



Iraq

Submission to the List of Issues to be taken up in connection with the consideration of Iraq's initial report by the Committee on Enforced Disappearances

Alkarama Foundation – 1 December 2014

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2. Introduction

In the context of its contribution to the initial review of Iraq by the Committee on Enforced Disappearances, Alkarama would like to provide suggestions of questions with the objective of strengthening the dialogue which will take place during the review of the State Party in September 2015.

Alkarama has carefully reviewed Iraq's national report (CED/C/IRQ/1) and wishes to make a preliminary remark. We note with concern that the Iraqi authorities seem to be denying that enforced disappearances continue to occur until today in the country. The report indeed refers to the practice of enforced disappearances as being only "widely used by the dictatorial regime which ruled Iraq from 1968 to 2003".¹

Although indeed, most cases pending before the Working Group on Enforced or Involuntary Disappearances (WGEID) occurred prior to 2003, we wish to highlight that this does in no way mean that this practice did not continue to occur after and is still present to this day. On the contrary, this practice has been exacerbating to the extent that it has become widespread and systematic. In a climate of terror fostered by the security services and state-controlled militias, it has become extremely difficult for human rights defenders and associations of families of disappeared to document all cases of disappearances and submit them to the United Nations Special Procedures.

3. Definition and criminalisation of enforced disappearance (articles 1-5)

The Iraqi report explains that the offence of enforced disappearance is not defined in Iraqi law in the terms of the Convention but affirms that enforced disappearance is classified "as an **autonomous offence**".²

Question:

1. *In what way does enforced disappearance constitute an autonomous offence when enforced disappearance is not criminalised per se?*

In addition, the authorities state that the Ministry of Human Rights is drafting an **integrated bill for the implementation of the Convention**³ which will "entail a review of the structure of the Criminal Code and other relevant legislation".⁴

Questions:

¹ Paras. 5, 11.

² Para. 36.

³ Para. 36.

⁴ Para. 47.

2. *What is the current status of the preparation of the draft and when is it expected to be adopted? Are civil society organisations, including associations of families, included to the drafting process? If not, why?*
3. *Can the State Party provide the Committee with the draft bill for the implementation of the Convention mentioned in the report,⁵ in particular the definition of enforced disappearance, its criminalisation and the penalties attached, as to allow the Committee to identify the changes required in order to implement the Convention.*
4. *What amendments will be made to the Criminal Code? How will the provision contained in article 5 of the Convention be "taken into account"⁶ when adopting that bill?*

In the absence of the criminalisation of enforced disappearances, we take note of the provisions of the Criminal Code mentioned by Iraq in its report – namely articles 322 to 324 – containing **offences committed by public officials or public servants** that could be categorised as enforced disappearance.⁷

Questions:

5. *Considering the numerous reports that state-controlled militias, e.g. the Badr Brigades, run by the Transport Minister,⁸ operate in the country, and amongst others, commit enforced disappearances, what is the status of the members of these militias in Iraqi law?*
6. *Which authority has jurisdiction to investigate cases of enforced disappearances committed by the aforementioned militias and according to which rules of procedure? What was the outcome of these investigations and were members of militias ever prosecuted for the crimes committed? If so, what sanctions were handed down?*

With regard to the **offence of abduction**,⁹ Alkarama wishes to express its serious concern over article 427 of the Code,¹⁰ which reads as follow:

If the offender mentioned in this Section then lawfully marries the victim, any action becomes void and any investigation or other procedure is discontinued and, if a sentence has already been passed in respect of such action, the sentence will be quashed.

Legal proceedings will resume or the sentence will be reinstated according to the circumstances if the marriage ends in a divorce brought about by the husband without legal justification or in a divorce ordered by the court for wrongs committed by the husband or for his bad behaviour within 3 years following the cessation of the proceedings.

[...]

