

# A criminal tribunal and a wide-ranging reparation programme is necessary for the victims of sexual violence and torture in Iraq

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## Introduction

The frequency and extreme nature of sexual violence committed in Iraq, primarily by the self-declared Islamic State in Iraq and the Levant (ISIL) from 2014 onwards, has shocked the international community. Now, four years later, victory over ISIL has been proclaimed but addressing past atrocities and their consequences has barely begun. There is a wide discrepancy between Iraq's human rights obligations, stressed by the United Nations (UN), and the reality on the ground, shaped by the Iraqi authorities. The present paper aims to highlight this discrepancy by providing an overview of the crimes committed, their qualification under international law, and the efforts of Iraqi authorities to punish those responsible. It will also discuss legal frameworks and the role of the UN, before positing some possible solutions.

## Object of the inquiry

The primary object of this inquiry is the conflict-related sexual violence (CRSV) that has taken place in Iraq since 2014. The term CRSV is used in the international discourse

to designate sexual violence occurring during or following armed conflict. UN bodies have set a gravity threshold for defining CRSV—incidents or patterns of acts of sexual violence such as “*rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity*” (UN Action Against Sexual Violence in Conflict, 2011, p. 3).<sup>1</sup>

## Factual overview of recent CRSV in Iraq

The armed conflict that spread across Iraq with the advent of ISIL increased the existing spiral of violence to an unprecedented level<sup>2</sup> and sexual violence played a key role in ISIL's reign of terror. The majority of those exposed to systematic

<sup>1</sup> WHO defined sexual violence as: “any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work” (Krug, 2002, p. 149). ICTR defined sexual violence as “any act of a sexual nature which is committed on a person under circumstances which are coercive” (ICTR, 1998, § 688).

<sup>2</sup> According to UNAMI, from the beginning of 2014 until the end of July 2018, the number of civilian casualties of hostilities in Iraq amounted to 86,522 (30,605 killed and 55,917 injured) (UNAMI, 2018).

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sexual abuse were reportedly women and girls of the Yazidi faith, but also other religious and ethnic minorities. Sexual violence against men and boys of various religious and ethnic backgrounds has also been reported. The Iraqi Security Forces (ISF), and affiliated militias, are also said to have committed CRSV. In addition, there have been allegations that women with perceived affiliation to ISIL, residing in camps for internally displaced people (IDP), are being subjected to or threatened with rape and sexual exploitation (Amnesty International, 2018, pp. 27–29).

#### *Patterns of CRSV*

Sexual violence against Yazidi women was thoroughly documented and thus helps to illuminate the methods employed by ISIL. After ISIL established control over the Sinjar area, entire Yazidi families were taken captive (Human Rights Council, 2016, para. 29). The separation of women and children from men and boys older than twelve followed (ibid, para. 42; UNAMI/OHCHR, 2016, para. 14). Men and boys were forced to choose between execution and conversion to Islam (ibid, 2016, para. 32; UNAMI/OHCHR, 2014b, p. 12). Those who refused to convert were executed within hearing range of their families (ibid, 2016, para. 33–34; UNAMI/OHCHR, 2016, para. 10; OHCHR, 2015, para. 18). Women were usually confronted with a similar choice: convert to Islam or be forced to continuously provide sexual services to ISIL fighters (ibid, 2015, p. 22). However, even conversion would not spare them from being raped. Those who refused to convert or marry ISIL fighters were either sold or allotted to individual militants as ISIL’s “collective property” and forced to provide sexual services (UNAMI/OHCHR, 2014b, p. 13, 15).

Women were sold together with their small children (Human Rights Council, 2016, para. 81). However, girls were separated from their mothers as soon as they turned nine and were subjected to the same pattern of abuse (ibid, para. 82). Boys above seven years of age were sent to ISIL camps to be indoctrinated and receive military training (ibid, para. 92, 94–95; OHCHR, 2015, paras. 45–46).

