 1963, excepting those who were executed for committing murders unconnected with their opposition to the Ba'ath party.
- b. Cases of martyrdom that occurred between 17 July 1968 and 8 April 2003.
- c. Cases of martyrdom that occurred after 11 June 2014 as specified in Article 1, paragraph (b).<sup>(92)</sup>

The Martyrs Foundation was therefore one of the institutions of transitional justice in Iraq and was established in accordance with Articles 104 and 132 of the Iraqi constitution.<sup>(93)</sup>

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(92) Paragraph (b) applied to every Iraqi citizen who gave their life in the course of serving their country and the religious authority (marja') after 11 June 2014. It stipulated that the Popular Mobilization Forces and Martyrs' Foundation, in coordination with other relevant entities, the Kurdistan Region, and governorate councils, were responsible for recording the names of martyrs. Members of the Popular Mobilization Forces who had been martyred during the fight against the terrorist organization ISIS, and whose names had not been recorded, were to have their cases brought before the committee stipulated in Article 9, paragraph 1, in order to ensure they received their due rights and benefits.

(93) Article 104 of the constitution provided for the establishment of a foundation to be known as the Martyrs' Foundation which was to be connected with the Council of Ministers. Its operations and scope were to be carried out in accordance with the law establishing it. Article 132 of the constitution stipulated that (1) the state was responsible for caring for the families of martyrs, political prisoners, and those harmed by the unjust practices of the former dictatorial regime and that (2) the state was responsible for providing reparations for families of martyrs and those injured as a result of terrorist acts.

### **Subsection 5: The Political Prisoners' Foundation**

In accordance with Law No. 4 of 2006, a public institution known as the Political Prisoners' Foundation was formed as one of the institutions of transitional justice in Iraq, according to what was stipulated in the Iraqi constitution (Article 132, paragraph 1). Article 2 of the law stated that the foundation's objective was to address the situation of political prisoners and detainees and to provide material and symbolic compensation in accordance with the damages suffered during their imprisonment or detainment. In order to do so, the following legal principles were set forth in Article 3 of the law, which stipulated that the foundation shall undertake the following measures:

1. Designate political prisoners and detainees according to the provisions of this law.
2. Offer various benefits for the groups included in the provisions of the law through cooperation with non-governmental organizations in different sectors.
3. Providing material reparations for political imprisonment and detainment commensurate with the extent of harms suffered and the regulations issued for this purpose.
4. Providing work and study opportunities, in accordance with the person's qualifications, and giving priority for such opportunities.
5. Providing aid such as promotes the economic and social prosperity of victims and their families regarding legal and economic support, health care, and social security, among others.
6. Promoting and commemorating the values of sacrifice and redemption in the media and the arts, and through political and social activities.
7. Working to attract various local and international entities to provide material and symbolic support for the foundation.

### Subsection 6: Forced Disappearance and Mass Graves

On 12 July 2010, Law No. 17 of 2010 was issued, which was the law that made Iraq party to the International Convention for the Protection of All Persons from Enforced Disappearance. At the same time, the term “forced disappearance” entered the Iraqi legal lexicon for the first time. Iraq became a party to this convention out of a desire to prevent this crime from occurring in the future. The country had previously suffered extensively from this phenomenon and its repercussions, since disappearance had been one of the main strategies of the former regime that ruled Iraq between 1968 and 2003. There were thousands of Iraqis who were killed after being detained and disappeared for political, ethnic, or sectarian reasons; the whereabouts and fate of the vast majority of these persons remain unknown. The reports of the special rapporteurs on human rights in Iraq, Max van der Stoep and Andreas Mavrommatis, between 1991-2004 indicated that this phenomenon was widespread throughout the country.<sup>(94)</sup> The reports also indicated that these crimes had been condemned in several UN Commission on Human Rights and General Assembly resolutions issued between 1991 and 2003.<sup>(95)</sup>

Iraqis endured a regime that imprisoned persons and cut them off from the outside world, including preventing communication with their family or receiving legal aid. However, even if families did not have knowledge of the disappeared person’s whereabouts, information gathered from here and there usually indicated that they had been detained for security or political reasons. For the most part, families did not communicate directly with security agencies out of fear that others in the family would be detained. They usually resorted to reporting the person missing at a police station

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(94) See UN documents No. E/CN.458/1994/, E/CN.456/1995/, E/CN.442/2001/, and E/CN.436/2004//Add.1.

(95) See: UN General Assembly Resolution 14448/ as set forth in document A/RES/48144/ of 28 January 1994, Resolution 20349/ (Document A/RES/4923/) of 13 March 1995, Resolution 10651/ (Document A/RES/51106/) of 3 March 1997, and Resolution 17456/ (Document A/RES/56174/) of 27 February 2002. The last of these condemned the gross human rights violations taking place, including the cases of “enforced or involuntary disappearances, routinely practiced arbitrary arrests and detention, and consistent and routine failure to respect due process and the rule of law.”

as a legal measure that created a record of what had happened for future proceedings. There could also be a statement from the security agencies of intent to detain the person. After a report on the disappearance was filed via Ministry of Interior channels, or more directly through the Ministry of Interior searching for their whereabouts in coordination with the judiciary, or the legal status of the person was otherwise determined as missing, then the case was dealt with according to the mechanisms established through the Law on the Care of Minors No. 78 of 1980 (Articles 87, 92, 93, and 95).<sup>(96)</sup>

On 25 October 2002, with the growing threats from the international coalition to wage war on Iraq, the regime issued a law of general amnesty (No. 225 of 2002) entitled the Resolution for General, Comprehensive, and Final Amnesty for Iraqis Sentenced to Death or Imprisonment. Iraqis felt that the amnesty was nothing more than whitewashing, since it released all those who had been put in prison or pre-trial detention. The law of amnesty stipulated that there should be an exception for crimes of murder, and payment of what was owed for financial crimes or crimes related to the payment of fines, but that the law would not grant any exceptions for political crimes. In 2002, a large number of cases were filed against the regime by families who believed that their children were held under administrative detention and had not yet been released as part of the general amnesty. This led to the formation of a governmental committee to process these requests and investigate the whereabouts of the disappeared persons. The approach of this committee was apparent in regime documents pertaining to its security agencies: most of the documents were given to

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(96) Article 87 of the aforementioned law stated that the announcement of a civilian's disappearance should come from a court, and from the Ministers of Defense and the Interior in case of a non-civilian disappearance. Article 92 stated that a case of disappearance could end due to extinguishment, the death of the person concerned, or if the court ruled for their legal death and the judges confirmed the death. Article 93 likewise stipulated that case could end as a result of the following three situations: conclusive evidence of the death, the passage of four years since the date of disappearance, or the passage of two years if the circumstances indicated probable death. Article No. 95 of the law stated that the date of death was to be the date the court issued a ruling on the disappeared person's death.

Ministry of Human Rights, which subsequently archived them. In examining these documents, we find in the correspondence of the security agencies that it had indeed detained persons and transferred them between prisons or other sites of arbitrary detention for years, after which they were disappeared to unknown locations. Cases in which persons had fallen out of communication were not isolated incidents but rather a widespread phenomenon. The teams from the Ministry of Human Rights that were charged with archiving these documents did not find that the committee had been able to finish its work, because the occupation of Iraq began on 9 April 2003, while military operations had begun in March of that year.<sup>(97)</sup>

The UN has condemned the forced disappearance of many Iraqi citizens in different reports and resolutions.<sup>(98)</sup> However, the reality was that this was a regular phenomenon and not a series of isolated incidents. The Working Group on Enforced or Involuntary Disappearances found over the course of 20 years that Iraq was one of the countries with the highest rates of forced disappearance, with a total of 16,400 cases in that period,<sup>(99)</sup> most of which occurred prior to 2003. During 2012, the Iraqi government formed a special committee for addressing these cases and presenting information on them to the working group. The committee included representatives of some of the transitional justice institutions in Iraq as well as other relevant Iraqi institutions. It found that there was a large number of cases of victims of the previous regime, and is preparing lists

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(97) I accessed this information in my professional capacity as the general director of the Humanitarian Affairs Department in the Ministry of Human Rights, which was charged with investigating this matter.

(98) See UN documents No. E/CN.458/1994/, E/CN.456/1995/, E/CN.442/2001/, and E/CN.436/2004// Add.1 and UN General Assembly Resolution 14448/ as set forth in document A/RES/48144/ of 28 January 1994, Resolution 20349/ (Document A/RES/4923/) of 13 March 1995, Resolution 10651/ (Document A/RES/51106/) of 3 March 1997, and Resolution 17456/ (Document A/RES/56174/) of 27 February 2002. The last of these condemned the gross human rights violations taking place, including the cases of “enforced or involuntary disappearances, routinely practiced arbitrary arrests and detention, and consistent and routine failure to respect due process and the rule of law.”

(99) See: Annual reports from the working group and the position of States on the cases of forced disappearance.



to present to the working group. However, the website of the group indicates that the numbers do not reflect changes based on what the committee will present to the group.

After the fall of the regime and the end of military procedure, the families of forcibly disappeared persons went to the security and military sites, grave sites in which executed persons were buried, and other sites that had been mentioned in the testimony of survivors or statements given by security officials as sites of mass graves. The largest mass grave was discovered in the Mahawil region, and another in the site of the fourth army division in the Maysan governorate, while marked graves were found in the Karkh cemetery and Mohammad Sakran cemetery at the outskirts of Baghdad, and at other various sites in all Iraqi governorates. This led the marja' Ali al-Sistani to issue fatwas prohibiting the unearthing of mass graves without permission of the ruler (hakim) and stipulating that an international commission should supervise these affairs to ensure that evidence of crimes against humanity committed by the previous regime were preserved.

The UN Assistance Mission for Iraq (UNAMI) proposed to the Ministry for Human Rights that a legal structure for these efforts should be established in the form of a national center for missing and disappeared persons. Workshops were convened for this purpose in Baghdad and Amman in cooperation with the International Commission on Missing Persons (ICMP), which resulted in a draft law for an Iraqi national center for missing and disappeared persons to serve as the institutional framework for dealing with missing and disappeared persons in Iraq under the previous regime, and as a functional entity to deal with any similar cases in the future. However, the political forces in the National Assembly and elected Council of Representatives came together to obstruct the proposed draft law. As a result, it never came to fruition.<sup>(100)</sup> Law No. 5 of

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(100) The above information is from my work preparing the draft law for the National Center of Missing and Disappeared Persons in coordination with UNAMI and ICMP.

2006 (amended), on the protection of mass graves, and its regulations (No. 1 of 2007) were passed as a legal and procedural framework for dealing with the question of mass graves in Iraq. The first Article of this law stipulated the following objectives:

- a) Protect mass graves from unauthorized meddling, unearthing, or exhuming without official approval from the Ministry of Human Rights.<sup>(101)</sup>
- b) Organize the exhuming of mass graves according to legal procedure and humanitarian principles with the aim of identifying the victims, and carry out appropriate legal proceedings within the scope of this law.
- c) Protect and preserve evidence that could be used to help identify victims.
- d) Identify the perpetrators of these crimes and help gather evidence against them in order to prove individual criminal responsibility for crimes committed against victims, and to prosecute these crimes in court.

The Ministry for Human Rights was to play a leading role in the process of unearthing mass graves, counting the number of graves, and documenting their contents. We will examine the institutional, legal and procedural frameworks in detail during later discussion of the institutions of transitional justice in Iraq.

With regard to the Kurdistan Region, the Region issued Law No. 3 of 1999<sup>(102)</sup> on the affairs of persons missing as a result of genocidal campaigns.

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(101) The Martyrs' Foundation replaced the Ministry for Human Rights after the latter was dissolved in accordance with executive order 312 of 2015.

(102) The Kurdistan Region gained a special status after 1991, when the Region became semi-autonomous from the central Iraqi government. The Law of Administration for the State of Iraq for the Transitional Period (2004) and the current Iraqi constitution (of 2005) ratified all the laws that had been issued by the Region's parliament since 1992. Article 141 of the constitution stated that the laws passed in the Kurdistan Region since 1992 would remain in effect, and that the resolutions issued by the government of the Kurdistan Region, including contracts and court rulings, would remain in effect provided that they had not been amended or abrogated by a competent authority in accordance with the laws of the Kurdistan Region, and that they did not violate the constitution.

The law included the following provisions for disappeared persons:

1. Persons who went missing during the forced displacement of Feyli Kurds by the Iraqi government in 1980. December 31, 1980 was considered the date of their disappearance if the investigations into their whereabouts had exhausted all potential avenues and four years had passed since they went missing.
2. Persons who went missing during the genocide against Barzani Kurds by the central Iraqi government in 1980. December 31, 1980, was considered the date of their disappearance if the investigations into their whereabouts had exhausted all potential avenues during a four-year period following their disappearance.
3. Persons who went missing during the genocidal campaigns and chemical attacks against the city of Halabja by the central Iraqi government on 16 March 1988, which was considered the date of their disappearance, if the investigations into their whereabouts had exhausted all potential avenues during a four-year period following their disappearance.
4. Persons who went missing during the Anfal campaigns of 1988. December 31, 1988 was considered the date of their disappearance if the investigations into their whereabouts had exhausted all potential avenues during a four-year period following their disappearance.
5. Persons who went missing during the uprising of March 1991 and the subsequent exodus of a million people from Iraq. December 31, 1991 was considered the date of their disappearance if the investigations into their whereabouts had exhausted all potential avenues during a four-year period following their disappearance.

Under this law, after a set period of time had passed, the missing person was presumed dead and the competent court was to issue a death certificate for such missing persons upon the request of one of their relatives (up to the fourth degree) after obtaining confirmation of the person's martyr status from the competent administrative body, provided that the missing person's circumstances were among those covered under this

law. If a relative of the degree stipulated in the law did not exist, any relevant party or government entity had the right to request the issuance of the death certificate.

Although the law covered many victims of forced disappearance, there were key groups of victims who were excluded from this law, including those killed as a result of the armed conflict between the two main political parties in the Kurdistan Region (in 1994-1997-),<sup>(103)</sup> and the Communist Party victims killed during the conflict with the Patriotic Union of Kurdistan in 1983, in what was known as the Peshtashan massacre.<sup>(104)</sup> The Iraqi armed forces, during their involvement in the armed conflict between the two parties, had carried out extrajudicial executions and the forced disappearance of opposition party members based in the Kurdistan Region, including the Iraqi National Congress party. The Ministry of Human Rights has documented information related to mass graves for persons killed in 1996 by the federal Iraqi forces.<sup>(105)</sup>

In accordance with Law No. 4 of 1997, the Martyr Foundation was set up in the Kurdistan Region, which was later abrogated by Law No. 8 of 2006, which established the Ministry of Martyrs and Anfal Affairs in the Kurdistan Region, and which was to oversee the following matters:<sup>(106)</sup>

- I. Offer material and symbolic support for families of martyrs, disappeared persons, and victims of the Anfal campaign, in order to help them live with freedom and dignity.

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(103) Regime forces were involved in the fighting in 1996; National Democracy Party forces regained control of Erbil after eliminating the Patriotic Union of Kurdistan forces.

(104) See also: Khalf al-tawahin (the literal meaning of Peshtashan in Kurdish), by the Communist writer Amer Hussein. There were more than 70 members of the Communist party killed in the massacre. In 2005, several Communist party cadres in Baghdad presented a statement to the transitional Governing Council in which they called for Jalal Talabani, a member of the council at that time, be tried in international court for these crimes.

(105) See reports of the Ministry of Human Rights on mass graves in Iraq.

(106) See Article No. 2 of the law creating the ministry.

- II. Hold special ceremonies to commemorate martyrs and victims of the Anfal campaign and work to have these crimes acknowledged locally and internationally.
- III. Propose laws and amendments to the Council of Ministers in order to achieve the ministry's goals.
- IV. Establish a general policy for developing the ministry's resources and use them according to the ministry's national and patriotic obligations and social and economic goals, and implement this in accordance with the relevant laws.
- V. Work with relevant agencies in educational, cultural, social, health, economic, and construction spheres in order to help families of martyrs and Anfal victims and establish programs in order to implement this.
- VI. Work to improve the circumstances of those covered under this law through cooperation between the ministry and international and local funding bodies, and governmental and non-governmental organizations, in accordance with the relevant laws.
- VII. Document everything related to the martyrs, Anfal victims, and victims of chemical weapons attacks in order to demand that the federal government and the entities that provided Iraq with these weapons provide reparations to the victims' families.
- VIII. Coordinate with the federal government, international governmental, and non-governmental organizations in order to prosecute those involved in planning or carrying out genocide against the people of the Iraq in the competent court for retributive justice.
- IX. Coordinate with relevant agencies in order to ensure housing is available for families of martyrs, Anfal victims, and victims of chemical attacks.
- X. Investigate the whereabouts of Anfal victims, search for mass graves, and return remains to the victims' hometowns.

### **Subsection 7: Forced Displacement and Demographic Change**

The policy of forced displacement was not limited to the Ba'ath Party alone. Throughout the twentieth century, Iraq suffered multiple displacement operations prior to those committed against the Feyli Kurds in 1980. In 1933, there were 63 Assyrian villages in the Dohuk and Mosul governorates subjected to massacres that killed more than 600 people. After the massacres, most Assyrians fled to Syria, where they still live and hold Syrian nationality, although they continue to make demands to return to their native country of Iraq.

The same was true for the wave of forced migration of Iraqi Jews during or after 1950. As previously mentioned, there were legal frameworks put in place to rescind the nationality of Iraqi Jews and confiscate their property. In 1980, the regime issued its infamous Resolution No. 666 which rescinded Iraqi nationality from all persons of foreign origin, if it could be proved that they were not loyal to Iraq and its people, and the national and social objectives of the revolution. Under this resolution, the Minister of the Interior was responsible for overseeing the deportation of all persons who had lost their nationality in accordance with paragraph 1, unless they could formally prove sufficient cause to remain in Iraq due to legal or judicial necessity or to protect the rights of undocumented persons.

It is worth mentioning that some of those affected by the resolution for forced displacement were those who had in fact had Iraqi nationality since the first Nationality Law was passed in 1924, but who had tribal affiliations that suggested Iranian roots, which was considered sufficient cause to strip them of their Iraqi nationality. They were also often Shi'ites, and the vast majority were working in trade and manufacturing. The resolution on forced displacement was implemented after persons working in these sectors were invited to a meeting at the chamber of commerce, whereupon they were suddenly detained. Their families were later persecuted and their properties confiscated,

while the youth were sent to a special detention facility. The order for their expulsion was then carried out at the Iranian border. Many were killed during this operation because they were forced to cross over areas with landmines.

The youth were held in detention facilities belonging to the General Security Directorate. Some were transferred to the Nograth Salman Prison in the desert in the Muthanna governorate, where they were later executed and buried in mass graves, which were subsequently discovered by the Ministry for Human Rights and the Martyrs' Foundation. Other graves in Feyli Kurdish villages in the Haidaria region were found to contain entire families. The cases under investigation were given to the Supreme Iraqi Criminal Tribunal, which was responsible for prosecuting members of the former regime.

Iran received hundreds of thousands of Feyli Kurds who had been expelled from Iraq, although in many cases Iran refused to acknowledge their Iranian origins. Instead, it sent them to refugee camps under the auspices of the UN and the International Red Cross and gave them temporary documents. In 2003, after the majority of these Kurds returned to Iraq, there were still more than 250 families living in the Azna and Jahram refugee camps at the Iran-Iraq border, according to testimony given by Feyli Kurds.

After 2003, Iraqi nationality was restored to those who had returned to Iraq and filed a claim to regain nationality. They were also permitted to ask for the restitution of their property or equivalent compensation under the law, and today enjoy the same rights as other Iraqi citizens, despite certain ongoing discriminatory measures regarding the procedures for restoring their nationality.

It should be mentioned that the removal of Iraqi nationality, forced expulsion, and confiscation of immovable and moveable assets suffered by Feyli Kurds was one of the

cases that the Supreme Iraqi Criminal Tribunal heard during the trials of former regime officials. The tribunal issued Resolution No. 29 of November 2010, which stated that the crimes that the Feyli Kurds had suffered constituted genocide. This resolution was supported by the Council of Ministers' Resolution No. 426 in session No. 48 on 8 December of that year, which expressed support for the tribunal's decision and recommended the establishment of an Independent National Commission for Justice for Feyli Kurds, which has still not been formed as of the time of writing.

The Ba'ath regime continued to issue resolutions that degraded human rights and dignity, such as the (dissolved) Revolutionary Command Council's Resolution No. 115 of 25 August 1994, which stipulated that those evading or deserting military service would be punished by cutting off their earlobe and a tattoo on the forehead—a three- to five-centimeter by one-millimeter horizontal line. This was a flagrant violation of Iraq's transitional constitution and its obligations under the seventh Article on the International Covenant on Civil and Political Rights, which stated that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." It was usually information provided by the person's family that led to the imposition of this punishment.

In the city of Kirkuk, the previous regime had also undertaken a policy of demographic change in an attempt to Arabize the city. They distributed lands among Arab residents and confiscated property owned by Turkmens and Kurds. Vast amounts of land were confiscated for military and government use under the provisions of Article 9 of the Law of Eminent Domain.<sup>(107)</sup> In 2001, the (dissolved) Revolutionary Command Council

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(107) Article 9 of the Law of Eminent Domain of 1981 stipulated that governmental, Ba'ath party, or mixed sector institutions had the right to exercise eminent domain over any property, in whole or in part, or the rights in rem over such property, in accordance with the provisions of the law, in order to carry out its projects and achieve its objectives. The law also prohibited courts from hearing cases arising from the application of this law.



issued Resolution No. 199 of 6 September 2001, which gave every Iraqi over 18 years of age the right to change their national identity to Arab. This was also a clear violation of Iraq's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, which Iraq is a party to.<sup>(108)</sup>

The Kurdistan Region is seeking to annex several areas outside the current boundaries of the Region, which fall within what the Security Council recognized as the Green Line. This line was adopted by the UK-US occupying powers as the boundaries of the Kurdistan Region on the basis that these were Kurdish lands that the region wished to have restored to it. The Law of Administration for the State of Iraq for the Transitional Period and the temporary constitution of Iraq (Article 140) outlined the procedures that needed to be followed in order to normalize these areas in Iraq. This Article did not only apply to the conflict between the Kurdistan Region and the central Iraqi government but also to disputes over the borders of governorates. The Kurdistan Region acted unilaterally, and without legal justification, to issue Law No. 19 of 19 May 2003-forty days after the regime was toppled-to reverse the effects of coercive measures carried out as part of the ethnic cleansing (Arabization) of Iraq. It also adopted other unilateral measures in accordance with the law, as a fait accompli policy change.<sup>(109)</sup> The law included the following:

Article 1: In order to reverse all effects of coercive procedures carried out by dictatorial Iraqi governments with the aim of changing the ethnic composition of Kurdistan, Iraq, and Arabizing it; and to restore circumstances to what they were before this policy was implemented, the following steps shall be taken:

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(108) Article 2, paragraph 1A, stipulated that "each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation."

(109) From a legal perspective, the aforementioned law was issued by an authority without jurisdiction to issue the law, since the federal government was the only competent legal entity in this regard, and therefore all outcomes of its implementation were considered null and did not confer any legal effect or right, and damages caused by its implementation were to be remedied through reparations to the aggrieved parties.

First: Recover assets confiscated on the basis of national belonging or activities carried out under the policies of the dictatorial regime to their legal owners.

Second: Return all non-Kurdish citizens to the regions in which they had previously been living, if they were settled in Kurdistan, Iraq, as part of the Arabization policies in the governorate of Kirkuk, Kurdish regions in the governorates of Diyala and Nineveh, or parts of the governorates of Erbil and Dohuk, including persons who:

1. Were settled in Kurdistan for the purpose of the Ba'athification of the area.
2. Worked in repressive national security agencies (special security, intelligence agencies, military intelligence, general security, or Fedayyeen Saddam).
3. Worked in the departments and agencies of the internal security forces.
4. Prevented residents from accessing their right to employment or took their places by filling empty posts.
5. Took the place of employees who were the original inhabitants of the region, in order to exile or transfer the latter outside the region or to have them dismissed from their position, pushed into retirement, or imprisoned.
6. Worked as part of the Republican Guard forces and participated in genocidal campaigns in Kurdistan.
7. Worked in the military units of the Iraqi army that were involved in the genocidal campaigns in Kurdistan.
8. Were recruited for waves of official emigration to Kurdistan from other governorates as part of the policy of Arabization, whether or not the person went voluntarily or for material or symbolic compensation.

Third: Provide fair reparations from the Iraqi government to all those harmed by the coercive policies covered under this law.

Article 2: Restore the names of places, regions, villages, district capitals, cities, counties, and districts that had been Arabized.

Article 3: Reestablish the links between villages, cities, and administrative units in the Kurdistan governorates that had undergone coercive demographic change, namely the governorates of Kirkuk, Nineveh, and Diyala.

Article 4: Restore the national identity of all citizens who undergone forced Arabization and correct their civil status records accordingly.

Article 5: First: Arab Iraqi citizens living in areas subject to Arabization are exempted from the provisions of this law in either of the following two cases:

1. If the Arab Iraqi citizen in question was a previous resident of Kurdistan and had been living there during the census of 1957.
2. If the person in question had settled in Kurdistan and moved their civil status documents there prior to 11 September 1961.

Second: Arab Iraqi citizens covered under the first paragraph of Article 5 shall enjoy the same civil, political, cultural, economic, and social rights as other citizens of Kurdistan.

Article 6: The Council of Ministers shall take the necessary steps to implement the provisions of this law.

Article 7: No Article in contravention of the provisions of this law shall be adopted.

Article 8: This law shall be in effect from the date on which it is published in the Official Gazette of Kurdistan.

In southern Iraq, the situation was not much better: Arab tribes from the marsh regions had been displaced, and the marshes had been drained under the pretext of protecting national security and fighting armed opposition forces. Most of the members of these tribes were either detained or forcibly disappeared and were subjected to extrajudicial execution. The lands were then seized for public benefit, for the Third River project or public estuary, and the environment was destroyed, including the biodiversity of fish, animals, and birds.

## **Section 2: Organizations Created to Manage Transitional Justice**

Just as there were entities created to address human rights violations during the transitional justice process, there were also cases given to certain ministries in order to address these violations, such as the Ministry for Human Rights and the Ministry of Migration and Displaced.

### **Subsection 1: The Ministry of Human Rights**

The Ministry of Human Rights was formed by Coalition Provisional Authority Order No. 60 of 2004, which formalized the legal status of the ministry, which had already been established in September 2003. It was intended to be one of the entities managing cases of victims of the previous regime, and recording violations that took place, and was the first institutional entity formed for this purpose. The Law establishing the Martyrs' Foundation and Political Prisoners' Foundation was passed in 2006, two years after the ministry was formed. The ministry, working in partnership with UNAMI and the National Assembly, created the legal frameworks underpinning many of the institutions for transitional justice (the Supreme Iraqi Criminal Tribunal, the Martyrs' Foundation, and the Political Prisoners' Foundation). In 2006, a law on mass graves was passed (No. 5 of 2006), which established a legal basis for working on the sites of mass graves. There was also a draft law for a national center for missing persons which was to serve as an institutional framework to address the thousands of cases of persons

disappeared by the previous regime or who went missing during wars. The Ministry also oversaw the cases of persons who went missing during wars between Iraqis and foreign parties (such as the Iran-Iraq war and the Gulf war). It adopted many legal and institutional initiatives in order to carry out these duties, as set forth in Section 2 of the aforementioned order, which outlined the role and duties of the Ministry as follows:

1. The Ministry of Human Rights shall work on the programs necessary to implement services, initiatives, and studies, and to create conditions that lead to the protection of human rights and basic liberties in Iraq. It shall likewise work towards preventing human rights violations in the country.
2. The Ministry of Human Rights shall make official recommendations that it deems necessary, including establishing new institutions, reforming existing institutions, and managing them in an effective way in order to prevent human rights violations in Iraq.
3. This coordination shall include the provision of appropriate support from foreign sources, including NGOs, international organizations, the UN, and the Multi-National Force operating in Iraq in accordance with UN Security Council Resolutions 1511 and 1546.
4. The Ministry of Human Rights shall develop the necessary policies and programs in order to implement this order.
5. The Ministry of Human Rights shall be the point of contact within the interim government of Iraq in its relations with the UN High Commissioner for Human Rights, the UN Commission on the Status of Women, and other national, international, and non-governmental organizations working in the field of human rights.
6. The Ministry of Human Rights shall advise lawmakers on whether a proposed law complies with international human rights law, including Iraq's obligations with regard to the international conventions on human rights that it is party to.

The Ministry of Human Rights was later dissolved in accordance with Order No. 312 of 2015, and its cases and functions were transferred to several different official institutions according to their jurisdictions. The matters pertaining to Iraq's international obligations regarding human rights, the writing of periodic reports for these treaty obligations, and the special procedures implemented in accordance with international conventions were transferred to the Ministry of Justice's department of human rights. The cases of persons imprisoned or disappeared during the Iran-Iraq War and the Gulf War against Kuwait were transferred to the Ministry of Defense. The cases of mass graves, victims of terrorism, and documentation of human rights violations were transferred to the Martyrs' Foundation. Other cases of disappeared and missing persons were transferred to the office of the inspector-general in the Human Rights Directorate of the Ministry of Interior. The negotiating mandate for prisoners and disappeared persons was transferred to Ministry of Foreign Affairs. The previous employees of the Department for Prison Oversight in the Humanitarian Directorate, the Departments for Training and Investigation in the Directorate for Monitoring and Protecting Human Rights, and the Directorate of Governorate Affairs in the National Center for Human Rights were transferred to the Independent Human Rights Commission.

### **Subsection 2: The Ministry of Migration and Displaced**

Coalition Provisional Authority Order No. 50 of 2004 established the Ministry of Displacement and Migration, which was later abrogated by the Law of the Ministry of Migration and Displaced (No. 21 of 2009). The latter established this ministry in order to look after the affairs of migrants, externally and internally displaced persons, and refugees, to find solutions to address their situations, and to protect their livelihoods. It oversaw the affairs of a key segment of Iraqi society, namely, migrants and displaced persons who were forced to leave Iraq under the previous regime, the affairs of Iraqi migrants and refugees abroad who had left Iraqi after 2003, and those who were internally displaced. The ministry sought to use the strategies available to it in order to

offer services to and to protect the human rights of these groups in order to successfully provide aid, assistance, and the necessary social services to these groups. These persons included:

1. Internally displaced Iraqis who were forced to flee their homes, or who left their usual place of residence within Iraq in order to escape armed conflict, violence, human rights violations, natural or man-made disaster, abuse by government authorities, or development projects.
2. Displaced persons who were expelled from their homes or their usual places of residence to other locations within Iraq as a result of the policies, decisions, or practices of the Iraqi government.
3. Iraqis who returned to the country from abroad, or internally displaced persons who returned to their usual places of residence, places of birth, or to any place they chose to live within Iraq, after being subject to forced displacement.
4. Victims of forced migration, who lost their Iraqi nationality as a result of Resolution No. 666 of 1980 (abrogated),<sup>(110)</sup> or who were forced to flee outside Iraq as a result of the oppressive policies of the former regime and who did not obtain refugee status outside Iraq.
5. Refugees and those seeking refugee status who were living outside Iraq due to forced emigration, and who obtained permanent residence or a foreign nationality there.
6. Palestinian refugees who were forced to leave their homeland in 1948 and who settled in Iraq legally, and were registered as refugees prior to this law.

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(110) Revolutionary Command Council Resolution No. 666 stipulated: (1) Iraqi nationality shall be removed from all Iraqis of foreign origin if it is proven they are not loyal to Iraq and its people, and the national and social objectives of the revolution; (2) the Ministry of the Interior shall order the expulsion of any person who has their Iraqi nationality rescinded in accordance with paragraph 1 unless they can formally prove sufficient cause to remain in Iraq due to legal or judicial necessity or in order to preserve the rights of undocumented persons, and (3) The Ministry of the Interior shall be responsible for the implementation of this resolution. The resolution was published in the Official Gazette (No. 2779 of 1980).

7. Refugees of other nationalities who came to Iraq as a result of persecution due to ethnicity, religion, national identity, belonging to a particular social group, or political belief, or as a result of general violence or events severely disturbing general security which threatened their physical safety or liberties, and who were registered as refugees under the law and in accordance with international conventions that Iraq was party to.

The Ministry was given responsibility to oversee these cases of external and internal forced displacement and migration, which had been accompanied by demographic change in many Iraqi governorates, resolutions rescinding the nationality of important subgroups within Iraqi society and confiscating their moveable and immoveable assets,<sup>(111)</sup> and the Arabization operations carried out in order to change the national identity of non-Arabs, which affected many Iraqis in the governorates of Kirkuk, Mosul, Saladin, and Diyala. The ministry allowed the aggrieved parties in these governorates to determine their own national identity and ethnic belonging without being subject to coercion or pressure. In addition, the ministry was responsible for restoring national ties with highly-skilled Iraqis who were subjected to forced emigration under the previous regime.

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## Chapter 4

### **The Mechanisms for and Social Consequences of Transitional Justice in Iraq**

The Iraqi experience with transitional justice necessarily reflects the specific context and conditions of Iraq. As previously discussed, Iraq's history has been marked by foreign military intervention unauthorized by the UN, namely the US-UK occupation, and the subsequent control of the occupying powers over the executive and legislative authorities in the country. The occupying powers adopted accountability mechanisms which they implemented without consulting the Iraqi people, UN institutions, or relevant international organizations. The occupiers only coordinated with the opposition forces, in whose favor the balance of power had shifted following the fall of the former regime.

Furthermore, the complete absence of a civil society in Iraq that could represent the people was exploited. It was only a nascent civil society, since it had not existed at all under the previous regime, which had pursued a policy of prohibiting any societal entities outside the institutional framework of the ruling party. There was also a lack of union representation in consultations with government authorities. Unions and syndicates were restructured in accordance with the resolution on the de-Ba'athification of Iraqi society, which dissolved the administrative councils of unions and syndicates, and required that new union elections be held, in which the candidates would be subject to vetting in accordance with the resolution, in order for their candidacy to be accepted.

These circumstances resulted in the creation of a transitional justice program without any unified institutional framework. There were numerous legal and institutional

structures that developed, and a similarly abundant number of paths for transitional justice without a shared umbrella. Certain paths received the bulk of the attention, while others fell to the wayside. This chapter is divided into two parts: the first addresses the Iraqi experience with different transitional justice mechanisms, while the second examines the social repercussions of transitional justice in Iraq.

## **Topic 1: The Iraqi Experience with Transitional Justice Mechanisms**

Saad Sultan Hussein

This section will examine the Iraqi experience with transitional justice mechanisms in order to highlight best practices and to address the successes and pitfalls of each path. The section will be divided into four main parts, which are as follows:

### **Section 1: Truth Commissions**

Iraqis, like other peoples who have endured oppressive regimes, yearned for the world to recognize the tragedies and violations they had suffered. There was national consensus about the need for retribution against the perpetrators of violations and calls that they be brought to justice. The victims who had been deprived of their rights under the previous regime turned to public platforms through which they could share what they had been subjected to, the horrific consequences of these crimes, and the extent of the deprivations, mistreatment, and exclusion that they had faced for many years.

