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# Human Rights in the Administration of Justice in Iraq:

# Trials under the anti-terrorism laws and implications for justice, accountability and social cohesion in the aftermath of ISIL

**United Nations Assistance Mission for Iraq**
**Office of the United Nations High Commissioner for Human Rights**
**January 2020**
**Baghdad, Iraq**

*'Robust safeguards for detention, due process and fair trials that comply with human rights obligations not only demonstrate commitment to justice but are also a necessary building block for reconciliation and social cohesion that help reduce the risk of history repeating itself.'*

Special Representative of the Secretary-General for the United Nations Assistance Mission for Iraq, Jeanine Hennis-Plasschaert, statement to the Security Council, 28 August 2019

'*It must be clear that all individuals who are suspected of crimes – whatever their country of origin, and whatever the nature of the crime – should face investigation and prosecution, with due process guarantees. Accountability, with fair trials, protects societies from future radicalization and violence. Betrayals of justice, following flawed trials – which may include unlawful and inhumane detention, and capital punishment – can only serve the narrative of grievance and revenge.*'

United Nations High Commissioner for Human Rights Michelle Bachelet, opening statement at the Human Rights Council, 24 June 2019.

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## Executive summary

Between June 2014 and December 2017, the so-called Islamic State of Iraq and the Levant (ISIL) carried out a campaign of widespread violence and systematic violations of international human rights and humanitarian law against the Iraqi population. These acts may amount to war crimes, crimes against humanity, and possibly the crime of genocide, under international criminal law.

Iraq has been on the forefront of the fight against ISIL. It also made considerable efforts to ensure accountability for the atrocities committed against Iraqis by ISIL fighters. From January 2018 to October 2019, the judiciary processed over 20,000 terrorism-related cases, with thousands pending as of January 2020. In their pursuit of justice, Iraq has stated its commitment to uphold the right to a fair trial.

This report, *Human Rights in the Administration of Justice in Iraq: trials under the anti-terrorism laws and implications posed to justice, accountability and social cohesion in the aftermath of ISIL*, was prepared by the United Nations Assistance Mission for Iraq (UNAMI) through its Human Rights Office and the Office of the United Nations High Commissioner for Human Rights (OHCHR). The report covers the period of 1 May 2018 through 31 October 2019.

The findings presented in this report are based upon independent monitoring by UNAMI of 794 criminal court hearings in Anbar, Baghdad, Basra, Dhi-Qar, Dohuk, Erbil, Kirkuk, Ninewa, and Wassit governorates. The majority of the trial hearings attended (619) involved men, women and children facing charges under Iraq's anti-terrorism laws. The report includes analysis of observations of investigative hearings and interviews with judges, prosecutors and defence lawyers.

The findings of the report should be considered in the broader context of UNAMI's work to promote and protect human rights in the criminal justice system, including in efforts to seek justice for widespread atrocities committed by ISIL against the population. The report aims at encouraging judicial authorities to conduct a thorough review of trial and sentencing practices, with a view to strengthening criminal justice procedures, in line with the Constitution of Iraq and the State's obligations under international law.

UNAMI generally observed efficiency, structure and order in the conduct of the judicial proceedings it monitored. The hearings attended proceeded in an orderly manner, with judges routinely prepared with investigation files and defence counsel present during almost all hearings attended. Given the heavy caseload of ISIL-related prosecutions, the consistent pattern of well-organized trial proceedings was notable.

Nonetheless, the findings also show serious concerns that basic fair trial standards were not respected in terrorism-related trials. The main areas of concern include:

- Violations of fair trial standards relating to equality before the courts and conduct of hearings – in particular as a result of ineffective legal representation, lack of adequate time and facilities to prepare a case, and limited possibility to challenge prosecution evidence – which cumulatively placed the defendant at serious disadvantage compared to the prosecution.
- The overreliance on confessions, with frequent allegations of torture or ill-treatment that were inadequately addressed by courts and that on their own constitute a human rights violation, further contributed to the disadvantaged position of defendants.
- Prosecutions under the anti-terrorism legal framework – with its overly broad and vague definition of terrorism and related offences – focused on 'association' with or 'membership' of a terrorist organization, without sufficiently distinguishing between those who participated in

violence and those who joined ISIL for survival and/or through coercion, and with harsh penalties that failed to distinguish degrees of underlying culpability.

- Under anti-terrorism laws, the death penalty is mandatory for a wide range of acts that do not meet the 'most serious crimes' threshold, which is necessary for imposing such a sentence. The overall findings also indicate the imposition of the death penalty following unfair trials.
- Practical restrictions on the publicity of hearings, lack of victim attendance in proceedings and overreliance on a charge of 'membership' of a terrorist organization limited the possibility for victims and their families, as well as the general public, to see the perpetrators being held to account, and failed to expose the full range of crimes committed.

The report provides a series of recommendations to the Government and the High Judicial Council aimed at supporting its efforts to hold to account perpetrators of serious crimes, including terrorist acts, while ensuring the protection of fundamental human rights.

In the broader context, the protection of human rights in the administration of justice also serves as a tool of conflict prevention. Compliance with procedural guarantees and fair trial standards helps prevent the emergence of new grievances, both real and perceived, and addresses conflict drivers, such as structural discrimination, injustice and impunity that had led individuals to choose violence and enabled ISIL to find support in Iraq.

## I. Mandate

This report is prepared pursuant to United Nations Security Council resolutions, including Security Council Resolution 2470 (2019) that mandates UNAMI to '*promote accountability and the protection of human rights, and judicial and legal reform, with full respect for the sovereignty of Iraq, in order to strengthen the rule of law in Iraq […]*'.

Through its Human Rights Office, UNAMI undertakes a range of activities, including human rights monitoring and reporting, in support of efforts to strengthen the rule of law and accountability for human rights violations in Iraq.

## II. Number and type of cases monitored

The ultimate objective of trial monitoring is to support the strengthening of the rule of law in the administration of justice. To that end, this report aims at identifying both positive practices in the judicial process as well as potential areas of concern through the analysis of credible and reliable data collected through systematic monitoring and documentation.

In May 2018, with the support of the High Judicial Council, UNAMI began observing criminal trials in Karkh and Rusafa Federal Courts in Baghdad. In 2019, UNAMI expanded its programme to regular and systematic monitoring of criminal hearings, including investigation and trial hearings, in Anbar, Baghdad, Basra, Dhi-Qar, Dohuk, Erbil, Kirkuk, Ninewa, and Wassit governorates. UNAMI welcomes the cooperation of the Government of Iraq[1] in enabling it to undertake this broad programme of work in collaboration with it.

As of 31 October 2019, UNAMI had monitored 794 hearings in criminal courts. The majority (619 hearings or 78 per cent) concerned defendants[2] prosecuted under anti-terrorism laws.[3] The remaining 175 hearings concerned criminal cases unrelated to terrorism. The 619 hearings on terrorism cases are used as the basis for the analysis and findings presented in this report, while the analysis of the remaining 175 criminal hearings on other matters is used for comparative purposes when relevant.

The 619 terrorism-related hearings included 23 cases with female defendants, 44 cases involving defendants who were children at the time of the commission of the offence (out of which one concerned a girl) and 28 cases involving foreign defendants from 11 different countries of origin. UNAMI monitored 25 investigative hearings in terrorism-related cases out of the total.

## III. Monitoring methodology and reporting

UNAMI followed a 'hearing-based' monitoring methodology, i.e. observations drawn from attending single judicial hearings, at either the investigative or trial stages. Both at the investigative and trial stage, the proceedings may consist of one or more hearings. Security permitting, UNAMI human rights officers attended court hearings on a regular basis, randomly selecting days and cases to attend. Out of the total, 510 terrorism-related trial hearings observed included the announcement of a judgment.

Data gathering focused on the observation of trial hearings and a limited number of investigative hearings. To consistently and accurately document relevant data, UNAMI Human Rights Office designed a specific trial monitoring guidance and a documentation template, based on national and international human rights norms and standards, to ensure that observations were monitored and recorded in a

[1] The term 'Government' is understood as encompassing the legislative, executive and judicial powers of the State.
[2] The term 'defendant' is used to describe suspects or accused during investigative and trial hearings.
[3] The vast majority referred to allegations of 'ISIL membership'.

consistent manner. All staff conducting trial monitoring received targeted training before commencing their work. Monitors prepared standardized hearing reports detailing their observations and analysis, from which the findings of this report were compiled.

In addition, human rights officers met with judges, defence lawyers (including the Iraqi Bar Association), prosecutors and other relevant interlocutors, such as civil society activists, victims and families of defendants, and gathered and analyzed legislation and information from other official documents and reports. The teams however did not have access to court files, including written judgments.

