



**Supplement to the
International Protocol on
the Documentation and
Investigation of Sexual
Violence in Conflict:**

Iraq

**GUIDANCE FOR PRACTITIONERS IN IRAQ
MARCH 2018**



Institute for International
Criminal Investigations



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ABOUT IICI

The Institute for International Criminal Investigations specialises in building and strengthening the capacity of international, national, civil society and other investigators and practitioners to document and investigate war crimes, crimes against humanity, genocide and serious human rights violations. Its course offerings include training on the investigation of conflict-related sexual and gender-based violence. More information on IICI can be found at www.iici.global.



TABLE OF CONTENTS

Note that chapter and section numbering largely mirror those in the second (March 2017) edition of the *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (“IP2”) for easy cross-referencing, though note not all IP2 chapters are included for further country-specific elaboration.

ACRONYMS	iii
PART I: USING THE INTERNATIONAL PROTOCOL IN IRAQ	1
CHAPTER 1: Using The International Protocol & This Supplement, And Other Notes On This Supplement	1
PART II: WHAT IS SEXUAL VIOLENCE?	3
CHAPTER 2: Understanding Sexual Violence	3
A. Contextualising Sexual Violence	3
1. Gender and Conflict in Iraq	3
B. Conflict and Atrocity Related Sexual Violence in Iraq	4
Saddam Hussein’s Use of Sexual Violence and Torture against Political Opponents and Detainees	4
Post US-Invasion Surge in Sexual Violence	4
Intensifying violence before Da’esh Attacks and Territory Seizure in 2014	5
Da’esh Sexual Violence and Subjugation of Women – 2014 onwards	5
C. Impact of Sexual Violence in Iraq	6
PART III: ACCOUNTABILITY AVENUES AND REMEDIES	9
CHAPTER 3: Accountability Avenues And Remedies	9
A. Overview of Accountability Avenues and Remedies for Victims	9
1. Domestic Avenues (in Iraq)	9
2. Regional and International Human Rights Mechanisms	11
3. Investigative and Fact-Finding Bodies	11
4. International and Hybrid Courts and Tribunals	11
5. Proceedings in Third States – Extra-territorial Jurisdiction including Universal Jurisdiction	12
CHAPTER 4: Individual Criminal Responsibility	15
A. Introduction	15
1. Legal Framework	15
B. Elements of Crimes	16
Main Crimes under Iraqi Law Relevant for Sexual Violence	16
Iraqi Law – Modes of Liability	21
Defences under the Iraqi Penal Code (which generally do not reflect the strictly defined defences under international law):	24
C. Factual Scenarios	26
D. Rules of Procedure and Evidence	27
1. Consent	27
2. Corroboration	27
3. Prior and Subsequent Sexual Conduct	28
4. Other Protective Measures	29

PART IV: DOCUMENTATION IN PRACTICE: PREPARATION	31
CHAPTER 7: Do No Harm	31
A. Key Concepts	31
1. Harm.....	31
B. Informed Consent	35
C. Mitigating Harm.....	38
1. Threat and Risk Assessments for Iraq	38
2. Coordination Problems in Northern Iraq	38
4. Referrals in Iraq (men, women, girls and boys).....	41
CHAPTER 9: Planning	42
ANNEX I: EVIDENCE WORKBOOK USING IRAQI LAW.....	45
ENDNOTES	55

ACRONYMS

CARSV	Conflict and Atrocity Related Sexual Violence
CAT	Convention Against Torture
CBO	Community Based Organisation
CED	Convention on Protection of All Persons from Enforced Disappearance
CEDAW	Convention on Elimination of Discrimination Against Women
CERD	Convention on Elimination of Racial Discrimination
CIJA	Commission for International Justice and Accountability
CMR	Clinical Management of Rape
COI	Commission of Inquiry
CPC	Criminal Procedure Code
CRC	Convention on the Rights of the Child
CRC-AR	Additional Protocol to CRC on Rights of Children in Armed Conflict
CRPD	Convention on Rights of People with Disabilities
DCVAW	Directorate on Combatting Violence Against Women, KRI
FCO	Foreign & Commonwealth Office of the UK
FFM	Fact-Finding Mission
FGM	Female Genital Mutilation
GBV	Gender-based Violence
GOI	Government of Iraq (Federal)
IICI	Institute for International Criminal Investigations
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Crescent
IHT	Iraqi High Tribunal
IIIM	International Impartial and Independent Mechanism for Syria
INGO	International NGO
IP2	International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, 2nd Edition: March 2017
IPV	Intimate partner violence
KRG	Kurdish Regional Government
KRI	Kurdistan Region, Iraq
MOMA	Ministry of Martyrs and Anfal Affairs, KRG

NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
PSEA	Prevention of Sexual Exploitation and Abuse
PSVI	Preventing Sexual Violence in Conflict Initiative, United Kingdom Foreign and Commonwealth Office
SGBV	Sexual and gender-based violence
SGM	Sexual and gender minorities
SOP	Standard Operating Procedure
UJ	Universal Jurisdiction
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNAMI	United Nations Assistance Mission for Iraq
UNCOI	United Nations Commission of Inquiry
UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	United States of America

PART I / USING THE INTERNATIONAL PROTOCOL IN IRAQ

CHAPTER 1 / USING THE INTERNATIONAL PROTOCOL & THIS SUPPLEMENT, AND OTHER NOTES ON THIS SUPPLEMENT

Note about Using the International Protocol & its Iraq Supplement. This Supplement must be read alongside the March 2017 (2nd edition) of the *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law (IP2)*.¹

This Supplement contains complementary, Iraq-specific content. It does not replace IP2 and generally does not repeat the content of IP2. The Supplement generally cannot be used on its own.