During the first months after the fall of the regime, Iraqi society had tried to engage in public dialogue about the injustices that had occurred and how the scars of the past could be healed through rebuilding national and societal infrastructure in order to strengthen and develop shared principles and human rights. However, the challenges that arose prevented such a course of action, since the occupying powers, interim government, and eventually the elected governments of Iraq did not attempt to uncover the truth through any mechanisms engaging the public. Their investigations of violations were limited to special judicial institutions that adopted judicial procedures, and non-judicial institutions that pursued other administrative measures to investigate human rights violations and crimes committed under the previous regime.

These efforts were shaped by many internal and external political factors, as well as obstacles created by regional and international interests. The US did not support the creation of any public truth commissions<sup>(112)</sup> in the context of the legal system set up by the Coalition Provisional Authority. Instead, the orders of the civilian administrator focused on dismantling the Ba'ath party within Iraqi society, as well as developing mechanisms to address the demands of victims regarding their confiscated assets and properties. The political parties from which the transitional Governing Council was formed also avoided forming truth commissions even though the opposition had previously issued a statement committing to this (with a paragraph calling for investigating violations and holding the perpetrators accountable).<sup>(113)</sup> However, there were many factors that emerged after the fall of the regime which led them to abandon the question of public truth commissions. The feeling was that there were a lot of potential obstacles and unknowns at the domestic level, including that this would create partisan divisions beyond the political sphere, due to the parties' involvement in violations perpetrated by the former regime. For example, after documents from various regime agencies began to circulate, they were seized by various political parties, which wanted to examine the extent of intelligence and security violations against the Iraqi opposition.

In addition, the opposition parties reconsidered the interests and approaches of their followers. After the Law for the De-Ba'athification of Iraqi Society was implemented, certain areas experienced waves of unemployment because most of their residents had been involved in security institutions close to the regime. Truth commissions would have further complicated matters and exacerbated societal exclusion and legal and judicial prosecution. The security situation had also begun to deteriorate and there were increasing terrorist attacks from al-Qaeda. Pursuing truth commissions would have required a stable security situation to facilitate the investigation of violations, such as holding interviews and

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(112) It is well-known that the US provided aid to the previous regime during the Iran-Iraq war, during which time the regime committed a series of human rights violations. This makes the US government complicit as a partner in some of the violations that previously occurred in Iraq.

(113) See paragraph 16 of the final statement of the Iraqi Opposition Conference in London in 2002.

hearings with victims. This requires circumstances that enable the provision of security for victims and the ability of uncover the perpetrators of these violations.

For its part, the Kurdistan Region did not adopt truth commissions either. Instead, the Kurdistan Region Parliament issued a law entitled Determining the Legal Status of Officials from the Previous Regime (No. 18 of 27 May 2003), which included a series of procedures that can be summarized as follows:

The law outlined the legal status of the operatives and officials of the former dictatorial regime who were present in the Kurdistan Region of Iraq and who had not been included in the general amnesty issued after the 1991 uprising as follows:

**I. For a period of 15 years, they were prohibited from:**

1. Voting or running for public office, including general elections, elections for local and municipal councils, associations, and syndicates, or serving as members of governing councils for mixed or public sector institutions and companies.
2. Holding administrative and political office.
3. Bearing or possessing arms.
4. Receiving decorations, medals, or honors, or any of the related rights or privileges.
5. Belonging to any political party or human rights organization, or being involved in any political activity.
6. Owning any form of media production (radio, television, newspapers, or magazines) or other means of influencing public opinion in any way.
7. Entering into any agreement with the government or its institutions, or public or mixed sector companies, either directly or indirectly.
8. Working for a university in any form.

This resolution actually provided amnesty! The law did stipulate that it was not permissible for any of the individuals included in the aforementioned law to act against public or private interests by passing any future resolution or law which resulted in loss of life, imprisonment, or torture. However, in reality, none of the intended forms of prosecution against regime officials were carried out. The Region failed to act on arrest warrants issued by the Supreme Iraqi Criminal Tribunal against the Kurdish militia leaderships that had supported the former regime in its war against the Kurds. Likewise, the previous fighting between the two Kurdish parties also ended with an agreement between the Kurdistan Democratic Party and Patriotic Union of Kurdistan. This closed off the possibility of discussing the matter of killed or forcibly disappeared persons or any of the violations that had been committed, even though the previous regime had been involved in this conflict, resulting in gross violations of national and international law perpetrated against the Kurdish people and political activists that had used the Kurdistan Region as their base.

Nevertheless, some of the legal frameworks for institutions of transitional justice led to extensive investigations into human rights violations, and uncovered information on the means by which violations occurred and the identity of perpetrators and victims. Article 4, paragraph 2, of the Law for the National Commission of Accountability and Justice stated that the commission was created in order to achieve its objectives, including furnishing evidence and documents to the Iraqi judiciary regarding the crimes committed by the Ba'ath party and its repressive agencies against Iraqi citizens, via the Public Prosecutor's Office. The third paragraph of the same Article stated that the commission would receive complaints filed by persons who had been harmed as a result of the criminal practices of Ba'ath party members and its repressive agencies, and would gather evidence and documentation of the aforementioned crimes and prosecute the accused accordingly. In accordance with the previous Articles, truth-

seeking efforts that were due to begin were constrained by the procedures of the Commission for Accountability and Justice, and limited to crimes committed by Ba'ath party members and its repressive agencies. Thirdly, the violation had to have occurred during the period between 17 July 1968 and 9 April 2003. No investigations could be made if the perpetrator did not fit the above categories and requirements.

As a result of the aforementioned regulations, many of the violations and crimes committed in earlier periods were excluded from transitional justice procedures in Iraq. This included the violations perpetrated against Christians in 1933 in what was known as the Simele Massacre, which was followed by the expulsion of the people of the village of Simele to Syria, and the confiscation of their land. This was in addition to the acts committed against Iraqi Jews in the 1950s, when their nationality was rescinded and property confiscated. In both of these cases, the commission did not have the legal authority to investigate these incidents. Likewise, the crimes committed by opposition parties against the Iraqi people, or by the people against each other, fell outside the jurisdiction of the commission. The law prevented the commission from prosecuting human rights violations committed in the Kurdistan Region by the Region's government or its political parties.<sup>(114)</sup> After 1992, the Kurdistan Region had enjoyed semi-official autonomy from the government in Baghdad, and the Iraqi government recognized the legal standing of institutions and laws established in the Region during this period, pursuant to Article No. 141 of the current Iraqi constitution of 2005.<sup>(115)</sup>

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(114) During the period of internal armed conflict in the Kurdistan Region between the two parties, there were many human rights violations and war crimes committed. The Region has withheld information on the whereabouts of thousands of victims of forced disappearance, despite pleas from their families. There have also been anti-communist purges by both the Kurdish Democratic Party and Patriotic Union of Kurdistan, which resulted in incidents such as the Peshtashan massacre, and the massacre of communist exchange students.

(115) Article 141 of the Iraqi constitution stipulated that laws issued in the Kurdistan Region since 1992 would remain in effect.

During 2003-2005, the Ministry of Human Rights was supposed to investigate the legacy of the former regime as fully as possible, in accordance with the legal authority vested in it by section 2, Article 3. This portion of the law entrusted the ministry with establishing programs to help the Iraqi people to heal from the atrocities committed under Ba'ath party rule, and to cooperate with the Supreme Iraqi Criminal Tribunal in prosecuting regime officials. However, the legal conditions in Iraq at that time required translating this Article into other legal resolutions and laws, which the Ministry later did in an effort to create an institutional framework that could help address violations and their victims. It began to engage in serious dialogues with UNAMI, in coordination with the special rapporteur on human rights in Iraq, Andreas Mavrommatis. Detailed reports were prepared by the Ministry of Human Rights and representatives of the government of the Kurdistan Region, with documents from security and military agencies that attested to the crimes carried out by the former regime. This was also supported by interviews the special rapporteur held in Amman with survivors of the mass graves and forced emigration perpetrated against the Feyli Kurds, as well as opposition party members who were targeted by purges and assassination campaigns. Following this meeting, the special rapporteur added an annex to his periodic report, in which he documented the consultations that had taken place on 3 March 2004 with the Iraqi delegation in Jordan, and that this had fully succeeded in uncovering new evidence, and in particular eyewitness testimony from survivors of mass executions, mass graves, brutal torture operations, the Anfal campaign, the chemical attacks on Halabja, the draining of the marshes, forced displacement campaigns, beheadings, disfigurement including mutilation of ears and tongues, forced tattoos,<sup>(116)</sup> and Arabization. The report

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(116) See the resolutions of the Revolutionary Command Council, particularly: No. 59 of June 1994, on the cutting off of hands for crimes of theft, or execution if the accused was carrying a weapon or if the theft resulted in the death of a person; No. 92 of 21 July 1994 on the cutting off of hands for crimes of forgery; No. 109 of 18 August 1994 on tattoos after the cutting off of hands; and No. 115 of 25 August 1994 on the cutting off of ears as punishment for deserting military service. See also Resolution No. 117 of 1994 prohibiting the removal of tattoos, and the resolution on the cutting of tongues for those who insulted President Saddam Hussein or his family.



indicated that “the new evidence, particularly that of eyewitnesses, added another dimension to the systematic crimes of the former regime, revealing unparalleled cruelty, even in respect of the people being taken away for execution, and at the same time stories unfolded that were far worse than originally reported to the Special Rapporteur in the past.”

During the period in which the Ministry was working to develop a special program for uncovering human rights violations perpetrated by the previous regime, political parties involved in the transitional Governing Council quickly adopted the Law on the De-Ba’athification of Iraqi Society, the law establishing a special criminal tribunal for the prosecution of regime officials, the Law establishing the Martyrs’ Foundation, and the Law of the Political Prisoners’ Foundation. At the time same time, the ministry was involved in developing a legal framework for institutional infrastructure that could address forced disappearances and mass graves,<sup>(117)</sup> and

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(117) During the period before the Law on the Protection of Mass Graves was ratified, the Governing Council agreed to a proposal by some ministers to establish a committee to work on the question of mass graves. The Governing Council ratified the following in its regular session (No. 61 on 1 December 2003):

1. A committee shall be formed composed of the ministers of justice, the interior, health, and human rights, as well as the media representative from the Governing Council, in order to oversee the question of mass graves.
2. The aforementioned committee shall carry out the following tasks:
  - a. Confirm the identity of the martyr using the documents available, or through examining the remains.
  - b. Reinter the remains of martyrs according to the appropriate rituals.
  - c. Document the unearthing of the mass graves, reintering of martyrs’ remains, and all other necessary steps for this process.
  - d. Provide full media coverage in order to show the world the crimes perpetrated by the previous regime, including involving international human rights organizations.
  - e. Prepare special reports on the reparations provided to martyrs’ families and adopt the necessary resolutions in order to implement this.
  - f. Take steps to gather information on perpetrators of crimes of genocide that resulted in these mass graves and bring them to justice.
3. This resolution shall enter into effect from the date it is published in the Official Gazette.

lead to the establishment of a national archive.<sup>(118)</sup> This culminated in the Law for the Protection of Mass Graves, and the submission of a draft law establishing a national center for missing and disappeared persons and National Documentation Center.

Political parties passed laws to establish four of these institutions, but opposed a unified institutional structure for the legal transitional justice system in Iraq. They also blocked the passage of the draft law for a center for missing and disappeared persons, and the Center for National Documentation, and replaced the latter with the Iraq Memory Foundation. The Memory Foundation was a non-government organization established by resolution of the civilian administrator (Paul Bremer) to maintain and examine a national Iraqi archive. The foundation was authorized to use the premises of the Monument to the Unknown Soldier to carry out its work. Meanwhile, the archive of the national leadership of the Ba'ath party had been seized by the US and transferred outside Iraq. It would later be returned and handed over to the Iraqi government in 2020.<sup>(119)</sup>

The Shi'ite marja' was also involved in this process, following acts of retribution that had occurred after regime documents began to circulate publicly. As previously discussed, the marja' issued legal opinions (fatawa) on the impermissibility of retribution (qisas) against members of the previous regime outside official channels.

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(118) The Governing Council issued Resolution No. 83 of 2004, which stipulated that all parties, associations, and organizations would be required to hand over important documents pertaining to the intelligence and general security agencies that contained information pertinent to the state's interest in employing these agencies to protect the security of the nation and its citizens.

(119) According to Article 4 of the Law of the Commission for Accountability and Justice, the commission was responsible for preparing the Ba'ath party archive, and this archive should be given to the Iraqi government and later become a permanent Iraqi archive.

### **Text of the fatwa**

Grand Ayatollah Ali al-Sistani, a Shi'ite marja', was asked the following questions, and issued the following legal opinions (fatawa):

1. Question: Many of the cronies of the old regime had a direct or indirect role in harms committed against the people. These are some of the questions we would like to have answered. If it has been confirmed that such a person had a direct role in the killing of innocents, either by their own admission or otherwise, is it permissible to engage in retribution (qisas)?

Answer: Retribution is only permissible for the deceased's kin after the crime has been proven in a court of law. This is exclusively the right of the person's relatives, and it is not permissible to do so until a ruling on the matter has been issued by a judge (qadi).

2. Question: In the case of a person who, based on a written report against some believers, had a primary role in their execution, is it permissible for the deceased's kin to kill this person, compel them to leave the city, or something similar?

Answer: It is not permissible to take such punitive measures. The matter must be delayed until a court of law can examine the case.

3. Question: If a person was important member of the former Ba'ath regime or cooperated with the security agencies of the regime, is this sufficient cause to kill this person?

Answer: No, it is not sufficient. This falls within the purview of a court of law, so you must wait until such a court is formed.

4. Question: After the fall of the regime, a large number of documents from the security agency fell into the hands of some believers. It is permissible to publish the names of the regime agents and collaborators contained in these documents?

Answer: No, it is not permissible to do that. You must hold onto this information and give it to the relevant agency that has jurisdiction in these cases.

5. Question: Some of those whose names have come up as collaborators with security agencies have claimed that they only collaborated under coercion. It is permissible to denounce them before it has been confirmed whether they acted of their own free will? Answer: No, it is not permissible to denounce them until it is confirmed, except in certain cases where higher interests are at stake.

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The Iraqi legal system did not address the principle of truth-seeking in the usual way. Iraq did not form truth commissions, nor did it hold any dialogues with the public or survivors. As a result, no connections were made between the work that was supposed to be carried out by truth commissions and the legal proceedings taking place. Neither were there any meetings held between the perpetrators and victims, except in the context of the Supreme Iraqi Criminal Tribunal, when the witnesses who had been victims of violations gave their testimonies. The publications posted on the websites of the Iraqi institutions of transitional justice detailing the accounts of victims and the violations they had endured were not followed by any response from those accused. The methods and procedures that needed to be carried out in order to dismantle the authoritarian system were left unclear, particularly with regard to determining the violations that had taken place, and documenting these incidents as well as the reasons, conditions, causes, related circumstances, and outcomes of the incidents. There was likewise a need to determine what had happened to victims of ethnic cleansing, killing, and forced disappearance, and the locations of the victims, as well as the identity of the perpetrators of these crimes and others responsible. There were 12 cases heard before the Supreme Iraqi Criminal Tribunal in which relevant documents were examined and public hearings held to gain information about the perpetrators, victims, and mechanisms through which the violations occurred. However, nothing was done to address the questions of the thousands of families of forcibly disappeared persons, or mechanisms for unearthing mass graves, including exhuming the remains, determining

the identity of victims, and prosecuting the perpetrators remain incomplete. At the time of writing, no DNA fingerprinting had yet been carried out for any of the mass graves in order to check for matches with relatives.

Iraq has not adopted any form of truth-seeking mechanisms. The country had a relatively simplistic understanding of transitional justice mechanisms in 2004,<sup>(120)</sup> and was focused on providing reparations to victims and charting a clear path towards judicial and administrative accountability and prosecution using governmental mechanisms that prevented the public from participating in these decisions.

## **Section 2: Accountability and Prosecution**

Transitional justice aims to strengthen the culture of accountability in order to overcome the previous culture of impunity for perpetrators of gross violations and criminal acts. In Iraq, a series of violations had accumulated under the brutal regime, so it was difficult for society to accept amnesty for perpetrators. When opposition parties came to power, this helped lead the country towards accountability and prosecution rather than other avenues that might have less impact.

The Iraqi legal system adopted a dual approach to holding perpetrators accountable for crimes and violations committed under the previous regime. It adopted both judicial procedures and administrative measures in order to bring Ba'ath party members to

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(120) A survey conducted by the Human Rights Center at the University of California, Berkeley, as part of a 2004 study found: "Among Iraqis in Iraq, there is little knowledge of or exposure to the idea of a truth commission, and not much exposure to other countries' experience." The study added that "participants did offer diverse and creative suggestions for memorializing the past and victims of the regime, including . . . the creation of museums and documentation centers, [and] photographic and videographic displays." It noted that "there was strong support . . . for holding accountable through a legal process those responsible for human rights violations" and that "education, training, and information dissemination should cover the comparative experience of other countries, various models that have been used in the past, and the different options for the mandate of a truth commission and the scope of its powers."

justice, as well as persons complicit through affiliation with other elements of the state apparatus or through civil society organizations or syndicates. This was in accordance with the legal frameworks initially outlined in the resolutions issued by the occupying power's Coalition Provisional Authority, the Governing Council that it appointed, and later the interim government that was formed under the auspices of the occupying power. These resolutions would later be abrogated by new legislation passed by elected legislative bodies.<sup>(121)</sup> The question of accountability became part of the jurisdiction of competent judicial and administrative bodies only. This process occurred as follows:

### **Subsection 1: Judicial Measures: The Supreme Iraqi Criminal Tribunal**

The Iraqi legal system is based on a specific and specialized system<sup>(122)</sup> governed by a constitution. However, the Iraqi Special Tribunal for prosecuting perpetrators of violations and crimes from the previous regime was exempted from the constitutional regulations set forth in Article 90. The Supreme Judicial Council was responsible for managing the affairs of the judicial bodies, and the law stipulated the council's jurisdiction and how it would be established, and the rules governing its work.

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(121) The Statute of the Iraqi Special Tribunal for Crimes Against Humanity was issued in accordance with Order No. 48 of the Coalition Provisional Authority and Resolution No. 1 of 2003 (issued by the transitional Governing Council), which was later abrogated by Law No. 10 of 2005 (the Law of the Supreme Iraqi Criminal Tribunal), which was in turn amended by Law No. 35 of 2011 pertaining to the Commission for Accountability and Justice. Governing Council Resolution No. 21 of 2003 had previously established the De-Ba'athification Commission, which was ratified by Article 49 of the Law of Administration for the State of Iraq for the Transitional Period. The constitution of Iraq kept this Article in effect through Article 135. Later, a new law was adopted, the Accountability and Justice Act (No. 10 of 2008), which established the Commission for Accountability and Justice.

(122) Iraqi criminal law did not previously contain provisions criminalizing genocide, war crimes, or crimes against humanity, which were included in the law establishing the Supreme Iraqi Criminal Tribunal, and which amended the existing Iraqi criminal code, although this was limited by the tribunal's temporal jurisdiction. The temporal jurisdiction extended from 17 July 1968 to 1 May 2003, but did not include any crimes committed after this set period of time.

The Supreme Iraqi Criminal Tribunal was established as an exception to the aforementioned constitutional regulations. Article No. 134 of the constitution stated that the Supreme Iraqi Criminal Tribunal would continue to function in its capacity as an independent judicial entity to examine the crimes of the members of the previous dictatorial regime. It also stipulated that the Council of Representatives was to dissolve the tribunal by issuing a law after its work was completed. However, the tribunal, as outlined in the law at the time of the constitutional referendum of 2005, also included more than one clause referring to the powers of the Council of Ministers in organizing the tribunal's work.<sup>(123)</sup> The law was later amended by Law No. 35 of 2013, so that the Supreme Judicial Council replaced the Council of Ministers in this role. As a result of this amendment, the tribunal became completely independent from the Council of Ministers.

## **I. Establishing the Tribunal**

Article 1 of the law of the tribunal stipulated that the Supreme Iraqi Criminal Tribunal shall enjoy full independence and temporal and spatial jurisdiction for the prosecution of natural persons (but not juridical persons), whether of Iraqi nationality or not, provided that the person was resident in Iraq, and had been accused of crimes specified

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(123) Article 2 stipulated that the tribunal shall hold its sessions outside Baghdad by resolution of the Council of Ministers upon the suggestion of the chief justice. Article 3, paragraph 5, stipulated that the head of the Council of Ministers, in case of necessity and upon the suggestion of the chief justice of the tribunal, was permitted to appoint non-Iraqi judges. Article 4, paragraph 3, stipulated that the Council of Ministers must approve the appointment of judges nominated by the Council of Judges; paragraph four stipulated that the Presidential Council could, upon the suggestion of the Council of Ministers, transfer any judge or public prosecutor to the Supreme Judicial Council for any reason. The same was true with regard to ending the term of any judge or public prosecutor; Article 6 stipulated that the Council of Ministers had the right to refer the recommendation of the tribunal's Court of Cassation to the Presidential Council in order to end the tenure of any judge or public prosecutor. Article 35 of the law stated that the head of the tribunal would prepare an annual report on the tribunal's activities, which would be presented to the Council of Ministers. In accordance with Article 39, the Council of Ministers, in coordination with the head of tribunal, could issue guidelines to facilitate the process of implementing the law of the tribunal.

in the paragraphs (a) (b) or (c) of the law, which included:

1. Crimes of genocide
2. War crimes
3. Crimes against humanity
4. Paragraph (d) stipulated that the general jurisdiction of the court applied to the prosecution of violations of the Iraqi laws mentioned in Article 14, namely four categories of violations:
  - Interfering with the affairs of the court, or attempting to influence its proceedings.
  - Wasting or squandering national resources.
  - Abuse of one's position.
  - Any crime punishable under the Penal Code or any other penal regulation in effect at the time the crime was committed, if the prosecution failed to produce evidence that the accused had committed one of the three crimes (genocide, war crimes, or crimes against humanity). The jurisdiction of the court was limited under Article 1 to the period between 17 July 1968 until 1 May 2003, without any restrictions to spatial jurisdiction, i.e., whether the crime had been committed in Iraq or abroad.

As we have demonstrated, the Iraqi Penal Code did not include any provisions to criminalize acts considered criminal in the law establishing the tribunal. The law of the tribunal amended the Iraqi Penal Code but was limited to specific perpetrators of crimes and timeframes in which the aforementioned crimes were committed. In 2019, the question of the limitations of the Iraqi legal system with regard to criminalizing these acts was raised again, particularly since Iraq had previously ratified the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>(124)</sup> UNAMI worked with the Iraqi government in order to draft a law for a criminal tribunal that could address the most serious crimes.<sup>(125)</sup>

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(124) Iraq ratified the convention on 20 January 1959.

(125) See annex No. 1 on the proposed law for international crimes in Iraq.



## II. The Structure of the Tribunal

As stipulated in Article 3 of the relevant law, the tribunal consisted of:<sup>(126)</sup>

1. A court of cassation to consist of 9 judges who would elect a chief justice for the tribunal
2. Criminal court(s) to consist of five judges who would elect a chief justice from amongst themselves
3. Investigative judges
4. The Public Prosecution Department

## III. Mechanism for Appointing Judges to the Tribunal

Article 4 of the law for the tribunal stipulated that:

1. The judges and public prosecutors shall possess high moral standards, integrity, and impartiality, have experience in the field of criminal law, and meet the standards for appointment stipulated in the law of the judiciary (No. 160 of 1979) and the law of the public prosecution (No. 159 of 1979).
2. Candidates for the position of judge on the tribunal who are judges, lawyers, judicial investigators, or legal experts and have at least 10 years of previous experience in legal and judicial roles in courts or state ministries shall be exempted from the first clause of this Article.<sup>(127)</sup>

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(126) Law No. 35 of 2013 stipulated the continuity of the tribunal with one investigative body and one criminal body which would hear complaints that fell within its jurisdiction. Its procedures were subject to the provisions of the Criminal Procedure Code No. 23 of 1971.

(127) This clause was adopted in accordance with the Law of Amendments No. 35 of 2014 and replaced the previous text of the clause which read as follows: Candidates for the position of judge on the Court of Cassation, criminal courts, or of investigating judge or public prosecutor, who are judges or public prosecutors with two years of continuous service, are exempted from the first clause of this Article. Likewise, retired judges and public prosecutors may be nominated to the court without restriction due to age. Iraqi lawyers with appropriate qualifications and experience and plenipotentiaries could also be nominated under the Law of Legal Practice No. 173 of 1965, provided they had no fewer than 15 years of previous judicial or legal experience.

3. (a) The Supreme Judicial Council shall nominate all the public prosecutors and judges for the tribunal, and they shall be appointed by resolution of the Presidential Council following the approval of the Council of Ministers. They shall receive a grade (1) salary in exception to the provisions of the laws of the judiciary and public prosecution; their salaries are to be determined by guidelines issued by the Council of Ministers.  
(b) The judges, public prosecutors, and their staff shall be considered to have legally valid appointments, in accordance with the provisions of this law as of their date of appointment in accordance with paragraph 3 of Article 4 and Article 33 of this law.
4. The Presidential Council, at the proposal of the Council of Ministers, may transfer any judge or public prosecutor to the Supreme Judicial Council for any reason.

In practice, the vast majority of the tribunal's judges were lawyers with plenipotentiary powers.<sup>(128)</sup>

#### **IV. The Role of Foreign Judges, Advisers, and Lawyers in the Tribunal**

Article 3 of the law of the tribunal enabled the Council of Ministers in case of necessity, and upon the suggestion of the head of the tribunal, to appoint non-Iraqi judges with experience prosecuting the crimes covered under the law and who possessed high moral standards, integrity, and impartiality to the tribunal if one of the parties to the case was the Iraqi state. These judges were to be appointed with the assistance of the international community, including the United Nations.

The court record does not show that the Council of Ministers used this power: Iraqi judges were appointed in all of the trials of the tribunal.

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(128) See Article 21 of the current Law of Legal Practice No. 173 of 1965.

Article 19 of the law allowed for the involvement of foreign lawyers to defend the accused, provided that the main lawyer on the defense team was Iraqi. In practice, foreign lawyers have worked alongside Iraqi judges in defending the accused.

Article 8, paragraphs 9 and 10, allowed investigating judges to utilize non-Iraqi advisers and experts.

Paragraph 9 stipulated that the chief investigating judge, after consulting with the head of the tribunal, could appoint non-Iraqi experts to provide judicial assistance to judges investigating the matters covered under this law, whether international experts or otherwise. The chief investigating judge was to appoint these experts with the help of the international community, including the UN.

Paragraph 10: The non-Iraqi experts and observers stipulated in the ninth paragraph of this Article were to possess high moral standards, integrity, and impartiality. It was preferred that such experts and observers, if not Iraqi, should have previously worked as judges or public prosecutors in their countries or in international war crimes tribunals.

In practice, foreign experts were called upon to participate in investigations in order to uncover and document evidence regarding mass graves resulting from the Anfal crimes, among others.

## **V. Jurisdiction of the Tribunal**

The second part of the law stipulated that the tribunal had jurisdiction over certain crimes and associated acts as set forth in Article 11, paragraph 1, of the law:

For the purposes of this law, and in accordance with the International Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, which had been ratified by Iraq on 20 January 1959, genocide is defined as any of the acts

listed below that are committed with the intent of eliminating a national, ethnic, racial, or religious group, either in whole or in part:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group.

#### Article III

The following acts shall be punishable:

- a) Genocide;
- b) Conspiracy to commit genocide;
- c) Direct and public incitement to commit genocide;
- d) Attempt to commit genocide;
- e) Complicity in genocide."

Article 12, paragraph one, of the law specified the acts included in the definition of crimes against humanity, which included:

First: For the purposes of this law, "'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- a) Murder;
- b) Extermination;
- c) Enslavement;
- d) Deportation or forcible transfer of population;
- e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

- f) Torture;
- g) Rape, sexual coercion, enforced prostitution, forced pregnancy [...] or any other form of sexual violence of comparable gravity;
- h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- i) Enforced disappearance of persons; [...]
- j) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”

Second: For the purposes of implementing the provisions of the first paragraph of this Article, the terms below shall have the following definitions:

- a) “‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;”
- b) Genocide means intentionally imposing living conditions, such as preventing access to food or medicine, that aim to eliminate part of the group;
- c) Enslavement means exercising some or all the powers attached to the right of ownership over a person, including through human trafficking, especially of women and children;
- d) Deportation or forcible transfer means moving persons forcibly from the region in which they legally reside, through expulsion or any other coercive act, without any reason justifiable under international law;
- e) Torture meaning intentionally causing severe pain and suffering, whether physical or mental, to a person under detention or otherwise under the control of the accused. Torture does not include pain or suffering resulting from legal punishment or otherwise related to it;

- f) Persecution means intentionally depriving a person from exercising basic rights in violation of international law as a result of their belonging to a particular organization or social group;
- g) Enforced disappearance means the detaining or abducting of persons, either by the state or a political organization, or through the permission or support of the state or organization for this act, or through turning a blind eye and refusing to acknowledge that these persons were denied their liberties or to provide information about them, with the goal of preventing victims from accessing legal protections for a long period of time.

Article 13 of the law stipulated that for the purposes of the law, war crimes were defined as including:

First: "Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- a) Willful killing;
- b) Torture or inhuman treatment, including biological experiments;
- c) Willfully causing great suffering, or serious injury to body or health;
- d) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- e) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- f) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;"
- g) Unlawful detention;
- h) Unlawful deportation or transfer;
- i) Taking of hostages.

Second: "Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

- a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- b) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- c) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- d) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects [ . . . ] that would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;"
- e) Intentionally launching an attack in the knowledge that such attack will cause "widespread, long-term and severe damage to the natural environment, that would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
- f) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- g) Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion;
- h) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;"

- i) The transfer, directly or indirectly, by the Iraqi government or any of its agencies, or any of the agencies of the Arab Socialist Ba'ath party, into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- j) "Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives."
- k) Subjecting persons who are in the power of any state to "physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- l) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- m) Declaring that no quarter will be given;
- n) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- o) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- p) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- q) Pillaging a town or place, even when taken by assault;
- r) Employing poison or poisoned weapons;
- s) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- t) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;"



- u) "Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- v) Committing rape, sexual slavery, enforced prostitution, forced pregnancy [...] or any other form of sexual violence of comparative gravity;
- w) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- x) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- y) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for [under international law];
- z) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities."

Third: In an armed conflict of any kind, "any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

- a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- b) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- c) Taking of hostages;
- d) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable."

Fourth: "Serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

- a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- b) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- c) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- d) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- e) Pillaging a town or place, even when taken by assault;
- f) Committing rape, sexual slavery, enforced prostitution, forced pregnancy [...] or any form of sexual violence of comparable gravity;
- g) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
- h) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- i) Killing or wounding treacherously a combatant adversary;
- j) Declaring that no quarter will be given;
- k) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which

are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

- l) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.”

Article 14 of this law also specified the acts that were to be included among crimes violating Iraqi law; the first paragraph of the Article stipulated that the tribunal’s jurisdiction applied to perpetrators of the following crimes:

1. Interfering with the affairs of the court or attempting to influence its proceedings;
2. Wasting or squandering national resources, in accordance with paragraph (k) of the second Article of the Penal Code on conspiring against the security of the country and undermining the regime (law No. 7 of 1958);
3. Abuse of one’s position, pursuing policies that could lead to the threat of war, or using the Iraqi armed forces against another Arab state, in accordance with Article 1 of Law No. 7 of 1958;
4. If the tribunal finds that any of the elements of the crimes stipulated in Article 11, 12, or 13 of this law are taking place, and that this constitutes a crime under the Iraqi Penal Code or any other elements of penal law at the time it was committed, then the tribunal has jurisdiction to examine the case.

## **VI. Jurisdiction of the Tribunal over Prosecution in National Courts**

Articles 29 and 30 of the law address disputes over jurisdiction between the tribunal and national courts under the Supreme Judicial Council. These Articles stipulate that:

1. The tribunal has precedence over all other Iraqi courts for cases under its jurisdiction, namely for the aforementioned crimes stipulated in Articles 11, 12, and 13. This Article is not particularly necessary since Iraqi law did not contain provisions criminalizing acts related to war crimes, genocide, or crimes against

humanity. The Supreme Iraqi Criminal Tribunal is the only court with jurisdiction to address these crimes. In such cases, a dispute over jurisdiction is impossible if persons are being prosecuted for acts that the law covers under any of the three aforementioned categories, unless the Iraqi Penal Code or other Iraqi law stipulates a criminal penalty for the act in question.

2. The tribunal has joint jurisdiction with the national courts for crimes listed in Article 14. However, paragraphs 3 and 4 of Article 29 give the tribunal the right to ask to hear any case pertaining to the crimes stipulated in its law, and that the courts must respond to the request. The crimes listed in Article 14 are to be heard by the Supreme Iraqi Criminal Tribunal which is to prevent the accused from benefitting from any other previous law of amnesty that would apply if the case was heard by a normal court. Article 15, paragraph 6, of the law stipulated that amnesty laws issued prior to when this law went into effect do not include those accused of any of the crimes stipulated in this law. The sixth paragraph was limited to the three grave crimes stipulated in Articles 11, 12, and 13.

## **VII. Amnesty and Statutes of Limitations**

Article 17, paragraph 4, of the law stipulated that the crimes listed in Articles 11, 12, or 13 were not subject to statutes of limitations for criminal proceedings or punishment. This is also unnecessary since Iraqi law does not itself utilize statutes of limitations for criminal proceedings punishment; this applies to civil cases only.<sup>(129)</sup>

With regard to amnesty, the law of the tribunal addressed two scenarios. First, if the accused is covered under previous amnesty laws that prevent their prosecution, then Article 15, paragraph 6, stipulated that these previous amnesty provisions could not be applied to perpetrators of the crimes listed in the law of the tribunal.

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(129) See Article 12 of the Iraqi Civil Code (No. 40 of 1951).

The second scenario relates to the implementation of provisions stipulated in Article 27, paragraph 2, regarding not granting amnesty or reducing sentences issued by the tribunal, and that the stipulated punishment was to be carried out within 30 days of the date when the ruling or decision became irrevocable.

### **VIII. The Activity of the Tribunal**

The most important observations about this law and the functions of the tribunal include:

During its tenure, the Supreme Iraqi Criminal Tribunal heard 12 cases related to prosecuting members of the previous regime and issued 412 confirmed convictions.<sup>(130)</sup> Five of the twelve cases were related to the crime of forced disappearance, which is a crime against humanity pursuant to the provisions of Article 12, paragraph 1, clause (p) of the law of the Supreme Iraqi Criminal Tribunal (No. 10 of 2005). These cases were:

- The Anfal crimes<sup>(131)</sup>
- Attacks against the city of Halabja<sup>(132)</sup>

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(130) See Document No. CCPR/C/IRQ/5 on the concluding remarks of OHCHR, periodic report No. 5 on Iraq.