From the survivors’ accounts it transpires that women were subjected to various forms of sexual violence including virginity tests (ibid 2016, para. 51), rape, sexual slavery, forced prostitution (OHCHR, 2015, para. 35, 37), forced pregnancy (ibid, 2016, para. 71), and forced abortions (ibid, 2015, para. 39–41). They were coerced into sexual intercourse by being severely beaten, and threatened with gang rape, death, beating, and the killing or selling of their children (Human Rights Council, 2016, para. 65–68; UNAMI/OHCHR, 2016, paras. 15–16). Multiple consistent allegations of the brutality of the sexual act—leading to bleeding, cuts, and bruises—have been recorded. For instance, some women were handcuffed behind their backs or had each leg tied to the side of the bed while being raped (ibid, 2016, para. 64) and escape attempts were severely punished by gang rape, as well as other atrocities (ibid, 2016, para. 68). Victims were denied medical care when injuries were incurred (ibid, 2016, para. 66) and there are accounts of women being raped hundreds of times during their captivity (ibid, 2016, para. 69). Even pregnant women were not spared (ibid, 2016, para. 64; UNAMI/OHCHR, 2016, para. 14; OHCHR, 2015, para. 41). Some were involuntarily administered contraceptives (ibid, 2016, para. 69). The extent and outcome of the forced pregnancies and sexually transmitted

diseases that undoubtedly ensued were not satisfactorily documented due to victims' reluctance to speak out (ibid, 2016, para. 71). Sexual slavery was usually combined with forced labor in their captors' households (ibid, 2016, para. 72). Food was sometimes deliberately withheld as a punishment; moreover, nutrition provided to the victims was generally poor (ibid, 2016, para. 73). Some of the victims attempted or committed suicide (ibid, 2016, para. 53).

The following case examples aim at reporting the lived experiences of two individuals, whose experiences are representative of many other women.<sup>3</sup>

#### *Leila*

When ISIL soldiers attacked their village in August 2014, Leila and her husband were taken as prisoners whereas their children, a son and three daughters, managed to escape. ISIL fighters forced Leila to watch her husband's execution while forbidding her to express her grief by crying. She was then imprisoned and crammed between the dead bodies of former prisoners for hours. Afterwards, Leila was forced to convert to Islam and trafficked several times. Her initial resistance resulted in severe beatings and sexual abuse. She was initially sold to a man whose two wives frequently pressured her to kill herself. In spite of this, she refused to end her own life as her children would then be orphaned. Leila was eventually re-

sold to an elderly man whom she implored to treat her "*as his daughter*," but to no avail. Again, she was sexually abused and then re-sold. Luckily, a random man on the street agreed to smuggle her to the Kurdistan Region of Iraq (KRI) where she was reunited with her children. Upon her return, she learned that her oldest child had died of starvation, whereas the remaining children refused to accept her, and saw their paternal grandmother as their mother. Leila was shattered to the core. Her love for them had given her the strength to avoid taking her own life. She doubted that there could be justice in the world, as her tormentors were not punished. She reports a number of psychological symptoms following the captivity, including aggressive behavior, disrupted sleep, re-experiencing symptoms, hyper-arousal, and fear of men with long beards and loud voices. Leila perceives relocation out of Iraq, to somewhere the family could be safe and start afresh, as the only way out of this unbearable situation.

#### *Bahar*

After a failed attempt to flee from her native village, Bahar, a seven-year-old Yazidi girl was captured by ISIL troops along with her mother, father and two siblings. ISIL separated the women and children from the men and imprisoned the former. Bahar had not seen her father since. Detention conditions were appalling. The prison cell was flooded with residue water, only inedible food and dirty drinking water were made available, and neither blankets nor heating were provided. Bahar's mother stated, "*ISIL militias have treated us very badly and brutally, furthermore, they have used offensive words. We have suffered due to hunger and thirst.*" Women and girls considered attractive were separated from the rest of the group through brute force. "*The atmosphere was full of the sounds of*

<sup>3</sup> These personal accounts, recorded in 2017, stem from narratives of two survivors who received medical treatment and psychotherapeutic support at a Trauma Clinic for survivors of sexual violence in Iraq, run by the Jiyān Foundation for Human Rights. The names have been changed for the purpose of protecting the survivors' identities.

women and children crying, screaming, praying and asking for help,” added the mother. Shortly thereafter, Bahar and the rest of the family were sold and forced to live with an ISIL militant and his family. In addition to being humiliated, beaten and exploited by the captor’s family, the girl’s mother was raped. She described the experience as “*an unbelievably painful event I shall not forget for as long as I live,*” and added, “*I was only worried about my children.*” The family was sold several times and Bahar’s mother was being continuously raped by different men. Finally, their last captor took pity on them and arranged their escape from ISIL controlled territory. The family now lives in an IDP camp in the KRI. Bahar still suffers from anxiety, cries a lot, displays fear towards a variety of external cues (e.g., loud voices, bearded men and people wearing black clothing), has nightmares, displays eating problems and cannot concentrate.