Throughout the trial observation process, human rights officers observed the core principles of impartiality, objectivity, non-intervention/non-interference, accuracy, informed observation and confidentiality as part of overall efforts to work constructively with Iraqi authorities.

The monitors were not tasked to evaluate the innocence or guilt of individual defendants. The report intends to outline general trends and patterns observed.

*Limitations*

Comprehensive analysis of the fairness of a trial requires an overall assessment of human rights protection throughout the entire judicial process, including the investigative phase. The scope of this report does not cover the full range of issues that may impact the effective and fair administration of justice in Iraq, such as systemic institutional or administrative problems, broader issues of the independence of the judiciary, investigation, arrest, detention or screening practices, witness' and victims' protection and appeal proceedings where violations can be remedied.

Hearing-based monitoring may still achieve a wide range of purposes, including quantitative and qualitative findings on procedures and practices regarding the trial process. Its inherent limitations (no overall assessment of the entire process) were taken into account during the analysis of the information.

## IV. Legal Framework

### *A. International human rights law*

The right to a fair trial is a key element in ensuring the proper administration of justice, and in human rights protection more generally. Trials serve as a mechanism to ensure accountability and provide remedies for victims of crime or injustice. As such, it is crucial for trials to be fair, and to be perceived as fair.

The overarching right to a fair trial consists of a series of important human rights that serve to safeguard the rule of law through procedural means. These rights are principally found in article 14 and 26 of the International Covenant on Civil and Political Rights.[4] However, the right to a fair trial is broader than the sum of these individual rights. The enjoyment of fair trial rights also significantly depends on the conduct of the criminal justice proceedings preceding the trials. The right to a fair trial is also often linked to the enjoyment of other rights, such as the right to life, the right to be free from arbitrary detention, and the right to be free from torture as well as other forms of cruel, inhuman or degrading treatment or punishment ('ill-treatment').

[4] Iraq ratified the International Covenant on Civil and Political Rights on 25 January 1971. Various elements of the right to a fair trial are also found within other human rights treaties, such as article 40 of the Convention on the Rights of the Child, accession by Iraq on 15 June 1994.

International human rights law, including the right to a fair trial, applies in times of both peace and armed conflict. States also must ensure that any measures taken to counter terrorism fully comply with international human rights law.[5]

In addition to the obligation to hold perpetrators to account, States must address the needs and rights of victims of serious crimes, including terrorism. The right to the truth about serious crimes under international law is an important safeguard against the recurrence of violations and necessary for the consolidation of peace. The right of victims to access justice and participate in criminal proceedings against suspected perpetrators has also been recognized under international human rights standards.[6]

### *B. International humanitarian law*

Iraq is a party to the Geneva Conventions of 1949 and Additional Protocol I of 1977.[7] In the context of a non-international armed conflict, article 3 common to the four Geneva Conventions of 1949 explicitly prohibits 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples' with respect to persons taking no active part in the hostilities, including those placed *hors de combat* by sickness, wounds, detention or any other causes. Common article 3 also prohibits violence to life and person, in particular murder of all kinds of civilians and persons *hors de combat.* Under international law, executions carried out in violation of this prohibition, may amount to a war crime.

The principles of legality and individual criminal responsibility, as well as the prohibition of collective punishments, have been recognized as customary international humanitarian law applicable to both international and non-international armed conflicts.[8]

### *C. Domestic procedures relating to criminal trials*

Iraqi criminal proceedings are generally divided into two stages: a pre-trial investigation (a judicial fact-gathering phase) and the main trial (judicial adjudication phase). The criminal process is of inquisitorial nature.

Investigative judges lead the judicial fact-gathering. They have broad investigative authority, including responsibility for the evidence gathering process and the conduct of formal hearings of suspects and witnesses. Based on the available evidence, investigative judges may dismiss a case, close it temporarily or refer it to a court for main trial.[9] When the case transitions from the investigative court to the main trial, the dossier created by the investigative judge is used as a formal record.

The trial judge leads the trial process for each case, including responsibility for the trial hearing and deciding on the case in court. The length of trial hearings is typically relatively short, as the main evidence-gathering process is conducted by the investigative judge. The role of the public prosecutor in Iraq is mainly administrative in nature and includes monitoring judicial proceedings and places of detention to ensure legality of procedures.[10]

The judgments of the trial courts may be appealed in the Court of Cassation, which consists of case file review. Sentences of death or life imprisonment are automatically reviewed by the Court of Cassation.[11]

[5] See for example: General Assembly Resolution 60/158 of 16 December 2005.
[6] See Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, 8 February 2005. The phrase 'serious crimes under international law' is defined on p. 6.
[7] Iraq ratified the Geneva Conventions of 1949 on 14 February 1956 and Additional Protocol I of 1977 on 1 April 2010.
[8] See ICRC, IHL Database Customary IHL, Rules 100 – 103.
[9] Iraq Criminal Procedure Code No. 23 of 1971, articles 130 (A) and (B).
[10] See General Prosecution Law No. 49 of 2017.
[11] Iraq Criminal Procedure Code No. 23 of 1971, article 257 (B); General Prosecution Law No. 49 of 2017, articles 5 (7th) and 10.

The Constitution of Iraq guarantees the independence of the judiciary and the right to be treated with justice in judicial and administrative proceedings. It clearly prohibits the use of confessions elicited under 'force, threat, or torture' and also provides the right to defence in all phases of the investigation and trial.[12] The Criminal Procedure Code[13] sets forth further fair trial and procedural guarantees, including the right to remain silent, to cross-examine witnesses, to a public hearing, and the prohibition of 'illegal methods' for influencing an accused and extracting a confession.[14]

Of concern, the Criminal Procedure Code allows statements from secret informants in offences against internal and external security of the State or crimes punishable by death. It further permits judgments solely based on the confession of a defendant without further evidence, if the court is satisfied of the truth of the statements and that the defendant understands their implications.[15]

The Juvenile Welfare Law applies to persons under the age of 18 at the time of the offence. While the law envisages several protective measures for children in the justice system and reduces the maximum penalty to 15 years of imprisonment, UNAMI notes with concern that the minimum age of criminal responsibility is set very low, at nine years of age.[16]

### *D. Domestic law applicable to persons suspected or accused of terrorist acts*

The Iraqi Federal Government and the Kurdistan Regional Government adopted anti-terrorism laws in 2005 and 2006 respectively.[17] While constituting separate pieces of legislation with differing content, both laws are characterized by a broad definition of 'terrorism'.[18]

The individual terrorist acts in both laws range from 'use of violence to spread fear' to 'any act with terrorist motives that threatens the national unity of the State' to 'damage to public property'. The Anti-Terror Law applicable in the Kurdistan region ('KRI Anti-Terror Law') explicitly criminalizes 'membership' of a terrorist organization in its article 3(7). There is no such explicit provision prohibiting 'membership or association' in the Federal Anti-Terrorism Law.

The two laws, however, significantly differ in terms of sentencing rules for terrorist crimes. The KRI Anti-Terror Law provides consecutive sentences for different acts of terrorism, ranging from the death penalty to life imprisonment to imprisonment for less than 15 years. By contrast, the Federal Anti-Terrorism Law requires the mandatory application of the death penalty for any person who commits any of the terrorist acts detailed in the law. Those who incite, plan, finance, or assist terrorists face the same penalty as the main perpetrator of the terrorist act.[19]

While there is no comprehensive international definition of terrorism, the principle of legality, enshrined in article 15 of the International Covenant on Civil and Political Rights, sets out that no one shall be held guilty for an act or omission that was not a criminal offence at the time it was committed.

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[12] Constitution of Iraq, articles 19 and 37. Torture is criminalized under the Iraqi Penal Code (article 333).

[13] The Criminal Procedure Code No. 23 of 1971 was adopted in the Kurdistan region of Iraq and applies with minimal differences.

[14] Criminal Procedure Code No. 23 of 1971, see articles 123 (b); 125 - 127, 152 and 218.

[15] Criminal Procedure Code No. 23 of 1971, articles 47 (2) and 180 (d).

[16] Juvenile Welfare Law No. 67 of 1983, articles 47 and 77. Article 64 of the Penal Code stipulates seven as the age of criminal responsibility, but it is raised to nine years by the Juvenile Welfare Law.

[17] Federal Anti-Terrorism Law No. 13 of 2005 and Anti-Terror Law No. 3 of 2006 applicable in the Kurdistan region.