(131) Thousands of Kurdish civilians-men, women, and children-were subjected to forced disappearance during the military operation that occurred in 1988 and which became known as the Anfal campaign. When the military operations ended, the Kurds were detained in army camps and detention centers. The documentation and evidence presented to the tribunal attested to the forced disappearance of these persons, which is a crime against humanity, and the tribunal issued rulings against the members of the dictatorial regime who committed this crime. See reports of the Committee on Enforced Disappearances, country reports, Iraq, 2014.

(132) After the chemical attacks on the city of Halabja on 16 March 1988, the survivors fled to neighboring countries. When amnesty was issued for Kurds on 16 September 1988, the army and other regime forces arrested residents of Halabja who were returning as a result of the amnesty provision and detained them in camps (Kird Jal and Bir Hashtar) and imprisoned them in the Nograth Salman prison in the Muthanna governorate of southern Iraq. The tribunal issued rulings for the offenders in this case who had committed the crime of forced disappearance. See reports of the Committee on Enforced Disappearances, country reports, Iraqi, 2014.

- Incidents that took place in 1991<sup>(133)</sup>
- Incidents related to secular parties<sup>(134)</sup>
- Purges of religious parties<sup>(135)</sup>

The tribunal also heard other cases, the most important of which were:

- The Dujail massacre<sup>(136)</sup>

- (133) During the Sha'aban uprising (the 1991 uprising of the Iraqi people against the former Iraqi president and his oppressive partisan security apparatus), which occurred after the withdrawal of the Iraqi army from Kuwait in 1991, the governmental forces used repressive strategies, including detaining citizens from different social strata who participated in these events. This occurred in southern governorates including Basra and Maysan. The dictatorial regime forces committed frequent violations of human rights during the uprising, including forced disappearance of persons. Some key officials from the dictatorial regime were prosecuted for this crime. See reports of the Committee on Enforced Disappearances, country reports, Iraq, 2014.
- (134) After the now-dissolved Ba'ath party took control of Iraq in 17 July 1968, it developed a plan to eliminate parties, including political parties, which it considered to pose a threat to its power. It undertook purges of secular parties at that time, most notably the Communist party, and committed grave human rights violations against their members, including forced disappearance. The tribunal issued rulings against some members of the dictatorial regime who had committed this crime.
- (135) The dictatorial regime did not allow for any political activity outside the now-dissolved Ba'ath party and issued resolutions that criminalized establishing or belonging to other parties, including religious parties. The regime created various pretexts justifying this, most importantly that the parties threatened internal and external state security. One of these resolutions was the (now-dissolved) Revolutionary Command Council's Resolution No. 461 of 31 March 1981, which stipulated that the Islamic Dawa Party, one of the religious parties, was anti-nationalist, and criminalized its political activity on the basis that it was working against the interests of national security. It also made belonging to this party punishable by death in accordance with this resolution. These measures extended to all religious parties and resulted in tens of thousands of persons being killed or imprisoned for their political beliefs. The crime of forced disappearance was one of the crimes the dictatorial regime systemically committed against those who belonged to these parties. Documentation provided to the tribunal demonstrated that members of the dictatorial regime had committed this crime and they were prosecuted in accordance with the law of the Supreme Iraqi Criminal Tribunal.
- (136) This was the case that resulted in Saddam Hussein being sentenced to death, along with his half-brother Barzan al-Takriti, the director of the intelligence service, Taha Yassin Ramadan, a vice president of Iraq, Awad al-Bandar, chief judge of the Revolutionary Court, and six other leading Ba'ath party officials in the Dujail region. The crime in question was the execution of 148 persons from the town of Dujail, following a failed assassination attempt against Saddam Hussein, which was carried out by a group that the regime claimed was linked to the Islamic Dawa Party.

- The genocide and forced disappearance of Feyli Kurds<sup>(137)</sup>
- The Barzani genocide<sup>(138)</sup>

In order for national courts to effectively and fairly prosecute crimes committed under international law, four key conditions had to be met:

1. An effective legal framework for the court;
2. Judges, public prosecutors, defense lawyers, and well-trained administrative personnel;
3. The appropriate infrastructure;
4. Fostering a culture of genuine balance between the rights of the prosecution and the defense, and ensuring the impartiality of the judiciary.

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(137) In 1980, there were a series of unjust resolutions passed by the Revolutionary Command Council against the Feyli Kurds. The most dangerous of these was Resolution 666 of 1980, which rescinded their Iraqi nationality. They were subsequently detained and more than half a million people were forcibly displaced and lost their moveable and immovable assets. Youths between the ages of 14 and their mid-30s were detained and later executed in order to prevent them from joining the Iranian armed forces in the war against Iraq after leaving the country. There were a number of mass graves found and the Supreme Iraqi Criminal Tribunal ruled that this constituted genocide; the Council of Ministers later issued a resolution to the same effect.

(138) This crime began in 1975 when the former regime issued an order expelling the Barzani tribe from their villages in the governorate of Erbil to southern governorates in Iraq. In 1980, they were forcibly returned to housing units in the subdistrict of Qushtapa. In the period between 30 June and 1 September 1980, the security forces and the Republican Guard surrounded these camps and detained thousands of Barzani men and youths over the age of 9, claiming they would be taken to attend a meeting and then returned to their places of residence. They were instead taken to the city of Kirkuk. What happened next was unknown until some remains of detainees were found after 2003, indicating that they had been executed by firing squad and buried in mass graves in the subdistrict of Yasia in the governorate of Muthanna. Statistics suggest that the victims of this crime number around 8000 people. After 2003, the Iraqi government transferred the case of those accused of this crime to the Supreme Iraqi Criminal Tribunal for prosecution. On 2 March 2009 the tribunal held its first session and on 3 May 2011 ruled that this constituted genocide against the Barzanis.

## **IX. Non-Judicial Measures for Accountability**

Strengthening accountability and preventing impunity were two key factors in building a state with democratic foundations after the fall of the authoritarian regime. This is crucial for establishing rule of law and respect for human rights, as well as honoring the suffering and sacrifices of victims and ensuring the non-repetition of violations in the future. In order to achieve this, accountability cannot be limited to judicial measures, since totalitarian regimes, including the former Iraqi regime, completely control all parts of the state under a single ruling party, which means that the scope of violations and abuses against human rights and liberties extends to all areas of life. The fourth principle of the Chicago Principles stipulates that countries should implement policies, including removing persons from office and administrative penalties and procedures, alongside judicial proceedings. As discussed above, such policies of removal and exclusion had been adopted in Iraq before 2003, during the changes of power that took place in 1958 and 1963. When the Ba'ath party came to power, it also pursued similar policies of purges within governmental institutions. This policy of exclusion aims to preventing individuals responsible for past violations from being involved in the government or from holding public office for a set period of time, or permanently. Policies of exclusion and related administrative penalties and procedures aim to punish perpetrators of crimes and violations and are adopted as part of the new regime's efforts to prevent future violations and to distinguish the new regime from previous oppressive regimes through making a clear commitment to accountability and basic human rights.

Policies of exclusion and its related penalties must be proportionate to the violations that took place and must have as their future objectives the achievement of peace, national interests, and building a stable society.

With regard to security and military institutions, there is a particular need to make an effort to identify the persons in the armed forces and intelligence and security agencies responsible for grave violations of human rights and humanitarian law. This should be



followed by preventing those most directly responsible for these violations from being involved in government or security forces, particularly those who had a role in planning, instigating, ordering, or committing gross violations of human rights or humanitarian law. Likewise, those who aided political leadership in planning, instigating, ordering, or committing gross violations of human rights or humanitarian law should be prohibited from participating in government or political institutions. In the justice system, the policy of exclusion should target the judges with ties to the repressive regime, and especially those who were involved in committing, supporting, or enabling others to commit gross human rights violations. There should also be administrative measures for exclusion: justice requires that such individuals be prevented from accessing special privileges that they had received under the previous regime for their services or loyalty.

The state must also provide guarantees of the due process of justice through adopting non-judicial measures against perpetrators of violations. All individuals subject to exclusion or other non-judicial procedures, including administrative and civil penalties, must receive appropriate assurances of the due process of justice, given the logical connection between a policy of exclusion and the criminal proceedings after criminal responsibility is proven.

In Iraq, the De-Ba'athification of Iraqi Society was the first order issued by the civilian administrator Paul Bremer (Order No. 1 of 16 March 2003), which required members of the Ba'ath party of all levels (even "member" or "active member") to be "removed from their positions and banned from future employment in the public sector" and to "be evaluated for criminal conduct or threat to the security of the Coalition."<sup>(139)</sup> This

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(139) This was not the first legislation of its kind in the Iraqi legal system. After the Revolution of 1958 and the coup of Abd al-Karim Qasim, the same approach was adopted in Law No. 2 of 1958 for reorganizing the government, which removed a significant number of governmental employees from office for reasons related to their political beliefs. The Ba'ath party took the same steps following its first coup in 1963, which overthrew the Abd al-Karim Qasim government. At this time, another law to reorganize the government was issued (No. 48 of 1963).

resolution did not distinguish between those who belonged to the party for professional or security reasons, and those who belonged to the party and had committed the crimes in question. As a result of this resolution, a large number of public employees, judges, and army and police officers were dismissed from their positions. The education sector was the second hardest hit, after the security sector.

The next order passed was Order No. 2 of 23 May 2003 on the Dissolution of Entities, which expanded the de-Ba'athification policy to include the dissolution of the institutional entities listed in the order, and left open the possibility of adding other institutions to this list in the future.<sup>(140)</sup> After this order, hundreds of thousands of employees were dismissed and were prevented from accessing any of rights related to their former positions, at least during the period when the law first went into effect.

## **Subsection 2: Establishing the Legal Framework for the De-Ba'athification Commission**

In CPA Memorandum No. 7, the civil administrator delegated powers related to de-Ba'athification to the Governing Council. Governing Council Resolution No. 21 of 2003 then established the De- Ba'athification Commission, which was later ratified by Article 49 of the Law of Administration for the State of Iraq for the Transitional Period. The

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(140) The list of entities and institutions to be dissolved by the order (the "Dissolved Entities") included the following: "the Ministry of Defense, the Ministry of Information, the Ministry of State for Military Affairs, the Iraqi Intelligence Service, the National Security Bureau, the Directorate of National Security, the Special Security Organization, all entities affiliated with or comprising Saddam Hussein's bodyguards, to include the Murafaqin (Companions) and al-Himaya al-Khasa (Special Guard); the following military organizations: the army, the air force, the navy, the air defense force, and other regular military services, the Republican Guard, the Special Republican Guard, the Directorate of Military Intelligence, the Al Quds Force, and the Emergency Forces; the following paramilitaries: The Saddam Fedayeen, Ba'ath Party Militia, Friends of Saddam, and Saddam's Lion Cubs (Ashbal Saddam); other organizations: the Presidential Diwan, the Presidential Secretariat, the Revolutionary Command Council, the National Assembly, the Youth Organization, the National Olympic Committee, the Revolutionary, Special, and National Security Courts and all other organizations subordinate to the dissolved entities."

current Iraqi constitution likewise kept this law in effect by issuing Article 135. Many political blocs and affiliated parties contributed to the establishment of the Governing Council and the appointing of members to the Commission.

## **I. Resolutions of the Commission**

The Commission issued two main resolutions (1 and 2) as well as a set of procedures to clarify the mechanisms under which it would work:

1. Resolution No. 1 stipulated the dismissal of anyone who had held the rank of group member or higher in the Ba'ath party, prevented them from reassuming this position, and stated that they had the right to appeal this decision. The resolution was less severe than the order previously issued by the civil administrator, which prevented anyone who had held the rank of active member or above in the Ba'ath party from holding public office. The commission also chose to grant an exception for returning to public office after vetting the person's claim that they had not been involved in crimes and violations and after confirming their rank within the party. In this case, the person could not hold a rank higher than section member. This resolution enabled thousands of people to return to their positions.
2. Resolution No. 2 stipulated that any person who had held the rank of group member, general director, expert, or advisor, or who had been working for the regime's repressive agencies was forbidden from holding leadership positions in state institutions, newspapers, the media, or civil society. Resolution No. 2 also marked a step back from the original resolution of the civil administrator, which had only stipulated that these persons be removed from their positions, and that those who had been group members in the party, or experts, advisers, district administrators, subdistrict heads, or had worked in the dissolved security apparatus were not allowed to hold any position of public authority.

3. Affiliates of the security apparatus and dissolved entities: Resolution No. 2 permitted former affiliates of the dissolved security agencies to work; they did not have to give up positions of public authority. In practice, the commission prevented them from returning to work or receiving their pensions. This was not consistently applied in all cases: there was some interference by political parties, and purchasing of loyalties, which resulted in many persons returning to work and assuming high-level positions, such as leaders of security and military units. This was also the case with employees of dissolved institutions, i.e., the law was unevenly applied among them.<sup>(141)</sup>
4. Section members and party leadership: In accordance with Coalition Provisional Authority Order No. 1, high-ranking party leaders were to be permanently excluded from holding public office or participating in political life, were forbidden from accessing any of the rights or benefits that they had previously enjoyed, and were subject to investigation and evaluation regarding their role in the crimes and violations committed under the previous regime.
5. The judiciary and public prosecution: The Commission did not adopt any exceptional measures for the judiciary. They were included in the vetting carried out by the judicial review committee established in accordance with Coalition Provisional Authority Order No. 15 of 2003.

The procedures of the Commission in issuing resolutions during its first phase were neither transparent nor professional. Instead, this policy of exclusion drew upon unconfirmed information and data. This was exacerbated by the fact that the law of the commission did not outline a mechanism for appealing decisions related to the resolution before an external entity, and which would have the final say on grievances or appeals. The commission issued various laws until 2008, when the Law on the Commission for Accountability and Justice was passed (No. 10). By this time, it had

(141) Legal study by scholar Ayad Mohsen, an employee of the De-Ba'athification Commission.

granted more than 14,000 exceptions to Ba'ath party officials who held the rank of group member, and granted 5,000 Ba'ath party group members their pensions, most of whom were in the governorates of Saladin, Ramadi, Diyala, and Mosul; the lowest number of exceptions were granted in Maysan, Najaf, and Nasariya. The commission cooperated with administrative agencies in the western and northern governorates in carrying out these pension exceptions for their residents who had been group members in the party, while other governorates dealt with pension delays for those covered under the law.<sup>(142)</sup>

Here we must mention that in many spheres of government, the commission's resolutions were not applied, while in other areas of government high-level members of the dissolved Ba'ath party were reappointed without the commission's knowledge or approval, for reasons related to the minister's position. The commission also received criticism for being politicized or used for political and electoral purposes.<sup>(143)</sup>

As a result of the initiative for national reconciliation, the compromises made by different political blocs, and pressure from external parties, the Law of the Commission for Justice and Accountability was issued as an alternative to the Law for the De-Ba'athification of Iraqi Society.

## **II. Law No. 10 of 2008: The Law of Accountability and Justice**

Five years after the fall of the regime and the implementation of the law establishing the De-Ba'athification Commission, it was clear there was a need to reexamine the law. Calls for change were made in response to electoral pressure, particularly regarding the payment of pensions. The main demands were to pay out pensions to section members from the Ba'ath party as well as those associated with the security agencies that had

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(142) Legal study by the scholar Ayad Mohsen, an employee of the De Ba'athification Commission.

(143) For example, of the 499 candidates excluded from the parliamentary elections of 2010, 145 had appealed, but only 55 candidates were reinstated.

been classified under the Order for the De-Ba'athification of Iraqi Society as "entities to oppress the Iraqi people." Article 8 of the Law of the Commission for Accountability and Justice defined this category as including general security, the intelligence service, special security, special protection services, national security, military security, and military intelligence, and Fedayyeen Saddam. It was no secret that affiliates of these agencies were generally from the central and western governorates, which prompted politicians from these governorates to demand that the Law on the De-Ba'athification of Iraqi Society be reexamined, and that those included under this law be paid their pensions. They also called for a judicial mechanism to be established that could challenge the resolutions of the commission.

At the same time, the other side supported the continuation of these laws excluding Ba'ath party members from political life and public office, and was keen to hold onto the provisions that prevented the return of the Ba'ath party in any form.

### **III. Establishing the Commission and its Objectives**

Article 2 of the Law of the Commission established the commission under a name that was at odds with the name adopted under the Iraqi constitution. For this reason, the De-Ba'athification Commission was renamed the Commission for Accountability and Justice, which legally replaced the former, and an entity was designated to serve as a bridge between the two, namely, the Council of Representatives.

Paragraph 2 of Article 2 stipulated that commission was the investigating agency with regard to persons covered under the procedures set forth in its law.

Paragraph 4 of Article 2 stipulated that the commission should be composed of seven members with political and legal experience who could provide balanced representation of different sectors Iraqi society. These members were to be proposed by the Council of

Ministers, approved by the Council of Representatives by a simple majority, and ratified by the Presidential Council.<sup>(144)</sup> The sixth paragraph of the law stated that the seven members would vote by secret ballot to directly elect their chairman and deputy, who would then be ratified by the Council of Representatives by an absolute majority.

In order to establish a mechanism for evaluating appeals filed against the commission's resolutions, the law created a judicial body for cassation within the Court of Cassation, which was called the appellate commission for accountability and justice, and which was composed of seven judges who were not covered under the de-Ba'athification laws, and who were nominated by the chief justice of the Supreme Judicial Council and then voted on by the Council of Representatives. This body was led by the most senior judge and made decisions by a four-vote majority.

#### **IV. Objectives of the Commission**

Article 3 of the law establishing the commission stipulated that its goals were as follows:

1. Prevent the ideas, administrative structure, policies, or practices of the Ba'ath party, under any name, from returning to power or entering any part of the public life of Iraq.
2. Fully implement de-Ba'athification of institutions in the government sector, mixed sector, civil society institutions, and Iraqi society in general.
3. Transfer the cases of members of the dissolved Ba'ath party and its repressive agencies, who had been convicted of crimes against Iraqi people, to the competent courts to carry out justice.
4. Empower victims of crimes committed by the Ba'ath party and its repressive agencies, through having the competent entities review their demands for reparations for damages suffered as a result of these crimes.

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(144) After the Presidential Council was disbanded after two sessions, the power to ratify was transferred to the president of Iraq.

5. Help locate the funds seized by officials from the former regime through illegal avenues, either in Iraq or abroad, and return them to the state treasury.<sup>(145)</sup>
6. Support Iraqi collective memory through documenting the crimes and illegal practices of members of the Ba'ath party and its repressive agencies, and providing a database of the aforementioned information to prevent future generations from suffering the same injustices, persecution, and tyranny.

## **V. Responsibilities of the Commission**

Article 4 set forth the tasks the commission needed to carry out, and that it would adopt the following methods in order to achieve its goals:

1. Apply the provisions of the law in accordance with the relevant Articles of the constitution.
2. Present evidence and documentation held by the commission about the crimes committed by members of the Ba'ath party and its repressive agencies against Iraqi citizens to the Iraqi judiciary via the Public Prosecutor's Office.
3. Receive complaints from persons harmed by the practices of and crimes committed by members of the Ba'ath party and its repressive agencies, and gather evidence and documentation of the aforementioned crimes and prosecute them accordingly.
4. Present the necessary studies and recommendations through coordination with the relevant agencies in order to amend or abrogate legislation passed by the previous regime for the benefit of regime officials, especially if this occurred without including other members of society.
5. Support historical memory through documenting the suffering and scandals caused by the former regime in order to prevent future generations from suffering the same persecution and tyranny, and fostering coexistence, reconciliation,

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(145) On a practical level, the commission remained external to the approved procedures for recovering these funds after a fund for the recovery of looted Iraqi funds was established under the auspices of the Commission of Integrity.



peace, justice, equality, and shared citizenship among Iraqis, and in particular working to achieve the following:

- a) Develop a complete list of the individuals covered under the de-Ba'athification procedures during the period in which the commission was carrying out its work, and publish a list with the de-Ba'athification procedures stipulated in the law, with regard to gathering a list of names of all the individuals subject to these procedures, including the rank of each individual and the date of the relevant order. This list was to be kept as an archive of the dissolved Ba'ath party.
- b) The custody of all cases of the dissolved Ba'ath party was the responsibility of the government, in order to preserve these cases until a permanent Iraqi archive could be established in accordance with the law.
- c) Contribute to the development of social programs to raise awareness and affirm political diversity, tolerance, equality, and human rights, and denounce the crimes committed by the former regime, as well as the culture of one-party rule, exclusion, and marginalization.

## **VI. Procedures and Penalties Adopted by the Commission**

Article 6 lays out the procedures that were adopted by the commission for those who had belonged to the Ba'ath party and its repressive agencies prior to 9 April 2003, in order to achieve the commission's objectives. This included the following measures:

1. End the term of service for any Ba'ath party employees who had held the rank of section member or higher, and move them into retirement in accordance with the law of service and retirement.
2. Transfer all Ba'ath party employees who had held more specialized positions (equivalent to general director or higher), above the rank of group member, into retirement in accordance with the law of service and retirement.
3. End the term of service of all those affiliated with the repressive security agencies and transfer them into retirement in accordance with the law of service and retirement.

4. Prevent former members of Fedayyeen Saddam from accessing retirement benefits as a result of their work for the aforementioned agency.
5. Enable all employees who had not held special positions within the party, namely those who held the rank of group member or below, to return to their departments and continue their work.
6. Ba'ath party members who held the rank of group member were not allowed to return to or continue their service in any of the three executive bodies, the Council of Judges, ministries, security agencies, the Ministry of Foreign Affairs, or the Ministry of Finance.
7. Retirement pensions or grants were not to be paid out for those who belonged to the Ba'ath party after 20 March 2003 and who had received political or humanitarian asylum in any other country.
8. Prevent any Ba'ath party members who held the rank of general member or above, and who took from public funds, from assuming the position of general director or an equivalent or higher role, or director of an administrative unit.
9. Refer all of those who were not covered under the law of service and retirement to work for state institutions, with the exception of the three executive institutions, the Council of Judges, the security agencies, the Ministry of Foreign Affairs, or the Ministry of Finance, except for those included in the first paragraph of the Article.
10. All of the rights set forth in the previous paragraphs were to be withheld from any persons convicted of crimes against the people of Iraq, or of taking from Iraq public funds.

Although Article 3, paragraph 2, stipulated that the commission aimed to fully de-Ba'athify the governmental sector, the mixed sector, civil society organizations, and Iraqi society as a whole, it is also true that Article 6 (which included the penalties adopted under the law and the procedures that the commission could legally use to carry out its objectives) lacked legal authority regarding how the commission was to implement this

on a practical level. The commission forbade those covered under the law from forming or establishing any civil society organization and stated that the commission's approval was a prerequisite to register with the NGO directorate. In our opinion, the law did not enable the commission to enforce penalties or to adopt measures in the event of violation of the law. This violated the Iraqi constitution, which holds that both crimes and punishments must have a legal basis.

In accordance with Article 6, the penalties adopted did not depend upon legal responsibility for violations and crimes as the basic criteria that would need to be investigated prior to prosecution. Instead, it considered active member status in the Ba'ath party to be sufficient to apply the law of the commission to a particular case, while the lowest levels of party membership were exempt from prosecution.<sup>(146)</sup>

The current law, which went into effect on 14 December 2008, stipulated in Article 7 that those covered under the law must present their claims during a period of sixty days from when the law went into effect in Iraq, and ninety days from when it went into force for those abroad.

The above timeframe produced some legal confusion, since the period for presenting a claim had begun, but the entity responsible for handling the claims that not yet been formed. The period stipulated in Article 7 should have gone into effect after procedures for forming the new commission had finished, especially since the period for presenting claims under Iraqi law is part of the general regulations and cannot be exceeded. A claim presented outside this scope is rejected on procedural grounds; there is also a process of making claims which requires guidelines to be issued by the competent authority

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(146) The lowest levels in the Ba'ath party structure were *nasir* (partisan) and *nasir mutaqaddim* (advanced partisan), followed by active member, which was the lowest rank covered under the law, though with the lightest penalties.

regarding the necessary information and forms, and the mechanisms through which the claim is to be determined. This is not possible without forming the Commission for Accountability and Justice, which remained tucked away in a desk. The actual establishment of the commission was delayed out of fear of creating political rifts at a time when bridges needed to be built.

The establishment of the new commission has been met by various obstacles and roadblocks. There are many reasons for this, including conflicts among party interests and the desire of other forces to stall the process. The most important consequence of this has been the re-appointment of higher- ranking party members, as well as making the candidate's standing with regard to the Law of Accountability and Justice a prior condition to appointment. Submitting candidate lists for parliamentary and governorate elections also requires the approval of the same commission. This led the Council of Representatives to issue a resolution stating that during the caretaker phase, the De-Ba'athification Law had become obsolete from a legal standpoint and could not be applied in carrying out the law of the commission, and that the current law of the commission required the formation of the commission in accordance with the law.

## **VII. Decorations, Titles, and Privileges**

Article 9 of the law removed titles, decorations, and privileges connected to military rank or public sector employment that had previously been bestowed upon group, section, and branch members of the Ba'ath party and employees of its national and regional offices.

## **VIII. Prosecution**

Article 4, paragraph 2, stipulated that the commission was responsible for coordinating with the judiciary, and that evidence and documentation held by the commission about

crimes committed by members of the Ba'ath party and its repressive agencies against Iraqi citizens shall be handed over to the Iraqi judiciary via the Public Prosecutor's Office. The third paragraph of the same Article added that the commission was responsible for receiving complaints from those harmed by the practices of and crimes committed by members of the Ba'ath party and its repressive agencies, and for gathering evidence and documentation about the aforementioned crimes and prosecuting them.

Article 10 of the law included a general provision for prosecuting all crimes committed by members of the Ba'ath party, its repressive agencies, or the armed forces against the Iraqi people or relating to the use of public funds for personal gain.

Article 14 of the law made the Public Prosecutor's Office responsible for receiving complaints regarding crimes allegedly committed by members of the Ba'ath party, its repressive agencies, former regime officials, and bringing these cases before the competent court if sufficient evidence was available. The last provision of this Article clearly contravenes Article 4, paragraph 3, of the law, which requires this be carried out by the Public Prosecutor's Office only, which was to coordinate with the commission to obtain the informed it possessed.

Article 11 of the law stipulated that the Ba'ath party should be prosecuted on the basis of being the party and regime responsible for committing crimes against the Iraqi people. The party was banned under the current Law No. 32 of 2016, along with takfiri, terrorist, and discriminatory entities, parties, and activities – belonging to any of the above was punishable by up to life in prison.<sup>(147)</sup> This law did not contain any mention of the Commission for Accountability and Justice.

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(147) Law No. 32 of 2016, Banning the Ba'ath Party and Takfiri, Terrorist, and Discriminatory Entities, Parties, and Activities (see Articles on criminal penalties nos. 812-).

## **IX. Dissolving the Commission**

Article 25 of the law granted the Council of Representatives the right to dissolve the commission after it finished carrying out its work. This required an absolute majority in accordance with the constitution of Iraq. At this point, the appointments of the judges and public prosecutors would end, and they would return to working in the Supreme Judicial Council unless they had reached retirement age before the commission was dissolved. Persons who had been affiliated with the commission were to be transferred to equivalent staff positions within the three governing bodies, or the ministries, security agencies, Ministry of Justice, or Ministry of Finance. They would continue to receive the emoluments they earned working for the commission for a period of a year after being transferred.

The law did not set a deadline for the commission to complete its designated tasks: it was left up to the commission to announce when its work was finished. The problem of when to dissolve the commission was tied to the question of dealing with the staff employed by the commission—a total of more than 1017 employees. It would be difficult for the Ministry of Finance to redistribute such a large number of employees, particularly given the existing limitations of the public workforce in Iraq.

Practically speaking, the commission was legally obligated under Article 24 of the law to prepare an archive of all of the persons covered under Article 6 of the law, including their rank in the party, position of employment, and the date that the relevant procedures were carried out. This archive was to be moved to the Council of Ministers and circulated to all of the ministries, departments not connected a ministry, independent bodies, and civil society organizations. This archive was supposed to be prepared in order to replace individual vetting by the commission regarding those covered under its provisions. Instead, any entity required to screen a person for previous Ba'ath affiliation could examine this archive.

Joining the Ba'ath party was also criminalized under Law No. 32 of 2016 (the Law Banning the Ba'ath Party and Takfiri, Terrorist, and Discriminatory Entities, Parties, and Activities). This was a strictly judicial matter in which the public prosecution was to act on behalf of the public interest. The proposal was to require the commission to deliver the archive within a set period of time and to hand it over to the Council of Ministers to deal with according to the aforementioned mechanisms. The commission's other tasks were entrusted to the judiciary since these were judicial matters. If it was proven that a person had become involved again in Ba'ath party activities, then there was to be a judicial decision (rather than administrative procedures) since they were no longer covered under the law of the commission. As one of the transitional justice institutions, the commission did not have a permanent mandate. Its purpose was to carry out investigations of persons covered under the law's provisions, and it therefore could not add new groups to the law, such as those who had newly joined after Ba'ath party affiliation became criminalized under the law.

### **Section 3: Reparations**

If we compare the approach to reparations in Iraq with other case studies, what stand outs in the Iraqi case are the sectors of society included in the program and the kinds of damages for which victims could receive material compensation. One explanation for this is that the majority of laws guiding the transitional justice process in Iraq were issued during the period prior to the first elections for the Council of Representatives. Opposition parties took the majority of seats in the National Assembly, which had appointed rather than elected members: they were therefore both the source and the target of the legislation.

However, discussions of reparations for victims cannot be limited to material compensation: the state has many other obligations. First, it must determine who the

victims are and what physical, mental, psychological violations they have suffered, individually or collectively. The injustices that they and their families have endured must be examined, as well as the social and economic repercussions resulting from these violations. In order to succeed, these programs and policies must take into consideration the specific needs and situations of the victims and their families. Victims must be provided with fair redress and full knowledge of the facts of the violations that occurred, as well as the circumstances and identity of the perpetrator. They must have access to legal and institutional avenues through which they can pursue justice, and be guaranteed full legal representation and the support of legal aid in order to ensure that they are made aware of their rights and how to access them. Victims must be genuinely involved in the legal and criminal procedures related to the violations that occurred, either as primary or secondary victims in the case, or as civil plaintiffs.

The state is obligated to provide reparations to victims that go beyond addressing particular violations and the political climate that produced them. It must also ensure the non-repetition of violations in the future, to the victims and others. For one, states must endeavor to empower victims to obtain direct compensation from the perpetrators of violations without impinging on their right to reparations from the government in its capacity as the entity responsible for providing reparations for violations of rights, even if the perpetrator was a former government official.

There are many forms of reparations that the government can offer in its effort to restore victims' circumstances to what they had been prior to when the violation occurred. These reparations must be commensurate with the nature of the violation and harms it caused, and must include all victims.

Compensation in kind may include restoring liberty to a previously imprisoned person, or returning lost properties, possessions, or moveable or immovable assets, in addition



to positions of employment lost as a result of the violation that occurred. This could also include restoring citizens' rights and educational opportunities; expunging a victim's criminal record so that they have a clean slate; reuniting the victim with their family; determining the whereabouts of remains of deceased or forcibly disappeared persons; and restoring legal rights that victims have been deprived of as a result of the violation. Furthermore, victims should be gradually reintegrated into society, first by removing the stigmas imposed upon groups by the previously regime. Victims should be individually and collectively commemorated, so that the wounds of the individual and of society as a whole may be healed, and its social fabric gradually restored.

Financial compensation can take many different forms, such as money paid to the victim as a grant, either in a lump sum or in installments; fees for treatment of physical, mental, or psychological harms suffered as a result of the violation; loans offered in order to pursue economic, social, or educational opportunities; or other fees related to legal aid that the victim requires in order to receive their rights and reparations. This could include lawyers' fees, fees for caseworkers, psychological experts, medical consultations, or rehabilitation.

There are many forms of rehabilitation for victims, depending on the particular circumstances in question. This may include steps to address the psychological and physical harms resulting from the violations through medical and psychological rehabilitation; providing social services to address social repercussions for victims; skill-building through professional development; ensuring access to primary, secondary, or university education; helping the victims attain advanced degrees at domestic or foreign universities through providing scholarships with affirmative action for victims in the form of annual quotas; specialized programs aiming to rehabilitate the victims' children; or issuing formal apologies. Apologies are a form of reparations through which the society can denounce the violations that occurred and express a desire to turn over

a new leaf and promote social harmony. It is also prudent to launch programs to rebuild society and to persuade victims to accept pardons and forgiveness for perpetrators. The state is responsible for apologizing to victims and demanding apologies from perpetrators of violations.

Here we must distinguish between legal and other forms of reparations. There are many forms of legal reparations that have been offered to victims of the former regime, and many institutions that were formed and laws that were consequently passed in order to address the circumstances of particular sectors of society. However, this occurred in the absence of a unified institutional framework, which meant that there was not a legal system for providing reparations to victims of the former regime and that certain groups of victims received reparations for the crimes perpetrated against them, while others did not. This included material reparations as well as compensation in kind, as will be discussed further below.

### **Subsection 1: Martyrs and the Martyrs' Foundation**

Law No. 3 of 2006 established the Martyrs' Foundation. The text of the law indicated that the foundation had been formed to address a difficult period in Iraqi history, the likes of which had rarely been seen before, in which the government was dominated by a handful of criminals led by one of the most notorious dictators in human history. As a result, hundreds of thousands of Iraqis were martyred; they sacrificed themselves to redeem the homeland and the principles of human decency. The law was therefore enacted to address the grave harms suffered by families of martyrs who had borne consecutive hardships and to compensate for a small portion of the sacrifice they made for Iraq and for the greater good.

The aforementioned law adopted a new definition of martyr that differed from the definitions used in the laws of military retirement, and of service and retirement for

internal security forces. There came to be two categories of martyrs: martyrs who were victims of war, and martyrs who fell under the definition of the aforementioned law as victims of the former regime. The Martyrs' Foundation, as one of the institutions of transitional justice in Iraq, was responsible for protecting the rights of these victims. The Law of the Martyrs' Foundation was abrogated by Law No. 2 of 2016, which instituted key changes so that the foundation no longer functioned exclusively as an institution of transitional justice. Instead, the definition of martyr was expanded to include those covered under Article 1, paragraph 1, of the new law, which defined martyr as:

- a) An Iraqi citizen or any other person residing in Iraq who gave or lost their lives either directly as a result of any of the crimes committed by the former Ba'ath party, including execution, imprisonment or torture, the effects of imprisonment or torture, genocide, chemical attacks, crimes against humanity, ethnic cleansing, or forced migration, as well as those disappeared or found in mass graves, as a result of punishment for failing to complete military service, or due to their opposition to the regime, political beliefs or affiliation, or sympathy or aid rendered to the opposition.
- b) Any Iraqi citizen who gave their life in the course of serving their country and the religious authority (marja') after 11 June 2014. The Popular Mobilization Forces and Martyrs' Foundation, in coordination with other relevant entities, the Kurdistan Region, and governorate councils, were responsible for recording the names of martyrs. Members of the Popular Mobilization Forces who had been martyred during the fighting against the terrorist organization ISIS, and whose names had not been recorded, were to have their cases brought before the committee stipulated in Article 9, paragraph 1, in order to ensure they received their due rights and benefits.