The order, formatting, section and paragraph numbering, etc., of this Supplement correspond to that of IP2 to facilitate the effective use of the Supplement alongside IP2.

Like the English version of IP2, its Arabic and Kurdish translations should be available on the FCO's website sometime during the first half of 2018. The English, Arabic and Kurdish versions will also be available on IICI's website in due course.

The primary audience of this Supplement are those who are documenting or participating in accountability processes for conflict and atrocity related sexual violence (CARSV) in or concerning Iraq, whether as members of civil society, the legal profession, officially mandated Iraqi or Kurdish Regional Government in Iraq (KRG) investigators, prosecutors or judges or as international practitioners. However, practitioners who document sexual or gender-based violence (SGBV) which is unrelated to past or ongoing conflicts in Iraq or other forms of crimes should also find the Supplement (and IP2) useful.

For this Supplement, "mandated actor" means a person or body granted official government powers or mandate to act in a law enforcement, investigation, expert witness, prosecution and/or adjudicative function. This mandate can be given directly by, for example, a government, through national law, through an agreement with a government, through the UN Security Council acting under its Chapter VII powers, or through another body with the power to grant such official mandate.

This Supplement emphasises differences between the international criminal law, procedure and practices set out in IP2, and the law, procedure and practice in or relevant to Iraq. Users of this Supplement should note that laws can be changed and all legislative provisions set out here should be checked against up-to-date law in Iraq. Given the turmoil and violence which Iraq has faced in recent years, it is very possible that new mechanisms and laws, including new definitions of crimes and new rules of evidence and procedure, may be created to try to address these crimes. Indeed there are ongoing discussions about how to ensure accountability for such crimes, and a new international investigative mechanism has just been created at the request of the government of Iraq (GOI) and its terms of reference are being drafted just as this Supplement is being finalised.

The legal provisions addressed in this Supplement are based on an English translation of original Arabic text. The original Arabic text is authoritative and so it is critical that users check the original Arabic text.

Iraq has a federal system, and under its Federal Constitution, the Kurdistan region (KRI) has some delegated executive, legislative and judicial powers. This means that different legal provisions may apply in the KRI. These differences are highlighted in this Supplement, but, users should

check the up-to-date position of the law relevant to their operating locality.

Law is also informed by judicial interpretation. Sexual violence cases are relatively rare in Iraqi courts and court records are hard to find and access. The Supplement has been guided by anecdotal evidence of interpretation and practice by Iraqi courts, but this too changes over time and may vary between different parts of Iraq.

The information in this Supplement should be correct as of mid-November 2017, unless otherwise stated.

Whilst documentation, investigation and accountability for SGBV crimes in Iraq has been relatively rare, in recent years documentation efforts in Northern Iraq have surged in response to the systematic SGBV instrumentalised by Da'esh.² As discussed in more detail below, there is now a serious problem with a large number of *ad hoc*, uncoordinated documentation efforts which may do harm to survivors and to accountability efforts for reasons set out in IP2 and in this Supplement. Practitioners considering documenting CARSV, including in or in relation to Northern Iraq as well as past and other ongoing conflicts in Iraq, are urged to consider what purpose their documentation would serve, what benefit it brings for survivors, whether there is already a mandated actor undertaking this work and how they can coordinate and design their work to minimise any risk of duplication and harm.

Note about Adapting this Supplement. To repeat what is stated earlier, this Supplement is intended to be a living document and tool.

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PART II /

WHAT IS SEXUAL VIOLENCE?