[18] Article 1 of Iraq's Federal Anti-Terrorism Law defines 'terrorism' as: *'[e]very criminal act committed by an individual or an organized group that targeted an individual or a group of individuals or official or unofficial institutions and caused damage to public or private properties with the aim to disturb the peace, stability and national unity or to bring about horror and fear among people and to create chaos to achieve terrorist goals.'* The Anti-Terror Law applicable in the Kurdistan region defines a 'terrorism' as: *'[o]rganized use of violence, or threatening to use violence, or encouraging or glorifying the use of violence to achieve a criminal act either by an individual or groups randomly for the purpose of spreading terror, fear, chaos among the people to sabotage the general system or jeopardize security and safety in the region or the lives of individuals or their freedoms or security or sanctity, and causing damage to the environment or natural resources or public utilities or public or private properties to achieve political, intellectual religious, racist or ethnic aims or goals.'*

[19] The only exception to the death penalty is for those who 'cover up a terrorist act or harbour a terrorist', who, if convicted, shall be sentenced to life imprisonment, Federal Anti-Terrorism Law No. 13 of 2005, article 4 (2).

Additionally, any law must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.[20] Further, any definition of terrorism should be confined in its use to conduct that is genuinely terrorist in its nature and limited to the countering of offences that correspond to the cumulative characteristics of conduct to be suppressed in the fight against international terrorism, as identified by the Security Council:[21] (i) acts committed with the intention of causing death or serious bodily injury, or the taking of hostages; (ii) for the purpose of provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any act; and (iii) constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism.[22]

The broad definitions related to criminal offences under the existing anti-terrorism laws enlarge the scope of the proscribed conduct and make them susceptible to subjective and overly discretionary interpretation.

Article 6 of the International Covenant on Civil and Political Rights strictly limits the death penalty to the 'most serious crimes' and is interpreted to prohibit its mandatory application.[23] The United Nations Human Rights Committee[24] has unequivocally clarified that: '*The term 'the most serious crimes' must be read restrictively and appertain only to crimes of extreme gravity involving intentional killing. Crimes not resulting directly and intentionally in death … although serious in nature, can never serve as the basis, within the framework of article 6, for the imposition of the death penalty. In the same vein, a limited degree of involvement or of complicity in the commission of even the most serious crimes, such as providing the physical means for the commission of murder, cannot justify the imposition of the death penalty*.'[25]

> *'Many judges are not necessarily seeking harsh penalties. They are looking to address the issues, conditions and circumstances which led to committing the crime, but the law does not give much choice.'*
>
> Statement made to UNAMI by a judge, Baghdad, June 2019

The list of crimes for which the death penalty is mandatory under the KRI Anti-Terror Law and Federal Anti-Terrorism Law is extensive. Consequently, it does not provide scope for the courts to consider the degree of participation in the act, the severity of the act or any mitigating circumstances. The laws also include a wide range of acts that do not meet the threshold of 'most serious crimes' necessary to impose such a sentence.

Finally, while the Federal Anti-Terrorism Law is silent on fair trial rights and procedural guarantees, article 13 of the KRI Anti-Terror Law stipulates that accused persons should be treated fairly in accordance with the law during interrogation, including through the provision of a lawyer. Torture and

[20] See Human Rights Committee, General Comment No. 34 (2011) on article 19: freedom of opinion and expression (CCPR/C/GC/34), para. 25.
[21] Security Council Resolution 1566 (2004), para. 3.
[22] See also, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: Ten areas of best practices in counter-terrorism, 2010 (A/HRC/16/51), paras. 26 - 28; Economic and Social Council, Report of the Special Rapporteur Martin Scheinin, 2005 (E/CN.4/2006/98), paras. 26-50.
[23] According to the Human Rights Committee, '*mandatory death sentences that leave domestic courts with no discretion as to whether to designate the offence as a crime warranting the death penalty, and whether to issue the death sentence in the particular circumstances of the offender, are arbitrary in nature*'; Human Rights Committee, General Comment No. 36 (2018) on article 6: the right to life (CCPR/C/GC/36), para. 37.
[24] The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties.
[25] Human Rights Committee, General Comment No. 36 (2018), para. 35 (footnotes omitted from citation).

inhuman treatment are also explicitly prohibited. However, contrary to international law,[26] article 13 of the KRI Anti-Terror Law allows for confessions extracted under duress to be used in court if they are supported by other evidence.

### *E. International crimes under Iraqi law*

International crimes are not codified as such by Iraqi law. Iraqi courts thus do not have jurisdiction over the crime of genocide, war crimes or crimes against humanity committed within its territory. Iraq is not signatory to the Rome Statute of the International Criminal Court.

## V. Key findings and observations

### *A. Equality before courts and fairness of hearings*

Articles 14 and 26 of the International Covenant on Civil and Political Rights together guarantee the rights to equality before courts and fairness of hearings. This includes the opportunity to effectively present one's case and the enjoyment of the same procedural rights as the opposing party, unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.[27]

UNAMI observations concerning equality before courts and fairness of hearings focused on three areas of concern relating to the equality of parties in general terms, linked to specific rights of all persons charged with a criminal offence. The following three areas of concern are addressed below: adequate time and facilities to prepare defence, effective legal representation, and reliance on anonymous informants and intelligence or security reports.

#### *i Adequate time and facilities to prepare defence*

Article 14(3)(b) of the International Covenant on Civil and Political Rights requires that anyone charged with a criminal offence has the right to adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing.

Of the 475 hearings (77 per cent of all terrorism-related cases observed) where the court had appointed a defence counsel for the defendant, defence lawyers were almost exclusively assigned at the beginning of the trial session only, and therefore had little or no opportunity to familiarize themselves with the case file or prepare their defence. With some rare exceptions, court-appointed lawyers did not request an adjournment either to allow them to consult with their client or review the case file in detail in order to prepare an adequate defence.

In the 44 terrorism-related hearings observed involving children, 81 per cent of the defendants had court-appointed lawyers. In 13 out of 23 hearings observed involving female defendants (57 per cent), women had court-appointed lawyers. The overall percentage of court-appointed lawyers in criminal hearings unrelated to terrorism was significantly lower at 45 per cent (79 out of 175 hearings observed).

Defence lawyers also reported that there was generally no continuity between court-appointed lawyers who represented defendants during the investigative hearings and those who represented them at

[26] Article15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) requires that any statement made as a result of torture is inadmissible as evidence.
[27] Human Rights Committee, General Comment No. 32 (2007) on Article 14: Right to equality before courts and tribunals and to a fair trial (CCPR/C/GC/32).

trial. As a consequence, the court-appointed defence lawyers rarely had prior knowledge of the evidence presented during the investigative hearings or of the case itself.

Similarly, private lawyers raised concerns that they were frequently not granted permission to access to court files, in particular during the investigation phase.

According to international fair trial standards, what constitutes 'adequate time' to prepare a defence depends on the circumstances of the case. If the defence counsel reasonably considers that the time for preparation of defence is insufficient, it is incumbent on him/her to request an adjournment. There is an obligation on the court to accept a reasonable request for adjournment, particularly when the accused is charged with a serious criminal offence. 'Adequate facilities' for a defence includes access to documents and other evidence, including materials that the prosecution plans to offer in court against the accused or that are exculpatory.[28]

### *ii Effective legal representation*

Whilst article 14(3)(d) of the International Covenant on Civil and Political Rights does not entitle the accused to choose a lawyer provided to him/her free of charge, the court must take measures to ensure that the lawyer, once assigned, provides effective representation. The need for the court to consider the interests of justice is particularly acute in cases where the accused is charged with a serious criminal offence and may face severe punishment, such as the death penalty or life sentence.[29]

In addition, the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems[30] provide that 'States should ensure that anyone who is detained, arrested, suspected of, or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process'. This includes ensuring that detainees have access to legal aid for the purpose of submitting appeals and filing requests related to their treatment and the conditions of their imprisonment, including when facing serious disciplinary charges, and for requests for pardon, in particular for those prisoners facing the death penalty.

It was observed that the courts mostly abided by the requirement to assign a court-appointed lawyer where the defendant did not have a lawyer of his/her own choosing and postponed hearings if the defence lawyer was not present. Out of 619 hearings, UNAMI attended five which continued without the presence of a defence lawyer. Of serious concern, UNAMI received consistent reports that no lawyer was allowed to be present during interrogation by police or other security forces.[31]

Moreover, it was consistently observed that defence counsel, in particular court-appointed lawyers, usually played a passive role during both the investigative hearing and trial stages. The typical role of court-appointed lawyers at trial appeared to be limited to requesting the court to exercise leniency towards the defendant, without posing any questions or carrying out other interventions.