In accordance with the above definition, another category of martyrs was created, who were now covered under a law that had originally been created for the specific benefit

of victims of the former regime, even though they were not victims of the regime. At the time of writing, the Iraqi government has also drafted a law under which those killed in the October 2019 protests would be considered martyrs and would enjoy the same rights stipulated for martyrs under the law of the Martyrs' Foundation.

Article 1, paragraph 2, of the current law on the Martyrs' Foundation defines martyrs' relatives as the parents, children and spouses – even if non-Iraqi – and also their siblings, nieces, and nephews. The definition was apparently expanded in this way so that the law would cover the same categories of relatives as were affected by the violations carried out under the former regime, whose policies affected up to fourth-degree relatives of victims.

The law laid out the foundation's objectives in later articles of the law, including reparations for martyrs, which included:

1. The provision of aid to families of martyrs in addition to financial and symbolic compensation commensurate with the sacrifice made by the martyrs and their families, and provision for their social and economic welfare.
2. The provision of suitable work and study opportunities to martyrs' families, according to their qualifications, and granting priority for such positions.
3. The provision of programs and other forms of assistance to families of martyrs in legal, economic, social, financial, health, and educational spheres, among others.
4. Promoting the values of martyrdom, sacrifice, and redemption in society through:
  - a) Holding cultural, artistic, and media activities.
  - b) Building monuments and museums and naming public institutions after martyrs.
  - c) Requiring all ministries and associated departments, as well as institutions and associations not connected with ministries, to issue guidelines to facilitate procedures for martyrs' families.

5. Highlighting the sacrifices of martyrs, the suffering of their families, and the violations and crimes committed against them, through various activities and events.
6. National, regional, and international agencies should acknowledge the martyrs' sacrifices and the injustices that they and their families have suffered, and issue a UN resolution criminalizing the Ba'ath party.
7. Developing the resources of the investment authority so that its revenue can be used for the purpose of providing aid and support to families of martyrs.

### **I. The Mechanism for Reviewing Claims under the Law of the Martyrs' Foundation**

Article 9 of the law established a five-person committee led by a judge (qadi) and consisting of three other representatives of the foundation as well as a representative from the Popular Mobilization Forces (PMF). This committee was responsible for hearing the claims covered under the law within a period of three months from the date that the claim was submitted. Rulings were made by majority decision, and the committee tended to rule in favor of the foundation due the number of its representatives on the committee. The committee adopted procedural rules through the Law of Civil Procedure No. 83 of 1969, and the Law of Evidence No. 107 of 1979, which governed its decision-making. The defendant could appeal the committee's decision within a 60-day period from when they were informed of the decision, and if the case was rejected, they could resort to the court of first instance, whose decision was subject to the review of the appellate courts.

In addition to the aforementioned mechanism, Article 9, paragraph 7 stipulated that a committee shall be formed to review appeals in cases where the committee rejected the claim. This committee was to consist of one judge and four members who were employees of the foundation. Its rulings consequently tended to be made in favor of the foundation. The decisions of this committee were also subject to appeal before an administrative court during a 60-day period from the date the claimant was informed of

the decision, at which point the decision became irrevocable. The head of the foundation, in accordance with paragraph 10, could also request that the committee's decisions be reviewed based on the provisions of the previous law of the foundation. If it was found that the decision violated the provisions of the new law, then the committee would present its decision to the head of the foundation within a 30-day period. In general, the review procedures for claims, grievances, and appeals almost always tended to be decided in favor of the foundation due to the number of its representatives on the committees, since decisions were made by majority vote.

## **II. Types of Reparations under the Law**

**Material Reparations:** This included pensions due to the families of martyrs not affiliated with state institutions at the time the person was killed. In accordance with Article 11 of the law of the commission, this payment was to be three times the minimum pension for public employees.<sup>(148)</sup> If the martyr had worked for a state institution, then the family was due the pension appropriate to his office, and could choose between this pension or the above compensation offered under the law to families of martyrs not affiliated with state institutions, whichever was more.

The martyrs' relatives could combine the two pensions, i.e., the pension share stipulated under the law of the foundation, along with the retirement pension or usual salary while in the civil service. This benefit lasted for 25 years from the date that the law of the foundation went into effect (2006).<sup>(149)</sup> The same article stipulated that certain relatives of the martyr had the right to continue to receive the pensions beyond this period of

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(148) Article 12 of the Unified Pension Law stipulated that the minimum pension was 500,000 Iraqi dinars.

(149) This amended the dissolved Revolutionary Command Council Resolution No. 1927 of 1981, which permitted the relatives of the martyr to permanently benefit from both pensions. The amendment applied to those covered under the law establishing the foundation but did not include the relatives of martyrs covered under the military retirement codes and the law for relatives of internal security service forces.

time under certain circumstances. This included: the martyr's parents, wife, children, siblings, and nieces and nephews, in case of persons with special needs, and the martyr's daughters, sisters, and nieces, if the women were unmarried or not working. In the case of the martyr's wife, the pension was suspended if the marriage ended. If payment of the pension to one of the beneficiaries was suspended for any reason, the pension was to be redistributed equally among the other remaining beneficiaries. Those covered under the provisions of the law had the right to choose the higher pension between the two, i.e., between the martyr's pension or the other pension, which would be paid to them after the end of the period of time stipulated in paragraph (a), clause 2, of Article 11. Article 12 addressed cases of devolution of rights upon the death of the first beneficiary, or if the martyr was unmarried, or in cases in which the martyr's wife remarried.

Compensation in kind: Article 13 of the law stipulated that the wife and children of the martyr had the right to a plot of land to live on, and that the same was due to the parents of martyr. This could take the form of a land grant with a building loan, and this transaction was exempted from the restrictions imposed under Iraqi law that the land given to a martyr be in the martyr's birthplace, as well as the regulations of the Real Estate Bank and Housing Bank with regard to building a structure as soon as the loan was given, having multiple beneficiaries, and the rules around taking possession of the property. The law gave the relatives of the martyr a choice between accepting the land or an equivalent sum, based on the market value of the property, and that this should be paid out by the Ministry of Finance.

The loans granted to the martyrs' relatives did not need to be repaid; instead, the foundation was to pay the loan in a lump sum to the Real Estate and Housing Bank. The foundation was also required to build housing units on the lands which the Ministry of Municipalities, the Ministry of Finance, and Mayoralty of Baghdad would give without cost to the families of martyrs.

Article 16 of the law covered cases in which there were multiple martyrs from the same family. A family with more than one martyr was entitled to the following rights:

1. Adding 50 percent to the pension due to the martyrs' relatives, and to the financial benefits attached to the case of each martyr.
2. Allocating a housing unit 50 percent larger than the unit due to families with a single martyr, or allocating multiple units accordingly. If a plot of land was allocated, the area of the plot had to be 50 percent larger than that of the plot due to families with a single martyr, or multiple plots were to be allocated accordingly.
3. If the parents of the martyr did not receive a plot of land, the equivalent monetary value, or a housing unit because they had passed away, then the right to receive this benefit was transferred to the martyr's siblings.

Other forms of compensation offered under the law of the foundation included:

1. Exemption from estate taxes;<sup>(150)</sup>
2. Exemption from taxes or fees pertaining to the processing of paperwork for lands allocated by the foundation or waiving the family's portion of the fees. The martyr's family also received a one-time exemption from taxes and fees for sales, even for lands not allocated by the foundation;
3. Transferring a relative of a martyr who was a state employee to any ministry they wished to be transferred to, as appropriate to their experience and training; the penalty for failing to provide the above right was set forth in Article 329 of the Penal Code;<sup>(151)</sup>
4. Fifteen percent of government posts were to be set aside for families of martyrs;
5. Ten percent of places in higher education were to be set aside for the families of martyrs;
6. Ministries were to allow those covered under the law to take study leave for purposes of continuing their higher education;

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(150) See Article 17, paragraph 3.

(151) Article 329 stipulated that using one's position of employment to prevent the implementation of a law or order issued by the government was punishable by imprisonment or a fine.



7. The foundation was to pay 50 percent of the tuition for such study, while the Ministry of Education was to pay the other half;
8. Families of martyrs were exempt from conditions related to age, grades, or period of time worked for acceptance to institutes, universities, or other institutions of higher education within Iraq or abroad. Additionally, relatives of martyrs who had previously completed technical studies or vocational training had the right to study in the humanities, in exception to the usual regulations;
9. An exemption to the condition of residency in order to have degrees recognized was granted by the Ministry of Education for students studying abroad;
10. Families of the martyrs were granted places for the pilgrimage to Mecca (hajj), and the foundation would cover 50 percent of the costs of the pilgrimage;
11. The retirement age for families of martyrs was set at 68 rather than the usual age of 65;
12. Families of martyrs were given priority for medical services offered by the Ministry of Health and for treatment outside the country; the ministry was obligated to carry out medical treatment within a period of 30 days;
13. Families of martyrs were exempted from the condition of nationality in receiving the benefits stipulated by the law of the foundation;<sup>(152)</sup>
14. The benefits provided under this law were not to impinge upon other benefits due to martyrs' families on the basis of having been victims of violations under the former regime. The latter included the Law of the Commission for the Resolution of Real Property Disputes, which dealt with property that had been confiscated by the regime; the Law on Property Reparations for Victims of the Former Regime No. 16 of 2010, which dealt with compensation for damages related to moveable and immoveable assets; and the amended Law on the Reinstatement of Persons Dismissed for Political Reasons (No. 24 of 2005).

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(152) Iraqi law prohibited foreigners from owning property, being appointed to public office, holding certain positions, or being involved in agencies that were reserved for Iraqis only.

### **III. Returning Remains and Investigating Forced Disappearance**

As discussed above, the Ministry of Human Rights established programs after 2003, which were followed by other initiatives related to the violations of the former regime. However, the ministry failed to turn into law its proposal to establish institutional infrastructure to address the question of persons disappeared by the former regime. The would-be law proposed to the Council of Representatives has remained in draft form since 2004 and is still so at time of writing. The ministry succeeded in getting the Law of the Protection of Mass Graves (No. 5 of 2006) passed, while cases of forced disappearances were transferred, in coordination with the UN Working Group on Enforced or Involuntary Disappearances, to the Ministry of Human Rights. During the first years after it was established, the Ministry established a project to record the contents of documents from the former regime that included information about victims and forcibly disappeared persons. This project was halted when the draft law for the center for documentation was rejected, and so the work of the ministry was limited to two main areas: managing sites of mass graves through the department of mass graves, and communicating with the Working Group on Enforced or Involuntary Disappearance. The documents received by the working group indicate that there were 16,400 disappearances reported, about which neither current nor former Iraqi governments have provided information. There were a number of additional cases raised against the governments of Iraq after 2003.

A national-level group was established within the ministry to deal with the question of mass graves, which was later expanded to include three field teams, one working on graves of victims of the former regime, the second on graves of victims of acts of terrorism carried out by ISIS, al-Qaeda, or militias, and the third to deal with victims of wars in order to return the remains of missing soldiers to their families.

The department of mass graves unearthed various mass grave sites of victims of the former regime, and DNA sampling was carried out on the remains that had been exhumed. There have been various attempts at national campaigns to gather blood samples from victims' families, but the initiative is still stalled and no DNA matching of victims with their families has yet been carried out. Although the Ministry of Health has created infrastructure for this purpose over the past 17 years, the economic crisis, combined with other factors, has pushed the victims of the former regime lower on the list of priorities. These factors included the sectarian war after 2006, as well as al-Qaeda terrorist operations and, later, ISIS's occupation of entire governorates and subsequent creation of additional mass graves. In 2015, the Ministry of Human Rights was dissolved by Executive Order No. 312 of 2015 and was no longer associated with the department of mass graves. Instead, two of the teams on mass graves came together to form the Department for Mass Grave Affairs, which was linked to the Martyrs' Foundation.<sup>(153)</sup> It worked in direct coordination with the Ministry of Martyrs and Anfal Affairs in the Kurdistan Region. Information from the foundation and its official website indicates that the department focuses on victims of recent violations perpetrated since 2014, such as the graves from the Camp Speicher massacre, mass graves of Yazidis, and others.

The process of returning remains has been slowed by the number of cases that need to be processed, but families have been able to find out what happened to their children through the documents that have been found so far. The Martyrs' Foundation established the National Center for the Documentation of Ba'ath Crimes for this purpose. Administrative Order No. 859 of 30 August 2007 stated that the center shall oversee the documentation and compilation of information pertaining to the former regime and shall be responsible for supplying official bodies with the information that was gathered. It also entrusted the center, under an oversight body, to carry out

(153) See Article 24 of the Law of the Martyrs' Foundation, No. 2 of 2016.

a national campaign for gathering information and blood samples for the purpose of conducting DNA matching with families of victims. However, as of the time of writing, it is not possible to say that the Iraqi government and its institutions have abided by their legal obligations towards the families of victims with regard to providing answers about the fate of their children or their remains.

#### **IV. Apologies and Rehabilitation for Victims**

The Iraqi government issued an official apology in a resolution from the transitional Governing Council (No. 46 of 10 September 2003). It stated that:

The Governing Council wishes to express its apologies for the illegal executions, lifetime imprisonments, or imprisonments of shorter duration which were imposed for political activity, and which were related to the crimes of the ousted regime. The people of Iraq who were subjected to these crimes, including falsely-accused victims, relatives of executed persons, and anyone harmed by these accusations are therefore due rehabilitation through the following steps:

1. That the persons shall be considered innocent, and indeed victims of the criminal regime.
2. That the cases of victims of the former regime shall be brought to a fair trial and that the injustices they have suffered shall be brought to light.
3. That the negative effects on the families of victims, on both a symbolic and material level, shall be duly remedied.

In addition, the apology took into account the following considerations:

1. It addressed particular groups of victims, namely martyrs, detainees, and political parties that had been targeted. There are indications that many different violations were perpetrated against victims of the former regime including execution, detention, forced disappearance, forced migration, rescinding of

nationality, deportation for purposes of demographic change, forcing persons to change their national identity, and imposing physical punishments such as tattoos, the cutting of ears, the cutting of other appendages, and other violations which resulted in the destruction of the natural environment such as draining the marshes. All of these violations required an apology from the Iraqi government and from the perpetrators of these crimes, which did not happen.

2. The apologies and rehabilitation were not accompanied by a procedural mechanism with which to implement them.

## **V. Commemoration**

One of the goals of the foundation outlined in the law was highlighting the sacrifices of martyrs and the suffering of their families, and making public the violations and crimes committed against them through various activities and procedures. It stated that national, regional, and international bodies should acknowledge the sacrifices made by martyrs and the injustices that they and their families had faced, and that the UN should issue a resolution criminalizing the Ba'ath party.

However, Article 17, paragraph 2, did not indicate how this commemoration was going to occur. The first paragraph of the article created what was called the martyr's badge. The president allowed the families of martyrs to choose its size and shape and how the badge and associated benefits would be issued. This was to occur within a period of six months from the date the law went into effect, upon the foundation's recommendation.

Paragraph 2 of the same article criminalized insulting the dignity and status of martyrs or denying the sacrifices they made, with corresponding penalties stipulated in Article 372 of the Penal Code No. 111 of 1969 and its amendments.

## **VI. Data and Statistics on the Beneficiaries of the Law of the Martyrs' Foundation**

Data collected by the Martyrs' Foundation indicates that the number of beneficiaries of the law is 47,417 persons who were martyred by the former regime, according to the law of the foundation. The number of beneficiaries of the martyrs' retirement pensions was 146,475 persons during the period between 2007 and 2014. As discussed above, other victims of terrorism were later included under the scope of this same law.

The number of martyrs in the Kurdistan Region was 78,000 persons, with 96,000 persons receiving martyrs' retirement pensions.

The total number of verified martyrs in Iraq was 125,417 persons, and the total number of persons benefitting from martyrs' pensions was 242,475.

It is worth mentioning that Article 10 of the law of the foundation specified the funding sources for the foundation's budget, which were to include the federal budget as well as donations, contributions, and awqaf (charitable endowments) that the foundation received. It also managed investment projects whose proceeds benefitted the foundation.

### **Subsection 2: Prisoners and the Political Prisoners' Foundation**

Article 21 of the current Iraqi Penal Code No. 111 of 1969 defined political crimes as crimes committed with a political motive, or otherwise non-political crimes which nevertheless infringed upon individual or public political rights. The same article stated that the following crimes were considered political if they were committed for political reasons:

1. Crimes committed for petty personal reasons;
2. Crimes encroaching on the security of the state;
3. Crimes of murder and attempted murder;
4. Criminal attempts on the life of the president of Iraq;

5. Crimes of terrorism;
6. Crimes of moral turpitude, such as theft, embezzlement, forgery, breach of trust, fraud, bribery, or sexual assault.

If the court rules that the crime was political, then it must state this in its ruling.

The regime classified opposition activities as a threat to external and internal state security, as we can see in the rulings of the Revolutionary Court (a special tribunal under the previous regime) and the convictions it issued. In their reasoning, these rulings indicated there was proof that the accused had belonged to an opposition party and that their actions were considered a threat to the internal security of the state. On this basis, the defendant was to be executed according to the provisions of Article 156 and the following Articles of the Penal Code on threatening external or internal national security. The same punishment applied to all acts carried out by opposition forces which aimed to overthrow the regime or threatened the life of the president. Since opposition members usually resorted to using forged or falsified documents in order to secretly carry out their activities, Article 21 of the Penal Code on political crime and political detainees was not tenable.

The above article influenced the Law of Political Prisoners No. 4 of 2006, which defined regime opponents as those who were detained, imprisoned, or suffered other damages for political reasons, for acts that involved or aided opposition forces, or which were intended to demonstrate opposition to the former regime, even if the person in question had not previously been a member of a political organization.

The law also included persons detained for passive reasons, such as having an identity that the regime was targeting, including the elderly, youth, women, or children. For example, thousands of Feyli Kurdish youth were detained after their nationality was rescinded. The majority were executed and buried in mass graves, expelled outside the

country, or locked up on false charges. Kurds and Turkmens were also detained on the basis of their ethnic identity in order to effect demographic change in Kirkuk and the areas adjacent to the Kurdistan Region with the goal of creating an environment of fear in order to force populations to leave as part of Arabization operations. The mass detention of residents of the marsh regions was also carried out under the pretext of undermining opposition forces - victims were subjected to violations even though they were not involved in the opposition at all.

The Political Prisoners' Foundation was established in accordance with the above law alongside the Martyrs' Foundation. Article 1 of the law stated that it was a foundation formed for political prisoners and connected to the Prime Minister's Office. It was founded as part of the constitutional obligations of the Iraqi state as set forth in Article 132 pertaining to the welfare of families of martyrs, political prisoners, and persons who had been harmed by the arbitrary practices of the former dictatorial regime. Article 2 of the law stated that the general objective of the foundation was to improve the situation of political prisoners and detainees, and to provide them with symbolic and material compensation commensurate with their sacrifice, and the suffering endured under imprisonment or detention. Pursuant to Article 3 of the law, the foundation aimed to promote the welfare of former political prisoners and detainees and to provide certain benefits stipulated in the law, including:

1. Designating political prisoners and detainees according to the provisions of this law.
2. Offering various benefits for the groups included in the provisions of the law through cooperation with non-governmental organizations in different sectors.
3. Providing material reparations for political imprisonment and detainment commensurate with the extent of harms suffered and the regulations issued for this purpose.
4. Providing work and study opportunities, in accordance with the person's qualifications, and giving priority for such opportunities.



5. Providing aid such as promotes the economic and social prosperity of victims and their families regarding legal and economic support, health care, and social security, among others.
6. Promoting and commemorating the values of sacrifice and redemption in the media and the arts, and through political and social activities.
7. Working to attract various local and international entities to provide material and symbolic support for the foundation.

## **I. Scope of the Law**

There were three groups covered under the law of the foundation: political detainees, political prisoners, and persons who had been held in Rafha camp. Article 5 of the law defined these groups as follows:

- a) Political prisoners: Persons imprisoned in Iraq or abroad following a ruling issued by a court due to their opposition to the former regime, as a result of their political views, party affiliations, or aid rendered to the opposition. Children and minors who were born in prison or who were imprisoned with or because of their detained relatives were also considered political prisoners.
- b) Political detainees: Persons detained or arrested in Iraq or abroad, or placed under house arrest without a competent court ruling on the charges made against them by the former regime for one of the reasons listed in paragraph (d) of this Article. This also applies to minors and children detained with their relatives or families.
- c) Rafha camp detainees: Persons who fought in the Sha'aban uprising of 1991, and who after the regime crackdown were forced to leave Iraq for Saudi Arabia. This includes their families who left with them, and persons born in the refugee camps according to official international records and registries, as well as victims of the Halabja chemical attacks who sought asylum in Iran.
- d) Relatives of prisoners, detainees, or Rafha camp detainees: Persons who were spouses, first-degree relatives, or heirs of the above groups according to the laws of inheritance.

In accordance with the amendments included in Law No. 35 of 2013, the groups covered under the Law No. 4 of 2006 were expanded to include additional groups of prisoners and detainees, as well as the Rafha camp detainees and the Kurdish victims of the Halabja chemical attacks who had been displaced to Iran. The amendment also expanded the definition so that detention or imprisonment abroad would have the same legal effect as imprisonment or detention within Iraq. The law was also expanded to include those who were sentenced to prison in absentia while they were outside the country, as well as the children of detainees and prisoners covered under the law.

Article 5 stipulated that the law applied to the two periods of time during which the Ba'ath party had been in power in Iraq: 8 February 1963 to 18 November 1963, and 17 July 1968 to 8 April 2003. These were the same time periods stipulated by Article 4 of the Law of the Martyrs' Foundation.

## **II. Mechanisms for Hearing Appeals and Claims**

Article 7 of the law specified the mechanisms for hearing claims submitted for reasons covered under the law of the foundation. Political prisoners and detainees were to submit their claims to the special committee formed under paragraph 5a, which stipulated that one or more special committees were to be formed under the leadership of a human rights lawyer who had received a degree in law and had at least 5 years of experience, and who belonged to a group covered under the provisions of this law. The members of the committee were to include one representative each from the Ministry of Finance and Ministry of Interior, and two political prisoners who were not state employees, and who were to be chosen by the head of the foundation in order to hear claims from the groups covered under the law.

Article 7, paragraph 5c, stipulated that a second special committee would be created to hear the claims of a third group of victims of the law, namely the Rafha camp detainees.<sup>(154)</sup>

It stated that:

One or more special committees shall be formed to hear claims submitted by persons imprisoned in Rafha camp. This committee shall be headed by a human rights lawyer who received their degree in law and has at least 5 years of experience, and who is covered under the provisions of the law. The members of the committee shall include representatives from the Ministry of Foreign Affairs, the Ministry of Migration and Displacement, the Political Prisoners' Foundation, and a representative for the Rafha camp detainees.

Both versions of the special committees made decisions by majority vote as stipulated in paragraph 2 of Article 10, and usually ruled in favor of the foundation, which had 32-majority on the committee.

This imbalance in the composition of the committee was even more prominent in the appeals commission of the Political Prisoners' Foundation. Paragraph (d) stipulated that this commission was to be headed by a judge nominated by the Supreme Judicial Council in addition to four other members selected from among the employees of the foundation. This commission was responsible for hearing appeals made by those who had their claims denied by either of the other two committees.

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(154) Rafha was a refugee camp for Iraqi refugees during the Gulf War and the Sha'aban uprising. It was located 20 kilometers from the Saudi-Iraqi border and held more than 29,000 refugees during the period between 1991 and 2008, when it was finally closed and the refugees were able to settle in various countries, including Australia, the US, Canada, Denmark, Finland, the UK, Iran, Holland, Norway, Sweden, Switzerland, and Syria with UNHCR aid. According to UN data, the last group of refugees left in 2008, although some returned to Iraq after the regime was toppled in 2003.

The law stipulated that those had their claim rejected had the right to appeal before this commission and to be heard before an administrative judge during a 30-day period from when they were informed of the decision. The decision of the administrative court was also subject to appeal under the law.

Article 6, paragraph 4, of the law stipulated that the committees and appeals commission were to adopt the means of proof stipulated in the amended Law of Evidence No. 107 of 1979 in order to provide evidence of the detention or imprisonment through official documents. In lieu of such documents, eyewitness testimony from inside the detention site could be used, as per paragraph 5, which stated that official written evidence must take precedence over other forms of evidence.

### **III. Reparations and Benefits under the Law**

Material reparations: Article 17 of the law of the foundation stipulated that political prisoners and detainees should be compensated for their loss of liberty and foregone gains as follows:

1. Political prisoners covered under the provisions of the law shall receive a monthly pension of at least three times the minimum pension stipulated under the Unified Pension Law No. 27 of 2006 and its amendments, or under any law that might replace it.
2. In addition to the minimum monthly pension for political prisoners stipulated in paragraph 1 of this Article and for political detainees, pursuant to paragraphs 3 and 7, an additional 60,000 Iraqi dinars shall be added each month for every year of imprisonment and 5,000 dinars for each additional month; half a month is to be considered the same as a month.
3. Political detainees covered under the provisions of this law who spent longer than a year in prison shall receive the benefits and rights granted to political prisoners under this law.

4. Political detainees covered under the provisions of this law who have been imprisoned for six to eleven months, and detainees who are survivors of mass graves, shall receive pensions equivalent to twice the minimum pension stipulated in Unified Pension Law No. 27 of 2006 and its amendments, or under any law that might replace it.
5. Political detainees covered under the provisions of this law who have been imprisoned for between one and five months shall receive a retirement pension equivalent to the minimum amount stipulated in the Unified Pension Law No. 27 of 2006 and its amendments, or under any law that might replace it.
6. Political detainees covered under the provisions of the law whose period of detention was less than a month shall receive a grant equivalent to 5,000,000 dinars in one lump sum.
7. Political detainees covered under the provisioners of this law who have been imprisoned for at least 30 days shall receive the rights and privileges of political prisoners stipulated in the provisions of the law.
8. Political detainees covered under the provisions of this law whose period of detention was at least 30 days shall receive the minimum retirement pension stipulated in the United Pension Law No. 27 of 2006 and its amendments, or under any law that might replace it.
9. Persons detained in Rafha camp shall receive the same rights and benefits due to political detainees as stipulated in the provisions of this law, from the date that the law of the Political Prisoners' Foundation (No. 4 of 2006) went into effect.
10.
  - a) Persons covered under the first, third, and seventh paragraphs of this Article shall receive the pension as set forth in the law, along with any other salary or pension that they are due from the state, for a period of 25 years from the date that Law No. 4 of 2006 went into effect.
  - b) Persons covered under the provisions of this law who are not covered

under part (a) of this paragraph shall receive both the salary stipulated in this law and any other salary or pension they are due from the state for a period of 10 years from the date that Law No. 4 of 2006 went into effect.

11. The second wives and children of deceased persons covered under this law shall receive the same rights as the first wife and her children as per the provisions of the second paragraph of this Article.
12. Persons who are sentenced in absentia on political cases shall receive the minimum retirement pension stipulated in the Unified Pension Law No. 27 of 2006 and its amendments, or any other law that may take its place, as well as a plot of land to build on.
13. The Directorate of Public Pensions shall be responsible for distributing the reparations stipulated in this Article.

A look at the provisions of this law demonstrates that the compensation for those covered under the law was paid in the form of retirement pensions, which is a clear violation of the law of the Directorate of Public Pensions and the Unified Pension Law, which stipulated that pensions were due to those who had made pension contributions during their working years, which is not the case for persons covered under this law. Furthermore, this law does not provide a time limit for how long the state would continue paying reparations, except for the 25-year or 10-year period, in the case of combining the two pensions. In the event that those covered under the law did not have an additional pension, then the law gave them the right to a pension equivalent to employee pensions, including with regard to the transfer of rights to the person's heir in case of death. Paragraph (c) of Article 22 stipulated that the pension should continue to be paid to the legal heirs (working or retired) of those included under the provisions of the law for the period remaining at the time of their death. This is inconsistent with paragraphs 10a and 10b of Article 17, which only addressed cases of combining pensions and did not address cases in which the person in question did not have another pension.

Compensation in kind: Article 18 of the law granted former prisoners the right to a plot of land to live on. The second paragraph of this article stipulated that prisoners were to be given a land grant with loans for the purposes of building, or they could choose a housing unit or its monetary equivalent. Paragraph 6 of Article 19 indicated that the foundation was required to pay prisoners' loans in one lump sum to the Real Estate Bank, Housing Bank, and Agricultural Bank. In practice, this article on the foundation's responsibility to pay loans has been misused because the law did not specify a ceiling for this, and so the foundation has ended up paying hundreds of millions in loans to these banks for political prisoners, especially agricultural loans.

#### **IV. Other Forms of Reparations**

1. Five percent of government positions were to be allocated to those covered under the law (Article 19, paragraph 2).
2. Persons covered under the law were to be allocated a certain number of places in each department in institutions of higher education within Iraq, and for competitive fellowships and scholarships abroad (Article 19, paragraph 1a).
3. Ministries were required to grant study leave to those covered under the law for the purpose of completing higher education.
4. The foundation was responsible for paying the study fees for night school or private study for persons covered under the law according to Article No. 19, paragraph 1b.
5. Persons covered under the law were exempted from the condition of age, grades, and period of time for universities and higher education, and graduates of technical institutes had the right to choose any field of study, in exception to the usual regulations (Article 19 paragraph, 1e).
6. An exemption was granted from the legal regulations regarding validating degrees after appointment (Article 19, paragraph 1f).

7. Political prisoners and detainees were to be granted roundtrip airfare to Iraq once each year, for themselves and one family member, in accordance with Article 19, paragraph 4. This is unclear since paragraph 5 of this Article used the term “political detainee” differently than in paragraph 4, and states that such detainees are due a one-time roundtrip airfare.
8. The retirement age for persons covered under the law was 68 instead of 65 (Article 4, paragraph 3 of the amended Law No. 24 of 2005 on the Reinstatement of Persons Dismissed for Political Reasons).
9. The foundation was responsible for paying for medical treatment for persons covered under the provisions of the law, and for their relatives in Iraq and abroad.
10. The benefits set forth in the law were not to prejudice any other benefits due to political prisoners and detainees under other laws on the basis of having been victims of violations under the former regime. The latter includes the Law of the Commission for Resolution of Real Property Disputes, which dealt with property that had been confiscated by the regime; the Law on Property Reparations for Victims of the Former Regime No. 16 of 2010, which dealt with compensation for damages related to moveable and immoveable assets; the amended Law on the Reinstatement of Persons Dismissed for Political Reasons (No. 24 of 2005); and the decisions of the committee outlined in paragraph 8 of Article 19 regarding evaluating the value of damages suffered and providing reparations.

## **V. Apologies and Rehabilitation**

The law of the foundation did not address the matter of official apologies from perpetrators or from the government or rehabilitation for victims. The apology issued by the transitional Governing Council in Resolution No. 46 of 10 September 2003 is the only such text that deals with apologies and rehabilitation.



## **VI. Commemoration**

Article 3, paragraph 6, of the law of the foundation stipulated that one of the objectives of the foundation was to honor the sacrifices of victims through political and social activities as well as in the arts and media. Article 19, paragraph 9, of this law outlined different forms of commemoration including establishing a museum for those covered under the law to document their sacrifices and called on official and non-official entities to provide relevant materials for this purpose. Article 10 made 25 Rajab Political Prisoners' Day, which was also the anniversary of the death of Imam Musa al-Kadhimi. Paragraph 11 of this article created a medal of freedom that was granted to those covered under the law. The law did not include any programs targeting the education sector or developing educational curricula about victims' sacrifices.

## **VII. Statistics on Beneficiaries of the Law**

Data from the Political Prisoners' Foundation indicates that more than 60,000 political prisoners and more than 30,000 political detainees have been beneficiaries of the law of the foundation, in addition to 29,181 beneficiaries from the Rafha camp. This is according to the foundation's data from the fifteen federal provinces that ratified the resolution and were covered under the law of the foundation. In the Kurdistan Region, there were only 5,000 beneficiaries.

With regard to sources of funding for the foundation, the law laid out annual allocations from the state budget as well as the support that the foundation would receive from local, regional, and international granting bodies.

### **Subsection 3: Property and the Iraqi Property Claims Commission**

As previously discussed, Iraq adopted a mechanism to resolve property disputes arising from the policies of the former regime through Regulation No. 12 of the Coalition Provisional Authority. It then issued Law No. 2 of 2006, on the Resolution of Real

Property Disputes, which was abrogated by Law No. 13 of 2010 of the Iraqi Property Claims Commission, which became one of the institutions of transitional justice in Iraq. Article 2 of the law stated that it aimed to safeguard the rights of citizens whose property had been illegally confiscated, to protect public funds, and to address the gap between the interests of citizens and those of the state.

The commission was responsible for returning property and land that had been confiscated or seized through gross fraud by the regime. It was also responsible for restoring property that had been seized or reallocated by agents of the regime without compensation, or with only symbolic compensation.

### **I. Establishing the Commission**

Article 1 of the law established an independent commission called the Iraqi Property Claims Commission, which was a juridical person that worked in coordination with the judicial and executive authority and was also linked to the Council of Representatives. Article 3 stated the law covered properties included under its provisions during the period from 17 July 1968 until 9 April 2003. It stated in paragraph one of this article that this included:

- a) Property that had been confiscated for political, ethnic, religious, or sectarian reasons.
- b) Property that had been expropriated without compensation in violation of legal procedures.
- c) Property that the state had taken without any compensation, or with only symbolic compensation, for officials of the former regime, or which was allocated to them.
- d) Cases of appropriation which occurred by decision of judiciary committees under the Law of the Commission for the Resolution of Real Property Disputes (No. 2 of 2006).

- e) Property that had been seized by order of the former regime, or by resolution of the (dissolved) Revolutionary Command Council, and which violated the law, or through ex post facto application of the resolutions issued under the Law of Commission for the Resolution of Real Property Disputes (No. 2 of 2006).

Paragraph 2 stipulated that an exception was to be made for properties that had been confiscated as part of agricultural reform laws or given as in-kind compensation in governorates covered under the law.

## **II. Mechanisms of the Commission**

The commission carried out its work through judicial committees that were formed in accordance with Article 4 of the law and which were headed by a serving or retired judge. The judge was named by the head of the Supreme Judicial Council; the members of the committees were to include an employee of the Real Estate Registration Directorate with appropriate experience, who was to be appointed by the general director of the Real Estate Registration Directorate; and a legally-trained employee nominated by the head of the commission who had worked in the legal profession for at least 10 years. Article 6 of the law stipulated that the judicial committees would adopt the procedural mechanisms stipulated in the Law of Civil Procedure, the Law of Evidence, and other relevant laws.