CHAPTER 2 / UNDERSTANDING SEXUAL VIOLENCE

A. Contextualising Sexual Violence

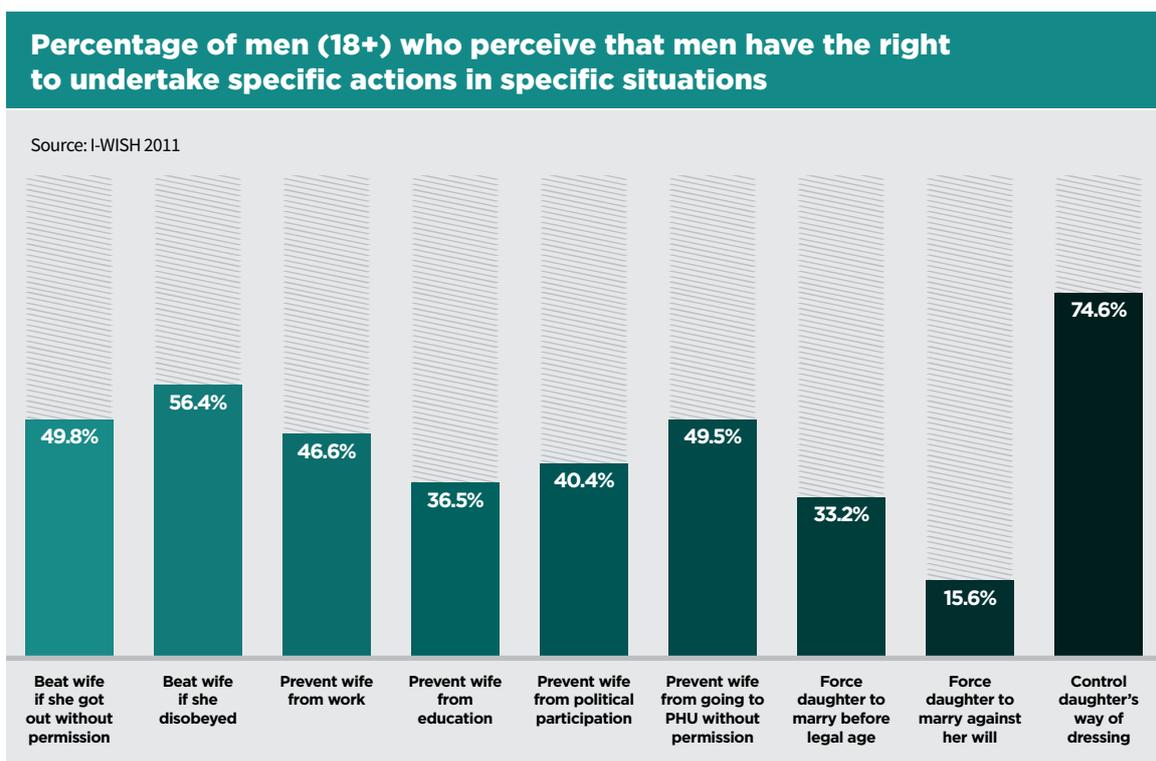
1. Gender and Conflict in Iraq

Across most of Iraq, societal relations and behaviour are based on a traditional patriarchal social and cultural model, with very deeply set binary gender norms which demand conformity. Men are considered the dominant, strong providers, protectors and decision-makers. Women are often seen as wives, mothers and daughters – ‘pure’, vulnerable and to be protected; usually with the assumption that their role and safety is best secured in the home. There are, of course, variations; both towards even more conservative views and also to less fixed roles and more progressive views. There has also been variation over time, with some Iraqi cities becoming markedly more conservative during the 1990s and 2000s.³

A survey in 2011 in Iraq shows how these gender norms influence behaviour, freedoms and violence between men and women. Statistics from Iraq also show high levels of gender-based violence (GBV), particularly domestic violence⁴ and “honour killings” against women.⁵

CARSV is driven and shaped very much by context. Its form and target are often moulded by the underlying culture and gender norms in which it is perpetrated. The impact of CARSV on survivors is frequently heightened by the societal values/judgements where survivors live.

Further information about the context in Iraq is provided in Chapter 7 (Do No Harm) when considering the challenges and risks to documenting and investigating any form of sexual violence in Iraq, and the societal stigma and subsequent harm which survivors face.



B. Conflict and Atrocity Related Sexual Violence in Iraq

Numerous Iraqis have expressed the view that there had been no sexual violence in Iraq before Da'esh crimes started in 2014.⁷ However, CARSV can be traced clearly throughout Iraq's recent history.

Saddam Hussein's Use of Sexual Violence and Torture against Political Opponents and Detainees

During Saddam Hussein's years in power (1979-2003), Iraq experienced a series of international and internal conflicts and instability. For example, the Iran-Iraq war (1980-1988) saw internal campaigns against those thought (by the Saddam Hussein regime) to oppose the regime and/or, for example, align themselves with Iran in some way. Islamist and Kurdish women, among others, were tortured and sexually abused as a way to dishonour their families, often as a means of indirectly attacking male political opponents.⁸ These brutal crack-downs included reprisals against Al Dujail and Balad in 1982 and the Al-Anfal campaign against the Kurds in 1986-1989. The judgements of the Iraqi High Tribunal (IHT) following the regime's fall in 2003 reveal the extent of sexual violence used against its opponents. Sexual violence was integral to torture and terrorisation of opponents in detention.⁹

Al Dujail and Balad Reprisals 1982

Whilst sexual violence was not explicitly charged, the IHT judgement found sexual violence formed part of torture against women detained after the Al Dujail reprisals. This included the "rape of relatives; threat[s] to personally rape the victim; forcing the victim to watch another person being violated; subjecting the victim to humiliating treatment, such as the forceful stripping of clothes accompanied with a method of menacing, such as threatening to cause a severe harm."¹⁰ These practices were conducted in Al-Hakimiya prison, Abu Ghraib prison and in the Lea desert detention camp. The Tribunal found that testimony from witnesses of sexual violence included indirect descriptions due to social taboos and stigma: "'torture of women used to take place at night', they 'undressed them', or 'they raised a women's legs' and 'most of the girls did not marry because of the effects of the torture'.

Al - Anfal Campaign against Kurds 1986-1989

The Anfal Campaign is known mostly for the wholesale and systematic destruction of villages (estimate: 4,500),

high numbers of dead (estimate: 182,000) and the repeated, devastating use of chemical weapons in civilian areas including the Halabja chemical weapons attack which killed thousands of people. However, the same pattern of sexual violence and torture emerged against those detained. Women were separated from the men and subjected to repeated rape by multiple perpetrators; some in front of their relatives, others in front of other women. Some women are believed to have died as a result of this violence.¹¹

While the IHT Judgements do not detail any sexual violence as torture against male detainees in these detention centres, this seems most likely to stem from the substantial stigma and denial of male sexual violence in Iraq, rather than a confirmation that it did not occur.