Questions:

7. *Does this provision apply to the authors of abduction in the event that there are state officials or are acting with the support or acquiescence of the government?*
8. *If so, how is this provision compatible with the Convention since it decriminalises a form of enforced disappearance and opens the door for impunity and further abuses?*

⁵ Para. 36.

⁶ Para. 54.

⁷ Para. 39.

⁸ Human Rights Watch, *Iraq: Pro-Government Militias' Trail of Death*, 31 July 2014, <http://www.hrw.org/news/2014/07/31/iraq-pro-government-militias-trail-death> (accessed on 25 November 2014).

⁹ Paras. 41-44.

¹⁰ Para. 44.

9. Given that prosecution can only be triggered if after marrying the victim of abduction, the abductor unilaterally divorces his victim, what are the possibilities given to the abducted to divorce and trigger prosecution?

4. Judicial jurisdiction and duty to report and investigate (articles 9 & 12)

According to article 9 of the Convention, Iraq has the obligation to "take the necessary measures to establish its competence to **exercise jurisdiction over the offence of enforced disappearance** [...] committed in any territory under its jurisdiction."

At the time Iraq was under occupation by the forces from the United States (U.S.), several human rights violations, including enforced disappearances were reported. In particular, Alkarama has documented several cases of individuals detained *incommunicado* by the U.S. force before being handed over to the Iraqi authorities, and who remain disappeared since.

Under article 12 of the U.S. – Iraq Status Of Forces Agreement of 2008, Iraq maintains jurisdiction over U.S. contractors and their employees but shares jurisdiction with the U.S. over U.S. forces. Iraq can assert exclusive jurisdiction over U.S. forces, including the civilian component for the commission of grave premeditated felonies committed off-duty.

Questions:

10. Can Iraq provide the Committee with the list of detainees who were held by U.S. forces and handed over to the Iraqi authorities?
11. How does Iraq make sure that enforced disappearances committed by U.S. forces when the U.S. were acting de facto and de jure governmental power in Iraq are duly investigated?
12. Is there any cooperation mechanism to ensure that the substitution of jurisdiction does not hinder accountability?
13. Do Iraqi relatives of disappeared have access to any relevant authority that can provide them with information on the fate and whereabouts for the period when the governmental authority was the U.S.?

Regarding article 12 of the Convention and the duty of the State party to report and investigate enforced disappearances, we note that the Iraqi authorities mention in their report the **High Commission for Human Rights** (HCHR) as being entitled to receive complaints on human rights violations.¹¹

Questions:

14. How is the independence and freedom of the HCHR from executive interference guaranteed? Is addressing enforced disappearances amongst the priorities of the HCHR?
15. How many cases of enforced disappearances were documented and according to which procedure complaints of enforced disappearances were received by the Commission to date? How many initial investigations were conducted and how many cases were allegedly referred to the Office of the Public Prosecutor; what was the action taken in this regard?
16. What safeguards are provided in order to ensure that these authorities have immediate access to any place of detention or where there are reasonable grounds to believe that a disappeared person may be present?

¹¹ Para. 85.

Furthermore, according to article 12(4) of the Convention, each State party is to take measures to prevent and sanction acts "that **hinder the conduct of an investigation**". While we acknowledge the provisions of the Criminal Code, State Officials Discipline Act, Army Act and Internal Security Forces Act mentioned in the report,¹² Iraq domestic law does not provide for suspension from duties of the alleged offender during the investigation. On the contrary, the provisions mentioned refer to sanctions applied to officials when they either overstep the bound of their duty or if a court has issued a decision.

The only provision which covers the investigation stage is article 17 of the State Officials Discipline Act, according to which "the Minister or the head of department *may* suspend an official for a period of not more than 60 days if they consider that his remaining in public service would be prejudicial to the public interest or could affect the course of investigation".¹³ This provision falls short of the Convention's standards since the suspension during the course of the investigation is only conditional which cannot impede officials from influencing the progress of the investigation.