## **III. Procedures of the Commission**

Article 7 of the law outlined the procedures that the committee would follow in order to resolve disputes and settle claims brought before it that were related to confiscated or re-allocated properties. This article stipulated the following:

1. a. Annul decisions to confiscate, seize, or re-allocate property, which had not been carried out; and reverse distraint of property covered under Article 3 of the law.

- b. Annul decisions to confiscate, seize, or re-allocate the property, which had been carried out in accordance with Article 3 of this law, and to return the property to its rightful owner in accordance with the provisions of the law.
2. If the property was confiscated for public benefit or charity purposes, then the original owner shall receive the equivalent value of the property at the time it was last assessed, while the property shall continue to be used for the purpose it has been allocated for.
  3. If the confiscated property has been sold again without major changes to the property, then the judicial committee may pursue either of the following two options:
    - a. Return the property to its original owner and pay the last owner the equivalent value at the time of last inspection.
    - b. Allow the new owner to keep the property and pay the original owner a sum equivalent to the value of the property at the time of last inspection.
  4. If substantial changes have been made to the property that increase its value, then the judicial committee may pursue either of the following two options:
    - a. Return the property to its original owner and pay the last owner a sum equivalent to the value of the property at the time it was last assessed, based on its condition before these changes were made. The original owner shall pay the difference for any changes to the property, provided that in its assessment, the committee takes into account the rate of depreciation that applies to the changes.
    - b. Allow the last owner to retain the property and pay the original owner a sum equivalent to the value of the property at the time it was last assessed, based on the condition of the property when it was confiscated. Depreciation shall be deducted from the amount paid by the current owner to the original owner or, depending on the circumstances, by the agency that originally disposed of the property.

5. If another property was added to the original, then the judicial committee may pursue either of the following two options:
  - a. If the properties are not divisible, then the committee may return the property to the original owner and record the additional property in their name, require the original owner to pay the value of the additional property to the last owner, based on its value at the time it was last assessed, and compensate the last owner for the value of the original property at the time of its last inspection.
  - b. If it is possible to divide the properties, then the judicial committee may do either of the following:
    - Return the original property to the original owner and keep the additional property in the name of the last owner and provide compensation to the last owner for the value of the property at the time of last inspection.
    - Compensate the original owner for the value of the original property at the time it was last assessed.
6. If the property is encumbered with a loan or lien that was recorded in the Real Estate Registration Directorate before 9 April 2003, then the property shall be returned to its original owner without any such loan attached, after deducting the amount of the loan or lien from the compensation due to the last owner.
7. If the property was sold to the original owner or one of the owner's heirs, then the judicial committee may take either of the following steps:
  - a. Compensate the buyer with an amount equivalent to the purchase, valued in gold, at the date the sale took place, based on its value at the time it was last assessed.
  - b. Return the property to the original owner and register it in the original owner's name, if it is not already registered in the owner's name or that of their descendants.

8. If the original owner of the property did not receive compensation, or only received symbolic compensation, and the property is still registered in the name of the last owner, then the property shall be returned to the original owner, and the last owner shall receive compensation equivalent to the value of any significant changes made to the property, and the first transferor of the property shall pay the original owner compensation for damages and depreciation to the property.
9. If the building on the property was destroyed and rebuilt, then the judicial committee may take one of two courses of action:
  - a. Return the property to its original owner after paying the last owner a sum equivalent to the value of the structures, including the value of the old structure at the time it was last assessed, and compensate the last owner for the value of the property at the time it was last assessed, based on its condition when it was seized or confiscated.
  - b. Compensate the original owner for the value of the original property at the time it was last assessed, based on its condition when it was seized or confiscated.
10. If the property is a plot of land and the last owner has built a structure on it, then the judicial committee may take one of two courses of action:
  - a. If the value of the structures is greater than the value of the land, then the property shall remain registered in the name of the last owner, and the original owner shall be compensated for the value of the land at the time it was last assessed.
  - b. If the value of the land is greater than the value of the structures, then the property shall be registered in the name of the original owner after paying the last owner a sum equivalent to the value of the structures, and the last owner shall be compensated for the value of the land at the time of last inspection, or the original owner shall be compensated for the value of the plot of land at the time of last inspection.

Paragraph 11 of Article 7 of the law stipulated that the judicial committee may pursue either of the following two options in such cases:

**First:**

- a. If the entity exercising eminent domain requires the property, it shall pay the original owner the difference between the actual value of the property when it was seized and the amount paid for the confiscated property. This shall be valued in gold at the time of seizure based on its value at the time it was last assessed.
- b. If the entity exercising eminent domain does not need the property, then it shall be returned to the original owner and they shall pay back the consideration they received for the property (valued in gold) at the time the property was seized and based on its value at the time it was last assessed.

**Second:**

The entity exercising eminent domain shall demonstrate its need for the property within 60 days and if this is not demonstrated, then the provisions of part (b) of paragraph (1) shall apply.

Paragraph 12 stated that if property ownership was transferred to an heir of a victim of the former regime, then the judicial committee may pursue one of two options:

- a. Return the property to its original owner and provide reparations to the heir for the value of the property at the time it was last assessed.
- b. Provide compensation to the original owner equivalent to the value of the property at the time it was last assessed, while the last owner retains the property deed in their name.

There were difficulties with actually implementing Article 7 and the other Articles of the law due to the Ministry of Finance lacking the resources to pay compensation to one of the parties to the claim as stipulated in Article 13 of the law. Additionally, since

most of victims of the former regime who had their property confiscated had left Iraq and settled elsewhere with their families, they generally preferred to receive monetary compensation for the value of the property. As became clear in dialogue sessions with the victims' representatives, there were problems with delays in the compensation payments, which as a result of the financial crisis were rarely carried out.

#### **IV. Appeals Commission for the Judicial Committees**

Article 8 of the law stipulated that the appeals commission shall be composed of nine judges nominated by the Supreme Judicial Council from among the top-ranking serving or retired judges, and that these judges were to name a head and two deputies from among themselves. Two of the nine candidates were to be from the Council of Judges in the Kurdistan Region, and three additional reserve judges were to be named by the Supreme Judicial Council. The commission was to form three subsidiary appeals commissions, each led by a member of the commission's leadership (either the head or one of the deputies).

#### **V. Jurisdiction of the Appeals Commission**

Article 8, paragraph 2, stipulated that the appeals commission had jurisdiction over the following kinds of appeals:

- a) Appeals related to the decisions and rulings issued by the judicial committees.
- b) Transferring claims from one committee to another.
- c) Resignation of the head of a judicial committee.
- d) Recusal of judges.
- e) Providing advisory opinions.

The commission was to issue its decisions as stipulated in paragraph 4, Article 8, through approving the decision or cassation decision, modifying it, or overturning it, and its decision was irrevocable in the case of an approved or modified decision. Paragraph 5



stipulated that a decision was necessarily subject to cassation judgment when the state was one of the parties to the case. Article 9 of the law of appeals permitted appeals of judicial decisions through the means stipulated in Law of Civil Procedure No. 83 of 1969. The law stated that in case of objections to rulings made in absentia, objections by third parties, retrial, cassation, correcting a cassation decision, and permission to appeal decisions made by the judicial committee, then the appeals procedure was to be carried out according to the procedures stipulated in Law of Public Prosecution No. 159 of 1979. Article 10 of the law stipulated that the decisions of the judicial committee requiring state agencies to provide compensation or restore properties to their original owners were also automatically subject to cassation.

According to Article 10 of the law, the commission had jurisdiction to hear cases of property disputes, and other courts were required to refer claims to the judicial committees formed under this law. Article 14 of the law granted persons that had suffered harms as a result of decisions of the judicial committee the right to demand due reparations in the case that the party responsible for paying compensation had not been determined, or compensation had not been paid when the confiscation occurred, or if the request for compensation had been rejected, in accordance with Regulation No. 12 of 2004 (establishing the Iraqi Property Claims Commission).

#### **Subsection 4: Reparations for Victims of Forced Displacement and Demographic Change**

The Ba'ath party engaged in discriminatory policies from when it first came to power in 1963, and continued to target different segments of Iraqi society, most notably the Feyli Kurds, whom the regime claimed were aligned with Iran, even though they had been living in Iraq for more than a century. Several thousand Feyli Kurds were forcibly displaced in 1963, but the biggest wave of migration occurred after the Ba'ath party came to power again during 1970-1972, when more than 70,000 Feyli Kurds fled Iraq.

It is worth noting that Iraqi citizenship was initially not based on official documents, as it only in the 1970s that the government began to undertake registration campaigns and produce documentation attesting to citizenship, including certificates of Iraqi nationality, for many Iraqis. However, some tribes had Iranian origins going back several generations, and this was used as a pretext to continue to marginalize their descendants. The British occupation sowed the seeds of these troubles when the Iraqi monarchy, under the British mandate, issued its first nationality law (No. 42 of 1924) which stipulated that anyone present in Iraq on 6 August 1924 and who held Ottoman nationality at that time was now an Iraqi citizen. This ignored the fact that the Iraqi society at that time contained many tribes of Iranian origin, a problem that the Iran-Iraq war only exacerbated further. The Revolutionary Command Council issued many resolutions aiming to settle the question of “foreigners,” as the regime put it; in reality, these policies primarily targeted Feyli Kurds. This question came to the forefront later in resolutions such as Resolution No. 180 of 1980. Feyli Kurds were a minority with economic clout in Iraq and were known for their support of the revolution of Abdel Karim Qasim and for the Shi’ite religious authorities (marja’), as well as for their stance against the 1963 revolution. Many Feyli Kurds were involved in Islamic and secular parties at the time when the Ba’ath party first came to power, and were concentrated in Baghdad at the center of the country’s economy and adjacent to the seat of government.

Before the Iran-Iraq war officially began on 4 September 1980 (with a declaration of war from the Iraqi side, at least), the Revolutionary Command Council issued its infamous Resolution No. 666 of 7 May 1980. The first paragraph of the resolution stipulated that Iraqi nationality would be rescinded from all Iraqis of foreign origin if it could be demonstrated that they were not loyal to Iraq and its people, and the social and national goals of the revolution. The Minister of the Interior was responsible for overseeing the deportation of all persons who had their nationality rescinded unless they could prove that there was sufficient cause for them to stay in Iraq due to legal or judicial necessity,

or in order to protect the rights of undocumented persons.

Although the resolution used the term “foreign” in a general sense, in practice the law was used to specifically target the Feyli Kurdish minority. The security agencies summoned Feyli Kurds working in manufacturing and trade to a meeting in Baghdad, and they were told that the meeting was for the purposes of discussing economic and industrial plans for Iraq. Instead, they were suddenly detained and had their official documents confiscated. The regime then went after the family members of the detained person, who likewise lost their nationality and had their moveable and immovable assets seized. Directive No. 2884 of 1980 indicated that instructions were circulated to security agencies by the Ministry of Interior. Paragraph 3 of these directives stated that in the case of families deported via the Iranian consulate, if the authorities did not take these persons, then they would be expelled via border crossings. The regulations issued aimed to facilitate the implementation of Revolutionary Command Council Order No. 666 of 1980 with regard to exemptions for specific groups of persons. The regulations stipulated that military personnel could not be expelled and needed to be handed over for military discipline. In the case of Iranian women who were married to Iraqis, they were not to be expelled but lists of these persons were to be made. Youth between the ages of 18 and 28 were to be held in pre-trial detention facilities until further notice. Paragraph 9 stipulated that those who tried to return to Iraqi territory after being expelled shall be shot.

According to UNHCR statistics in 1997, 595,000 Iraqis had their nationality rescinded and were subject to forced migration to Iran.<sup>(155)</sup>

However, the Iranian government did not recognize the expelled Iraqis as Iranians and

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(155) See Dr. Abdul Hussain Shaaban's book, *Man huwa al-'Iraqi: Ishkaliyat al-jinsiyya wa-l-la-jinsiyya fi al-qanunayn al-'Iraqi wa-l-dawli*, p. 86.

refused to grant them nationality. It considered them to be Iraqis whose nationality had been rescinded by the Iraqi government, which rendered them stateless persons, and they were placed in refugee camps: Jahram camp in the province of Fars, Azna camp in the province of Lorestan, Gotvand and Ansar camps in the province of Khuzestan, and Ziveh, Dilzeh, and Bezileh camps in the province of West Azerbaijan, among others.

The refugees were given a green card by the Iranian authorities, and the UN was put in charge of providing humanitarian aid to the refugees in coordination with the Iranian government.

The majority of migrants later left Iran for other countries. Statistics from the Ministry of Migration and Displaced indicate that the number of Iraqis who still remain in these camps is less than one thousand out of all those who had been expelled, keeping in mind that some expelled Iraqi families had later integrated into Iranian society.<sup>(156)</sup>

The Revolutionary Command Council issued resolutions to address the affairs of mixed families, i.e., in which one of the spouses was of Iranian origin. Under Resolution No. 474 of 1981, paragraph 1, an Iraqi military man married to a woman of Iranian origin was paid 4,000 Iraqi dinars (equivalent to \$13,200 at that time) while an Iraqi civilian man was paid 2,500 Iraqi dinars (equivalent to \$7,500) if he divorced his wife and sent her outside the country.

This resolution was followed by Resolution No. 1610 of 1982, which prevented an Iraqi woman married a non-Iraqi man (that is, a Feyli Kurd) from transferring her moveable and immoveable assets to her non-Iraqi husband. She was also forbidden from undertaking any legal action that led to the transfer of some or all of these

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(156) Official correspondence of the Office of the Ministry of Immigration in Tehran (No. 36 of 14 August 2016).

assets, and annulled any legal actions covered under this resolution. It also prevented a husband whose nationality had been rescinded from inheriting from his Iraqi wife, and if there was a dispute between an Iraqi wife and her husband outside Iraq, then in case of divorce, these assets were to remain with the wife. Additionally, custody of children was transferred to the Iraqi mother if she accepted this. Resolution No. 194 of 1983 stipulated that the financial authority shall oversee properties belonging to Iraqi women after the expulsion of their husbands, and that they would maintain their Iraqi nationality.

There was a further series of resolutions issued by the Revolutionary Command Council, including Resolutions No. 489 and No. 617 of 1981, targeting areas in which Feyli Kurds were located in the Diyala governorate. There were also eminent domain rulings for agricultural lands and orchards taken by gross fraud, which resulted in the internal displacement of the remaining groups of Kurds.

This created tragic circumstances for Feyli Kurdish minorities on an unprecedented scale. Hundreds of thousands of Feyli Kurds had their nationality rescinded and were forcibly displaced, and the remains of thousands of forcibly disappeared persons were discovered in mass graves. There were also thousands of properties and staggering quantities of moveable assets confiscated.

The first steps towards addressing this was restoring Iraqi nationality to those who had lost it. This was clearly outlined in the Article 18, paragraph 1, of the Iraqi constitution, which stated that any person born in Iraq could not have their nationality rescinded for any reason, and that those who had their nationality rescinded had the right to request the restoration of their nationality in accordance with the law. Article 17 of the current Nationality Law No. 26 of 2006 stipulated that the (dissolved) Revolutionary Command Council's Resolution No. 666 of 1980, which had rescinded Iraqi nationality from Feyli

Kurds, shall be repealed. It also stipulated that Iraqi nationality shall be restored to all those who had lost their nationality under the aforementioned resolution, in addition to all other unjust resolutions issued by the dissolved Revolutionary Command Council on this matter.

The law was not successful in addressing cases of rescinded nationality, since it required a claim to be submitted by persons who wanted their nationality restored, even though this had been forcibly removed. Why was the burden on the victim to make a claim and have it reviewed by the official bodies, when the latter already had a list of all the persons who had lost their nationality under the aforementioned resolution, and could potentially restore nationality through the same mechanism through which it was originally removed, i.e., through a mass decision that restored nationality to all of the names on the list?

In practice, there were various obstacles to the implementation of the aforementioned law for Feyli Kurds. There was a specific committee tasked with addressing negative impacts of the law on Kurds, in accordance with a resolution from the Council of Ministers which stated that the crimes against Feyli Kurds constituted genocide, based on a previous resolution from the Supreme Iraqi Criminal Tribunal stipulating that Feyli Kurds were victims of genocide. The obstacles prompted the committee to present its recommendations to the Ministry of Interior that the ministry should handle Feyli Kurds affairs via the Directorate of Civil Affairs, Passports, and Residency in accordance with Article 12 of the National Identity Card Law. It also recommended the procedures should be arranged in coordination with the ministry and its department, the courts, health authorities, entities responsible for carrying out the census, and Iraqi diplomatic missions in various countries around the world.

Other entities working on accountability and justice were tasked with managing

the affairs of martyrs, political prisoners, and their confiscated properties, as per the mechanisms described above. However, Feyli Kurds did not receive symbolic or material compensation for loss of nationality or forced displacement. It should also be mentioned that Feyli Kurds had a set quota in parliamentary and governorate elections, but in practice the larger parties exploited this quota and used it for the representatives of their own parties.

Iraqi Jews were another minority that was subjected to forced migration, and had their nationality rescinded in accordance with Law No. 1 of 1950. This law stated that the Council of Ministers could rescind nationality from Iraqi Jews who wanted to leave Iraq permanently after signing a special form in front of an employee appointed by the Ministry of Interior. Iraqi Jews who left or tried to leave illegally would have their nationality revoked by decision of the Council of Ministers. If the person had previously left Iraq illegally, then it was considered the same as leaving Iraq permanently, if they had not returned during the two-month period after the law had gone into effect, and their nationality was rescinded at the end of that period. The Minister of the Interior would order the deportation of anyone who had their nationality removed in accordance with the first and second articles, unless the person could prove sufficient need to remain in Iraq temporarily, due to legal or judicial necessity or in order to preserve rights that were not officially documented. This law remained in effect for a year from the date it originally went into force and could be suspended at any time during this period through a royal decree published in the Official Gazette.

Resolution No. 1293 of 1975 stipulated that Iraqi Jews could return to Iraq and benefit from all their legal rights as Iraqi citizens, and that the Iraqi government was to ensure that Jews that returned received their full constitutional rights, including equal treatment and the right to live in peace without discrimination. However, Nationality Law No. 26 of 2006, which abrogated Resolution No. 1298, made an exception for Jews in Article

14. Paragraph 2 of Article 14 held that if a person had lost their Iraqi nationality and that as a result their minor children also lost their nationality, then the children were to have their nationality restored upon their request, if they returned to Iraq and resided there at least one year. They were then considered Iraqi from the date of their return. However, those who had their nationality rescinded under the provisions of Law No. 1 of 1950 and No. 12 of 1951 could not have their children's nationality restored in this way.

Article 14 of the aforementioned law therefore violates the Iraqi constitution, which states in Article 18, paragraph 1, that any person born in Iraq could not have their nationality rescinded for any reason, and that those who had their nationality rescinded had the right to request the restoration of their nationality in accordance with the law. This is an absolute and general right which it is not permissible for a law to add restrictions or exemptions to.

After the Iraqi government seized Jewish property, it deposited the value of the property at the time of confiscation into the account of the owner in the Central Bank of Iraq, in accordance with a resolution of the Revolutionary Command Council, which was only published in the confidential version of the Official Gazette that had limited circulation.<sup>(157)</sup>

The third group that was subjected to forced migration was Assyrian Christians. In this case, the expulsion was a result of the violations perpetrated against Iraqi Christians in what was known as the Simele massacre, which was followed by the forced

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(157) In 2001, appeals were filed regarding the legality of the Ministry of Finance carrying out these procedures in accordance with the Revolutionary Command Council resolution, since the resolution had not been published in the Official Gazette. The Official Gazette indicated that the resolution was only published in the confidential edition of the gazette which had limited circulation, so the case was dismissed and the Ministry of Finance's decision to seize properties found to belong to Iraqi Jews was upheld in 2001.



displacement of the village's residents to Syria and the confiscation of their property in 1933. There have not been any measures taken to remedy this matter, even though those who fled were Iraqi nationals. Article 2 of the current Nationality Law stipulates that these persons are Iraqis under the original Nationality Law No. 42 of 1924 and have the right to demand that their nationality be restored in accordance with the provisions of Article 18 of the constitution and Article 14 of the current Nationality Law.

Law No. 16 of 2010 stipulated that compensation was to be provided for assets confiscated by the former regime, and that this fell under the jurisdiction of the Iraqi Property Claims Commission. However, other damages with regard to victims' moveable or immovable assets were to be addressed by a separate mechanism for reparations under Iraqi law as part of the institutions of transitional justice, under Law No. 16 of 2010, which stated the objective of the law in its first Article:

This law aims to compensate citizens who have had their moveable or immovable assets confiscated by the former regime with the equivalent value of these moveable or immovable assets that were confiscated, destroyed, frozen, or seized for political, ethnic, or sectarian reasons not covered under the Law of the Property Claims Commission. Article 2 of this law stipulated that there shall be a mechanism for determining the value of the damages (valued in gold) at the time the harms were perpetrated. This article stated that this should be calculated in order to provide compensation, as per in Article 1 of the law, equivalent to the value of the moveable or immovable assets in Iraqi dinars, valued in gold, at the time the damages occurred. The law also specified the set time period for covered damages, and that the law covered requests relating to damages covered under the provisions of the law which occurred between 17 July 1968 and 20 March 2003.

The mechanism for deciding claims was the responsibility of the central committee of

the Ministry of Finance. Article 3 of the law stipulated as follows:

**First:**

- A. The central committee of the Ministry of Finance shall consist of the following:
  - 1. A first-class judge to head the committee, nominated by the Supreme Judicial Council
  - 2. A member who is a representative of the Ministry of Finance with the rank of director
  - 3. A member who is a representative of the Ministry of Justice with the rank of director
  - 4. A member who is a representative of the Kurdistan Region, and of any regions formed in the future, with the rank of director
- B. The central committee shall oversee the following:
  - 1. Ratification of compensation decisions issued by the subcommittees in the governorates or regions.
  - 2. Relaying decisions on reparations to the Ministry of Finance so that it can process the compensation within a period of 90 days from the date that the decision was provided by the governorates or regions to the committee.

The second paragraph of the law stipulated that subcommittees shall be created as follows:

**Second:**

- A. A subcommittee shall be formed from each governorate or region and consist of:
  - 1. A first-class judge to head the committee, nominated by the Supreme Judicial Council
  - 2. A member who is a representative of the Ministry of Finance with the rank of director
  - 3. A member who is a representative of the Ministry of Justice with the rank of director
  - 4. A member who is a representative of the governorate or region, with the

rank of director

Paragraph (b) outlined the mechanism through which the committee would receive and review claims:

- B. The subcommittee shall oversee the following:
1. Receiving claims presented to it 60 days after the law goes into effect.
  2. Reviewing claims and determining the compensation due according to the circumstances and facts of each case.
  3. Relaying decisions on reparations to the central committee to be ratified. Decisions shall not be implemented until they are ratified by the central committee.

Article 4 designated the mechanism for appealing decisions, namely that decisions of the subcommittees and central committee could be brought before the appeals committee that was to be formed by the Ministry of Finance during a 60-day period from when the committee's decision was issued. The decision of the appeals committee was final and could not be appealed.

Article 5 stipulated that the above compensation could be paid either to the aggrieved party or their heirs according to the laws of inheritance.

#### **Subsection 5: Reparations due under the Law of Reinstatement of Persons Dismissed for Political Reasons No. 24 of 2005**

Dismissal or exclusion from public office was one of the main strategies that the regime used against its opponents. The regime's approach was to punish the families of victims of its policies: if any person in a family violated one of its laws on political matters, there would be consequences for the victim's relatives (up to the fourth degree). These family members were also forbidden from being appointed to public office under the pretext of failing to obtain a security clearance. They were also forbidden from taking

up military or administrative leadership posts for the same reasons. These dismissals or exclusions from public office were made on administrative grounds, although the actual reason was national security. Things could escalate to the point where the person was forced to leave their position or would refrain from seeking appointment in the first place. Reparations were therefore also due to persons affected in this capacity. This was one of the reasons the Law of Reinstatement of Persons Dismissed for Political Reasons No. 24 of 2005 became necessary. It was issued for the purpose of providing justice for large numbers of employees who had been dismissed from their positions or forced to give up their posts due to political, ethnic, or religious persecution from the former regime. It was also intended to bring justice to political prisoners and to honor the families of martyrs who died in the prisons of the former regime.

Article 1 of the law stipulated that:

First: Persons who had been previously dismissed for political, ethnic, or religious reasons should be reinstated in their posts again in the state, public sector, or mixed sector, including civilian and military posts as well as internal security. This applied to those who had been removed from their positions between 17 July 1968 until 9 April 2003, and included:

- a. Persons who left their positions due to voluntary or forced emigration.
- b. Persons who were detained or arrested by the previous regime.
- c. Persons who were forced into retirement before the legal retirement age.

Second: Persons covered under this law include those who were imprisoned or detained for the aforementioned reasons during the period of time set forth in the first paragraph of the first article of the law, and who as a result were:

1. Unable to complete their secondary or university studies.
2. Unable to obtain a position, or to take up a position that they had previously been appointed to, prior to being imprisoned, detained, or arrested.
3. Not appointed, despite having a permanent contract with the state, public sector,

or mixed sector.

Article 2 of the law stipulated that persons covered under Article 1 had the following rights:

First: The period of dismissal or exclusion from office for one of the above reasons stated in the first article of the law was considered as active service for the purposes of calculating promotion, raises, or retirement.

Second: The period of detention or imprisonment for the one of the above reasons stated in the first article of the law was considered as active service for the purposes of promotion, raises, or retirement.

Third: The periods of time in paragraphs one and two of this article could count towards promotion if the person had sufficient qualifications and skills for the position.

Article 3 stipulated which ministries and other bodies were responsible for implementing training programs for persons reinstated to their positions. The same article also established the central committee for investigations in the General Secretariat of the Council of Ministers which would review the decisions of the ministry subcommittees on claims made, after approval by the central committee, upon which the claimant was due the relevant benefits under Article 2 of the law. In addition, the retirement age was 68 for persons covered under the law, and those under 68 were given the right to return to their positions. If the person was unable to return to work, then the years after their dismissal could be counted towards retirement. Article 5 of the law stated that in the case of persons who had died after their dismissal, their relatives had the right to claim their pensions.

Article 7 of the law stipulated that claims had to be received before 13 December 2015, and granted the head of the Council of Ministers the right to extend this deadline if necessary.

The law did not take into account whether or not the public sector needed such a huge

number of employees who, as a result of the decision to count time after dismissal as time served, were promoted to high-level positions above their qualifications. Such promotions were not based on their own credentials but rather the period of time spent out of office, which had a significant negative impact on the government. These persons generally held certain political views that contributed to the politicization of public office, which was widely criticized by the Iraqi public.

#### **Subsection 6: Reparations for Victims of Forced Displacement and Migration for Purposes of Demographic Change**

Article 58 of the Law of Administration for the State of Iraq for the Transitional Period clearly outlined the government's position on the violations of the previous regime that were committed in order to effect demographic change in various regions of Iraq. Article 58 stated that:

- a) The interim government of Iraq and the Commission for the Resolution of Real Property Disputes and other relevant agencies shall adopt the necessary measures with all due haste in order to remedy the injustices caused by the previous regime with regard to demographic change in particular areas of Iraq including Kirkuk, through expelling persons from their places of residence through forced displacement within or outside the given area, settling outsiders in these areas, and preventing the original residents from working. In order to remedy these injustices and restore persons to their original national identity, the interim government should take the following steps:
  - 1. With regard to residents who had been expelled, exiled, or forcibly displaced, in accordance with the Law of the Commission for the Resolution of Real Property Disputes and other legal provisions, the government shall return residents to their homes and properties within a reasonable period of time. If this is not possible, then the government shall pay the victims equivalent compensation.
  - 2. With regard to persons transferred to particular areas, the government shall

make a determination on their affairs according to Article 10 of the Law of the Commission for the Resolution of Real Property Disputes, in order to ensure they can be resettled and that they receive reparations or new land from the state close to their original place of residence in their original governorate; they may also receive compensation for the costs of relocating to these areas.

3. With regard to persons who were prevented from obtaining employment or another form of livelihood with the purpose of forcing them to emigrate from their places of residence with Iraq, the government shall encourage the provision of new work opportunities for these persons in these areas.
  4. With regard to modifications to persons' national identities, the government shall repeal all relevant resolutions and ensure that persons who were affected have the right to declare their own national and ethnic identity without coercion.
- b) The previous regime also meddled with administrative and other borders in order to achieve its political goals. In this case, the transitional Iraqi government and president shall be responsible for providing recommendations to the National Assembly in order to address these unjust changes. If the president cannot obtain unanimous support for the recommendations, then the presidential council shall appoint a neutral arbitrator with unanimous support for the purpose of studying this question and providing recommendations. If the presidential council does not approve the arbitrator, then it shall ask the UN Secretary-General to appoint a well-respected international figure to carry out the required arbitration.
- c) The final settlement on lands under dispute, including in Kirkuk, shall be delayed until the above procedures have been carried out, a transparent and just census can occur, and a permanent constitution is ratified. This settlement must be consistent with principles of justice and take into account the interests of the residents of these areas.

The Iraqi constitution outlines a roadmap for the Kurdistan Region and other disputed areas

in Articles 140 and 141. Article 143 of the Iraqi constitution of 2005 stipulated that the Law of Administration for the State of Iraq for the Transitional Period and its annex shall be repealed once the new government is formed, with the exception of paragraph (a) of Articles 53 and 58. Article 53 (a) stipulated that the government of the Kurdistan Region was recognized as the official government of the territories that the aforementioned government controlled as of 19 March 2003, in the governorates of Dohuk, Erbil, Sulaymaniyah, Diyala, and Nineveh. The term “the government of the Kurdistan Region” as used in this law means the Kurdish National Council, the Council of Ministers of Kurdistan, and the Region’s judiciary.

In reality, there were two approaches that were adopted by the Iraqi government in implementing the aforementioned articles of the constitution. A committee on Article 140 was established which included two representatives of the Kurdistan Region’s government and which would examine the resolutions issued by the Revolutionary Command Council that had served as the legal basis for demographic change. It also examined the cases of victims of the former regime who had suffered harms under Article 140. These victims were resettled and had their personal status documents restored to their previous status prior to the changes that had been made and a lists of persons who were due reparations were prepared. One of the members of the committee reported that the committee had implemented reparations for Kurdish victims of the regime, and that they had received compensation in accordance with their individual damages. With regard to the lists of persons due reparations in other governorates, the committee on Article 140 had assessed the damages and was waiting for the money to be allocated in order to compensate victims. However, due to the difficult economic conditions in Iraq, these procedures had not yet been carried out.

With regard to the census that was supposed to occur this year, the Ministry of Planning delayed the census due to the COVID-19 pandemic and announced it would occur the following year.

As for Article 140, there were serious obstacles in restoring conditions to how they had



been in 1968. There were new governorates that had since been created as well as districts and sub-districts. Based on the 1968 map of Iraq, the Kurdish governorates of Dohuk was part of the governorate of Mosul, and the governorate of Saladin did not exist at all. There were also disputes in the southern governorates with regard to important districts and subdistricts that were rich in national gas and oil. The same was true for the governorates of Anbar and Karbala, and an important border crossing in the city of Arar that Karbala wanted included within its borders. The Baghdad Belts were also returned to their pre-1968 status, which resulted in the expulsion of many Sunni tribes so that Shi'ite tribes could return to their areas. All of these were explosive issues that could set off conflicts at any moment between the governorates and the Kurdistan Region, or between Arab governorates. The passage of the draft law that was proposed by former President of Iraq Jalal Talabani did not resolve these tensions. There is a general view that the demands related to the implementation of Article 140 were political blackmail and that all parties involved were aware of the dangers of implementing any of its articles.

The Kurdistan Region has also exacerbated these issues through making unilateral decisions in 2003, when it issued Law No. 19 of 2003 to reverse the effects of coercive measures carried out as part of the ethnic cleansing (Arabization). This law adopted a policy of creating a *fait accompli* by exploiting the lack of a centralized authority.<sup>(158)</sup> The law stipulated the following:

Article 1: In order to reverse all effects of coercive procedures carried out by successive dictatorial Iraqi governments with the aim of changing the ethnic composition of Kurdistan, Iraq, and Arabizing it, circumstances shall be restored to the status quo ante before this policy was implemented, and the following steps shall be taken:

First: Return assets confiscated on the basis of national affiliation, or because of activities

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(158) From a legal perspective, the aforementioned law was issued by an authority without jurisdiction to issue the law, since the federal government was the only competent legal entity in this regard, and therefore all outcomes of its implementation were considered null and did not confer any legal effect or right, and damages caused by its implementation were to be remedied through reparations to the aggrieved parties.

carried out against the policies of the dictatorial regime, to their legal owners.

Second: Return all non-Kurdish citizens to the regions in which they had previously been living, if they had been settled in Kurdistan, Iraq, as part of the Arabization policies in the governorate of Kirkuk, Kurdish regions in the governorates of Diyala and Nineveh, or parts of the governorates of Erbil and Dohuk, including persons who:

- 1) Were settled in Kurdistan for the purpose of the Ba'athification of the area.
- 2) Worked in repressive national security agencies (special security, intelligence agencies, military intelligence, general security, or Fedayyeen Saddam).
- 3) Worked in the departments and agencies of the internal security forces.
- 4) Prevented residents from accessing their right to employment or took their places by filling empty posts.
- 5) Took the place of employees who were the original inhabitants of the area, in order to transfer the latter outside the region or have them dismissed from their positions, pushed into retirement, or imprisoned.
- 6) Worked as part of the Republican Guard forces and participated in genocidal campaigns in Kurdistan.
- 7) Worked in the military units of the Iraqi army that were involved in the genocidal campaigns in Kurdistan.
- 8) Were recruited for waves of official emigration to Kurdistan from other governorates as part of the policy of Arabization, whether or not the person went voluntarily or received material or symbolic compensation.

Third: Provide fair reparations from the Iraqi government to all those harmed by the coercive policies covered under this law.

#### **Section 4: Institutional and Legal Reform and Transitional Justice in Iraq**

There is no doubt that institutional reform in transitional justice processes aims to achieve peace and rebuild society, which requires the state that emerges in the wake of the dictatorial regime to examine the form of governance that produced these violations in order to build a new system of governance with institutions that can address past violations in order to provide remedy for the consequences of these violations. The institutions involved in these violations need to be restructured, and reforms must be pursued in the security sector and other sectors. At the same time, attention must be given to reformulating legal frameworks and rebuilding the judiciary. Activities that promote democracy and protect basic human rights should be organized, and this process will require consultation with the public and the inclusion of vulnerable sectors of society. Institutional reform must aim to support good governance and ensure the non-repetition of violations in cooperation with victims and civil society organizations. Women and minorities must also been given sufficient space to participate in society. This must occur in such a way as reassures all sectors of society of a genuine transformation taking place to ensure non-repetition of past violations.

Public security must be a priority in order to create a safe environment for these transformations to occur without intervention by armed groups or militias. In order to achieve a comprehensive policy of justice, all armed entities that have existed outside the law and the state must be disbanded.