### **Legal qualification of CRSV in Iraq**

#### *International Human Rights Law*

Given that nearly all international human rights treaties do not explicitly prohibit sexual violence, human rights bodies addressed it under provisions prohibiting torture and other cruel, inhuman or degrading treatment. Therefore, to assess whether CRSV committed in Iraq could be considered torture under International Human Rights Law (IHRL), one needs to determine whether the key elements of torture specified in article 1 of the United Nations Convention Against Torture (UNCAT) are met; namely, severity, intent and purpose, and state involvement.

*Severity:* Regarding the criterion of severity, it is well established that any pain or suffering caused by rape meets the requisite level of severity (ICTY, 2004, § 485; Rodley

& Pollard, 2009, p. 96). The pattern of sexual violence where women were deprived of liberty and incessantly raped is certainly severe. However, the situation is not so clear in the cases of other acts of sexual violence. Sexual harassment in the IDP camps, for instance, may not reach the level of severity required for torture.<sup>4</sup> Although virginity tests might not always meet the torture threshold, in the present context, they were normally carried out as part of a larger abuse pattern. Therefore, most acts of sexual violence described by the survivors must have caused severe physical and/or psychological pain.

*Intent and purpose:* Severe pain and suffering must be inflicted intentionally and with a purpose in mind. It has been suggested that a purpose consistent with the logic of UNCAT should have “*some-even remote-connection with the interests of policies of the State and its organs*” (Burgers & Danelius, 1988, pp. 118–119). ISIL’s treatment of people not fitting into their vision of Islam reveals a purpose resembling those stipulated in the UNCAT. In the Yazidi case, this meant forced conversion to Islam, where Muslims of different beliefs and practices were expected to adopt the “correct” version of Islam. In any event, purposes explicitly specified as prohibited in the UNCAT—such as punishing, intimidating or coercing the victim—are evident in the context described, and the experiences of Lila and Bahar. Therefore, we argue that the purpose element is also met.

<sup>4</sup> This does not, however, prevent adjudicating bodies from qualifying incidents with a sexual background as inhuman or degrading treatment. For a short overview of the practice of international bodies in qualifying sexual violence as specific forms of ill-treatment see Gaggioli (Gaggioli, 2014, p. 523).

*State involvement:* Finally, it must be established whether the indicated pattern of CRSV in Iraq meets the requirement of state involvement set forth in article 1 of the UNCAT. Some form of official sanction is required for a conduct to be designated as torture or other ill-treatment. In order to cover less conventional modes of state involvement, UNCAT specified that, in addition to a “public official,” a perpetrator can also be “any other person acting in an official capacity.” As this wording was meant to cover situations where state involvement was less evident, one could argue that even paramilitary formations wielding power resembling that of a state are covered. Namely, in the Elmi case,<sup>5</sup> the Committee Against Torture (CAT) reasoned that in a state where a central government has collapsed, members of rival armed groups are to be considered persons acting in an official capacity (CAT, 1999, § 6.5). However, the same body later stated that where state authority exists, even nominally, violations committed by armed groups fall outside the ambit of the UNCAT.<sup>6</sup>

As ISIL never exercised authority in the absence of the *de jure* government in both

Syria and Iraq, it seems that ISIL militants could be considered as neither state officials nor persons acting in an official capacity.

Similar problems arise if one qualifies CRSV as a violation of the right to life, or of the right to liberty and security of the person. The principal rule is that international law primarily deals with state responsibility for a breach of these specific obligations by an official whose acts are attributable to the state.<sup>7</sup>

It becomes more complicated when a state did not abide by its positive obligations. As the legal definition of slavery does not necessitate state involvement (Slavery Convention, 1927, Art. 1), private practices amounting to slavery can be qualified accordingly. The State could, then, be found responsible for the failure to meet its obligations (Stoyanova, 2017, p. 443-448) to act with due diligence in preventing such occurrences and punishing the perpetrators. The same is true for forms of ill-treatment other than torture and the violation of the right to life. However, these alternative avenues for qualifying and charging gross violations of human rights under IHRL might be seen as inappropriate for CRSV of such magnitude and brutality. Moreover, state-run justice systems could hardly effectively follow up on this by prosecuting individual perpetrators nationally.

#### *Prospects for Holding ISIL Accountable as a Collective Entity*

It is useful to consider whether an armed group member could be considered a person acting in an official capacity and, if so, whether it is possible to hold a state-like entity accountable.

<sup>5</sup> CAT examined a complaint of a Somali national against Australia who claimed that, if returned to his country of origin, he would be tortured and killed by armed clans exercising a de facto control over Mogadishu. Australia argued that as armed clans cannot be considered public officials the definition of torture is not met and the application ought to be declared inadmissible. See CAT (1999).