Similarly, in the investigative hearings attended, the court-appointed defence lawyers

**Death penalty without effective legal representation**

On 21 May 2019, UNAMI observed a trial hearing in Karkh court, Baghdad, where the defendant was sentenced to death. The court appointed the defence lawyer on the day of the trial. He had not seen his client and had not had access to the court files before the hearing and remained silent during the trial.

[28] Human Rights Committee, General Comment No. 32 (2007), para. 33.
[29] Human Rights Committee, General Comment No. 32 (2007), para. 38.
[30] Adopted by the General Assembly in 2012.
[31] UNAMI is not aware of an instance where a defence lawyer was present during the initial interrogation.

typically played no active part in proceedings, other than reading back to the defendant a transcript of his or her statements given to the investigating judge before asking them to sign it.

Taking into account concerns highlighted regarding the adequate time and facilities to prepare a case, it should be emphasized that misbehaviour or incompetence of court-appointed lawyers may entail the responsibility of the State in terms of article 14 of the International Covenant on Civil and Political Rights, provided that it was manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.[32]

#### *iii Anonymous informants and intelligence or security reports*

Article 14(3)(e) of the International Covenant on Civil and Political Rights guarantees the right of the accused to examine, or have examined, the witnesses against him or her.

In at least 428 cases (69 per cent of all terrorism-related cases observed), in addition to confessions, the evidence admitted – and primarily relied upon – included anonymous witness statements and information based on security or intelligence reports. UNAMI did not observe any instance where the defence counsel had the opportunity to challenge or refute such reports by cross-examining the anonymous witness(es), or where the judge adopted other measures to appropriately compensate for the disadvantage for the defence.

The practice of anonymous witnesses and security information in principle deprives defendants of the right to contest the arguments and evidence adduced by the prosecution, placing them in a seriously disadvantaged position. In exceptional circumstance, the right to a fair trial may permit that the identity of a specific witness remains confidential, particularly to prevent intimidation or protect his/her privacy or security, or for national security concerns, provided there remains fundamental fairness. The United Nations Human Rights Committee has however clarified that any restrictions on rights set out in the Covenant, including the right to a fair trial, must be demonstrably necessary and proportionate and not applied or invoked in a manner that would impair the essence of a right protected under the Covenant.[33] It may also imply that less weight should be attached to a particular witness' statement if it was not possible to cross-examine him/her.[34]

### *B. Confessions and claims of torture or ill-treatment*

The use of evidence obtained through torture or ill-treatment in proceedings of any kind is contrary to international law.[35] Article 37(1)(c) of the Constitution of Iraq also sets out clearly that 'any confession made under force, threat, or torture shall not be relied on'.

Confessions played a central role in the prosecution and were frequently referred to as evidence. In 436 out of 619 of the terrorism-related hearings observed (70 per cent), defendants confessed at some stage in the proceedings. However, UNAMI attended 366 hearings (59 per cent) where defendants who had confessed during the investigation stage subsequently withdrew their confessions at trial.

In 260 terrorism-related hearings observed throughout the country (42 per cent), defendants or defence lawyers raised allegations of torture or ill-treatment that had occurred during interrogation, including four women and 26 defendants who were children at the time of the commission of the

[32] Human Rights Committee, General Comment No. 32 (2007), para. 38.
[33] Human Rights Committee, General Comment No. 31 (2004) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant (CCPR/C/21/Rev.1/Add. 13), para. 6.
[34] Report of the United Nations High Commissioner for Human Rights, 2012 (A/HRC/22/26), para. 39.
[35] Except if a statement or confession is used as evidence that torture or ill-treatment occurred; see Convention against Torture, in particular article 15; article 14(3)(g) of the International Covenant on Civil and Political Rights guarantees the right not to be compelled to testify against oneself or confess guilt. See also Human Rights Committee, General Comment No. 32 (2007), para. 41.

offence (60 per cent of the latter raised such allegations). Comparatively, defendants raised claims of torture or ill-treatment in 32 out of 175 criminal hearings unrelated to terrorism (18 per cent), whereas defendants had confessed at some stage of the proceedings in 75 hearings (43 per cent), with 47 withdrawals at the trial stage.

Whilst UNAMI has no means of verifying the allegations made by the individual defendants, it has been receiving credible reports of torture and ill-treatment by law enforcement and security authorities in Iraq for many years, in particular for the purpose of forced confessions.[36]

In the hearings attended by UNAMI, judges generally did not question evidence obtained from confession, including when the defendants claimed this was extracted through torture or ill-treatment, and were nonetheless appeared to admit the confession as evidence.[37] In 13 hearings, monitors observed medical reports presented which appeared to confirm signs of torture or ill-treatment. It remained unclear how these reports influenced the judge's decision in each case: defendants were acquitted in five monitored hearings during which torture or ill-treatment related allegations were raised, while in four other cases, defendants received sentences of 15 years of imprisonment each.[38] On only one occasion, the court declared a confession to be inadmissible because it had been extracted under duress.

In eight hearings where the defendants had raised allegations of torture, the trial judge referred the defendant for medical examination to assess whether torture took place. There were no instances observed where the court ordered a full investigation after claims of torture were put forward by defendants.

UNAMI emphasizes that the burden of proving that a confession was made voluntarily falls on the prosecutorial authorities.[39] Lack of visible marks of torture or ill-treatment should not be a prerequisite for ruling that a claim of torture or ill-treatment is invalid.[40] Where there are reasonable grounds to believe that torture or ill-treatment has occurred, international law requires State parties to conduct prompt and impartial investigations into the allegations.[41]

### *C. Prosecution for association with, or membership of, a terrorist organization under the Federal Anti-Terrorism Law*

As an important aspect of the principle of fair trial, international law recognizes that individuals should only be held criminally liable and punished for acts for which they possess some personal culpability ('principle of individual criminal responsibility').[42] The acts must be based on a sufficiently precise law ('principle of legality'). In addition, the presumption of innocence until proved guilty according to the law ensures that the burden of proving that a specific crime was committed falls on prosecutorial authorities.[43]

In addition to the broad definitions within the Federal Anti-Terrorism Law, UNAMI is seriously concerned about the wide use of 'membership' of, or 'association' with, a terrorist group as a basis for

[36] See UNAMI/OHCHR *Report on the judicial response to allegations of torture in Iraq*, issued in March 2015. This report is based on monitoring by the UNAMI Human Rights Office (HRO) conducted between January and June 2014. Also see UNAMI/OHCHR, Report on Human Rights in Iraq, July – December 2017; January to June 2017; or July to December 2016.
[37] The assessment of evidence and how it influenced the judge's decision-making did generally not become clear during the hearings.
[38] The remaining hearings were postponed, so the outcome is not known.
[39] See Committee against Torture, Concluding Observations on the initial report of Iraq, 2015 (CAT/C/IRQ/CO/1), para. 22.
[40] In hearings observed by UNAMI, judges required defendants who claimed torture to show visible marks as proof.
[41] Convention against Torture, articles 12 and 16.
[42] See also ICRC, IHL Database Customary IHL, Rule 102. Individual criminal responsibility includes different forms of participation in crime, such as, for example, complicity, conspiracy, incitement, aiding and abetting.
[43] Article 14(2) of the International Covenant on Civil and Political Rights; Human Rights Committee, General Comment No. 32 (2007), para. 30.

conviction of individuals. In the hearings attended, defendants were sentenced almost exclusively under article 4 of the Federal Anti-Terrorism Law, which sets out rules for sentencing – the court does not determine any specific terrorist act prescribed elsewhere in the law as basis for the conviction.

As a consequence, judges required mere proof of 'membership' of, or 'association' with, a terrorist group, rather than any proof that the alleged conduct was in furtherance of a specific underlying crime. During pronouncements of sentences, judges generally did not provide an assessment of the evidence relied upon. Added to this, UNAMI emphasizes concerns raised earlier in relation to the lack of possibility to challenge evidence for defendants and an ineffective defence.

Moreover, the role of the prosecutor was typically passive and limited to giving recommendations on the findings of the case in the hearings observed – effectively leaving the judge to adduce evidence against a defendant and thus practically placing the burden of proof on the latter. UNAMI emphasizes that the lack of distinction between the two roles as allowed by the current legal framework may impede the ability of the judiciary to function in a fully impartial manner, particularly in an environment of high expectations of a severe approach against terrorism by the judiciary.

In light of the provisions of the Federal Anti-Terrorism Law, the broad interpretation of 'membership' or 'association' allowed courts to convict a wide range of defendants. While UNAMI recorded 229 cases where individuals were accused of participating in acts of violence or 'fighting against the Iraqi Security Forces', it also attended 305 hearings where the accusation generally referred to 'joining a terrorist organization'. Cases involved persons providing basic support to ISIL members, such as cooking or selling vegetables and family members of ISIL members, including women and children.