Other forms of sexual violence associated with the Hussein regime included the kidnap and rape of young Iraqi women and girls in Baghdad by Uday Hussein (one of Saddam's sons) and his militia.¹²

Post US-Invasion Surge in Sexual Violence

In the years between the invasion of Kuwait and first Gulf War in 1990 until the US-led invasion and toppling of the Hussein regime in 2003, sanctions, economic crises, and growing conservatism were accompanied by rising GBV including domestic violence. After 2003, with the presence of foreign troops, weakened state security and law enforcement, and considerable instability/insurgency, increasing and widening forms of GBV including sexual violence were reported: "Rampant domestic violence, verbal and physical intimidation, sexual harassment, rape, forced marriage – as well as increases in *mu'tah* or so-called pleasure marriages – trafficking, forced prostitution, female genital mutilation, and honour-based crimes, including killings".¹³ A sharp rise in abductions and rape against Iraqi women was also reported.¹⁴ Heartland Alliance considered violence against women in girls to have been institutionalised by 2011.¹⁵

The practice of sexual violence as torture in detention continued in government facilities and in foreign forces detention centres, such as Abu Ghraib. Abuses by foreign forces in these detention centres included ritualistic, humiliating forms of sexual violence, such as forced nudity, forced sexual acts or positions, forced masturbation in front of female soldiers or over other prisoners, rape (in-

cluding with chemical lights and brooms) and threats of rape. Often these acts were videoed or photographed. This violence was perpetrated by both male and female soldiers against both male and female detainees.¹⁶ Female US soldiers also reported sexual violence against them by their own male colleagues.¹⁷

Intensifying violence before Da’esh Attacks and Territory Seizure in 2014

After international/US troops left in 2011, violence and insurgency intensified again in Iraq. Da’esh (or its earlier incarnations) increased attacks, building up to 2014 when it began to seize territory, and its systematic practice of sexual violence and subjugation of women began in earnest. During this period of escalation, sexual violence as torture continued in Iraqi detention centres. Reports of sexual violence against men and women detained in Ministry of Justice facilities led to the Iraqi Ministry of Human Rights to confirm it was “pervasive” and “systematic”.¹⁸

There were also waves of attacks by militia of unconfirmed affiliation on men suspected to be homosexual, including a “campaign of killings in 2009” and “emo killings” in 2012. While being GBV, it has also included aspects of sexual violence including forced nudity and humiliation, genital amputation, forcing glue into anal cavities (causing death) and rape. It has been reported

that these widespread and systematic killings were carried out based on lists by militia and could have been ordered by a *fatwa*.¹⁹

Da’esh Sexual Violence and Subjugation of Women – 2014 onwards

In 2014, Da’esh began its ethnic cleansing and land grab in Northern Iraq. In June 2014, it took control of Mosul and then in early August, it attacked Sinjar. Religious minorities, such as the Yazidis, were particularly targeted. When their villages were attacked, Da’esh soldiers executed males who had reached puberty, and abducted the women and girls into a system of slavery that included rape, forced marriage and other forms of sexual violence. Da’esh runs an orchestrated and highly regulated slave-trade with sexual slavery markets, official price lists and rules for selling/bequeathing ownership, and women and girls as young as seven years-old gifted or sold as slaves to other fighters or local businessmen. Some were sold as sexual slaves as many as 15 times. Women and girls have been trafficked across borders, often with their young children, and in many cases raped multiple times by multiple perpetrators and/or subjected to forced marriage, forced abortion, forced pregnancy, forced contraception and other forms of torture and abuse, including forced conversion, beatings, starvation, and being used as human shields from drone attacks targeting Da’esh members. For those who tried to escape or commit suicide, some were punished by gang rapes.²⁰

Examples of Sexual Violence in Iraq	
Abduction and rape.	<i>Examples of sexual violence common in detention settings:</i>
Sexual slavery, trading women and girls.	
Forced marriage, including child marriage.	
“Corrective” rape.	
Trafficking and forced prostitution.	
Genital mutilation (and killing) of homosexual men.	
Forced “virginity testing”.	
Female Genital Mutilation or Cutting (“FGM”).	
Forced abortion.	
	Forced masturbation of men.
	Forced nudity of men and women.
	Forced or simulated sexual acts (including oral sex).
	Forced perpetration or witnessing of sexual violence.
	Threats of sexual violence against female relatives, including daughters.

PART II /

WHAT IS SEXUAL VIOLENCE?

CHAPTER 2 / UNDERSTANDING SEXUAL VIOLENCE

Note: It is important from an international criminal law perspective to distinguish between direct CARSV which is the focus of this field of law (see IP2, pp.11, 18-20 (“sexual violence as a war crime, crime against humanity, act of genocide or other serious violation of international criminal, human rights or humanitarian law”) and broader forms of sexual violence and GBV which have also increased in Iraq during and following these conflicts. These broader forms may be crimes under national law and are likely to be human rights violations for which there may be other forms of accountability and remedies under human rights mechanisms or civil courts. To clarify this further, some examples are set out below.

For example, during Saddam Hussein’s brutal suppression of opponents, Law 101 which imposed the death penalty for prostitution was invoked against hundreds of female dissidents and the wives, mothers, sisters and daughters of male dissidents.²¹ This is a form of GBV (possibly amounting to persecution as a crime against humanity), but it is not sexual violence and therefore does not fall within CARSV.²² As a further example, the rates of parents arranging early marriage for their young daughters have risen in some regions of Iraq, particularly rural areas. While this may be a common phenomenon in situations of conflict and instability, it may not be a form of direct CARSV since it is not a crime committed directly in or in connection to an armed conflict (for the purposes of war crimes law) and/or an attack against a civilian population (for the purposes of crimes against humanity law) but rather a potential consequence from the conflict (but closer factual and legal analyses may suggest a different conclusion). Female genital mutilation (FGM) has been prevalent across Iraq but particularly in the provinces of Erbil and Sulaymaniyah, with one study in 2014 showing as many as

70% of women (of all ages) in Erbil affected (although a significant recent decline has been noted in new FGM cases, giving hope for new generations).²³ While widespread, this form of sexual violence may not be directly related to conflict or atrocities, and therefore many not fall within the definition of CARSV.