Question:

17. *Is there any procedural mechanism as to exclude any civil, military, security or law enforcement official from the investigation into an enforced disappearance when that official is suspected or when one of its members stand accused in the offence?*

5. Prohibition of secret detention and guarantees (articles 17 & 18)

First, regarding the prohibition of **secret detention** enshrined in article 17 of the Convention, we wish to highlight that there are several reports according to which secret detention centres still exist in the country. A well-known example is that of Camp Justice in northwest Baghdad and Camp Honor in Baghdad's Green Zone.¹⁴

Questions:

18. *What measures are being taken to close these facilities or regularise their positions by moving them under control of the justice system and under the protection of the law?*
19. *When secret detention sites were discovered, were the perpetrators of abuses held accountable?*

Furthermore, there are several shortcomings regarding the guarantees attached to the deprivation of liberty of persons. Indeed, we note that Section 30, para. 13 of Coalition Provisional Authority Memorandum No. 2 of 2003 can restrict the right of a detainee to inform his family if it is "in the interests of the administration of justice and of the security and good order of the institution".¹⁵ This vague provision, along with the fact that there is no obligation in Iraqi law to mention in the registry the date, time, place and author of the arrest,¹⁶ clearly fosters a climate conducive to secret detention.

Questions:

20. *In these conditions, how do the authorities ensure that the detainees were not subjected to enforced disappearance before being brought into an official place of detention or during a transfer to another place of detention?*

¹² Paras. 87-97.

¹³ Para. 90.

¹⁴ Human Rights Watch, *Iraq: UPR Submission March 2014*, 10 March 2014, <http://www.hrw.org/news/2014/03/10/iraq-upr-submission-march-2014> (accessed on 25 November 2014).

¹⁵ Para. 127.

¹⁶ Para. 116.

21. In the event of a failure by public officials to record the deprivation of liberty, can a complaint be lodged? If so, before which mechanism and by whom? Were proceedings ever initiated in such cases? What were the sanctions imposed?

22. How will the Iraqi authorities ensure that every single place of detention has a registry mentioning the names of the detainees, the date, time, place and author of the arrest in order to prevent enforced disappearances, incommunicado and other types of abuses in detention that often flows from the secret nature of a detention?

Regarding the **monitoring of places of detention**, we take note of the role of the different bodies as explained in Iraq's report, including that of the Ministry of Human Rights,¹⁷ the Department of Public Prosecutions¹⁸ and the Council of Ministers.¹⁹

Questions:

23. Which places of detention come within the purview of the Ministry of Human Rights and the Department of Public Prosecution?

24. Can the State Party provide the Committee with the "enforced disappearance file"²⁰ that was allegedly transmitted to the Office of the Attorney General? In the absence of a definition in Iraqi law, on what grounds were the cases transmitted qualified as "cases of enforced disappearances"? Were investigations open? If so, could the State party provide examples?

25. Can Iraq provide the Committee with the "database on victims of enforced disappearance" established by the Ministry of Human Rights²¹? How many cases within this database occurred after 2003?

26. Can Iraq provide the Committee with the decision of the conviction that was reportedly obtained in one of these cases in which the person accused was found guilty of a criminal act of enforced disappearance²²?

6. Rights of victims and guarantees thereof (article 24)

According to article 24 of the Convention, each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared. In this regard, Alkarama is concerned that Iraqi legislation applies the principle of the **presumption of death**²³ under article 93 of the Act No. 78 of 1980 when a person has been missing for over four years. This is problematic as it fails to tackle adequately the circumstances of the enforced disappearances and creates impunity for the perpetrators.

Questions:

27. How does this provision comply with article 24 of the Convention in terms of the obligation of the right to truth?

28. How does the presumption of death comply with article 8 of the Convention as it establishes a de facto statute of limitations to criminal proceedings?

¹⁷ Paras. 120-123.

¹⁸ Para. 124.

¹⁹ Para. 125.

²⁰ Para. 122.

²¹ Para. 123.

²² Para. 123.

²³ Para. 152.