In order to provide assurances to victims of violations, there must be legal and institutional frameworks and programs adopted which provide justice and redress, and end impunity for perpetrators.

Military and security reform must also be a priority in order to make this transformation possible. These institutions must be monitored and operate alongside civil observer mechanisms that can reassure society that these changes are being instituted. There

must also be rehabilitation programs and specialized trainings in these institutions to affirm basic principles of human rights. The legal frameworks for these agencies are of utmost importance in affirming that these institutions are responsible for defending the sovereignty and unity of the state and the protection of its citizens through applying the rule of law. At the same time, as part of a democratic government, they must operate within the parameters of the law.

In the transitional period, rebuilding and reforming existing institutions will be important in order to ensure they operate in greater conformity with the rule of law. It is important for Iraq to respect its international obligations since the country is a member of international mechanisms that support the implementation of relevant international conventions on the protection of human rights. The independence of the judiciary is a cornerstone of achieving effective governance that operates in accordance with the law, and in which judges are bound by objective and independent international professional standards and abide by the necessary legal procedures.

Laws must be reformed. Those which are in alignment with the principles of society must be reflected in the constitution – the country's foremost document. On the other hand, laws that contravene obligations under international law or the elected government's support for international or regional mechanisms that aim to guarantee the protection of human rights and democratic institutions and procedures must be identified.

In order to ensure good governance, the state must demonstrate during the transitional period that it will adopt legal and institutional frameworks that aim to fight corruption, encourage transparency, hold perpetrators accountable, and protect public funds.

With regard to respecting human rights, the state must guarantee that human rights principles are incorporated into all areas of governance, and that its institutions support

human rights, democratic values, and the rule of law. It is also necessary for this approach to be supported by entities that can serve as independent or semi-independent human rights observers, and which can monitor, evaluate, and propose assessment and reform in cooperation with state authorities.

During the transitional stage, the state must endeavor to launch short-, medium-, and long-term programs that aim to train employees and raise awareness about human rights, and to help institutions develop codes of conduct for employees, including employees of law enforcement agencies, that contain monitoring and evaluation mechanisms.

These procedures must be accompanied by serious efforts to address social and economic disparities within society through establishing equality before the law in rights and obligations. These endeavors should address the underlying structural reasons for unequal opportunity, differential treatment under the law, and discrimination.

The constitution is one of the most important legal and structural references in the Iraqi legal and administrative system, and provides for the following:

1. The constitution moves beyond the centralized system of governance where the Revolutionary Command Council and its chairman (who was also the president of Iraq) dominated all the branches of government. Instead, it adopted a system of federal, decentralized forms of governance, as stipulated in Article 1. Article 116 stipulated that the federal government shall consist of a capital with decentralized regions and governorates and local administrations and shall adopt the principle of separation of powers within the federal system. Article 47 stipulated that the executive, legislative, and judicial branches shall exercise their jurisdiction and their functions based on the principle of separation of powers in order to offer redress for and constitutional protection of individual rights.
2. The constitution established a mechanism for fostering democratic governance in state institutions. Article 5 stipulated that the rule of law shall prevail and

that the people are the source of the government's power and legitimacy and shall vote by secret direct ballot through their constitutional institutions. Article 6 outlined the mechanisms for transfer of power, and that this must occur peacefully through the democratic means stipulated in the constitution.

3. Article 87 stipulated that the judiciary was independent and consisted of courts of different varieties and degrees that would issue rulings according to the law. Article 88 stipulated that the judges were independent and subject to no authority other than the law, and that that no entity could interfere in court cases or matters of justice. Article 90 and 91 stipulated that the functions of the Supreme Judicial Council were to oversee the affairs of the judicial commissions through the following functions:
  - a) Manage the affairs of the judiciary and oversee federal judges.
  - b) Nominate a head and members of the federal Court of Cassation, a chief public prosecutor, and a head of the commission for judicial oversight, and present these nominations to the Council of Representatives to be ratified.
  - c) Propose annual draft budgets to the federal judicial authority, and to the Council of Representatives to approve.

Article 95 prohibited the establishment of special or exceptional courts. According to Article 97, judges could not be dismissed except in particular cases outlined in the law, and special guidelines and disciplinary regulations were stipulated for judges. In order to firmly establish the principle of an independent judiciary, Article 98 prohibited judges or members of the Public Prosecutor's Office from holding a judicial post at the same time as another legislative or executive role, or while working in any other form for these institutions, belonging to a political party or organization, or from being involved in any other form of political activity. Article 100 prohibited making any administrative act or decision immune to appeal before the courts, while Article 101 stipulated that

a State Council could be established to carry out the functions of the administrative judiciary, issue legal opinions, draft materials, and represent the state and other public entities before the judicial bodies, except in cases exempted under the law.

4. The constitution limited the power of the executive authority with regard to declaring a state of emergency or war as a response to concerns among the Iraqi public about unilateral decision-making. Article 61, paragraph 9, of the current constitution of 2005 established the following:

- a) Approval of a declaration of war or state of emergency requires a two-thirds majority, based on the joint request of the president and prime minister
- b) A state of emergency may be declared for a period of thirty days, subject to extension; each extension required the same approval;
- c) The prime minister shall be given the necessary powers to oversee the affairs of the country during the period in which a war or state of emergency was announced. These powers shall be defined under the law and shall not contravene the constitution;
- d) The prime minister would present the steps taken and outcomes reached during the period since the war was declared or the state of emergency announced to the Council of Representatives within 15 days of the end of this period.

5. Articles 14 to 46 of the constitution outlined basic principles pertaining to the protection of human rights, basic liberties, and democratic rule. These principles can be summarized as follows:

- Equality and non-discrimination (Article 14);
- The right to life, security, and liberty (Article 15);
- The right to equality of opportunity (Article 16);
- The right to privacy and sanctity of the home (Article 17);
- The right to hold a nationality (Article 18);
- The independence of the judiciary and the right to a fair trial (Article 19);
- The right to participate in public life, and the right for men and women

to exercise their political rights, including voting and running for office (Article 20);

- The right to political asylum (Article 21).

Articles 37 - 46 outlined other basic rights and liberties including banning torture, forced labor, and slavery; the right to freedom of expression, opinion, assembly, peaceful protest, and association; the right to form political parties; freedom of movement, thought, conscience, and belief; strengthening the role of civil society organizations; and freedom of worship. There were to be no restrictions imposed on these rights except in accordance with the law.

6. In order to affirm the importance of the rule of law in the justice system, and respect human life, security, and liberty, to not encroach on the above except in accordance with the provisions of the law or decisions of a competent judge, to deal with persons justly in all administrative and judicial procedures, to adhere to the presumption of innocence of the accused until proven guilty, to ensure a fair and speedy trial before a judge, and to protect human dignity, the constitution included the following series of principles:

- Crime and punishment must be by virtue of law (Article 192/ of the current Iraqi constitution);
- The principle of the independence of the judiciary (191/)
- The right to a trial for all persons (193/)
- The right to defense in all the stages of investigation and prosecution (194/)
- The right to the presumption of innocence (195/)
- The right to just administrative and legal procedures (196/)
- The principle of individual punishment (198/)
- The principle of the non-retroactivity of the Penal Code unless it is in the interest of the accused (1910/)
- The principle of public trials (197/)
- The prohibition of administrative detention (1912//a)



- The right to be detained in sites specifically allocated for detention (1912//b)
  - The principles of equality and non-discrimination, which are included in many articles of the constitution that pertain to economic, social, political, and cultural rights, as stipulated in Articles 14, 2234-31 ,1/, and 494//f.
7. The Iraqi constitution of 2005 guarantees freedom of expression and opinion in all its forms, as stipulated in Article 38, paragraphs 1 and 2. This article stipulates that the state shall guarantee freedom of expression in all its forms, freedom of the press, printing, and the media, provided such expression does not impinge upon public order and morals. Efforts to turn this constitutional framework into national law have encountered major obstacles, where the Iraqi public's demands for guarantees of the freedom have come up against government efforts to pass laws that focus on restrictions of freedoms and accountability, as evidenced by the draft Law of Freedom of Expression and Opinion and the Law of Cybercrime.
  8. The Iraqi constitution created independent commissions that, for the first time, safeguarded the protection of human rights and democratic rule and fought corruption. Article 108 of the Iraqi constitution of 2005 provided for the establishment of independent commissions that were not connected to any of the previous three authorities for purpose of preventing any meddling in the decisions of these bodies. The heads of the independent commissions and members of their councils were to be chosen from among persons with experience and high professional qualifications, and who were not aligned with any particular party or sector of society in order to carry out their work without being subject to the pressures of other powers or entities. In reality, most of the heads of these commissions were split among different political parties based on a quota system. Some of these commissions included observer bodies such as the Commission of Integrity and the Independent Human Rights Commission. Others were in charge of organizing democratic practice such as the Elections Commission, the Communications and Media Commission, and the Endowments Offices. Still other commissions were responsible for drafting laws and overseeing the administrative

courts, which were separate from the executive and judicial branches of power, such as the State Council. There were also entities responsible for monitoring the official state financial institutions, such as the Financial Oversight Office, and an independent body that enables the Central Bank to manage its financial affairs, in accordance with Articles 102 and 103.

9. Article 104 of the constitution established the Martyrs' Foundation as one of the institutions of transitional justice, which was responsible for remedying the violations of the former regime, providing redress for victims, and commemorating their sacrifices. It also established the Supreme Iraqi Criminal Tribunal to prosecute perpetrators of these violations (Article 134). Article 132 of the constitution indicated that it was the state's responsibility to provide for the welfare of families of martyrs, political prisoners, and persons harmed by the arbitrary practices of the regime, and that they were to receive reparations. The constitution also prohibited rescinding nationality from any person born in Iraq for any reason, and that those who had their nationality rescinded under the former regime shall have it restored. The rescinding of nationality was considered a violation under Article 18, while Article 140 stipulated that Articles 53 and 58 of the Law of Administration for the State of Iraq for the Transitional Period shall remain in effect in order to remedy the violations of the former regime related to demographic change, which occurred in more than one governorate.
10. The constitution allowed Iraqis to hold more than one nationality and gave mothers the right to give their children foreign nationality under Article 18.
11. The constitution of Iraq recognized the rights of minorities, including the right to political representation and to hold administrative posts equal to other Iraqis, and that they shall be guaranteed the right to use their languages in their regions in which they constituted a majority of the population. Arabic and Kurdish were to be the official languages of the Iraqi state (as per Articles 9, 12, 49, 125, and 142).
12. The constitution prohibited the economic exploitation of children and prohibited any form of domestic violence or other forms of violence in society.

13. In an effort to address economic and social disparities and healthcare, the constitution adopted Articles 30 and 31, which required that the state assist in ensuring that individuals and families, especially women and children, were provided with social and health services and other basic needs in order to live a free and dignified life that and ensure that they had sufficient income and housing. The state shall also provide protections in case of old age, illness, or inability to work, and to protect individuals from ignorance, fear, and want, and to ensure the provision of housing.
14. The Iraqi constitution stipulated that the state was obligated to strengthen the role of civil society and to develop it as an independent entity consistent with the peaceful methods necessary to achieve the objectives set forth in Article 45.

There is no doubt that the Iraqi constitution clearly sets forth these general principles and rights in detail in order to assuage the fears of large segments of society that laws would again be overturned. Opposition forces were particularly concerned and wanted to prevent further changes to the constitution in an effort to protect the gains they had made after the transition in this high-level document.

Not all of these constitutional provisions became laws. The structures of the regime remained in place without the Council of Union that would serve as the second chamber of the legislature and represent the governorates and the Kurdistan Region, as stipulated in Article 48. Neither was a law passed to establish a federal court as stipulated in Article 92, which was supposed to lead to the establishment of a mechanism for the accountability of the president and prime minister (Article 93, paragraph 6). The court continued to work according to the law of the interim government of 2005, which is not in effect today, because of the legal loophole related to reparations for its members and the mechanism of making decisions that required unanimous approval.

The Penal Code and the regulations for criminal trials still remain in the same form as under the former regime. The resolutions that stipulated physical punishments or

gave judicial powers to elements of the executive authority were abrogated, but the rest remained the same. The former included giving powers to ministers, governors, mayors, and district commissioners to hold persons in administrative detention.

With regard to dealing with weapons outside the control of the state, the order of the Coalition Provisional Authority incorporated militias into the security ministries and some civil departments. However, in reality, all active political parties had armed wings, in contravention of the constitution and the law which forbade political parties from having armed wings (Article 8). However, the composition of the elections commission, which was charged with implementing the law of political parties, was an obstacle to carrying out this work in the absence of an oversight body.

In addition, laws related to domestic violence have also been stalled in the Council of Representatives for many years. The same is true for the laws on freedom of expression, assembly, protest, and other laws related to use of the internet.

The anti-corruption mechanism was fully developed with regard to the legal framework for an independent commission (the Commission of Integrity), the Department of Financial Oversight, and the independent authority of the Central Bank. All of these entities were set forth in the Law of the Public Prosecution No. 49 of 2017. However, the Supreme Judicial Council failed to implement the legal mechanisms for the public prosecution so that it could play a key role in fighting corruption through involvement in the ministries, and institutions unconnected to ministries, in order to protect public funds. This was to be carried out in coordination with other members of the anti-corruption apparatus and with the judiciary in accordance with Article 5, paragraph 13.

There were also other important laws that have still not been issued, such as those related to guaranteeing non-repetition of violations, including an anti-torture law that Iraq is

required to adopt as a state party to the Convention Against Torture. The same is true for the law against forced disappearance; the procedural and institutional frameworks for missing persons are currently mixed up between different agencies since the Ministry of Interior oversees the affairs of missing persons while the Ministry of Justice also has a department for missing persons, and the Martyrs' Foundation examines cases of victims of mass grave sites. There is a complete lack of a unified institutional framework to deal with these issues, which affect an enormous number of persons in Iraqi society and pose a significant problem for their families. The number of cases of missing persons continues to grow due to terrorist attacks after the fall of the regime.

Iraq also needs to create legislation criminalizing the most serious of these crimes, such as crimes of genocide, crimes against humanity, and war crimes. The UN has stated that there were gaps in Iraqi law regarding crimes of ISIS terrorism and that the organization should be criminalized based on these crimes that require redress.

Iraq's position on international conventions became stronger after the fall of the regime in 2003, when the country ratified many international conventions, most importantly:

1. The Optional Protocol on the Involvement of Children in Armed Conflict;
2. The Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography;
3. The International Convention for the Protection of All Persons from Enforced Disappearance;
4. The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment;
5. The Convention on the Rights of Persons with Disabilities.

Despite the points mentioned above, there have been significant changes in the right direction. Various laws for political, legal, and institutional reform have been adopted,

the most important of which are:

1. The Law of Political Parties (No. 36 of 2015)
2. The Law of the Protection of Mass Graves (No. 5 of 2006)
3. The Law of the Human Rights Commission (No. 53 of 2008)
4. The Law of Civil Society (No. 12 of 2013)
5. The Labor Law (No. 37 of 2015)
6. The Law against Human Trafficking (No. 28 of 2012)
7. The Law of the Public Prosecution (No. 49 of 2017)
8. The Law of the Supreme Judicial Council (No. 45 of 2017)
9. The Law of Private Security Contractors (No. 52 of 2017)
10. The Anti-Terrorism Law (No. 31 of 2016)
11. The Unified National Identity Card Law (No. 3 of 2016).
12. The Law of the Protection of the Rights of Witnesses, Experts, Informants, and Victims (No. 58 of 2017)
13. The Law of the General Commission to Monitor Allocations of Federal Revenues (No. 55 of 2017)
14. The Law Banning the Ba'ath Party and Takfiri, Terrorist, and Discriminatory Entities, Parties, and Activities (No. 32 of 2016).

Nevertheless, there is still an urgent need to create a comprehensive strategy for reform that develops long-term plans, since there are still attempts to selectively apply these measures – which could result in Iraq slipping back into a second period of violations.

## Topic 2: The Social Impact of Transitional Justice Mechanisms in Iraq

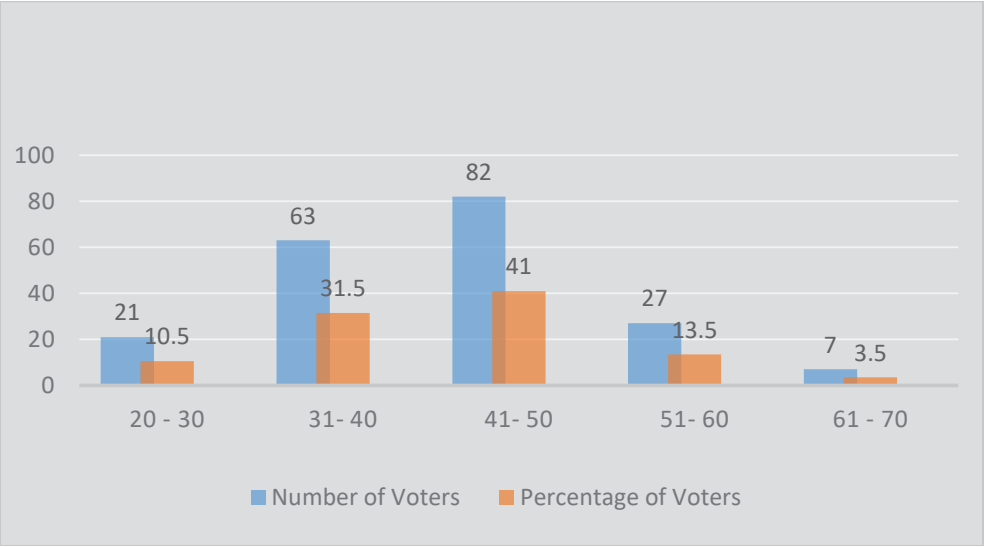
Karim Abdessalem

One of the most important challenges that transitional justice faces around the world is the gap between the underlying principles and the social context. Political considerations tend to dominate efforts to build transitional justice frameworks. However, the most important ramifications of transitional justice processes are how they shape society, for better or for worse. This can be seen in any systematic study of a society in the midst of implementing transitional justice in order to address past violations. Any country with a long history of gross human rights violations that has not been addressed will inevitably experience social divisions and a loss of public trust in state institutions. This will also prove a roadblock to establishing security and pursuing national goals of development and progress, and sow doubts about whether the state is serious about maintaining the rule of law. The situation may eventually descend into a vicious cycle of political, social, and cultural violence. Therefore, transitional justice is a crucial matter for post-conflict societies, especially if they hope to establish the foundations for democratic governance after a period of authoritarian rule.

This section presents societal perceptions of transitional justice in Iraq across different geographic areas and sectors of society, as well as the extent of knowledge of this concept and its history. It also asks about the projected consequences of transitional justice processes with regard to the democratic transition in post-conflict societies. After the ouster of the political regime responsible for these human rights violations, or the end of domestic or international armed conflict, there are many judicial or non-judicial legal steps that must be taken in order to undertake legal reform, prosecute the perpetrators of the violations, form truth commissions, and conduct truth-seeking

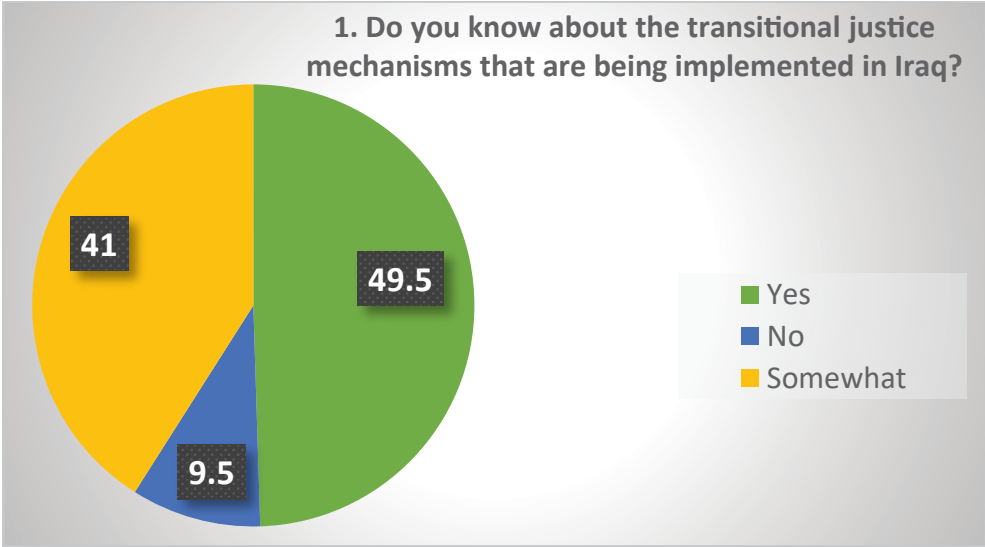
processes. The social consequences of these processes are as important as the political and legal ramifications, as we will see in this section, which draws upon three different methods to obtain data: surveys, focus groups with stakeholders, and individual interviews with decision-makers.

The 200 survey participants were spread across different age groups, as shown below. Of the participants, 71 percent were men and 29 percent were women.

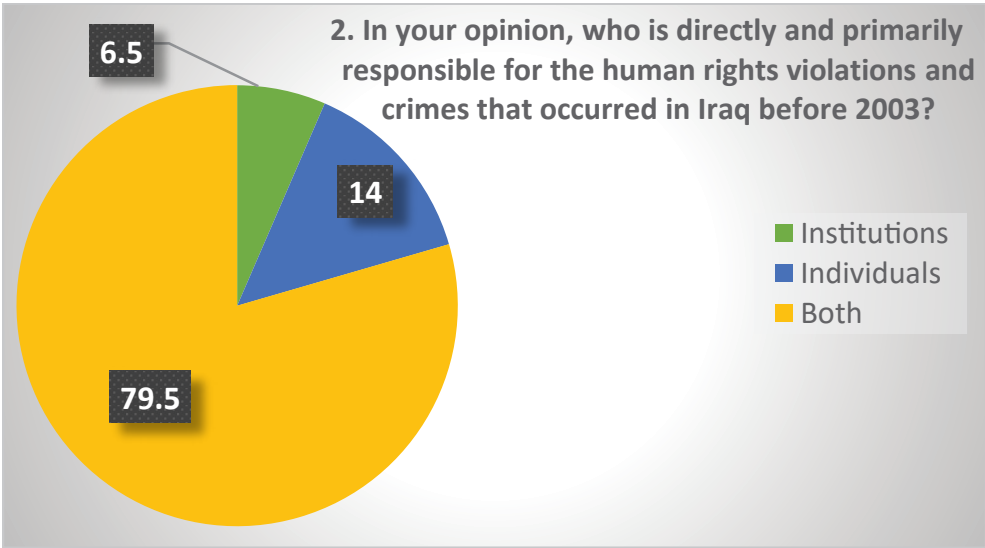


The sample group in the survey was asked about their knowledge of transitional justice in Iraq and the mechanisms through which it was implemented. More than 90 percent of participants felt that they had knowledge of transitional justice mechanisms to some extent, while only 10 percent said they did not. This demonstrates that the sample group had knowledge of the topics they were being asked to give their opinions on.





Approximately 80 percent of participants in the survey said that both institutions and individuals were responsible for crimes and violations that occurred during the pre-2003 period. There were 14 percent of participants who expressed that only individuals were responsible, and 7 percent felt that only institutions were responsible.



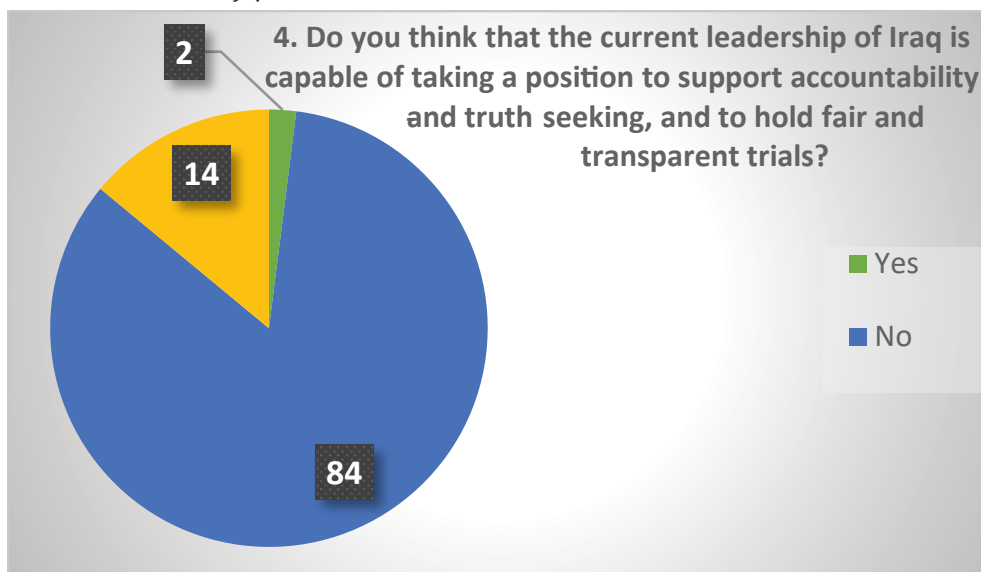
Given the grave nature of these violations and injustices, 60 percent of participants felt that perpetrators should be prosecuted, while 14 percent supported prosecution to some extent, and 16 percent said they should not be prosecuted.



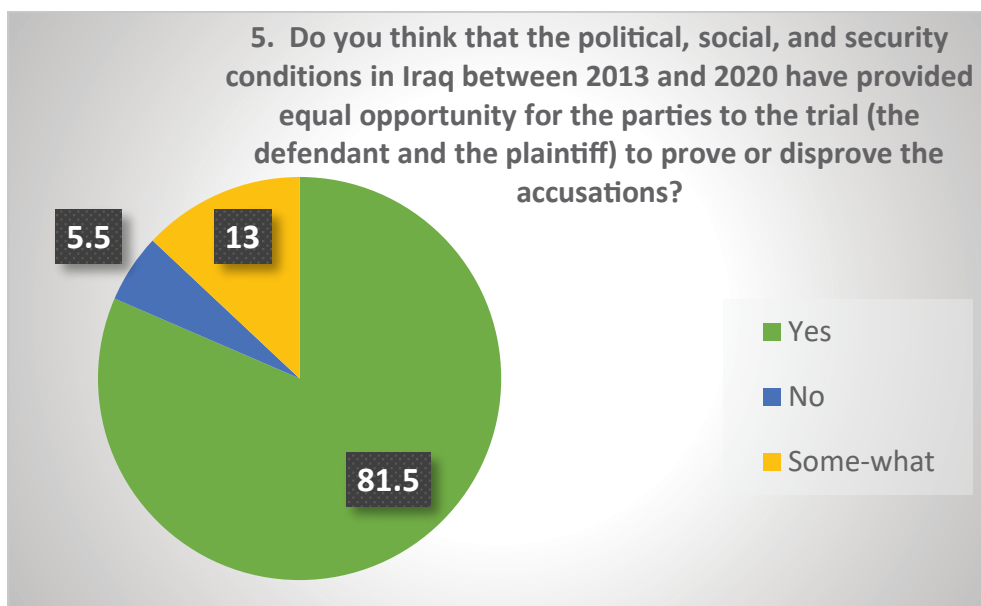
The survey found that 84 percent of participants lacked confidence that the current leadership of Iraq was capable of taking a stance to support accountability and prosecute perpetrators of violations, while only 2 percent had confidence in their abilities, and 14 percent were uncertain. This is clear evidence of the lack of trust in these politicians.

There are various causes for this, as journalist Saman Nouh explained. He said that a corrupt regime that had failed to implement transitional justice was incapable of holding the perpetrators accountable. Dr. Jawan Bakhtiar, a professor of sociology, also wondered how a government built on the quota system could really carry out transitional justice. Another respondent, activist Hiwa Muhammad, stated that there was no real political will among those in power to achieve transitional justice. Dr. Natheer al-Adnan, who works in diversity management, stated that the current ruling class is not qualified to oversee transitional justice proceedings, due to their lack of

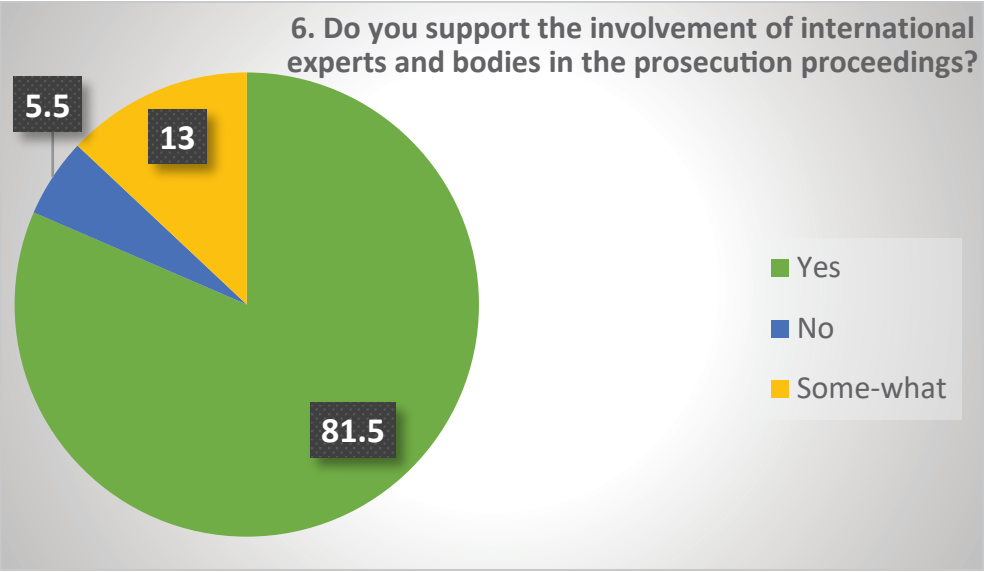
vision and commitment to the issue, and because they have been enmeshed in political conflicts and security problems since 2003.



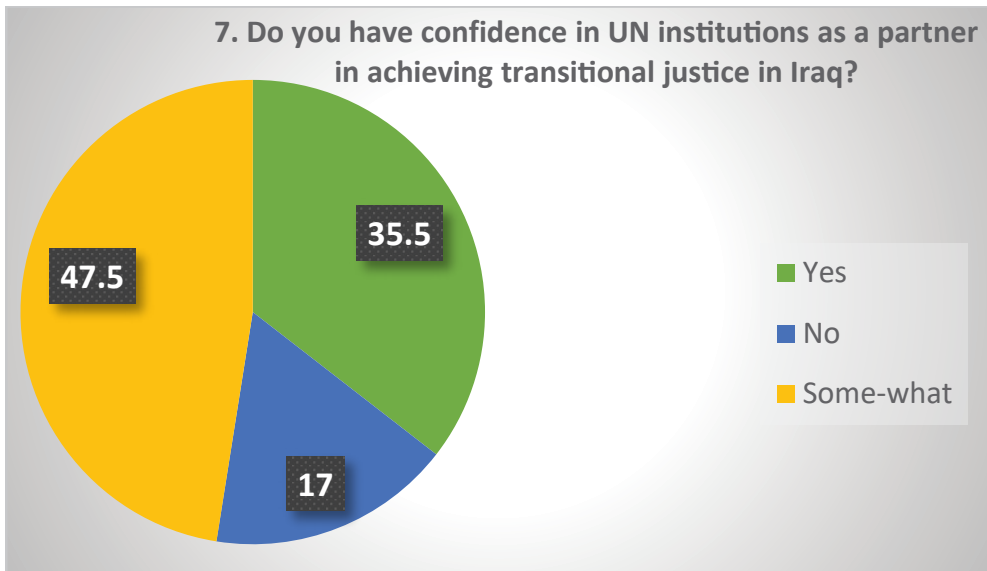
More than 82 percent of participants stated that the political, social, security conditions after 2013 had created equality of opportunity for the defendant and plaintiff to prove or disprove accusations, while 6 percent felt that this was not the case.



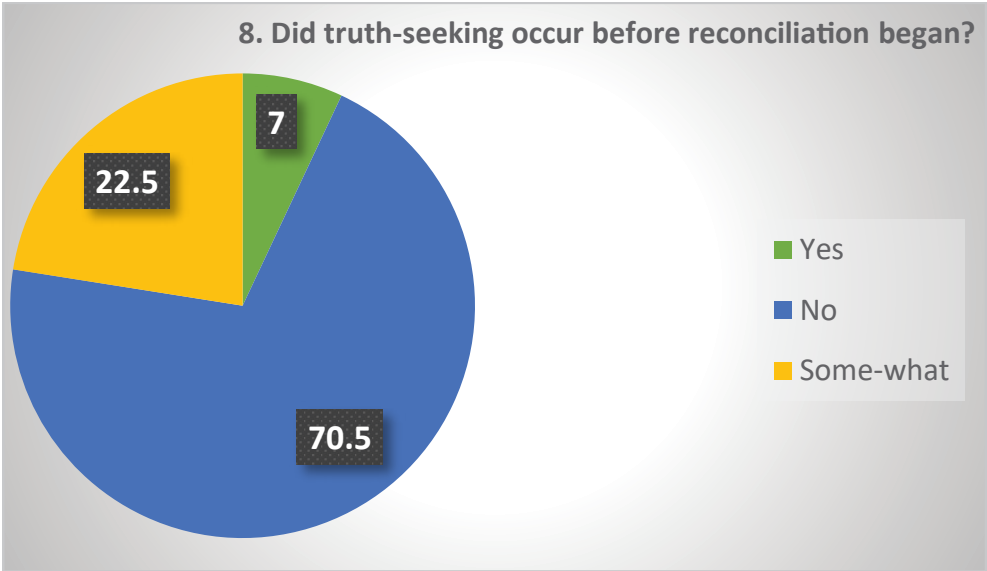
There were similar results with regard to participants’ opinions on whether international experts and entities needed to be included in the prosecution proceedings. This clearly demonstrates that there is no public confidence in the integrity of local political and governmental entities in this field.