It is equally important to note that not all CARSV (as referenced in IP2) is outlawed or defined as a crime under Iraqi law. Nor are some broader forms of SGBV. For example, in Iraq marriage under 18 years old is legal if there is parental consent or judicial approval (not in KRI). Under Iraqi law, ‘sexual penetration’ without consent is not rape if the victim was ‘married’ to the perpetrator during or after. There is no law against forced marriage in Iraqi law (but it is prohibited in KRI law). Under international criminal law, rape within marriage, forced marriage and marriage/acts of a sexual nature against a person who is unable to consent (including due to their age) may all be underlying acts of sexual violence as international crimes (CARSV) (provided all legal elements including chapeau/contextual elements are proven.) Further details about the national law in Iraq can be found in Chapter 4 (Individual Criminal Accountability).

C. Impact of Sexual Violence in Iraq

Most of the impacts detailed in Chapter 2 (Understanding Sexual Violence), Section D on Impact of Sexual Violence (Box 6, pp.25-27) in IP2 also apply in Iraq. There are some specific impacts worth highlighting due to the legal, cultural and social norms, and context in Iraq. The table below highlights some of the more prevalent Iraq-specific impacts of sexual violence. More information regarding risks and threats to survivors can be found below in Chapter 7.

Examples of Impacts of Sexual Violence in Iraq ²⁴			
Physical			
All Victims	Female Victims	Male Victims	Child Victims
» See IP2.	<ul style="list-style-type: none"> » Unwanted pregnancy » Children born of rape (abortion illegal in Iraq). » Court ordered virginity testing (by committee of 3 forensic experts). » “Honour” killing – high rates in Iraq. 	<ul style="list-style-type: none"> » Also at risk of violence and death if perception of homosexuality or dishonour. 	<ul style="list-style-type: none"> » Higher risks of increased physical damage. » Higher risks of physical damage and complications/mortality in pregnancies/births for girls under 16. » “Virginity Testing” (girls). » Suicide (pre-emptive or immediate aftermath) (reported in Da’esh captivity of young girls). » Children of rape may also be a victim of “honour” killings.

Psychological			
All Victims	Female Victims	Male Victims	Child Victims
	<ul style="list-style-type: none"> » Shame, blame. » Suicidal thoughts, self-harm including self-immolation and other methods of suicide. 	<ul style="list-style-type: none"> » Self-isolation and withdrawal. » Identity issues around “masculinity” or “sexuality”. 	<ul style="list-style-type: none"> » Can impact formative development stages, leading to behavioural and relationship difficulties – including regression. » See above: suicidal thoughts or self-harm. » Shame, blame, self-worth. » Increased risk of disorder and psychological problems in adulthood. » Early sexualisation.
Social			
All Victims	Female Victims	Male Victims	Child Victims
<ul style="list-style-type: none"> » High levels of social stigma. 	<ul style="list-style-type: none"> » Considered “unclean”, “dishonoured”. » High rate of “honour based violence” including burnings* » Impact on marriage or marriageability, also arranged marriages as protective (e.g. women and girls married to integrate them and have them accepted by the community again). » Law encourages marriage to perpetrator as conciliation and defence. 	<ul style="list-style-type: none"> » Very high levels of stigma surrounding male victims of sexual violence. » Cultural assumptions/myths around masculinity and sexuality. » Violence and killings against perceived and actual homosexuals, including honour killings. 	<ul style="list-style-type: none"> » Higher rates/risks of re-victimisation. » Interrupted education. » Children born of rape abandoned or outcast from families and communities. » Early marriage.
Socio-Economic and Legal			
All Victims	Female Victims	Male Victims	Child Victims
	<ul style="list-style-type: none"> » Law criminalises sexual intercourse outside marriage and ‘adultery’ (regardless of consent). » Abortion illegal. » Children born of rape stigmatised and unregistered (father). 	<ul style="list-style-type: none"> » Law criminalises anal sexual intercourse outside marriage (regardless of consent). 	<ul style="list-style-type: none"> » Children born of rape are often unregistered, stigmatised and disadvantaged. » Law of nationality provides conditions for nationality of child born to Iraqi mother to stateless or unknown father outside Iraq (e.g. taken by Da’esh to Syria).

*Begikhani, Nazand (2016), *Honour-Based Violence: Experiences and Counter-Strategies in Iraqi Kurdistan and the UK Kurdish Diaspora*, Taylor and Francis, pp.56-57: Examples of ‘honour based violence’ and consequences: “abandonment, incarceration, exile from home, physical attack and punishment ..., stabbings, removal from school and complete deprivation of education, forced marriage, rape and ‘corrective’ rape, public dishonouring, cutting off women’s noses or ears, forced hymen repair, and FGM. ... burnings, forced self-immolation, forced suicide and honour murders.” “[W]omen perceived as ‘bad’, dishonourable or shameful ... had been directly punished and had undergone, in the name of honour, severe physical abuse and torturing, con-

PART II /

WHAT IS SEXUAL VIOLENCE?

CHAPTER 2 / UNDERSTANDING SEXUAL VIOLENCE

finement, the control of their movements, coercion, deprivation of schooling and employment, punitive marriages, mutilation, forced divorce, forced abortion/infanticide and forced prostitution as punishment.”

*The Kurdistan Institute for Judicial Medicine carries out ‘virginity tests’ for all murder, burning and suicide cases, where a file is sent to the court, a distressing practice related to honour (and scientifically unsound – see below). According to Dr Yasin Ameen, director of the Institute, who is personally involved in this process: ‘60 to 70 per cent of the murder cases of women in Kurdistan Region are honour-related’ (p. 62).