<sup>6</sup> In *H.M.H.I. v. Australia* CAT dealt with an almost identical set of circumstances as in *Elmi*, only three years later. The crucial difference being that Somalia, at that point, did have a central government recognized by the international community (CAT, 2002, § 6.4).

<sup>7</sup> On attribution under IHRL see Marks and Azizi (2010).

ISIL harbored an ambition to be perceived as a state and, more importantly, acted as one. It performed tasks falling within a state's prerogatives (e.g., issuing official documents, including birth certificates, collecting taxes, etc.) (Callimachi, 2018). Executions, torture, and inhuman punishments were normally carried out following a ruling of self-appointed courts working to enforce ISIL rules. For instance, smoking and drinking were punished by lashing, and stealing by hand amputation (UNAMI/OHCHR, 2014c, p. 14).

However, the refusal of most of the international actors to consider sanctioning acts of privately run armed groups under the framework applicable to states persists, as if the group nature of the war effort is irrelevant for the capacity of individuals to commit mass crimes. In reality, however, such a state-like effort proves to be instrumental in enabling individuals to commit atrocities (e.g., war crimes, crimes against humanity, and genocide) on an immense scale. ISIL is a textbook example of such a paradigm, as its ability to indoctrinate, organize local administration, generate revenue and mobilize fighters from around the world surpassed that of many states.

The international obligations of armed non-state actors and their accountability remains a largely academic debate. There are no international fora where state-like groups could be held responsible (Bellal, 2017, pp. 240-242). Even if ISIL, as an armed non-state actor, is indeed, in addition to IHL, bound by IHRL, claims against it as a collective entity are not judicable at the international level.

*International Humanitarian Law (IHL) and International Criminal Law (ICL)*

*War crimes and crimes against humanity: In contrast to the IHRL, under the IHL/ICL*

framework, involvement of a state official is not necessary for an act to constitute torture (Henckaerts, Doswald-Beck, & Alvermann, 2005, pp. 317–318). Namely, it is well established that the essence of torture, either as a war crime or a crime against humanity, is not in the status of the perpetrator but in “*the nature of the act committed*” (ICTY, 2001a, § 495). It was further clarified that state involvement required under IHRL “*is inconsistent with the application of individual criminal responsibility for international crimes found in international humanitarian law and international criminal law*” (ICTY, 2001b, §§ 138–139).

Additionally, acts of CRSV are in and of themselves absolutely prohibited in international and non-international armed conflict under IHL (Henckaerts et al., 2005, pp. 323–327) and thus can constitute international crimes in their own right. The Rome Statute of the International Criminal Court (1998) explicitly criminalizes sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity (Art. 7 (1) (g), 8 (2)(b)(xxii), 8 (2) (e) (vi)). Alternatively, CRSV could be characterized as other acts amounting to either war crimes (inhuman or cruel treatment) or crimes against humanity (e.g., persecution, enslavement or other inhuman acts) (Centre for International Law Research and Policy, 2017, pp. 21, 31, 42, 49, 57, 66). It follows that most of the outlined atrocities fit squarely within the above categories.

Furthermore, specific requirements for an incident to be qualified either as a war crime (nexus between an offense and an armed conflict) or a crime against humanity (an act committed as a part of the widespread and systematic attack against civilians) are by and large met in the present situation. Namely, armed conflict in Iraq

could qualify as non-international as it meets the criteria of the intensity of violence and organizational capacity of the opposing parties (ICTY, 2008, § 49, 60). The acts themselves were by no means ordinary crimes given that the armed conflict “*played a substantial part in the perpetrator’s ability to commit the crime, his or her decision to commit it, the manner in which it was committed, or the purpose for which it was committed*” (ICTY, 2008, § 49, 61). Lastly, ISIL’s entire *modus operandi* in committing CRSV satisfies the necessary requirements for an attack against civilians to be considered widespread and systematic; the “*large scale nature of the attack and the number of victims*” was noted, as well as “*the organized nature of the acts of violence and the improbability of their random occurrence*” (ICTY, 2001a, § 428-429).