UNAMI notes that – despite the mandatory application of the death penalty required by the Federal Anti-Terrorism Law – Federal courts in fact imposed a range of sentences for terrorist offences ranging from one year to 19 years of imprisonment. This appears to indicate an attempt among some judges, notwithstanding the applicable legal framework, to consider the individual circumstances of cases and the severity of the crimes committed.

However, UNAMI observed little consistency or clarity as to the basis on which sentencing decisions were reached. Similar facts presented during hearings resulted in differing convictions, ranging from death sentences and life sentence to lesser terms of imprisonment or, on some occasions, acquittal.

In cases monitored, no account was taken of the extent to which a defendant's association with ISIL was voluntary or coerced, including wives and children of ISIL fighters. As a particular concern, UNAMI observed two hearings in which the courts sentenced defendants because they had provided medical services to ISIL fighters.[44]

### Sentences for association with ISIL

On 23 April 2019, UNAMI observed in Erbil Criminal Court the case of a wife of an ISIL fighter who was condemned to three years of imprisonment based on evidence provided by an informant that she used to prepare meals for her husband and fellow ISIL fighters. In another case, observed on 23 May 2019 in Karkh Juveniles court in Baghdad, a juvenile (aged 14 at the time of the alleged offence) was condemned to 15 years of imprisonment on the basis of his admission that his family (his father, mother and three brothers) were part of a group of civilians that acted as 'human shields' to protect a group of ISIL fighters from aerial attack.

[44] One defendant was sentenced to eight years of imprisonment for providing physiotherapy to wounded ISIL members in Erbil and another received a life sentence in Mosul for providing medical services to wounded ISIL members as pharmacist.

UNAMI highlights that customary international humanitarian law explicitly protects people exclusively assigned to the performance of medical duties. Personnel engaging in medical tasks must always be respected and protected, unless they commit, outside of their humanitarian function, acts that are harmful to the enemy.[45]

It should be noted that ISIL deliberately created a climate of extreme fear in areas they controlled. Of those tried on the basis of their 'membership' or 'association' with ISIL, some may simply have been unable to flee, were forced to live under ISIL rule, and complied with the group's social norms under conditions of coercion. Cases observed failed to sufficiently differentiate between voluntary and involuntary collaboration, as well as between more serious crimes and lesser offences.

UNAMI also received information that judgments were frequently overturned by the Court of Cassation,[46] leading to the imposition of harsher punishments, including the death penalty. UNAMI attended 50 re-trials of terrorism-related cases, which included an announcement of the judgment of the court; 42 of the 50 sentences were revised upwards on the grounds that the sentence passed at first instance was insufficiently severe: from 15 years imprisonment to life imprisonment, from life imprisonment to the death penalty, and from acquittal to various prison sentences or the death penalty. UNAMI observed two cases of the 50 where the sentence was lowered following a re-trial, while in six of those cases, the sentence did not change.

In light of the seriousness and severity of the crimes committed by ISIL and other terrorist groups, it is imperative to hold perpetrators duly to account. Nonetheless, the broad application of the Federal Anti-Terrorism Law to any form of 'membership' of or 'association' with a terrorist organization, alongside a lower standard of proof and serious disadvantage for defendants to present their cases, also risks amounting in its effect to a form of collective punishment of certain communities in the Iraqi population.

### *D. Application of the death penalty*

Article 6 of the International Covenant on Civil and Political Rights guarantees the right to life. For States that have not yet abolished the death penalty, its application is strictly limited to 'most serious crimes', meaning intentional killing or murder. In addition, violation of the fair trial guarantees provided for in article 14 of the Covenant in proceedings resulting in the imposition of the death penalty would render the sentence arbitrary in nature, and execution in violation of article 6 of the Covenant.[47] These rights, as noted above, include the right to a fair and public hearing by a competent, independent and impartial tribunal established by law; the right to be presumed innocent until proven guilty according to law; the right to adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing; and, importantly in capital cases, the right to have their conviction and sentence reviewed by a higher tribunal according to law. Violations of other provisions of the Covenant, notably article 7 concerning torture or ill-treatment, or of other relevant international law, such as rights to consular assistance of foreign nationals, if unremedied, also render subsequent executions arbitrary. Finally, according to article 6 of the Covenant, anyone sentenced to death shall have the right to seek pardon or commutation of the sentence.

Furthermore, under international humanitarian law - which also applies to trials related to armed conflict - the carrying out of executions without previous judgment affording all the judicial guarantees

[45] ICRC, IHL Database Customary IHL, Rule 25.
[46] This is also indicated from discussions with judges and lawyers.
[47] Human Rights Committee, General Comment No. 36 (2018), para. 41; see also Safeguards guaranteeing protection of the rights of those facing the death penalty, approved by Economic and Social Council resolution 1984/50 of 25 May 1984.

are explicitly prohibited by article 3 common to the four Geneva Conventions of 1949. Under international law, executions carried out in violation of this prohibition may amount to a war crime.

Of the 317 terrorism-related trial hearings in Federal courts attended which involved the pronouncement of sentences, judges applied the death penalty in 100 instances, involving 105 defendants (31.5 per cent). In contrast, UNAMI only observed three cases in general criminal hearings where the death penalty was applied, out of 105 (less than 3 per cent).

In at least 19 hearings, observations indicate that the defendants were sentenced to death even though the accusation only referred to mere 'membership of a terrorist organization' without reference to any acts of violence.[48] At a minimum, these sentences fall below the 'most serious crimes' threshold required by article 6 of the Covenant.

In addition, the overall findings concerning the lack of respect for procedural guarantees and fair trial rights as outlined in this report give rise to serious concerns that death sentences and subsequent executions could be in violation of articles 6 and 14 of the Covenant, which if carried out would to that extent amount to a violation of the right to life.

In the Kurdistan region, a *de facto* moratorium on the death penalty has been in place since 2008, based on an instruction from the former President of the Kurdistan region, indicating that death sentence warrants are not to be processed. This instruction has been breached on at least two occasions, with executions recorded in 2015 and 2016.

In the 186 trial hearings attended in the Kurdistan courts, ISIL defendants were almost exclusively prosecuted under the provisions that prohibit membership of a terrorist group (article 3(7) of KRI Anti-Terror Law), which attracts a sentence of life imprisonment rather than the death penalty. While courts handed down a full range of sentences from 2 years -up to- life imprisonment, UNAMI observed one hearing in the Kurdistan region in which the defendant received the death penalty.

UNAMI, consistent with the general position of the United Nations, opposes the use of the death penalty in all circumstances as a matter of policy. The international community as a whole is moving towards the abolition of the death penalty. States from all regions increasingly acknowledge that the death penalty undermines human dignity, and that its abolition, or at least a moratorium on its use, contributes to the enhancement and progressive development of human rights.

### *E. Publicity of hearings and the victims' right to the truth*

Article 14 of the Covenant on Civil and Political Rights guarantees the right to a public hearing. While certain limitations may apply, the publicity of hearings is based on the idea of transparent administration of justice.

UNAMI is not aware of any trial hearing for adult defendants[49] held entirely in closed session. However, it received reports about limitations of access to certain categories of individuals and instances where public access to trials was subject to authorization by courts, in particular applying to terrorism-related cases. UNAMI also observed instances when family members of defendants were not permitted inside the courtroom.

[48] UNAMI notes that the majority of hearings in death penalty cases typically make reference to defendants 'fighting against Iraqi Security Forces' in addition to 'membership of a terrorist organization', with insufficient details presented to allow for an assessment whether the 'most serious crimes threshold' had been reached.

[49] Hearings involving children are effectively held in closed session with only a close family member of the defendant permitted to attend to protect the best interests of the child.

UNAMI notes that, apart from exceptional circumstances, a hearing should be open to the general public, including the media, and should not be limited to particular categories of persons. Courts should provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, *inter alia*, the potential interest in the case and the duration of the oral hearing. Even where trial has been closed to some degree, the court's judgment must be made public, except in limited circumstances. [50]

The right to a public hearing also provides an important safeguard for the interest of the individual and of society at large [51] and facilitates the right to access to justice and to the truth for victims and their families. Victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and to learn the truth in regard to these violations.

> *'The absence of victims from ongoing trials impedes access to the truth and exposure of all the circumstances of the crimes committed, which negatively affects the creation of appropriate conditions for any international investigations into international crimes committed on Iraqi territory and against unarmed Iraqi citizens.'*
>
> *Statement by the Eyzidi Organization for Documentation, issued on 15 July 2019*

In the hearings observed, attendance of victims of acts of terrorism was limited.[52] Although the trials for adult defendants are supposedly open to the public, the dates of the hearings or the names of the defendants were not made public in advance. In addition, the broad and widespread reliance on 'membership' of, or 'association' with, a terrorist organization fails to meet victims' interests in exposure of the full range of crimes committed.