*Between January 2010 – June 2014, 1158 self-immolation and burning cases recorded by DCVAW in KRI. (p.61).

PART III /

ACCOUNTABILITY AVENUES AND REMEDIES

CHAPTER 3 / OVERVIEW OF ACCOUNTABILITY AVENUES AND REMEDIES

A. Overview of Accountability Avenues and Remedies for Victims

This section provides an overview of the key accountability frameworks and remedies -- inside and outside Iraq -- which may be available to victims of sexual violence in Iraq. For the most part, currently, these options are in the domestic field (inside and outside Iraq), with no criminal accountability avenues and few effective human rights mechanisms available for Iraqi victims in the international arena. In addition, Iraqi national law is the main instrument which can be used in Iraq. As will be seen in the next chapter, Iraqi law incorporates neither substantive international criminal law nor best practice procedures balancing fair trials and victim protection. Further, Iraqi law also does not permit for the direct applicability of international criminal law.

Iraq operates a federal system within which the Kurdistan region (KRI) has its own executive, parliamentary and judicial powers (unless those powers are reserved at federal level).²⁵ The laws of Iraq apply in the KRI to the extent that they have not been changed by KRI law. The KRI court system largely mirrors the Federal Iraq one. Where there are differences, they are specifically noted below. As can be seen below, there may be a lack of clarity and potential overlap in terms of different courts' or mandated actors' jurisdictions. (See definition of "mandated actor" in Chapter 1 above.)

It is possible that in the future either a hybrid national tribunal (with international crimes as part of its jurisdiction) or an *ad hoc* international criminal court or the International Criminal Court (ICC) may provide much needed broader criminal jurisdiction and more appropriate procedural and evidential protections in relation to CARSV prosecutions. Iraq, with or without international assistance, may also in the future pursue non-criminal forms of accountability and redress, including through a truth commission. The number of criminal and civil cases in third states for crimes committed in Iraq may also increase (though

most states require the presence of the suspect on their territory). Additional civil claims and reparations mechanism may also be possible in the future. Importantly, evidence collected in accordance with -- and which meets -- international criminal law and best practice standards (set out, for example, in IP2) is likely to have value regardless of the forum.

The mechanisms set out below are those in existence by October 2017.

1. Domestic Avenues (in Iraq)

a. Judicial

i. Criminal

» A **criminal complaint** can be initiated by an oral or written complaint by an injured party, any person taking his place in law, or any person who knows that the crime has taken place. If the crime is witnessed by the police, they can also file a complaint. It must be submitted to an investigative judge, a [judicial] investigator, a policeman in charge of a police station, any crime scene officer, or, unless the law says otherwise, a public prosecutor. (Criminal Procedure Code "CPC"; Art. 1A.)

» For **rape**, a complaint can only be initiated by the aggrieved party or someone taking their place in law. (CPC, Art. 3A.) There is an extremely short timeframe for initiating the complaint -- three months from when the aggrieved party becomes aware of the offence or from the disappearance of any compelling excuse which prevents submission beforehand. The right to submit a complaint ceases on the death of the aggrieved party unless the law provides otherwise. (CPC, Art. 6A.)

» There are a number of **mandated criminal investigative bodies** which have been established and have some form of jurisdiction over crimes committed by Da'esh.²⁶

Current Mandated Criminal Investigative Actors in Iraq with Jurisdiction over Da'esh crimes

(7 September 2014) **Commission for Investigation and Gathering Evidence** (“Genocide Office”), led by an investigating judge and established by the KRG High Committee of the Recognition of the Crimes committed against Kurdish Yazidis and Other Ethnic and Religious Minorities (international crimes): jurisdiction (crimes in territory/victims taken from territory or perpetrators within territory)

(Since February 2015 in Iraq) **CIJA** (Commission for International Justice and Accountability) – INGO with local mentored investigators, international analysts, case/indictment building and a mandate to establish and build the capacity of a local **Da’esh Crimes Investigation Unit**, gather and preserve evidence linking individuals to crimes and build prosecution-ready case files pursuant to a memorandum of understanding with the KRG Council of Ministers. (CIJA was mandated by the KRG.) The DCIU receives in-kind logistical and security support from the KRG Ministry of Martyrs and Anfal Affairs (MOMA), while maintaining investigative independence from any government or political body.

(12 June 2017) Higher Judicial Council of Iraq formed 3 **Special Investigative Commissions** (3 investigative judges and 1 prosecutor) based in Snune with a mobile unit – refer cases to criminal courts in Ninevah Province (Mosul Criminal Court).

Local criminal investigative judges where perpetrators detained and mainly focused on terrorism offences, e.g. Ninewah Special Investigative Court on Terrorism.

The Directorate Combatting Violence against Women (DCVAW) in the KRI interprets their mandate to include some of the Da’esh CARSV cases, and in particular secondary violence including ‘honour killings’, forced marriages, etc.

» There are several different types of criminal courts with- in Iraq: the Court of Felonies for non-summary cases; the Court of Misdemeanours for summary cases; the Court of Cassation as an appeal and review court; the Juvenile Court (CPC Art. 233C) for 9-17 years old accused; Military Courts for military personnel (the Military Penal Code 2007). Within the KRI, these are largely replicated and there are also specialist courts established under the Law on Combatting Domestic Violence.

ii. Civil

» A civil claim for ‘direct material or ethical damage’ can be made **as part of the criminal proceedings** against an accused and any person responsible under civil law for the actions of the accused. It is made by petition or oral request confirmed in the written record, at any time during the gathering of evidence, initial investigation and before the criminal court up to the point the judgement is issued. (CPC, Arts. 9-10.)