*Genocide:* Concerning the “crime of crimes,” as genocide is often known, it appears that the outlined pattern of CRSV committed against, at least, the Yazidi minority satisfies the material requirement for genocide. In particular, the prohibited acts of causing serious bodily or mental harm to members of the group and imposing measures intended to prevent births within the group. As to the mental element of the crime, namely the infamous genocidal intent (the intent to destroy, in whole or in part, a protected group), such an intent is discernible in documents issued by ISIL as well as consistent methodology, and a high level of organization and discipline demonstrated in carrying out the criminal acts. Moreover, the contours of a full-blown genocidal policy of ISIL towards Yazidis are discernible.<sup>8</sup> Therefore, it appears

that CRSV perpetrated against Yazidis together with other prohibited acts through which destruction was to be effectuated (e.g., killing members of a group, forcibly transferring children, etc.) constituted acts of genocide as well.<sup>9</sup> In sum, acts of CRSV, considered alone or categorized as torture or other crimes, may amount to war crimes, crimes against humanity, and genocide.

*Severity requirement revisited:* The question of severity also emerges in the context of IHL and ICL. Although severe forms of CRSV presumably constitute international crimes, this is not clear with regard to CRSV of lesser gravity. A certain threshold of gravity must be reached for an act of CRSV to be considered a war crime, crime against humanity or genocide. Acts of sexual violence of comparable gravity might include, for instance, “*trafficking for sexual exploitation, mutilation of sexual organs, sexual exploitation (such as obtaining sexual services in return for food or protection), forced abortions, enforced contraception, sexual assault, forced marriage, sexual harassment (such as forced stripping), forced inspections for virginity and forced public nudity*” (Gaggioli, 2014, pp. 506–507).

As most of the CRSV reported from 2014 onwards probably meets the required level of gravity, the gravity threshold cannot be considered a significant obstacle

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contribute to establishing that a perpetrator harbored a genuine genocidal intent (Gaeta, 2014, pp. 763–765).

<sup>9</sup> For a comprehensive analysis of crimes committed against Yazidis and its characterization as genocide in line with the requirements set out in the Convention on the Prevention and Punishment of the Crime of Genocide and the Rome Statute of the International Criminal Court, see Human Rights Council (2016).

<sup>8</sup> The genocidal policy is, strictly speaking, not a requirement for a genocide to exist but can

for effective prosecution. Lastly, nothing prevents the forthcoming criminal justice mechanism in Iraq from extending its understanding of war crimes and/or crimes against humanity to cover all CRSV.<sup>10</sup>

*Advantages of the IHL/ICL approach:* In addition to the outlined advantage of making use of the framework provided by IHL and ICL rules, there are others. By qualifying CRSV as an atrocity crime due to its large-scale and systematic nature, the so-called “contextual element” (Gaeta, 2014, pp. 756–757) of these crimes and the common plan the perpetrators pursued to carry them out would come to light. It follows that concepts provided by IHL and ICL are important for ensuring that the “architects” of atrocity crimes are convicted, and are indispensable for establishing the broader narrative of how such crimes came to pass.

### **Overview of legal framework applicable in Iraq**

#### *International Level*

Although Iraq is party to almost all core international human rights treaties,<sup>11</sup> it

did not accept any individual complaints procedure, nor did it ratify the Optional Protocol to the ICCPR abolishing the death penalty and the Optional Protocol to the UNCAT, which established an advanced system of monitoring places of detention. Moreover, it entered reservations to Articles 2 (f, g) and 16 of the CEDAW mandating states to repeal discriminatory laws and practices and ensure equality in all matters related to family and marital relations.

Iraq is a state party to the Geneva Conventions of 1949 and Additional Protocol I relating to the protection of victims of international armed conflicts, as well as to the Convention on the Prevention and Punishment of Genocide. However, it neither acceded to the Rome Statute of the International Criminal Court (ICC) nor accepted the ICC’s jurisdiction in relation to crimes committed on its territory under Art. 12 (3) of the Rome statute (UNAMI/OHCHR, 2014a, pp. 4–7).

#### *National Level*

Iraqi legislation is inadequate for addressing grave human rights violations, particularly sexual violence because it does not possess a legal framework necessary for effective prosecution of perpetrators and redress of victims. Atrocity crimes are not criminalized under Iraqi law, whereas forms of criminal responsibility (joint criminal enterprise or command responsibility) necessary for linking planners of crimes and those with command authority to the actual commission of concrete crimes are not envisaged. Furthermore, Iraqi penal and criminal procedure laws display significant

<sup>10</sup> The statute of the Special Court for Sierra Leone stipulates that in addition to explicitly specified sexual crimes (rape, sexual slavery, enforced prostitution, forced pregnancy) any other forms of sexual violence are to be considered crimes against humanity (UN Security Council, 2002; Gaggioli, 2014, p. 507).