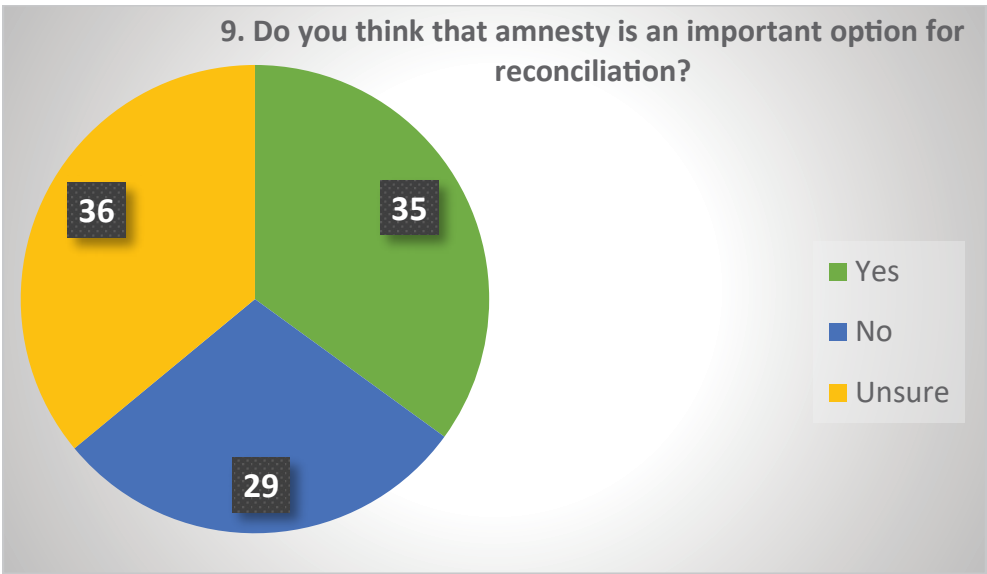
With regard to the participation of UN institutions in the transitional justice process, about 36 percent expressed confidence in these institutions, while 17 percent said they did not have confidence, and 48 percent were unsure. This suggests there is a complete lack of trust in these institutions, which may be due to their limitations or simply their lack of involvement in Iraq, which has created mistrust due to a lack of knowledge about the UN’s capacity to influence the political ruling class after 2003.



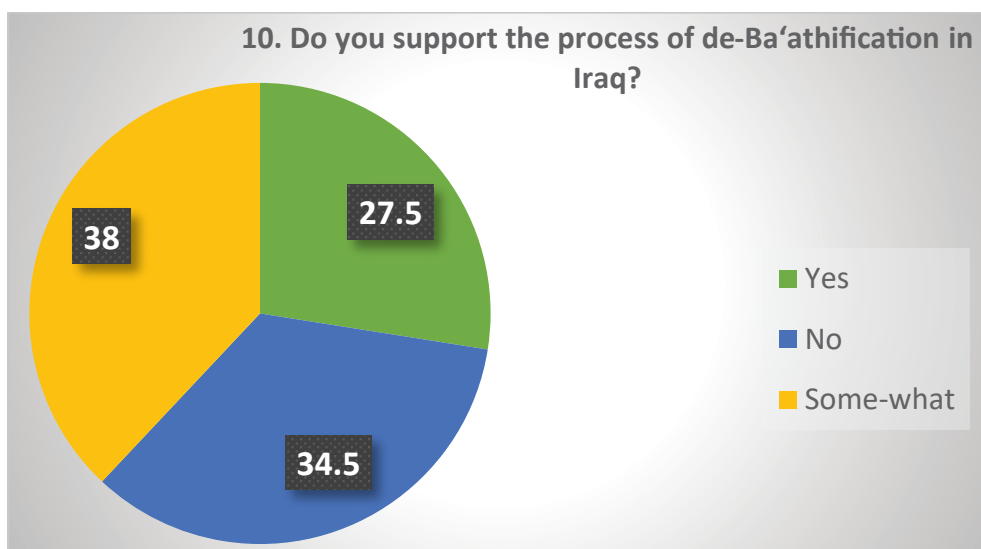
Only 7 percent of survey participants felt that truth-seeking had occurred prior to reconciliation, while 70 percent felt that it had not. Journalist Saman Nouh said that there had not yet been any societal documentation of what had happened in order to prevent these violations from fading from collective memory. He added that there have not been any studies or even journalistic or media coverage or documentation of the Anfal campaign in the Kurdistan region; on the contrary, these events have been covered up, which is not right. The activist Safa al-Khafaji added that there have not been any reports on any of the crimes of the former regime in order to determine who was responsible. Dr. Natheer al-Adnan, who works in diversity management, stated that Iraq had not witnessed any acknowledgement of the crimes that had been committed, and that only financial compensation had been provided. There was no real will to broach the question of an apology.



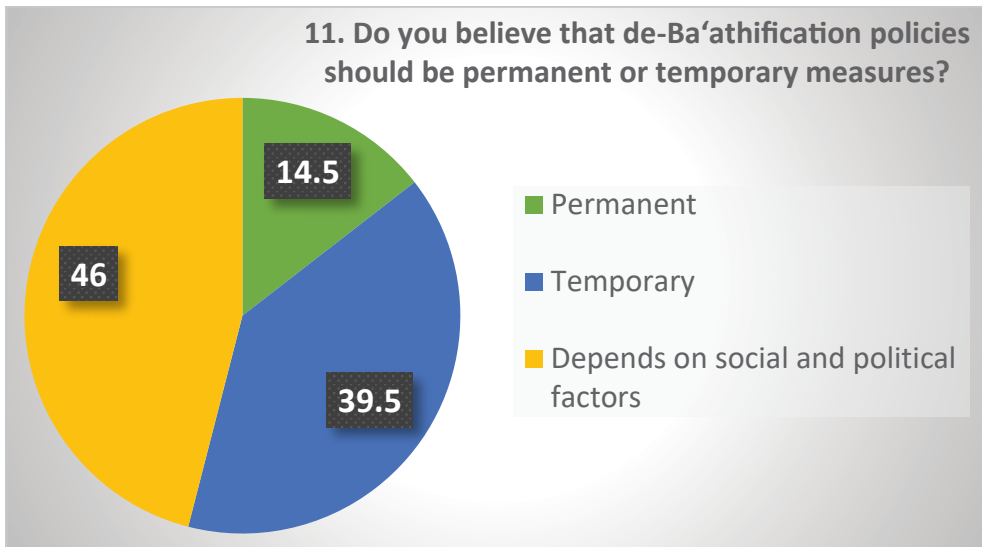
With regard to amnesty as a means for achieving reconciliation, there was clear split of opinion: 35 percent felt that this was an important option, while 29 percent disagreed, and 36 percent were unsure.



There was a similar split on the question of de-Ba'athification: Approximately 27 percent of participants supported it, while 35 percent opposed it, and the rest were uncertain. Dr. Ramzi Adel stated that these procedures had not been properly implemented in that they had targeted all members of the previous regime, even the "good" members, and those who did not commit crimes.

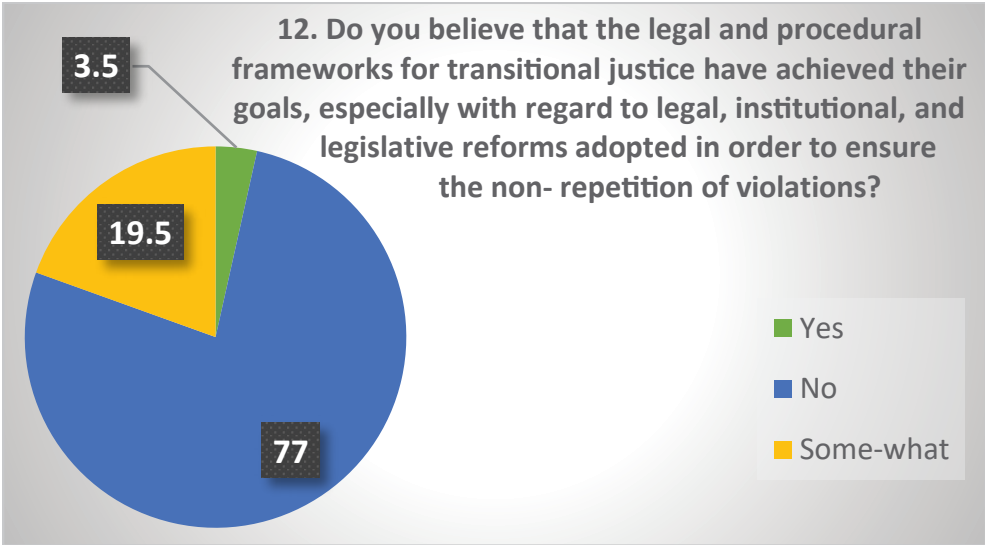


With regard to the scope of de-Ba'athification, 14.5 percent felt that these measures should be permanent, while 39.5 percent felt that they should be temporary, and the largest number of respondents felt that this should depend on social and political factors. Dr. Sonia Mardyan, an Armenian representative of the Alliance for Iraqi Minorities Network, stated that it was time to move past de-Ba'athification and embark on other issues that have arisen since 2003.

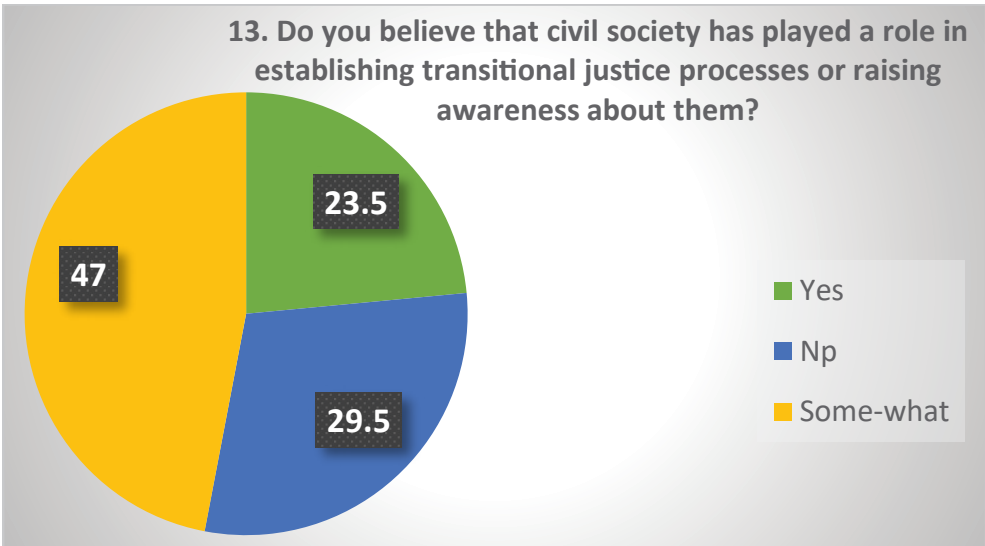


There was a loss of trust in the capacity of legal and procedural frameworks for transitional justice and their efficacy in ensuring the non-repetition of violations. Of the survey participants, 70 percent did not believe that these structures had achieved their goals, while only 3.5 percent felt that they had been successful. This demonstrates the extent to which the public's hopes in this process have been disappointed. Ms. Israa al-Fayli, a member of the general committee of the Alliance for Iraqi Minorities Network, stated that the judiciary did not function independently and was biased against minorities. Mr. Amer Habib, a specialist in law enforcement, said that there was no clear legal framework for how transitional justice would occur. He added that there had been different approaches adopted by various different entities but without a unifying legal structure. Dr. Ahmed Tarek said that there was no law for transitional justice in Iraq, nor a clear methodology or timeframe for implementation.

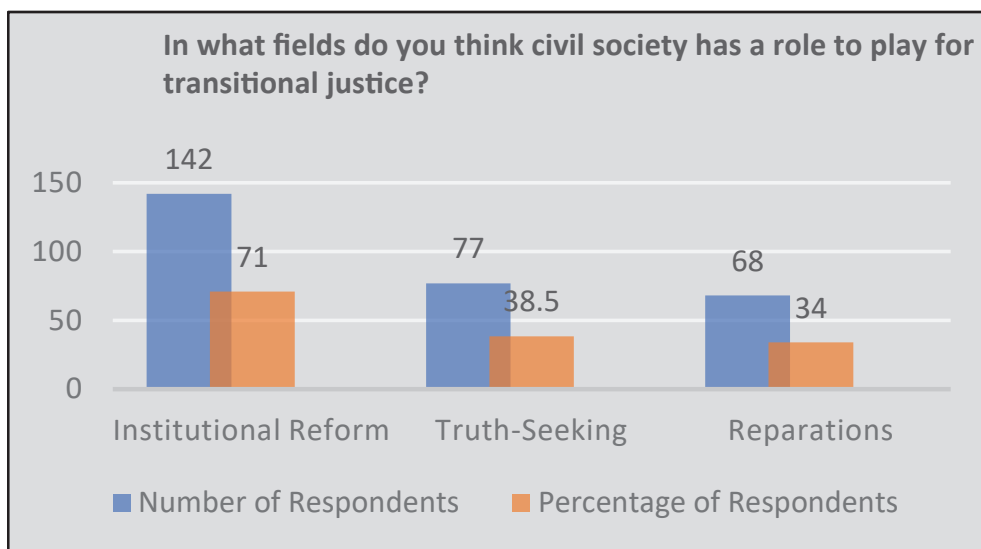




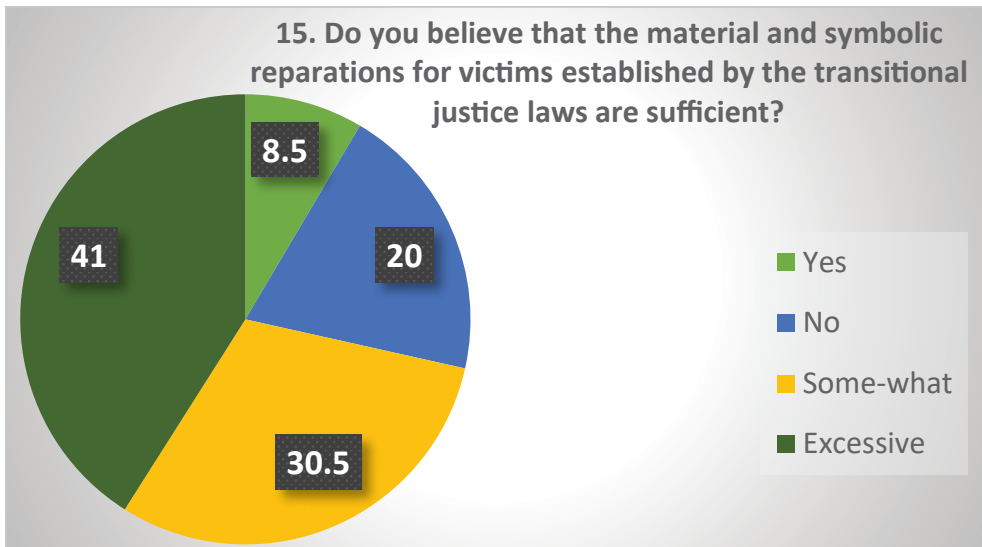
With regard to the role of civil society in transitional justice, only 23.5 percent of respondents felt that it had played a role in launching the process and raising awareness about transitional justice, while 29.5 percent felt it had not, and the largest number of respondents was uncertain.



Of the participants, 71 percent stated that it was most important for civil society to play a role in institutional reform, while the rest indicated that civil society should be involved in one of three other fields.

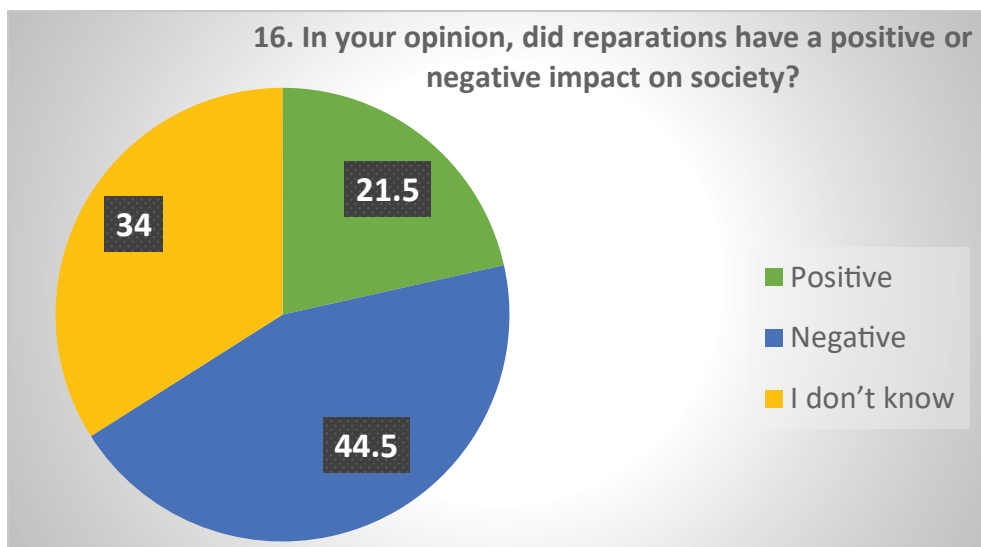


Of the participants, 41 percent felt that material and symbolic reparations were excessive, while 30.5 percent of respondents felt they were somewhat sufficient, and 20 percent felt they were insufficient. Khaled Romy, a former Sabian-Mandean member of the Council of Representatives said that there had not been any reparations for minorities. Ghanem al-Fati, the head of the Ghasin al-Zaiton Organization disagreed to some extent, saying that there had been relative justice in providing reparations to some victims, but that no trials had taken place. The human rights activist Naima Khaled agreed that there had only been material reparations without any apology or other acknowledgment of what had happened to victims. Dr. Talib Nowruz, a Feyli Kurdish activist, said that there were oversights in implementation of reparations regarding restitution of real property that was previously seized and reparations for victims of injustices.

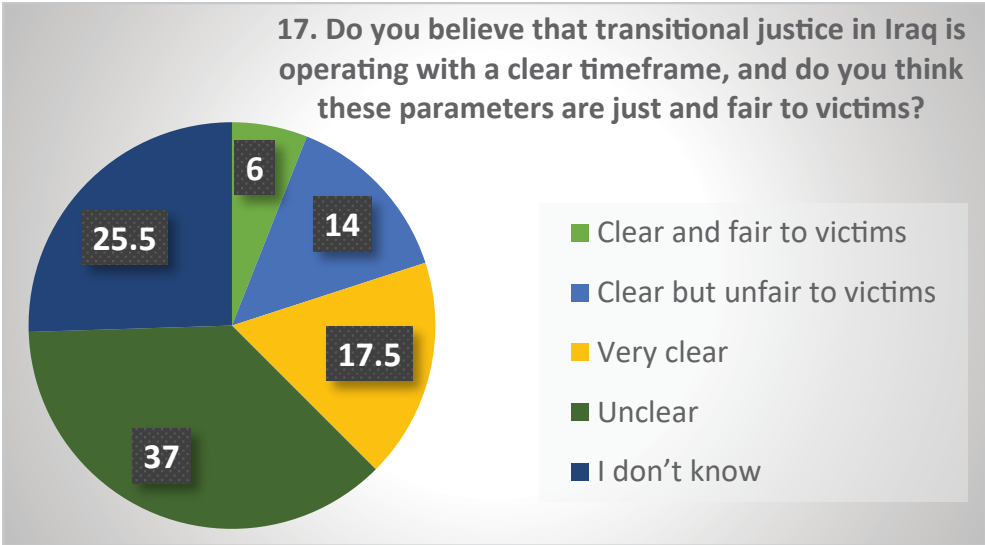


Of the participants, 21.5 percent felt that reparations had a positive impact on society, while 44.5 percent felt that there was a negative impact. Activist Mona al-Halali said that the system of transitional justice in Iraq was based on nepotism, and that reparations had only included first-degree relatives, while those targeted by policies of the former regimes had included up to sixth-degree relatives. The activist Bushra Abdel Karim, a member of the Iraq Civic Action Network, stated that transitional justice had not provided a solution to the fragmentation of Iraqi society; on the contrary, it had only exacerbated divisions. Khalid al-Khalidi, head of the Sergio de Mello Immediate Response Team, agreed that the implementation of transitional justice had caused many problems and contributed to growing divisions and discrimination in Iraqi society. The activist Baraa al-Bayati also affirmed that the wrong tools had been used to implement these processes and had sown further divisions in Iraqi society. She said that it had been a counterproductive endeavor that did not respect the cultural and economic diversity of Iraq and focused only on different sectarian groups and groups with different national identities. Al-Bayati added that it was not possible to implement transitional justice without political stability and public security. The most important

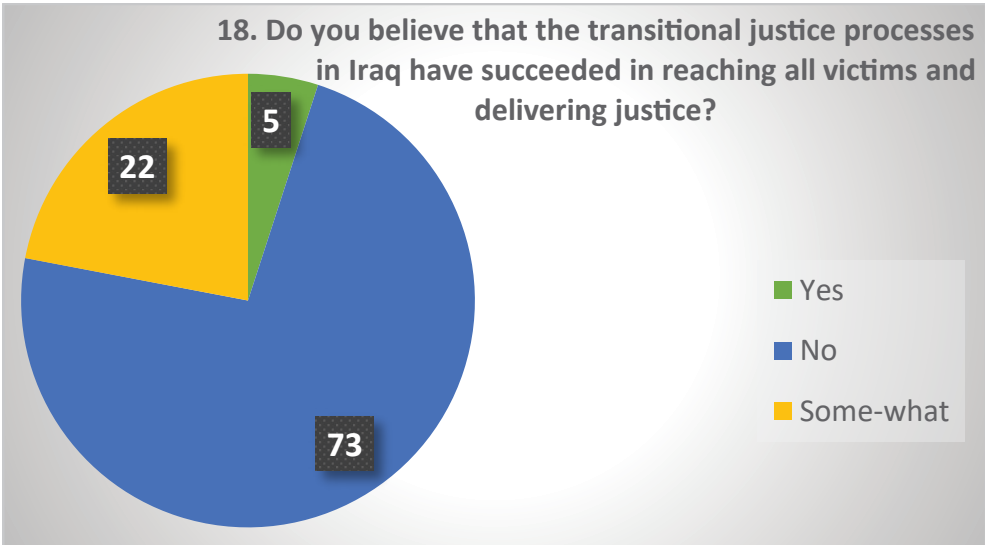
indication of the failures of transitional justice was the escalation of conflicts within Iraqi society. Ramzi Adel stated that transitional justice had been implemented on the basis of tribal affiliation, which had been disastrous.



Of the participants, 37 percent felt that the timeframe for implementing transitional justice in Iraq had not been clearly specified, while 37.5 percent felt that it had. There were also differences of opinion with regard to whether the process has been just and equitable. Ayad al-Aboudy commented that there needed to be a limited period of time and set issues that transitional justice was going to address; without this, the process would fail. Delair Jabbari, an expert in transitional justice, stated that there had been no clear cut-off date for the process and that transitional justice had begun to include victims from after 2003, which was at odds with how it was originally outlined. Iraq had not adopted any laws on transitional justice and therefore the process became unclear and politicized.



It is clear that the majority of respondents felt that the procedures had not delivered justice for all victims: 73 percent of participants felt that they had not succeeded in this regard, while only 5 percent felt that they had been successful.

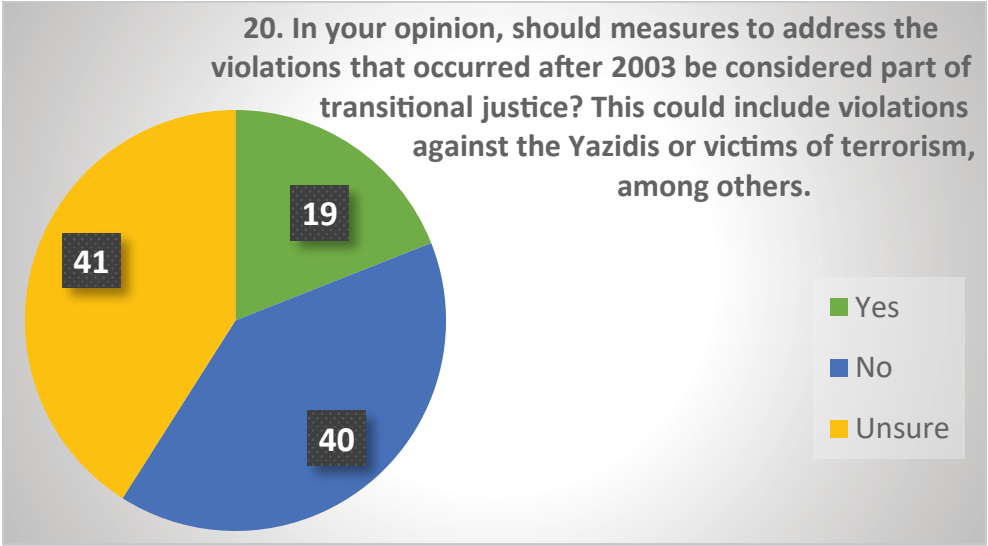


Similarly, a majority of respondents (54 percent) felt that transitional justice proceedings

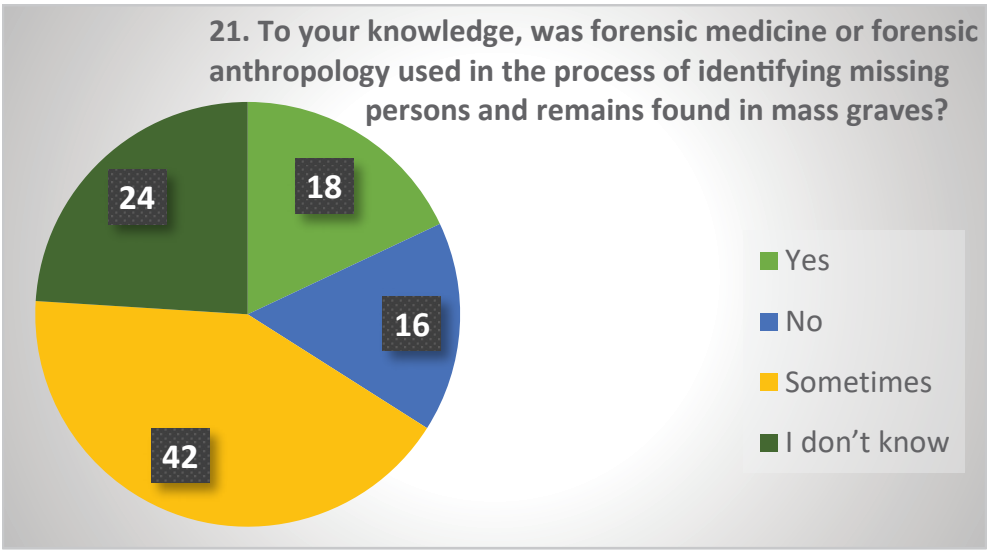
had not provided justice to minorities in Iraq, while only 13 percent felt that they had. Ramzi Adel stated that there was no clear vision regarding minorities in this regard, either legally or procedurally. Khadida Khalaf, a member of the governorate council in Nineveh, stated that it is not possible for minorities to achieve their rights as long as Islamic law sees non-Muslims as infidels. He added that the governorate had also failed to help minorities, especially Yazidis, as was clear from the fact that the largest percentage of victims of violations were religious minorities. William Warda, the director of the Hammurabi Human Rights Organization, stated that there was a need to examine the specific groups within the broader question of violations. The Shi'ites and Kurds were targeted because they were potential political rivals to the Ba'ath party. However, other minorities have been targeted even though they did not pose this kind of threat to those in power, and therefore should not be conflated with the first group. Warda added that there must be institutions for specific minority groups in order to pursue transitional justice for them. Dr. Talib Nowruz, a Feyli Kurdish activist, stated that there were around 250 Feyli Kurdish families who were still in Iranian camps and had not been returned to Iraq or had their rights restored to them.



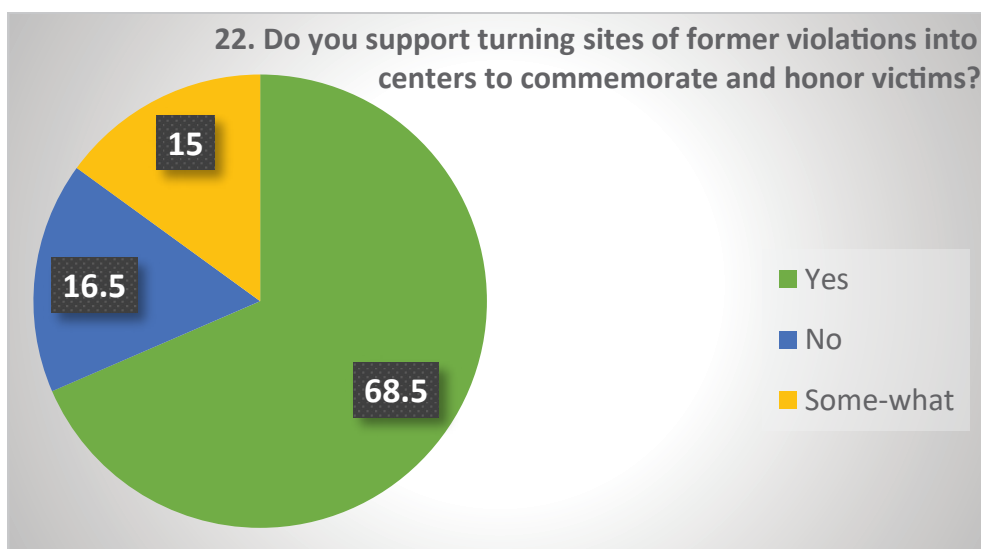
With regard to addressing violations that happened after 2003, 40 percent of participants felt that these should not be included in transitional justice proceedings, while 19 percent felt that they should, and 41 percent were uncertain.



Of the participants, 18 percent believed that forensic medicine had been used to identify missing persons and remains found in mass graves, while 16 percent thought it had not been used, and 42 thought it had been used some of the time. A further 24 percent indicated that they did not know the answer to this question.

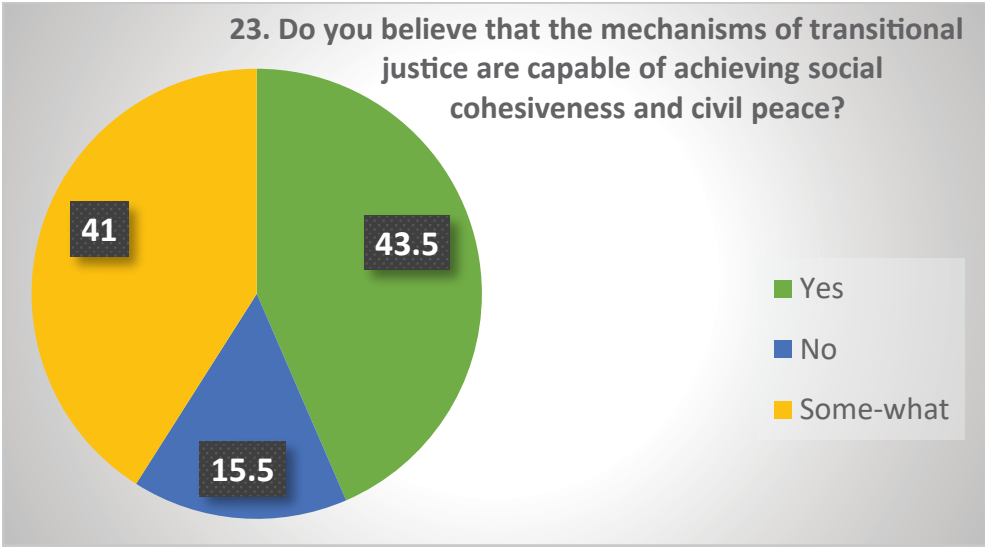


Of the participants, 68.5 percent supported turning sites where violations had occurred into centers to commemorate and honor victims, while 16.5 percent opposed this, and 15 percent were uncertain. The journalist Saman Nouh stated that in the Kurdistan Region there was no clear information gathered on the facts of the crimes, nor acknowledgment of wrongdoing, and no commemoration had taken place. Mr. Jihad Jamil, a member of the Kurdistan Human Rights Commission, stated that none of the transitional justice procedures had been carried out yet, especially regarding commemorating victims, prosecuting criminals, or providing reparations to victims.

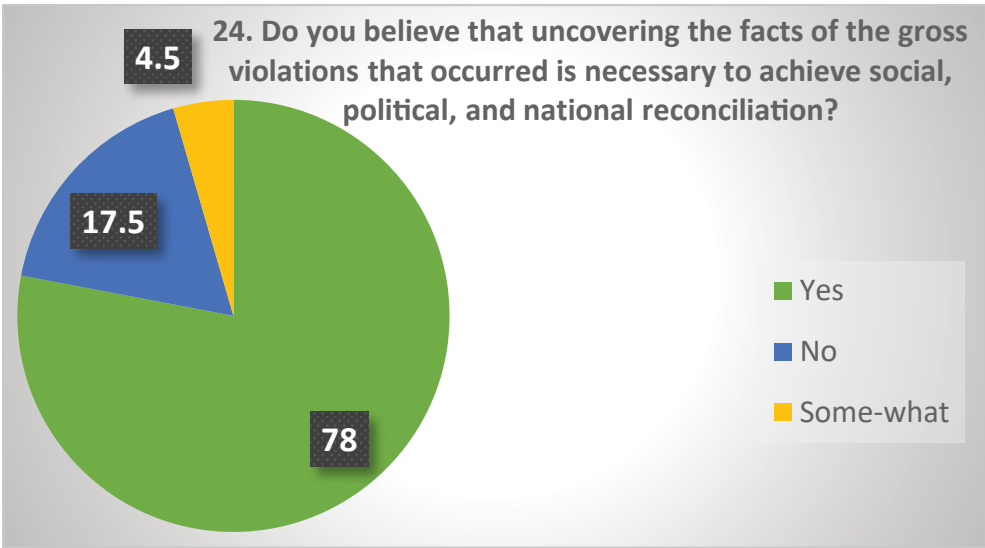


With regard to whether transitional justice mechanisms could help bring about social cohesiveness and civil peace, 43.5 percent felt this was possible, 15.5 percent felt it was not, and 41 percent were uncertain in this regard. Sarmad Muqbil, a representative of the Baha'i Faith in the Kurdistan Region, stated that cooperation needed to occur between the state and society in order to achieve transitional justice. He added that transitional justice needed to incorporate all facets of justice, and that this should go beyond court rulings.

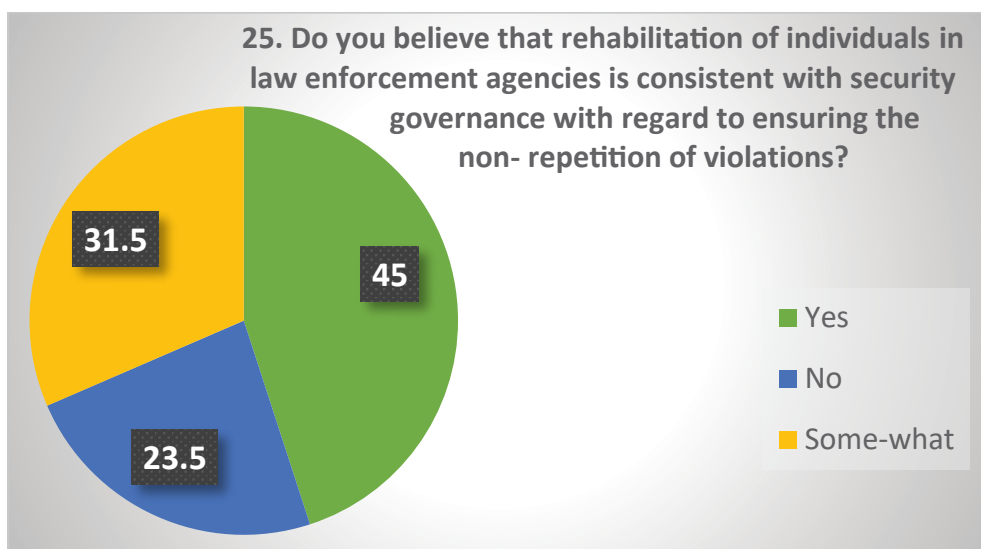




With regard to whether uncovering the facts of violations was necessary for national reconciliation, 78 percent said it was, while 17.5 percent said it was not. Dr. Ali Awda, a university professor, said that there were major limitations in the mechanisms for implementing transitional justice, including with regard to prosecuting criminals, uncovering the facts, providing reparations to victims, changing school curricula, and commemorating victims, and that this was due to political reasons.