» A civil claim can also be made under the Civil Code (see Arts. 202, 203, 205, 215) for reparation for harm or injury including moral, honour, etc.

» In 2014, the Iraqi High Commission for Human Rights (IHCHR) and the Iraqi High Judicial Council created special courts to determine claims of human rights violations.

More than 4,000 cases have been referred to these courts relating to 2015 allegations. Many were rejected for lack of evidence or procedural flaws. No judgements had been issued by December 2016.²⁷

iii. Constitution

» While individual protections are provided in the Constitution, there does not appear to be any right of individual petition or claim to the Supreme Court based on a violation of the Constitution.

b. Quasi-judicial (National Human Rights Institution (NHRI), Ombudsman, etc.)

» Iraqi High Commission for Human Rights: Established under the Constitution, Article 102, Law No. 53 of 2008 and the Paris Principles, it is the primary body for the protection of human rights enshrined in the Constitution. Its mandate includes:

- Receiving, investigating, and following up on complaints of human rights violations;
- Initiating lawsuits related to violations of human rights;
- Conducting visits to and assessments of prisons, social rehabilitation centres, and detention centres.

- » KRI Parliamentary Human Rights Committee
- » KRG's Ministry of Martyrs and Anfal Affairs: Compensation for unlawful arrest and detention handles compensation for unlawful arrests or detentions. The Human Rights Commission reported that while approximately 8,000 cases (including many historical cases) received approval for compensation, the government was not able to pay compensation due to budget constraints.

c. Non-judicial

- » Ministry of Justice Human Rights Offices and Complaint Boxes
- » Ministry of Interior Inquiry into Human Rights Violations carried out against civilians in Mosul by Special Forces (May – August 2017).

2. Regional and International Human Rights Mechanisms

Iraq has ratified or acceded to numerous human rights treaties including the Convention Against Torture (CAT), the Convention to Eliminate Racial Discrimination (CERD), the Convention to Protect all Persons from Enforced Disappearance (ICPPED), the Convention on Elimination of Discrimination against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Protocol to the Convention on the Right of the Child on Armed Conflict (CRC-AC), and the Convention on the Rights of Persons with Disabilities (CRPD).

a. Judicial:

- » There is no legally binding human rights court at regional or international level which has jurisdiction over human rights cases in Iraq.

b. Quasi-Judicial:

- » Iraq has not agreed to any individual complaints procedures under Optional Protocols or human rights treaties.

c. Non-judicial:

- » Iraq has agreed to **the inquiry procedures** under the Convention Against Torture, Article 20 (if there is reliable information that systematic torture, a confidential and co-operative inquiry process including visit and may result in report) and the Convention to protect

all persons from Enforced Disappearance, Article 33 (if information that serious, grave or systematic practice, then again a confidential and co-operative inquiry process can be initiated).

- » Individual 'complaints'/cases can be submitted to any of the **Special Rapporteurs and Working Groups** processes, which apply automatically without further state agreement.

- » Iraq has ratified the **Arab Charter of Human Rights** 2004, in force since 2008. This Charter has an oversight committee, and Civil Society Organisations can engage in the **state report review process**.

- » Other: ICRC and UNAMI monitoring of detention centres.

3. Investigative and Fact-Finding Bodies

» On 14 August 2017, Iraq's Foreign Minister, wrote to the United Nations Security Council (UNSC) requesting its assistance to support Iraq's investigations into Da'esh crimes in Iraq. On 21 September 2017, the UNSC passed a resolution (UNSC Resolution 2379) setting up an **International Investigative Team**, to be run by a UN Special Adviser, of both international and Iraqi experts to collect and preserve evidence of international crimes by Da'esh. The use of any collected evidence is to be in 'fair and independent national Iraqi courts'. For other courts, Iraq has to agree on a case-by-case basis. It is to be funded by voluntary contributions and has an initial mandate of 2 years.

» Although the mandate of the United Nations Commission of Inquiry for Syria is limited to Syrian territory, the Commission prepared a report on ISIS crimes against the Yazidis. Its main focus was on what happened to Yazidi women and girls when they were brought from Iraq into Syria. On this basis, it is not clear how the subsequent International Impartial and Independent Mechanism (**IIM**) for Syria will consider its mandate in relation to the same crimes.²⁸

» UNHRC – OHCHR Investigative/Fact Finding Mission on Da'esh crimes. September 2014 – March 2015. Completed its work on issuing report.²⁹

4. International and Hybrid Courts and Tribunals

» Iraq is not a state party to the Rome Statute of the **International Criminal Court**. In order to trigger ICC ju-

PART III /

ACCOUNTABILITY AVENUES AND REMEDIES

CHAPTER 3 / OVERVIEW OF ACCOUNTABILITY AVENUES AND REMEDIES

jurisdiction, Iraq would need to ratify the Rome Statute (although that ratification would not enable the ICC to prosecute crimes committed prior to the date on which the Rome Statute enters into force for Iraq, that is, ratification will not apply retroactively), the UNSC would need to refer the situation to the Office of the Prosecutor (which referral can have retroactive effect), or Iraq would have to make an Article 12(3) Rome Statute declaration for jurisdiction over crimes committed in Iraq or over Iraqi perpetrators (which declaration can have retroactive effect).

» Alternatively, the Office of the Prosecutor could investigate crimes committed in Iraq by nationals of Rome Statute state parties.