<sup>11</sup> Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (UNCAT); International Covenant on Civil and Political Rights (ICCPR); Convention for the Protection of All Persons from Enforced Disappearance (CED); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); International Convention on the Elimination of All Forms of Racial Discrimination (CERD); International Covenant on Economic, Social and Cultural Rights (CESCR);

Convention on the Rights of the Child (CRC); Convention on the Rights of Persons with Disabilities (CRPD).

deficiencies. As rape is considered a private offense, the state cannot take legal action against the alleged perpetrator without the consent of a victim or their legal guardian (Iraqi Criminal Procedure Code, Article 3). Failure to prove rape could lead to the victim being prosecuted for extramarital sexual relations. Marital rape is not criminalized. Legal proceedings against an alleged rapist are to be discontinued if he marries his victim (Iraqi Criminal Code, Art. 398), a husband's prerogative to punish his wife is considered his legal right rather than an offense (Iraqi Criminal Code, Art. 41), and honorable motives for committing an offense constitute mitigation ground (Iraqi Criminal Code, Art. 128). Legal frameworks in KRI concerning discrimination of women have somewhat improved as some of the problematic provisions in the penal code have been repealed (article 41, 128) and several gender-sensitive laws and strategies passed (KRG, 2012; Puttick, 2015, pp. 6–10). However, given the enduring discrimination against women and KRI's poor implementation record (Kaya, 2017, pp. 9–12), depicting KRI as progressive and the rest of Iraq as backward would be rather misleading.

Finally, both the Government of Iraq (GOI) and the Kurdistan Regional Government (KRG) enacted controversial antiterrorism legislation with a broad definition of terrorism, inadequate legal safeguards, and mandatory death sentences for a range of offenses labelled as terrorist acts.<sup>12</sup> Rape and other acts of sexual violence are not even criminalized under these laws (Human Rights Watch, 2017, p. 29).

### **Ongoing efforts to punish perpetrators of grave human rights violations**

Legal proceedings aimed at punishing ISIL supporters are taking place in both federal and KRI courts under their respective anti-terrorism legislation. However, these trials have not been conducted in compliance with international fair trial standards. Alleged perpetrators are arbitrarily deprived of liberty and held “incommunicado” to facilitate the acquisition of confessions, often by force. Moreover, guilty verdicts rely on confessions only, as no other corroborating evidence is deemed necessary. In addition, merely being an ISIL member or affiliate, or assisting ISIL in any capacity, suffices for conviction and subsequent sentencing to death or life imprisonment (Human Rights Watch, 2017). Finally, no efforts have been made to enable the participation of victims in the ongoing trials (Human Rights Watch, 2017, pp. 4, 22–23).

The outlined milieu for administering justice has profoundly negative consequences for victims of sexual violence. It has been reported that even when the accused admitted to having perpetrated crimes of a sexual nature, no separate charge under this heading has been brought (Human Rights Watch, 2017, p. 30). In addition, the requirement that victims ought to bring the rape charges personally might deter many from coming forward. Put simply, the entire legal framework and practice of judicial bodies in tackling ISIL-generated sexual violence appears beyond repair.

When confronted with incriminating evidence indicating ISF involvement in torture or extrajudicial killings, GOI either rejected the allegations altogether or, on rare occasions, assured that investigation will be carried out. Not a single case where such crimes were adequately punished could be

<sup>12</sup> For a critical assessment of KRG and FGI Anti-Terrorism Laws No.3 of 2006 respectively see UNAMI/OHCHR (2017, pp. 7–8); UN Special Rapporteur (2018, §§ 46–49).

verified (UN Special Rapporteur, 2018, §§ 57–58; UNAMI/OHCHR, 2017, p. 2).

As to the efforts to document serious crimes in Iraq in line with international standards, the most important actor is the Commission for Investigation and Gathering Evidence (CIGE). This body was established by the KRG in September 2014 to document international crimes committed by ISIL. Although CIGE appears to have collected a large amount of evidence and even identified a number of perpetrators, further action is blocked due to an unfavorable domestic legal framework (UN Special Rapporteur, 2018, § 71).

An initiative to establish a full-blown criminal tribunal in KRI, mandated to prosecute and try perpetrators of grave crimes committed in the war with ISIL in line with best international practices, has most probably been abandoned (Van Schaack, 2018, p. 125). This is a further discouragement to the possibility of justice.