These practices limit the possibility for the general public - and for victims and their families in particular - to see the perpetrators appropriately being held to account. It is thus less likely to facilitate processes of 'closure' for victims, or to create a basis for any movement towards reconciliation.

## VI. Conclusion

UNAMI findings give rise to serious concerns that basic fair trial standards have not been respected in terrorism-related trials. UNAMI also identified a number of intrinsic problems within the broader legal framework and system of counter-terrorism prosecutions, the scale and scope of which are beyond the power of the courts to address.

The violations of fair trial standards relating to equality before courts and the fairness of hearings – in particular with regard to ineffective defence and limited possibility to challenge evidence – placed defendants at serious disadvantage compared to the prosecution. The overreliance on confessions, with frequent allegations of torture or ill-treatment that were inadequately addressed and that constitutes a human rights violation in itself, further added to the disadvantage faced and fair trial concerns.

In addition, prosecutions under the anti-terrorism legal framework – with its broad definition of terrorism and related offences – focused on 'membership' of a terrorist organization without

[50] Human Rights Committee, General Comment No. 32 (2007), paras. 28-29.
[51] Human Rights Committee, General Comment No. 32 (2007), para. 28.
[52] According to the Criminal Procedure Code, victims can participate in criminal proceedings as plaintiffs or may be called as witnesses; see Criminal Procedure Code No. 23 of 1971, articles 10 et seq and 58 et seq.

sufficiently distinguishing between those who participated in serious crimes and those who joined ISIL out of perceived necessities of survival or under coercion.

The need for victims to be part of a holistic approach to justice and accountability also needs to be taken into account. Victims have a right to the truth, including exposure of the circumstances of the range of crimes committed.

In the past, allegations of torture and ill-treatment, unfair trials and the misuse of broad anti-terrorism legislation to target specific communities contributed to the conditions, which enabled ISIL to find popular support. Betrayals of justice, following flawed trials – which may include unlawful and inhumane detention and capital punishment – can only serve a narrative of grievance and revenge, which risks exacerbating tensions between communities.

It is also imperative to counter collective blaming of communities, as it undermines the legitimate efforts of the Government to ensure personal accountability for individual perpetrators. The current system of punishment imposed for 'membership' of a terrorist organization, in particular 'ISIL membership', risks being perceived as indiscriminate in its application, imposing disproportionate penalties and at times resembling collective punishment for certain (predominantly Sunni) communities.

The root causes of violence and conflict in Iraq need to be addressed in terms of human rights violations suffered by all communities in the country over several decades. This includes adherence to crucial elements of robust safeguards for detention, procedural guarantees and fair trials. This would demonstrate commitment to justice, while also constituting a necessary building block towards greater inter-community reconciliation and social cohesion.

Justice delivered in full compliance with human rights will build trust amongst all communities in Iraq, who share the desire for accountability of those responsible for the atrocities carried out. Only then can secure foundations be laid for the lasting peace that the Iraqi people deserve.

## VII. Recommendations

UNAMI welcomes the steps taken by the Government of Iraq to seek justice and accountability for crimes committed by ISIL in Iraq. UNAMI also recognizes the challenges faced by the judicial system in tackling an overwhelming caseload in the aftermath of the widespread violence perpetrated by ISIL. In support of the Government's efforts to ensure accountability for the perpetrators of terrorism-related crimes while safeguarding human rights and fundamental freedoms, UNAMI provides the following recommendations to the Government of Iraq:

***Legal and policy framework***

- Revise the anti-terrorism laws to comply with international law and ensure that:
    - The definitions of terrorism and related crimes are precise, based on internationally agreed parameters, and compatible with the principles of legality, foreseeability and precision;
    - Until it is abolished, the death penalty is only imposed for the 'most serious crimes' (meaning murder or intentional killing), should never be mandatory, and is only imposed upon full compliance with fair trial rights;
    - A consistent and more nuanced approach to punishments is adopted and applied, proportionate to and commensurate with the seriousness of the underlying crimes and including alternative measures;

- Confessions obtained under duress are under no circumstance accepted by the court, other than as evidence torture or ill-treatment occurred.

- Revise provisions of the Criminal Procedure Code that allow for extensive reliance on secret statements, reports and confessions, to come into accordance with international standards;

- Consider revision of the function of the prosecutor in the Iraqi criminal system;

- Raise the minimum age of criminal responsibility to an internationally acceptable standard;[53]

- Adopt a moratorium on executions, and commute sentences where there are concerns of unremedied violations of fair trial and procedural guarantees;

- Develop policies on rehabilitation and reintegration of perpetrators of terrorism-related crimes, particularly children, aimed at conflict prevention, and victim participation in judicial proceedings with a view to ensuring the right to the truth.

*Compliance with fair trial rights and procedural guarantees*

- Ensure that defendants have sufficient time, facilities and opportunity to prepare and present their case to the investigative and trial courts under conditions that do not place them at a substantial disadvantage, including appropriate access to case files, ability to comment on circumstances, to adduce and challenge evidence, and to cross-examine witnesses, on the basis of equality of arms;

- Implement an effective standardized referral system so that all detainees have prompt access to qualified lawyers or legal aid providers from the initial phase of investigation, and allow sufficient time to prepare their defence at all stages of the judicial proceedings;

- Ensure that interrogations take place in the presence of defence counsel;

- Provide reasons for judgments at trial and appeal court level, covering the essential findings, evidence for commission of, participation in, or contribution to a specific underlying offence and legal reasoning, including for cases where the public was excluded;

- Ensure that all defendants effectively benefit from the presumption of innocence, without discrimination and that the burden of proving a criminal offence remains throughout upon the prosecutorial authority;

- Develop sentencing criteria taking into account mitigating and aggravating features of the offence, including the potentially coercive nature of the relationship between the defendant and a terrorist organization, and the age and capacities of the individual defendant;

- Apart from exceptional circumstances, justified in each case, ensure that hearings of adult defendants are effectively open to the public.

*Providing effective protection for human rights*

- Issue clear instructions to judges that coerced confessions or statements should not be admitted as evidence in court proceedings except when invoked against a person accused of torture as evidence that the statement was made;

[53] For further details, see Committee on the Rights of the Child, General Comment No. 24 (2019) on children's rights in the child justice system (CRC/C/GC/24), paras. 20 et seq.

- Ensure that the competent authorities take sanctions against judges who fail to respond appropriately to allegations of torture or ill-treatment raised during judicial proceedings;
- Ensure that the burden of proof that the confession was made voluntarily falls on the prosecutorial authority during a trial;
- Provide training to law enforcement officials, judges and lawyers on how to detect and investigate cases in which confessions are obtained under torture or ill-treatment;
- Ensure that fundamental legal safeguards to prevent torture and ill-treatment are effectively afforded from the outset of deprivation of liberty, including access to an independent medical examination and contact with the outside world;
- Consider ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

## Annex I: Statistics from UNAMI monitoring of investigative and trial hearings

| Number of hearings and defendants | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Governorate | No. of hearings[54] | | | | No. of defendants[55] | | | |
| | Investigation hearing | Trials of children[56] | Trial hearing | Total no. of cases | Investigation hearing | Trials of children | Trial hearing | Total no. of defendants |
| Anbar | (3) | | 12(5) | 15 | 3 | | 16(1) | **19** |
| Baghdad | (15)[57] | 47 (37) | 174(134) | 236 | 17(2) | 48(1) | 223(8) | **288** |
| Basra | | 8 | 80 (14) | 88 | | 8 | 148(2) | **156** |
| Dhi-Qar | | 2 | 19 (2) | 21 | | 2 | 26 | **28** |
| Erbil | | | 187 (184) | 187 | | | 189(4) | **189** |
| Kirkuk | | (2) | (30) | 32 | | 2 | 46 | **48** |
| Ninewa | (7) | 6 (4) | 198 (180) | 211 | 7(2) | 6 | 204(5) | **217** |
| Wassit | | 2 | | 2 | | 2 | | **2** |
| Dohuk | | | (2) | 2 | | | 2 | **2** |
| **Total** | **25** | **67** | **702** | **794** | **27(4)** | **68(1)** | **854(20)** | **949** |

| Sentences and type of case | Up to 10 years of imprisonment | 11 - 19 years imprisonment | Life imprisonment | Death penalty | Acquittal | Total |
|---|---|---|---|---|---|---|
| Terrorism (men)[58] | 132 | 41 | 50 | 104 | 131 | **458** |
| Terrorism (women) | 3 | 1 | 5 | 1 | 5 | **15** |
| Terrorism (children) | 10 | 23 | - | - | 4 | **37** |
| Criminal (overall) | 49 | 1 | 20 | 3 | 61 | **134** |
| **Total** | **194** | **66** | **75** | **108** | **201** | **644** |

[54] Numbers of terrorism-related hearings out of the total are indicated in brackets.
[55] Numbers of female defendants are indicated in brackets.
[56] 'Trials of children' refers to all defendants under the Juvenile Welfare Law, which includes adults who committed crimes as children.
[57] This includes one juvenile investigation hearing.
[58] One defendant received a fine as punishment and is not included in the table.