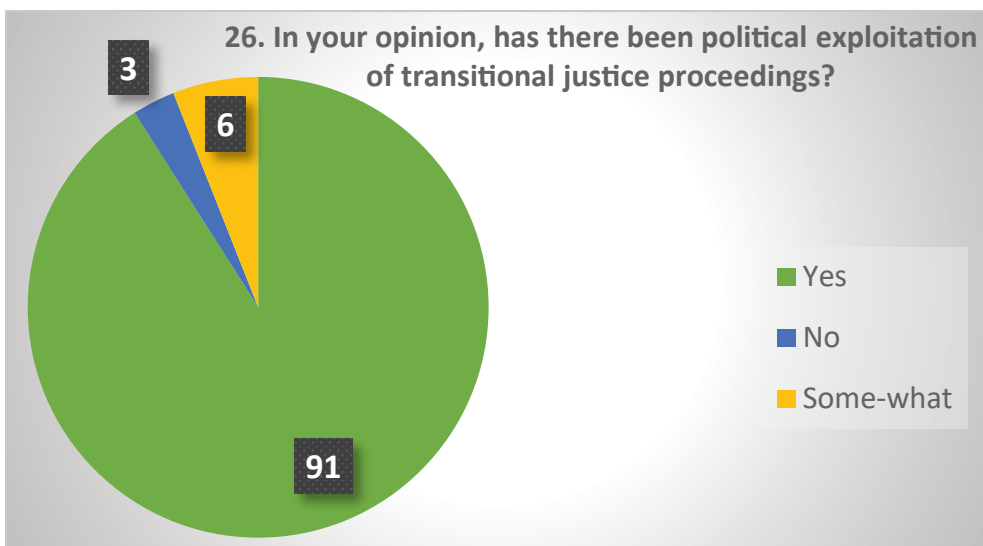


Of the participants, 45 percent stated that rehabilitation of individuals in law enforcement agencies was consistent with security governance in order to ensure the non-repetition of violations and injustices, while 23.5 percent said they did not support this, and 31.5 percent said that they were uncertain.

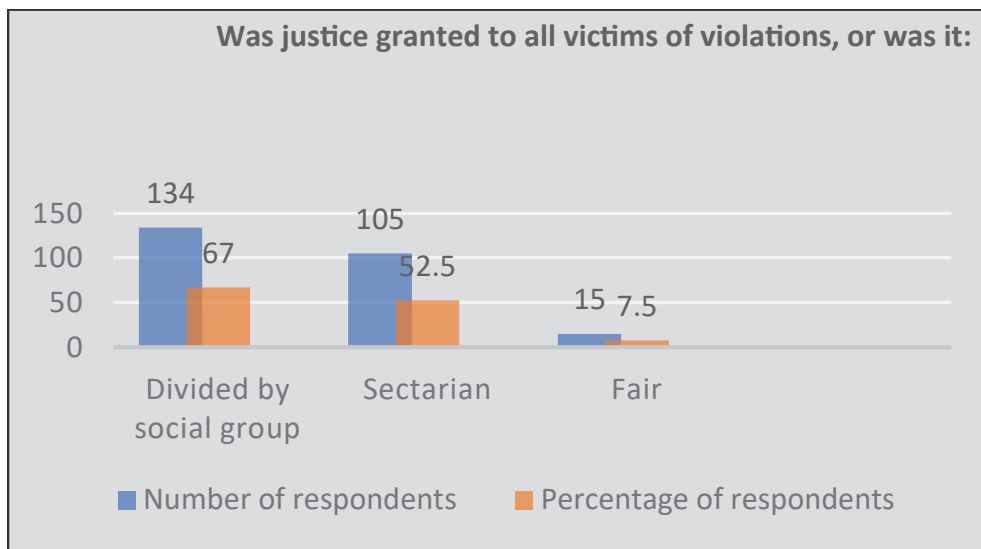


The vast majority of participants believed that the political forces had exploited the transitional justice process (91 percent), while only 3 percent said that they had not. The activist Bushra Abdel Karim, a member of Iraq Civic Action Network stated that the ruling parties had used transitional justice for political and personal gain, while Khalid al-Khalidi, the head of the Sergio de Mello Immediate Response Team, said that the commissions had their hands tied and were under the control of the ruling political entities in Iraq. He added that national reconciliation had caused a serious problem, namely, that it had targeted certain segments of society but not the perpetrators of crimes. Dr. Mahmoud al-Azu, a professor at the University of Mosul, stated that some of the parties were using transitional justice as a means of getting media attention during the elections in order to pick up votes and seats in parliament. The activist Baraa al-Bayati stated that the prosecution of criminals had not taken place, and that some had even been given positions in the government. The journalist Saman Nouh added that it had not been possible to determine the number of the victims of wars in Iraq between the two Kurdish parties, and that these conflicts had plunged the Kurdistan Region into chaos that lasted more

than 6 years and continues to divide the region today. Yesterday's criminals have become today's leaders, and therefore it is not possible for anyone to hold them accountable. The activist Hiwa Muhammad stated that there were many criminals in the Kurdistan Region who were still moving around freely outside the Region and that it was not possible to prosecute them. Kazim al-Baydani, a civil activist, stated that most victims had not received redress, and that the political interference in the implementation of transitional justice had been a problem, and that transitional justice had been used to serve the interests of the ruling parties in Iraq. Dr. Anas al-Azawi, a member of the Iraqi High Commission for Human Rights, stated that all the opposition parties had turned this into a political tool instead of treating it as a legal and humanitarian process. Many of the laws of transitional justice were not fully implemented because of political, ethnic, and sectarian tensions. He added that many criminals had been granted impunity by the political apparatus. Dr. Azhar al-Shaikhli, the former Minister of Women's Affairs, stated that the political meddling in transitional justice had prevented these institutions from carrying out their intended function, and turned them into a political tool for those entities. Dr. Saeed Yaseen, the head of the People's Cultural Association stated that transitional justice principles had been used for political purposes. Ali Hussein indicated that this had turned transitional justice into a bogeyman for Iraqis because it was poorly implemented and had been misused by political forces. Hussein added that institutions have not yet been reformed, and that security forces and state employees have the same mindset as under the previous regime.



Of the participants, 67 percent felt that certain social groups had disproportionately benefitted from reparations for victims of violations, while 52.5 percent felt that justice was being carried out along sectarian lines, and only 7.5 percent felt that it was fair to all parties involved.



Of the respondents, 13 percent believed that a final report on transitional justice had been issued, while only 4.5 percent said that there was a report and said that they had seen it. An additional 25 percent said that there was no such report, while the majority (62 percent) said they did not know.



Participants were also asked if, given the passage of 17 years since regime change in Iraq and the implementation of transitional justice procedures, they could name any memorial sites documenting human rights violations. The majority indicated that they were not aware of any such site, and that they had not seen any efforts made in this direction. Some participants mentioned certain sites, such as a monument for the martyrs of the Halabja chemical attacks and for the Feyli Kurds in Baghdad, Wasit, and Sulaymaniyah, memorials at the sites of mass graves, a very small museum for documenting human rights violations that had been set up by the now-defunct Ministry for Human Rights, and the monuments built by the same ministry in each of the governorates of Iraq for the victims of mass graves. The former security directorate of Sulaymaniyah was also turned into a museum documenting the injustices and violations of the former regime. Additionally, there was also a special archive in the Martyrs' Foundation and in the Prime Minister's Office, as well as an exhibition of artifacts from the mass graves, the Hillah Museum, a museum in Erbil at the former site of the security directorate, as well as spaces in Kurdistan documenting the Yazidi genocide under ISIS.

With regard to whether participants were aware of the history of other countries' approaches to transitional justice, and to what extent Iraq has been able to draw on these models, given Iraq's specific social and cultural context, the majority said they were unaware of other countries' histories of transitional justice. Some said that they had read about certain cases, such as Bosnia and Herzegovina, South Africa, Rwanda, the former Soviet Union, and Germany, and others expressed that it might be possible to learn from these other experiences with regard to how to implement transitional justice in Iraq.

## Conclusions and Recommendations

This study ends with several conclusions, the most important of which are as follows:

1. There is a lack of a coherent model for dealing with transitional justice in Iraq, which has resulted in many different institutions, legal frameworks, and forms of reparations, as well as inadequate mechanisms for documenting and investigating violations. In addition, there has been a lack of clear information provided to international organizations responsible for evaluating Iraq's performance in implementing transitional justice.
2. The legal frameworks for the courts' subject-matter and temporal jurisdiction in transitional justice proceedings have overlooked various kinds of violations because they are limited to the violations of the Ba'ath regime, even though there were two other categories of violations that occurred during the same period of time. First, there were violations committed by non-Ba'ath social, political, and governmental entities, including gross violations perpetrated by various political parties against each other under the previous regime, which resulted in thousands of martyrs and forcibly disappeared persons. The institutions of transitional justice did not have legal jurisdiction over these cases, while the competent authorities were unwilling to investigate the violations and the cases of their victims. For example, there were victims of armed conflict between the Kurdish parties from a period in which the Kurdish parties had collaborated with the regime against each other.

The second category of violations consisted of those committed prior to the Ba'ath regime era but whose repercussions were ongoing and which had not been addressed during the Ba'ath period or since 2003. This included the victims of forced emigration of Christian villages following the Simele massacre and the rescinding of nationality and forced emigration of Iraqi Jews.

The subject-matter jurisdiction of transitional justice institutions also overlooked violations of a cultural or economic nature, such as destroying archaeological or other heritage sites, falsifying history, exploiting national resources, banning Baha'i activities, and violations against Christian and Yazidi villages or against other minorities.

3. Many sectors of society have benefitted from the Martyrs' and Political Prisoners Foundations and have had their claims heard by judicial committees that issued decisions approving the inclusion of the claimant under one of the foundations' laws. These claims have included important information about the former authoritarian regime and perpetrators of violations. However, this information has not been analyzed by a competent body in order to document evidence about the crimes perpetrated in preparation for prosecution. Likewise, the mechanisms for non-judicial administrative prosecution under the Commission for Accountability and Justice failed to sufficiently dismantle the system that produced the violations. Although legal frameworks and mechanisms were established in order to exclude perpetrators of violations from public office, the documentation of evidence and criminal prosecution were not in fact carried out.
4. With regard to reparations, the primary legislative bodies, i.e., the transitional Governing Council and the National Assembly, violated the principle of conflict of interests. A close review of the relevant legal texts indicates that the vast majority of persons receiving reparations and benefits were opposition party members targeted by the former regime, who were appointed (rather than elected) members of the National Assembly. They did not permit other sectors of Iraqi society or members of the nascent civil society to participate in the discussion of these laws or evaluate the capacity of the Iraqi state to bear the financial burdens for the benefits outlined in these laws. Many governmental institutions became encumbered with too many employees, whom the head of the foundation had been forced to appoint

in accordance with transitional justice laws, regardless of the actual needs of these institutions. The security institutions likewise became hampered by new staff who lacked a military background but had been granted a military post in accordance with the laws and orders of transitional justice. This proved a burden for the law enforcement agencies because of the lack of qualifications of these employees, in addition to the excessive financial benefits granted.

5. The laws of accountability and justice in Iraq were adopted at the federal level. However, the Kurdistan Region adopted special mechanisms for its own affairs, with the exception of martyrs, political prisoners, and mass graves because of the financial obligations of the central government towards the Region. There was a great deal of ambiguity and conflict in the arrangements between the two authorities, and de facto authorities often took control outside legal frameworks, such as Article 140 of the constitution on disputed areas. The same was true of the Supreme Iraqi Judicial Council and the implementation of orders to detain criminals who had allegedly committed grave human rights violations.
6. With regard to truth-seeking and commemoration, it is clear Iraq's experience was unlike that of other countries in that governmental entities dominated the truth-seeking procedures. In Iraq, many different institutions of transitional justice were entrusted with uncovering the truth about violations, depending on the jurisdiction of each under the law. This has undermined the process in Iraq to some extent, since the prosecution of violations and examination of public and private documents were circumscribed by the objectives of the truth commissions, which prioritized identifying the victims and violations that occurred in order to provide reparations. However, they overlooked other important goals truth commissions are usually tasked with, such as determining collective or individual responsibility for the violations that occurred and addressing the responsibility of the state and its agencies. There should also be attention paid to determining the kinds of violations committed. Iraqi society



was only given a limited picture of human rights violations committed under the former regime. Although transitional justice institutions determined who was considered a victim and included under reparations programs, there was a failure to inform the Iraqi people about the kinds of violations that had occurred and to what extent the state and specific individuals were responsible. The judicial proceedings also had clear limitations in that only 12 cases from this entire period of time were heard before the Supreme Iraqi Criminal Tribunal.

7. Additionally, the legal structures of the former regime that had enabled the perpetration of violations were not systematically examined. Instead, the legal system was quite inconsistent in how it addressed the problematic resolutions and laws, even though the laws of various transitional justice institutions clearly gave these entities the jurisdiction to work jointly with the legislative authority in order to identify and annul the offending laws.
8. With regard to truth-seeking, these processes were monopolized by official agencies without any societal engagement. There have not been sessions held for hearings or testimonies, nor any academic or scholarly works documenting this stage except for some publications claiming to represent the perspectives of victims, but which cannot be confirmed. Although there have been more than 400,000 martyrs and political prisoners whose cases were presented to the judicial committees, with information on the violations that occurred and the entities that committed the violations, there has been a lack of cross-checking information, which has led to uncertainty about what actually occurred.
9. Transitional justice in Iraq has overlooked a key objective of transitional justice in post-conflict societies, namely that these procedures should aim to restore social cohesion and achieve national reconciliation. All of the laws in the Iraqi case have focused on accountability, prosecution, and reparations for victims without including any reconciliatory avenues for smaller crimes or in cases of individual responsibility for violations, through pardons or apologies after providing testimony. This has affected judicial and non-judicial measures for prosecution and accountability.

10. The supposedly temporary nature of transitional justice programs was not taken into account, despite the provisions of the Iraqi constitution to this effect. Instead, the work of these commissions has been left open-ended. The Commission of Accountability and Justice, according to the relevant law, was supposed to investigate members of the Ba'ath party and persons who used public funds for personal gain under the party's policies. The law stipulated that the commission was responsible for preparing an archive of persons covered under its law and presenting this to the Prime Minister's Office to circulate to all official institutions and civil society organizations. However, after the law criminalizing the Ba'ath party was issued (No. 32 of 2016), there were new cases that required prosecution, but did not involve any role for the commission. Candidates for high-level positions and for elected posts are supposed to be checked against this archive held by all institutions, including the elections commissions, but which is also not the role of the commission, since it had fulfilled its duties by submitting the archive. The same was true with the Commission for the Resolution of Real Property Disputes, which should also have completed its work within the last 17 years. The question of paying reparations has become the responsibility of the Ministry of Finance.
11. With regard to the Martyrs' Foundation, it is clear that this institution was supposed to transition from serving as a temporary institution for transitional justice to becoming a permanent institution. After the law was expanded to cover victims from after 2003, there have been suggestions to add other new groups, as well as to involve the OHCHR in cases of disappeared persons on a procedural basis outside the purview of the Department on the Protection of Mass Graves. The objective would be to investigate the remains of the victims of mass graves in order to prevent the Ministry of Interior from overseeing the investigation of missing persons, and to limit the role of the latter to serving as a member of a committee led by the foundation. The foundation has also held an observer role

for forced disappearances that occurred post-2003, which included many kinds of disappearances and different kinds of claimants. This indicates an intent to limit and circumvent the process with the judicial authority that was supposed to be followed in accordance with UN guiding principles.

With regard to the Political Prisoners' Foundation, there have been procedures carried out to determine the victims and compensation due to each party. However, these foundations have in general run into obstacles preventing the completion of their work. Some of these problems relate to the more than 3,000 employees working for the foundation, who are mostly from political groups that have stipulated quotas for employment and leadership positions. Another problem is that beneficiaries are generally connected to specific political parties that want to maintain the status quo.

12. With regard to reparations for victims of violations committed by former regime, there was conflation of reparations and retirement pensions. In the first case, the tort liability fell on the state because it was responsible for the violation and had been unable to offer protection to prevent the violation from occurring. In the case of pensions, the Unified Pension Law (No. 9 of 2014) stipulated the pension or lump sum due to the person under the law, based on the particular position held within the military, civil service, or security forces, or for other public service. The recipients of pensions therefore extended beyond the intended use of retirement funds under the Unified Pension Law and depleted these resources. It would be better for the Iraqi government to establish separate reparations funds under the auspices of the Ministry of Finance.

In the Iraqi case, reparations were authorized by an interim government, through which various opposition parties succeeded in passing laws to support victims of violations without discussing these matters with civil society or the general public.

These laws impose significant financial obligations regarding the state budget and employment in public office, especially since reparations were supposed to be paid from the general budget. The consequences of these laws became evident later, with the recent financial crisis and falling price of oil. The reparations related to the Iraqi Property Claims Commission or to policies to effect demographic change were enacted without allocating the appropriate funds.

13. In the Iraqi case, the mechanisms for reparations have focused on individual but not collective reparations and have prioritized various forms of material reparations for victims, including financial compensation, restitution of immoveable assets, compensation for moveable assets, reinstatement to former positions of employment, and medical rehabilitation. To a lesser extent, there have also been efforts to provide symbolic reparations, such as building monuments and museums. However, there were not reparations through truth-seeking and determining the kinds of violations that occurred, determining the responsibility of the state and individuals, or issuing apologies. There were important sectors of society excluded from reparations, including those who were subject to mutilation or tattoos, who received only a one-time compensation.
14. Despite Iraq's extensive history of forced disappearances, the mechanisms for dealing with this have been hindered by multiple decision-making bodies from different institutions and ministries, each with a particular function and responsibility, but without effective coordination between them. This process has also been dominated by governmental institutions, without including civil society or the families of victims in decision-making. The government has also failed to issue a law establishing a national center for missing persons, which victims had hoped would provide an institutional and legal framework for providing redress to victims of forced disappearance.

15. The role of educational institutions in archiving past violations and drawing attention to the crimes that been committed in Iraq has also been overlooked. The purpose of archiving and documentation is to guarantee the non-repetition of violations and to foster values of coexistence and justice, to prevent repetition of past errors regarding unilateral decision-making, and to learn from these lessons in order to create a pluralistic society that guarantees all citizens' civil, political, and cultural rights and rejects all forms of hate speech. There are many international models of how educational institutions have helped to reform and rehabilitate society after democratic transitions, such as Cambodia. Transitional justice is incorporated into the social science curriculum in middle school (fourth grade, p. 104105-), but is not mentioned in any other school curricula.
16. In Iraq, truth commissions were not set up and victims have been given very few opportunities to speak. There has not been a final report issued to summarize all the outcomes of transitional justice in Iraq. The process has been left open on both the procedural and societal level. Usually, truth commissions aim to provide remedy to victims and to close the case on violations committed during a specific period of time. The final reports issued by such commissions can vary from one case to another, but generally contain a section with results and recommendations and provide clarity on challenging or ambiguous matters.

In examining models of truth commissions in other countries, we have drawn a number of important conclusions regarding their objectives and purposes, which can be summarized as follows:

**Truth Commissions Can Help Uncover the Truth About the Past:** Truth commissions can create precise, detailed, impartial, and official records of the past which can help address exaggerations and rumors spread by former regimes prior to the political transition (or by any other party to the conflict). They can also help raise awareness about the scope of past

violence and its consequences. The commissions can also identify sites containing missing persons who were forcibly disappeared or secretly buried.

**Truth Commissions Can Help Hold Perpetrators Accountable for Human Rights Violations:** Truth commissions can assist with criminal prosecution through classifying, gathering, and preserving evidence. Such material can also be used to make a case for non-criminal penalties, such as civil liability, dismissal from office, restitution, and community service projects.

**Truth Commissions Can Offer Victims a Public Platform:** Truth commissions can help place victims who have been ignored and marginalized under repressive regimes at the front and center of the transitional justice process. This can help with individual and collective healing and help victims feel that justice has been restored. Additionally, the commissions can be a public platform for survivors to speak about what they endured, in order to raise public awareness about the human impacts of these crimes and rally support for further transitional justice initiatives for victims, such as reparations programs.

**Truth Commissions Can Catalyze and Enrich Public Discussion:** Truth commissions can promote public discussion around a range of complex moral, political, and legal issues that need to be dealt with during the transition process. This can be achieved through engaging the public in the commission's activities and promoting widespread media coverage of its work.

Truth commissions themselves can also provide a model for the people to reengage with divisive political issues without fear that this will descend into trading accusations or resorting to violence. The commissions can also become a source of independent and impartial judgment in cases where members of the previous regime have significantly distorted past events.

**Truth Commissions Can Recommend Reparations for Victims:** Reparations are important as a means of providing remedy for past violations, including past or ongoing psychological, physical, or economic harms that victims have suffered. Truth commissions can create fair parameters for the definition of “victim” for the purposes of financial compensation or other forms of reparations, and can also help to restore dignity to victims through demonstrating awareness of the harms that have occurred and finding means to overcome them. Truth commissions can also make proposals about appropriate forms of reparations for victims such as monuments, reburials, and memorial services.

**Truth Commissions Can Propose Appropriate Legal and Institutional Reforms:** Truth commissions can carry out investigations and then provide evidence of how particular institutions have violated their obligation to protect individual or collective human rights. They can also propose legal and institutional reforms in order to enable the country to achieve its long-term political, social, and economic goals in order to create a better future. These reforms could include strengthening civilian oversight of the intelligence agencies and the army, establishing new rules for the appointment of judges, their jurisdiction, and the disciplinary procedures they are subject to, as well as establishing an independent Public Prosecutor’s Office with the necessary funding, rebuilding the political and electoral system, undertaking agricultural reform, and providing new human rights training programs for members of the police and armed forces.

**Truth Commissions Can Strengthen Reconciliation:** Truth commissions can strengthen tolerance and understanding by allowing opposing sides learn about the pain and suffering that the other has endured, and to create mutual understanding and empathy in order to prevent retribution and diffuse tensions and animosity arising from past incidents. They can also offer a safe and neutral platform for restorative justice where victims and perpetrators can engage in mediation for lower-level issues that occurred in the past.

In addition, committees can recommend practical and fair procedures to reintegrate certain groups of perpetrators back into society.

17. As is evident from international and regional case studies, material compensation in reparations has proved one of the most controversial and challenging issues. There is no amount of money that can compensate for such harms as the loss of one's parents, children, or spouse, or for the horrors of torture or enduring psychological trauma. Therefore, reparations programs must discard anything that its designers or beneficiaries might see as an attempt to assign finite value to the lives of victims and the horrors they have undergone. Justice cannot be achieved until victims are viewed as individual citizens and social trust and solidarity are reestablished, and a commitment is made to ensure non-repetition of violations.
18. The Iraq experience with transitional justice is somewhat ambiguous. Although there were institutions, procedures, orders, and funds directed towards these processes, they struggled to raise awareness about the process at the local and international level. In other words, Iraqis still have very limited knowledge of transitional justice and there have not been any cultural forums for in-depth discussions of the topic. It has not been considered in comparative international context, even though other countries have struggled with setting up transitional justice processes and building capacities.
19. The Iraqi state has not taken any measures since 2003 to establish trust in governmental institutions. There has not been any institutional reform of the judicial apparatus or law enforcement agencies, which continue to have the same mindset as before the regime change, despite some limited structural and legal changes. However, genuine change has not yet occurred, and Iraqis still fear their security forces.



20. There has been some confusion about transitional justice among the beneficiaries of these programs, and among some politicians. The focus has been on long-term rights which depend on the existence of certain political blocs, and which are not achievable within the timeframe of these programs.
21. The many diverse case studies in transitional justice demonstrate that its relationship with the democratic transition has varied from one country to another. It is therefore not possible to talk about a single model for transitional justice, only to compare the experiences and circumstances of different countries.
22. The Iraqi legal system has adopted both legal and administrative measures for prosecuting violations committed by members of the previous Ba'ath regime and its agencies and institutions, or who were involved in other civil, social, and labor organizations in Iraqi society.
23. In reviewing the work of the Supreme Iraqi Criminal Tribunal, the following observations can be made:
  - a) A legal framework for the tribunal, including extended jurisdiction, was established without attention to the actual capacity of the tribunal to implement these measures. During a 17-year period, the tribunal heard only 12 cases out of the thousands of cases in which it had jurisdiction.
  - b) With regard to the legal personnel in the tribunal, it appointed lawyers instead of retired or non-Iraqi judges who had the relevant qualifications to hear these criminal cases.
  - c) There was a lack of strategy on the part of the tribunal with regard to clearly and transparently defining the temporal jurisdiction for its work. No one today is aware of the tribunal's activities and whether or not it is taking on new cases.
  - d) There was a lack of media coverage of the work of the tribunal so that Iraqis could be made aware of its previous activities and future plans, given that the seat of the tribunal and location for its hearings was in a fortified area.

- e) The tribunal's position on the most recent amendment to Law No. 35 of 2011 (which reduced the bodies functioning under the tribunal to a single commission) was ambiguous, as were the means by which it would deal with the huge quantity of complaints referred to it by the Commission of Accountability and Justice. This was in accordance with Article 4, paragraphs 2 and 3, of the law of the commission, under which the public prosecution was to provide documentation and evidence to the court of the crimes that had been committed by members of the Ba'ath party and its repressive agencies, and to hear cases pertaining to the same matters.
24. The institutions of transitional justice have not offered official apologies or restitution, either from individual perpetrators or from the government. The apology issued by the interim Governing Council (No. 46 of 10 September 2003) was the only official statement issued providing an apology and restitution.
25. The institutions of transitional justice have not addressed the importance of psychological rehabilitation for victims, nor have they provided social assistance to groups or individuals. There has not been a civil social movement established through coordination among transitional justice institutions, civil society organizations, or cultural elites.
26. There has not been significant international engagement (compared to other case studies in the Arab world or elsewhere), and there has been particular lack of involvement from UN bodies to build capacity and raise awareness about transitional justice.
27. We have observed through focus groups, surveys, and dialogue sessions that there is a huge gap between transitional justice institutions and the public, which does not benefit from these reparations programs, and has doubts about the work it is doing for victims due to poor implementation.

28. There were three periods of Iraqi history during which violations occurred since the establishment of the state of Iraq in 1921. One period consists of the violations of the Ba'ath party (1968-2003), which was the basis for transitional justice in Iraq. There were also the violations that happened before the Ba'ath party came to power (1921-1968), as well as a third period of human rights violations after the regime change of 2003 (2003-2020). Transitional justice in Iraq has primarily addressed the violations of the Ba'ath party (1968-2003), while ignoring violations that occurred prior to this period, and selectively addressing certain situations post-2003.

**Based on this study, we propose the following recommendations:**

1. Create a unified institutional framework for transitional justice with an independent commission linked to existing institutions of transitional justice (the Martyrs' Foundation, the Political Prisoners' Foundation, the Commission for Accountability and Justice, and the Iraqi Property Claims Commission), in accordance with Article 108 of the constitution.
2. Require the existing institutions of transitional justice, either as one independent body, multiple commissions and foundations, or truth commissions, to present a final report on all their activities with the goal of setting a timeline for completing this work and determining the means by which they will carry out their future obligations to third parties within the permanent institutions of the Iraqi state, in order to enable the legislative bodies to dissolve temporary institutions that have completed their tasks.
3. Form a parliamentary committee to review laws and resolutions that have hindered the timely implementation of the work of transitional justice institutions, and determine the entities responsible for this review, and which should be part of one of the three permanent institutions of the Iraqi state.

4. In order to address human rights violations that have been committed in Iraq during periods with many different prosecuting authorities, and whose effects continue to be felt today, and given the lack of a legal apparatus to address this situation, we recommend that the limits on the temporal jurisdiction for violations covered under transitional justice proceedings should be removed, and that the primary criteria for inclusion should instead be the gravity of the violation and the existence of ongoing repercussions for victims as a result of the aforementioned violation.
5. In order to document violations and define who is included with the definition of the former authoritarian regime and the persons accused of committing grave violations, and identifying which parts of the law serve to legalize or justify these violations, we recommend forming a judicial committee to review the documents provided by transitional justice institutions, with the goal of identifying specific actors from the regime and perpetrators of gross human rights violations, in preparation for making a list of the most important cases and the key perpetrators in order to prosecute them through the Supreme Iraqi Criminal Tribunal.
6. With regard to achieving the goals of transitional justice programs in rebuilding society and fostering reconciliation, we recommend establishing a path for reconciliation that includes both reparations and provides pardons to those who committed minor violations if they apologize to victims and participate in documenting gross violations, help identify perpetrators, and carry out truth-seeking for victims.
7. The lack of societal engagement in the drafting and ratification of transitional justice laws and fluctuating circumstances have contributed to arbitrary legal practices on the part of political parties in the National Assembly and the transitional Governing Council. We therefore recommend forming a national committee with representation from diverse sectors of society, including civil society organizations, unions, syndicates, and members of the legislature,

who can collectively review the legal framework for transitional justice, and in particular the financial obligations and open-ended timeframes stipulated in the current laws.

8. In order to end the domination of governmental entities over the process of uncovering violations against the Iraqi people, we recommend forming an independent committee composed of members of civil society and the societal elites, which will oversee coordination with the judicial committees and criminal courts in order to hold public hearings, hear victims' testimonies, and coordinate with both with governmental and non-governmental entities at the local and international level in order to ensure that the international community and Iraqi public are made aware of the kinds of violations that occurred and the responsibility of the state and of certain individuals for these crimes. They should also be made aware of the legal and institutional problems that led to these violations. Meanwhile, the committee should outline the steps that will be taken in order to remedy these problems and undertake institutional reform to ensure the non-repetition of these crimes in the future.
9. In order to address the legal ambiguities regarding the question of reparations in the form of retirement pensions, we recommend that that there should be separate funds established for reparations connected to the Ministry of Finance. This ministry should be responsible for providing financial grants to victims separate from allocations for retirement funds, since there is no legal justification for treating victims as retired persons.
10. In order provide redress and apologies to victims via legal resolutions from the committees and institutions of transitional justice, we recommend forming a committee headed by the Ministry of Interior that should be responsible for giving victims a clean slate, as well as providing an official apology for violations committed from the Iraqi state.

11. In order to address the limitations of the voting mechanisms within the judicial committees of the Martyrs' Foundation and Political Prisoners' Foundation, we recommend reevaluating the composition of the committees so that they can issue fair and balanced decisions (rather than having the composition of the committee skewed in favor of the leadership of these foundations at the expense of other representatives).
12. With regard to the many cases of missing persons and the entities responsible for looking for them, based on the reasons these disappearances occurred, we recommend that disappearances unrelated to any criminal act or which have a criminal component but in which the perpetrator was unconnected with state institutions should be handled by the Ministry of Interior in coordination with the judiciary. The Public Prosecutor's Office and the OHCHR should be responsible for cases of forced disappearance, and the Martyrs' Foundation and Department for the Protection of Mass Graves should only be responsible for providing logistical support for cases related to mass graves, in accordance with what has been stipulated by international mechanisms and in particular the guiding principles issued by the Committee on Enforced Disappearances.
13. As per Article 6 of the law of the Commission of Accountability and Justice, which stipulates that the commission is required to prepare an archive of the members of the Ba'ath party who are covered under the law of the commission, we recommend that the Council of Representatives ensure that the commission delivers this archive in accordance with the law. The archive should be given to the Council of Ministers and be circulated among all state institutions and civil society organizations. A law must be issued to annul the commission's jurisdiction to carry out any future investigations to amend or add to the archive (excepting what was stipulated under the law regarding future amendment or removal of provisions), so that state institutions can apply the law of the commission without any external interference. They must also issue a final report prior to the dissolution of the commission.

14. We recommend that the Council of Representatives should demand that the Supreme Iraqi Criminal Tribunal create a strategy for the future that includes judicial prosecution of the perpetrators of gross human rights violations and specifies the period of time in which this must occur.
15. We recommend creating research centers in the academic, social, and educational spheres in order to document the oral history of victims, preserve the memory of violations that occurred, and establish an educational curriculum consistent with human rights standards and international law to ensure the non-repetition of violations and the establishment of a new educational system based on pluralism, diversity, and accepting difference.
16. We recommend adopting measurable institutional reforms within law enforcement institutions, reforming the legal framework of the judiciary according to best practices in these fields, and ensuring the independent function of the six main elements of the judiciary and the federal courts. Additionally, these entities cannot be subject the supervision of any other authority, including administrative authorities within the judiciary. Other steps that should be taken include introducing electronic workflow to the courts and judicial entities, reforming the judicial oversight apparatus and the Public Prosecutor's Office, and ensuring the total independence of both the oversight mechanism and the public prosecution from the Supreme Judicial Council and other elements of the judiciary, in accordance with the resolution of the federal court. There should also be coordination between the federal judiciary and the judiciary of the Kurdistan Region in accordance with the constitution.
17. We recommend preparing programs to raise awareness about transitional justice for beneficiaries of these programs, as well as the general public, and coordinating with and learning from the expertise of local and international organizations and UN agencies.

18. Most of the violations committed in Iraq were legal under certain laws that still exist today, some of which are still in effect. This is a clear violation of the provisions of the Iraqi constitution. We therefore recommend reexamining the Penal Code in order to ensure non-repetition of these violations in the future.
19. We recommend re-examining cases of victims, individually and collectively, in order to ensure that justice is rendered to the greatest extent possible, since earlier programs ignored many cases and issues. We also recommend that reparations be based on the type of harm inflicted.





# TRANSITIONAL JUSTICE IN IRAQ

## Memories and Future Prospects

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- Ali Bakht
- Saad Sultan
- Hicham Cherkaoui
- Karim Abdessalem

This book aims to provide a clear overview of historical efforts to implement transitional justice. Such procedures aim to achieve justice through judicial and criminal prosecution of individual and collective perpetrators of crimes, offering reparations to victims, establishing memorials, and ensuring that the legacy of violations is fully addressed. In addition to criminal justice, transitional justice must address social and economic harms and ensure the non-repetition of violations through utilizing various institutions and laws to work towards these objectives.

Any society whose history is marked by gross human rights violations that have not been duly addressed will inevitably suffer from a lack of peace and social cohesion, which creates rifts between the people and the state. It may also sow doubts about whether the state is serious about maintaining the rule of law, which may eventually descend into a vicious cycle of widespread political, social, and cultural unrest. Therefore, transitional justice is a crucial matter for post-conflict societies and is the best means by which to build a new pluralistic society and overcome the grave violations of the past. It is not possible to heal such wounds without providing all necessary forms of material and symbolic restitution and reparation in order to rebuild society.

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