#### *Assistance of the International Community*

Following the request for assistance from the Iraqi Government, the UN Security Council established a special body (Investigative Team to Support Domestic Efforts to Hold ISIL (Da'esh) Accountable for Acts that May Amount to War Crimes, Crimes Against Humanity and Genocide Committed in Iraq (IT)) in September 2017 to assist GOI in holding ISIL accountable for international crimes committed on its territory. The core mandate of the IT is to collect and store evidence against ISIL, for acts amounting to atrocity crimes, to be used in fair criminal proceedings, primarily before Iraqi courts (UN Security Council, 2017 § 2, 5).

The Special Advisor is mandated to “work with survivors... to ensure that their interests in achieving accountability for

ISIL are fully recognized” (UN Security Council, 2017 § 13). After the terms of reference were finalized in February 2017 (UN Security Council, 2018), the UN Secretary-General was appointed as the head of the IT on 31 May 2018.<sup>13</sup> At the point of writing this article, it is not clear whether the IT became fully operational on the ground.

The IT faces considerable challenges.<sup>14</sup> It cannot ignore crimes committed by non-ISIL armed groups and also be perceived as impartial by all religious/ethnic groups in Iraq, empower the same courts that are sentencing alleged ISIL supporters in flagrant disregard of human rights standards, or cooperate closely with the KRG bodies such as CIGE, while respecting Iraq’s claim on absolute sovereignty. Persuading Iraq to properly address atrocities committed within its borders, in exchange for focusing on ISIL crimes only, may prove to be a mistake. In particular, the fates of those already convicted under anti-terrorism laws have not been duly considered.

#### **Forthcoming court—basic requirements**

Although the structure and composition of the prospective court are not known, it would need to meet some minimum requirements. Any criminal justice accountability mechanism established to deal with serious violations of international law, including CRSV in Iraq, in addition to having jurisdiction over international crimes committed by all parties to the

<sup>13</sup> A UK citizen with extensive experience in ICL and IHRL, Mr. Karim Asad Ahmad Khan, has been appointed to serve as a head of ITA in the capacity of a Special Advisor (UN Secretary-General, 2018).

<sup>14</sup> For a detailed analysis of the ITA and its prospects of success, see van Schaack (2018).

conflict, would need to be embedded in a wider transitional justice strategy of the GOI and KRG. Besides addressing criminal accountability, truth-seeking, and reparation issues, such a strategy should include a plan for dealing with individuals convicted in deficient proceedings conducted under anti-terrorism legislation. Legal professionals working in the forthcoming court or tribunal ought to be capable of managing diverse evidence and making it available to the defence. These professionals should be able to correctly qualify the crimes in question and be well versed in different modes of liability, such as co-perpetration, indirect perpetration, joint criminal enterprise, and objective liability, in order to connect senior leaders and those higher up in the chain of command with individual crimes. Merely proving that crimes actually took place does not suffice. They need to be attributed to individual perpetrators by utilizing the “beyond reasonable doubt” standard of proof typically applied in criminal justice settings (Wilkinson, 2011, pp. 17–18). Standards employed by various UN fact-finding missions established to collect evidence, including the Commission of Inquiry on Syria, fall short of the requisite standard of evidence (UN Commission of Inquiry on Syria, 2018, § 4; Wilkinson, 2011, pp. 40–41). Ideally, various data collection and analysis methods need to be employed to produce evidence on patterns of sexual violence (Aranburu, 2010). Finally, victims need to be adequately involved in the forthcoming trials. This would involve establishing a victim and witness support department and arrangements for their protection.

### **The issue of reparations**

Reparations for victims of CRSV including rehabilitation, satisfaction, and guarantees

of non-repetition are particularly sensitive.<sup>15</sup> The most suitable response to these crimes would be pursuing a transformative approach to reparations (UN Secretary-General, 2014, pp. 8–9), giving preference to measures capable of changing the imbalance of power that is detrimental for women in present-day Iraq. Guarantees of non-repetition are also important considering that many Iraqis have lost confidence in the state to prevent the recurrence of atrocities. Survivors belonging to the Yazidi community actively seek any opportunity to emigrate. Indeed, there have recently been initiatives, such as those sponsored by the German Federal State of Baden-Württemberg, offering Yazidi women temporary re-settlement and mental health treatment in third states. However, relocating survivors from their homeland, in the long term, may have a detrimental effect on the local society as it erodes north Iraq’s cultural and ethnic diversity. This highlights the need for the State to work on appropriate legal, economic, physical and psychological recovery measures as soon as possible after violent conflict has ended.