## Annex II: Response by the Government of Iraq to the UNAMI/OHCHR report[59]

Republic of Iraq
Ministry of Foreign Affairs
Human Rights Department
Ref: 12/Arabic letter Meem/7/84
Date: 22/1/2020

Immediate

The Ministry of Foreign Affairs of the Republic of Iraq/Human Rights Department presents its compliments to the United Nations Assistance Mission in Iraq (UNAMI). The Ministry is honored to relay to the Mission of the observations of the Ministry of Justice in the Republic of Iraq regarding the contents of the report issued by UNAMI under the title (Human Rights and the Judicial System in Iraq) as shown below:

1- In page (2) of the report there was reference to a specialized team from the United Nations who had received special training before attending the court sessions, taking into consideration that this team needs legal and judicial expertise and qualifications to act as a specialized team for this task and it is unclear whether this was the case or not.

2- In page (3) of the report paragraph (b) on International Humanitarian Law, there was reference to the additional first protocol annexed to the Geneva Convention, knowing that the first protocol is concerned with international armed conflicts contrary to what was indicated in the report.

3- In page (4) of the report there was reference to the Juvenile Welfare Law. Article (79) of the Iraqi Penal Law 111 of 1969, stipulates that (No person between the ages of 18 and 20 at the time of committing an offence can be sentenced to death. In such a case, he will receive life imprisonment instead of the death sentence.). The Juvenile Welfare Law No. (76) of 1983 in Article 3/Second defined a juvenile as one who has completed 9 years of age but did not complete 18 years of age.

4- In page (5) of the report on the definition of terrorism, we would like to explain that there is a proposal to amend the Anti-Terrorism Law No (13) of 2005 to ensure punishment of all perpetrators of terrorist crimes; including kidnapping and sexual violence crimes committed against women, girls and children, taking into account that there is no legal characterization that explains that these conflicts are non- international conflicts but rather anti-terrorism operations subject to the anti-terrorism law. Iraq acknowledges that fighting against ISIS is an "armed" international conflict and fall within the context of fighting terrorism.

   The Iraqi Constitution and the laws in force of jurisdiction have defined the death penalty on those who commit the most serious crimes in society explicitly and accurately for their importance in the lives of the citizens. The procedures of ruling and execution takes long time to ensure the fairness of the court rulings as this affect the lives of the accused in such penalties, and that the Iraqi judiciary is fully committed to the principles of justice by applying the law and issuing fair sentences against the perpetrators of such crimes.

5- Regarding what was stated in more than one paragraphs of the report about implementation of capital punishment (P 5 as an example) for terrorism crimes in accordance with international and national standards, we need to point out that the Iraqi law in dealing with death penalty has adopted the criterion of the most serious crimes as the criminal intent in (all terrorism-related crimes) has a general and private (personal) objectives. (The personal motivation…executing an organized individual or collective terroristic scheme) (destabilization of security and stability), whereas, terroristic motivation aims at (threatening the national unity and social integrity and putting the state's security and stability at risk….). The actual perpetrator may cause the killing of one person or may commit a single act of terror, while an instigating accomplice, a financer, or a supporter who hides, or accommodates a "terrorist" is more dangerous than the actual perpetrator.

[59] This is an unofficial translation. For the official response of the Government of Iraq (received on 26 January 2020) to the UNAMI/OHCHR report, please see the Arabic version of this report.

On the other hand, the Anti-Terrorism Law No 13 of 2005 did not tackle procedural issues because it is a penal law, therefore, the procedural issues are considered part of the applicable Criminal Procedure Code.

The Ministry of Foreign Affairs of the Republic of Iraq/Human Rights Department avails itself of this opportunity to express its highest consideration and respect to the United Nations Assistance Mission for Iraq.

United Nations Assistance Mission for Iraq (UNAMI)/Baghdad

//Signed & Stamped//

Human Rights Department

Ministry of Foreign Affairs

Republic of Iraq

22/01/2020

## Annex III: Response by the High Judicial Council to the UNAMI/OHCHR report[60]

Republic of Iraq
Ministry of Foreign Affairs
Human Rights Department

Ref.: 12/Arabic letter Meem/7/90
Date: 26/1/2020

The Ministry of Foreign Affairs (MoFA) of the Republic of Iraq presents its compliments to the United Nations Assistance Mission for Iraq (UNAMI) in Baghdad. With reference to Note No. (81) by UNAMI's Human Rights Office, dated 21/01/2020, MoFA has the honor to enclose herewith remarks by the High Judicial Council regarding the report titled "Human Rights in the Administration of Justice in Iraq" issued by UNAMI.

The Ministry of Foreign Affairs avails itself of this opportunity to reiterate to the United Nations Assistance Mission for Iraq in Baghdad the assurances of its highest consideration and respect.

Enclosures:
Remarks (4 pages).

//Signed & Stamped//
Human Rights Department
Ministry of Foreign Affairs
Republic of Iraq

United Nations Assistance Mission for Iraq (UNAMI)/ Baghdad

1- The High Judicial Council, concerned for applying the highest standards of justice in accordance with international conventions, has sought applying several steps to achieve that goal. These steps are being discussed initially during the periodic meetings of the Council, and the outcomes of these discussions are formulated into recommendations that are circulated as directives to all competent courts. Some of these directives are related to proceedings of investigation with all defendants, including juveniles; to monitoring torture cases and adopting the required measures against perpetrators in accordance with the law; and to ensuring neutrality in such cases. The directives have also emphasized the importance of careful deliberation in issuing arrest warrants until reaching adequate conviction by the competent judge in the existence of relation of some persons to commitment of crimes, including terrorist crimes, and on that basis, victims have filed complaints against those defendants. They have also assured providing all guarantees specified by the Constitution and the law in taking down testimonies of defendants who admit their guilt. The directives have also emphasized the court's role in finalizing procedures of collecting other evidence to ascertain the truthfulness of such confessions. Subsequently, the issue should be left to the competent court to undertake its role in discussing the evidence and to verify its truthfulness in order to adopt such evidence as proof to convict defendants and to hand down sentences against them.

2- Following security stabilization as a result of eliminating ISIS terrorist elements and activating the legal procedures against arrested elements of those gangs, beside the initiative of the affected persons to provide information on many of those elements while requesting implementation of legal procedures against them, a great increase occurred in the number of such cases. To address that issue, the High Judicial Council took the initiative and re-opened all the courts in the liberated areas; increased the number of investigative judges at the courts considering such cases at governorates' centers; increased the number of penal (disciplinary) bodies at criminal courts while limiting their tasks in considering such

[60] This is an unofficial translation. For the official response of the High Judicial Council (received on 27 January 2020) to the UNAMI/OHCHR report, please see the Arabic version of this report.

cases in order to allow for completion of the trial procedures and provision of all the required guarantees to achieve this goal.

3- Establishment of a committee comprising senior retired judges to reconsider the main laws. The said committee has finalized a draft bill for the Iraqi Penal Code, Criminal Procedures Code, and the Juvenile Welfare Act. The said bills are still under discussion by the State Shura (Consultative) Council.

4- Effective contribution to supporting and legislating a number of laws relevant to supporting courts procedures; including the law on the Protection of Witnesses, Victims and Informants to encourage relevant parties to come forward with the information they have regarding the trial of persons accused of committing terrorism and corruption related crimes. The Anti-Money Laundering and Counter-Terrorism Financing Law is also included.

5- As the judgements issued in the cases related to terrorism crimes are subject to mandatory review, the Federal Court of Cassation has played a great role in reconsidering a lot of conviction decisions and rulings and in establishing cassational principles that have been taken as a guide by criminal courts. The said principles addressed many aspects related to courts procedures and explained any ambiguity or confusion that had accompanied the implementation of the Iraqi Code of Criminal Procedure and the Counter-terrorism law.

6- Dozens of judges, members of the Public Prosecution Office and judicial investigators competent with terrorism-related cases have been involved in development courses. All judges treated all submitted cases with consummate professionalism and neutrality whether in investigation or trial. The High Judicial Council sought to get many officers tasked with investigative duties join training courses at the Judicial Institute to develop their investigative skills, especially terrorism-related cases, and emphasize adherence to international standards when investigating suspects of such cases;

7- The Presidencies of the Judicial Oversight Commission and Public Prosecution Office played a crucial and exceptional role in following-up and monitoring the status of detained defendants whether they were adults or juveniles of all groups including those accused of committing terrorist crimes at their places of confinement or when they are investigated until their cases are investigated, which helped in settling thousands of such cases in a record time in addition to documenting any violation committed by the investigators through field visits made by the judges and members of the Public Prosecution Office and record such incidents officially in visit reports as well as recommending ways to address reported negative indicators in such reports. This is in addition to receiving complaints lodged in this regard, investigate them and take legal action against those judicial or non-judicial staff found culpable of committing any violation and as per the law and notify other parties to take similar actions against their staffs.

From the above, we find that the signals in the said UN report do not fully convey the truth with respect to the size of accomplishment in the way of settling the cases of the detained persons who are accused of committing terror crimes from which the Iraqi people, in all its spectrum, suffered, nor does it convey the size of damages these crimes caused at all levels of life. The High Judicial council, through a series of measures and decisions taken by it, have enabled the criminal courts to embrace the big number of those accused and determine their fate with strict observance of the highest norms of justice and transparency as to the provision of all legal guarantees with regard to dealing with those accused both during investigation and trial. The HJC is still, and in coordination with relevant bodies, welcoming any remarks that are influential in helping it achieve its orientation and is considering and analyzing them to find proper means of addressing these remarks within the powers vested to it by the law.

## Annex IV: Response by the Kurdistan Regional Government to the UNAMI/OHCHR report[61]

KURDISTAN REGIONAL GOVERNMNET COUNCIL OF MINISTERS

Office of the Coordinator for International Advocacy

**Clarification Document in response to the report titled: Human Rights in the Administration of Justice in Iraq**

Arresting ISIL-affiliate juveniles:

According to the system in the reformatory center, completing school is one of the conditions for staying in the center. Accordingly, the minors who were willing to continue going to school could stay in the center until they turn 18 years old, otherwise they would not be allowed to stay in the center. When they attend university, they will be given accommodation in the dormitories until they get a job or find a permanent residence.

To explain investigation and trial process, Erbil Asayish Investigation Court sends the cases to Erbil Criminal Court 2 for terror-related cases. Each governorate in the Kurdistan Region has Asayish investigation courts as well as criminal courts relevant to terror cases. Each governorate has 4 criminal courts, one of which is for terror-related cases.

The statistics show those juveniles and women who were arrested for being ISIL-affiliates were held in the reformatory center. Among the number, 14 boys under 18 were detained during 2017 and 50 boys are convicted and serving their sentence. Of the remaining, 26 are women. Others who were arrested are subsequently released and have been sent back to their places of origin.

Investigations were carried out with most of the detainees who were arrested for ISIL-affiliation. As a result, some were sentenced according to the type of the crime they have committed. Detainees less than 18 years old who were arrested for being ISIL-affiliates were treated as victims rather than criminals. Children who did not have parents and came to Kurdistan were treated as orphans and shelter is provided for them.

[61] Official document received by UNAMI on 21 January 2020.

The General Directorate of the Reformatory Center worked to provide the women and juveniles to have a productive stay and to learn different jobs so they can be self-sufficient after they are released. It also worked to expedite their legal case as they have equal rights alongside all other detainees, including the right to a lawyer. The government provides them with lawyers in case they are financially incapable of providing themselves with one. Similarly, UNICEF had assigned a lawyer to follow up with the cases of the detainees in the reformatory center.

With regards to the children who lived with their mothers in detention, the directorate worked to return the children to their own homes and families, and otherwise with social monitoring houses. The families are usually not interested in accommodating these babies. Daycares were provided to take care of the babies, but according to law, the babies were allowed to stay with their mothers until they turn three years old.

Local and international organizations have been allowed to visit the reformatory centers according to the rules and regulations, which allowed the organizations to pay visits twice a week due to workshop schedules for the detainees given that they gave prior notice. The detainees were allowed to make phone calls to their families at any time except when they were under investigation. Furthermore, a special program was designed by the Ministry of Education for the detainees who wanted to continue their education in Arabic language.

Regarding healthcare services, the detainees were sent to hospitals when necessary. Those with chronic diseases were allowed to make their own healthy food, and regular medical checkups were done for the detainees.

Procedures for arresting suspects:

ISIL attacks in 2014 resulted in the displacement of thousands of people from the areas that were attached to the Kurdistan Region. Due to the huge influx of IDPs, separating innocent citizens and ISIL affiliates was not an easy task; it was very challenging for the Peshmerga and security forces. This encouraged the security forces to carry out certain security procedures to protect the safety of the civilians and IDPs while preventing ISIL affiliates from infiltrating the civilian IDPs.

Upon the arrival of refugees and IDPs in the reception centers, the security forces would start checking their identities and gather information on them. If they were suspected to be ISIL-affiliates, they would be transferred to Asayish and special courts. There have been many cases where there has been clear evidence of the suspects' ISIL-affiliation. In some cases, they were even ISIL snipers and they had participated in ISIL military and ideological trainings.

The information is gathered from their own confessions and witness testimonial. Prior to liberating their areas, there has also been intelligence information on certain suspects. The security forces confirm the information before they arrest the suspects or put them under investigation.

Arrests without a court order and legal procedures were not allowed. After their arrest, the detainees had full access to their legal rights according to international principles and laws. Consequently, after their arrest, all the detainees and suspects were treated according to the amended Iraqi Criminal Procedure Code No. 23 of 1971. The procedures include confirming the person's identity and beginning the investigations.

Whoever is arrested by the security forces is kept for 24 hours for investigation, later will be treated based on the results of the investigations, and afterwards will be sent to the special courts. However, due to the large number of IDPs, sometimes the legal procedures become time-consuming and it takes

longer to finalize the cases. To solve that issue and make the process faster, Ministry of Interior monthly sends a list of the names of detainees whose cases are pending to the Court of Appeals in order to carry out the trial process.

Legal Procedures regarding the detainees:

There are three types of detention places in the Kurdistan Region: arrest and conviction offices, reformatory centers, and juvenile and women reformatory centers. The arrested criminals and suspects are dealt with based on the amended Law No. 23 of 1971 which is a Principles of Criminal Trial. The procedures include verifying the suspect's identity and starting an initial investigation. Should a crime be proved, the detainee has the right to have a lawyer, and if he is unable, the court must provide him with a lawyer and their families are informed about their arrest in the police station. Consequently, the case will be sent to a special court to be finalized.

If an individual attacks other people using their official uniform and a governmental ID, he will be punished by Article 289 of the amended Iraqi Penal Code of 1969. The punishment is imprisonment that is not less than 15 years.

Peshmerga forces temporarily take hostages only during war for a few hours. After conducting a primary investigation, they will be handed over to other security forces (Asayish). The Ministry of Peshmerga does not have any war hostage prisons or other detainees.

Members of the General Prosecutor do not have an office within the building of Erbil General Asayish. However, a judicial investigator from Ministry of Interior has an office in the General Asayish building and members of general prosecutors' office use this office to carry out their work. Torturing detainees is prohibited under all conditions, and no torture cases have been recorded.

Torturing ISIL juvenile detainees and secret detention centers:

Torturing detainees for forced confession is completely and utterly prohibited by the KRG. According to Article 333 of the amended Iraqi Penal Code (No. 111 of 1969), the defendants have the absolute right to file a complaint. The reason why no committees have been formed to investigate the reported cases of torture is because no complaints have been issued by the detainees.

Forced confession and torturing detainees and prisoners by police and security officers is completely and utterly prohibited. According to the Iraqi Constitution Article 9/3, the detainees have the right to file a complaint to the relevant entities to the Ministry of Interior, General Prosecutors Office, Ministry of Justice, and Ministry of Human Rights. We have not received any complaints regarding this issue yet.

Representatives of the General Prosecutor's Office are present in the reformatory and detention centers, and in cases of any complaints from the detainees regarding torture, the general prosecutor's office will be immediately informed.

Death Penalty:

The 1969 amended Iraqi Penal Code No 111 Act 406 (Death Penalty) is suspended in the Kurdistan Region. The detainees convicted under the Act, their sentences are reduced to life imprisonment, twenty to twenty-five years imprisonment for each murder. The death penalty, however, was implemented for cases of rape. Kurdistan Parliament was in the process of passing a general amnesty bill which would result in the release of a number of convicts on bail or reduction of their service in prison.