Law No. 20 on Compensation for Victims of Military Operations, Military Mistakes and Terrorist Actions, passed by the Iraqi parliament in 2009, provides a framework for victims of recent atrocities to claim material compensation in the form of a one-time payment (the award of family rent or a plot of land). However, the amounts given to victims are relatively small; this statute has a number of shortcomings and is not fully implemented in practice.<sup>16</sup>

<sup>15</sup> On the right to reparation in general see (UN General Assembly, 2006).

<sup>16</sup> For a detailed analysis of the forms of reparation envisaged by the law, and practice of state organs

Most recently, on 28 March 2019, the Iraqi Presidency submitted a Yazidi Female Survivors' Law<sup>17</sup> to Parliament suggesting a range of reparative measures for Yazidi women abducted by ISIL and then released (Press release of the Iraqi Presidency, 2019). Although some articles, such as those recognizing genocide against Yazidis (though it refers only to abducted women) (Yazidi Female Survivors' Law, Article 9), ensuring monthly payments as a way of compensation (Yazidi Female Survivors' Law, Article 8), establishing a national remembrance day on crimes committed against the Yazidis (Yazidi Female Survivors' Law, Article 10), and pledging rehabilitation services (Yazidi Female Survivors' Law, Article 5), are to be condemned. The bill left much to be desired. Namely, it contains no explicit reference to CRSV and excludes all victims other than abducted and subsequently released Yazidi women. This bill thus hardly advances the objectives of transitional justice in Iraq as it tends to fuel rather than overcome sectarian divisions in Iraqi society, especially among victims themselves.

### **Acknowledging the victim's perspective**

The victims of CRSV face multiple traumas and require appropriate responses that involve them in decision-making processes. On the one hand, this requires making survivors aware of the legal status of the atrocities that have befallen them with a view to enabling them to accept the justice dispensed by the state, and thus facilitating the healing process. On the

other hand, lawyers, politicians, and other decision-makers must keep individual fates in mind when drafting legislation, ratifying international instruments, and creating accountability mechanisms or reparation programmes aimed at redress. Whilst there is no general consensus on the appropriate mode of participation for victims in criminal proceedings, punishing the perpetrators appears essential for strengthening their healing process (Danieli, 2009, p. 45). Keeping victims removed from legal reckoning and focusing solely on "eliminating the problem" produces especially grave effects as it denies survivors a crucial chance to regain power against the perpetrators as part of their mental healing and search for justice.

### **Our position**

Mass CRSV reached international awareness both in the early 1990s during the war in the former Yugoslavia, and in 2014 as the conflict in Iraq and Syria raged. Although both provoked a public outcry, they led to different outcomes. Whereas the UN Security Council in the 1990s established the ICTY, today we can witness a range of indecisive actions aimed at assisting Iraq in holding ISIL members accountable. These actions are not entirely misplaced; however, the question to be raised is whether they are sufficient. The main assumption on which IHRL rests, namely that gross human rights violations committed by non-state actors are to be sanctioned nationally, simply does not hold in the case of Iraq. The outlined accounts demonstrate that Iraqi authorities have no capacity either to bring justice to victims or to set the groundwork for enduring peace. The international avenues are also blocked since survivors have no recourse to international instances dealing with either state or individual

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authorized to work on its implementation see Sandoval and Puttick (2017, pp. 17–21).

<sup>17</sup> At this point it is hard to foresee whether this law will be passed through the Iraqi parliament and whether there is a room for improvement.

criminal responsibility. The situation is also complicated by the fact that most crimes have been committed by members of non-state armed actors. In light of this, the efforts of the international community focusing solely on enhancing the capacity of GOI seem inappropriate.

The psychological scars caused by the loss of family members to violent conflict, long periods of captivity and extended physical and psychological abuse, if not appropriately addressed, give rise to significant impairments to the individuals, their families, and communities and society as a whole. Yet, the two personal accounts presented in this paper bear witness to the extraordinary strength, resilience, and vitality of the survivors who managed to endure against the odds. This must be acknowledged. In addition to appropriate legal processing, the medical, psychological and social recovery of survivors must be accorded due priority in all programmes addressing CRSV in Iraq.

From a transitional justice perspective, the most sensible way to proceed would be to refer cases to the ICC or establish a hybrid tribunal mandated to prosecute and adjudicate serious international crimes committed by all parties in the conflict in Iraq, and to pursue a comprehensive gender-sensitive reparation programme. Iraq's compliance could be induced by, for instance, making the development and reconstruction assistance conditional upon meeting basic transitional justice requirements. The people of Iraq simply deserve better justice than that currently dispensed.

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