» There is an ICC preliminary investigation relating to allegations of crimes committed by UK Services personnel in Iraq between 2003 and 2008. While this was closed in 2006 for insufficient evidence for the majority of reports and for falling below the gravity threshold for incidents where there was evidence, it was reopened again in 2014 and remains ongoing at the time of publication.

5. Proceedings in Third States – Extra-territorial Jurisdiction including Universal Jurisdiction³⁰

There are some examples of criminal proceedings raised in third states for international crimes committed in Iraq. For example, in Finland, there are two sets of cases: (i) Jebbar Salman Ammar, Hadi Habeeb Hilal: both former Iraqi soldiers living in Finland convicted of desecrating bodies; and (ii) two Da'esh brothers for shooting 11 unarmed Iraqi soldiers, part of the Camp Speicher massacre in June 2014.³¹

There are also criminal, military, civil and non-judicial inquiries which have been conducted in relation to the events in Iraq when foreign personnel have been implicated. For example, in the UK, there has been the Iraq Historical Allegations Team (a criminal investigation); Ministry of Defence Iraqi Fatality Inquiries (for deaths at hands of UK soldiers); the Al Sweady Inquiry, and civil claims based on allegations of torture (including sexual violence).

The following chart sets out potential points of access for Iraqi victims to various kinds of justice and accountability mechanisms.

 Domestic level					
Individual responsibility				State responsibility	Both
<p>Judicial</p> <p>Criminal Court</p> <ul style="list-style-type: none"> • KRI and Iraq Special Investigative Judges empanelled. • Usual criminal courts. • DCVAW KRI some jurisdiction (but does not prosecute cases independently of public prosecution system). • Terrorism charges. • UN Hybrid Investigative Team to assist domestic investigations. 	<p>Judicial</p> <p>Military Court</p>	<p>Judicial</p> <p>Juvenile Court</p>	<p>Judicial</p> <p>Civil Court</p> <ul style="list-style-type: none"> • Civil claims under Civil Code but protections for public officials and those who ordered them. • Specialist Human Rights Courts. 	<ul style="list-style-type: none"> • KRG Parliamentary Committee on Human Rights • Ministry of Justice Human Rights Offices and Complaint Boxes • Ministry of Interior Inquiry into HRV carried out against civilians in Mosul by Special Forces (May – August 2017). • KRG MOMA unlawful arrest complaints (no budget for compensation). 	<ul style="list-style-type: none"> • Iraqi Human Rights Courts (from January 2014). • Iraqi High Commission for Human Rights (Constitution).
 Regional Level					
Individual responsibility		State responsibility			Both
		<p>Non-judicial</p> <p>Arab Charter State Report Review Process</p>			

International level		
Individual responsibility	State responsibility	Both
<p>Judicial</p> <ul style="list-style-type: none"> • ICC Preliminary Investigation Iraq/UK • ICC jurisdiction for foreign fighters from Rome Statute State Parties • <i>Pressure for UNSC ICC referral, Rome Statute ratification and/or Rome Statute Art.12(3) declaration for all Da'esh/ current conflict related events (see earlier points about retroactive application or not of these three avenues)</i> <p>Non-Judicial</p> <ul style="list-style-type: none"> • <i>Iraq requested UNSC international investigation for Da'esh crimes.</i> 	<p>Judicial</p> <ul style="list-style-type: none"> • ICJ (state v. state only) <p>Quasi-judicial</p> <ul style="list-style-type: none"> • CAT and CED Inquiry Procedures <p>Non-judicial</p> <ul style="list-style-type: none"> • UN Treaty Bodies – CAT, ICCPR, ICESCR, CERD, CRC, CED, CRPD country reports and UPR, i.e., universal periodic review (<i>no use of individual complaints procedures agreed</i>) • UN Special Procedures and Rapporteurs 	<p>Non-judicial</p> <ul style="list-style-type: none"> • UN (hybrid) Investigative Team for Da'esh crimes. • UNCOI (commission of inquiry) and IIM (cross-over) • OHCHR FFM 2014-2015

Internationalised and hybrid courts and tribunals					
Individual responsibility	State responsibility			Both	
	International level				
<p>CIJA investigative mandate granted by KRG CoM.</p> <p>UN Hybrid Investigative Team on international crimes by Da'esh.</p>	<p>ICC Preliminary Investigation Iraq/UK</p> <p>ICC jurisdiction for foreign fighters from Rome Statute State Parties</p> <p><i>[Pressure for UNSC ICC referral, Rome Statute ratification and/or Art.12(3) declaration for all Da'esh/ current conflict related events (see earlier points about retroactive application or not of these three avenues)]</i></p>	<p>ICJ</p> <p><i>(state v. state only)</i></p>	<p>CAT and CED Inquiry Procedures</p> <p>UN Treaty Bodies – CAT, ICCPR, ICESCR, CERD, CRC, CED, CRPD country reports and UPR</p> <p><i>(no use of individual complaints procedures agreed)</i></p>	<p>UN Special Procedures and Rapporteurs</p>	<p>UNCOI and IIM (cross-over)</p> <p>OHCHR FFM 2014-2015</p>
	Regional level				
		<p>Arab Charter State Report Review Process</p>			

PART III /

ACCOUNTABILITY AVENUES AND REMEDIES CHAPTER 3 / OVERVIEW OF ACCOUNTABILITY AVENUES AND REMEDIES

	Domestic level		
	<p>Criminal: KRI and Iraq Special Investigative Judges empanelled, and criminal courts. DCVAW KRI some jurisdiction.</p> <p>Military Courts</p> <p>Juvenile Courts</p> <p>Civil claims under Civil Code but protections for public officials and those who ordered them.</p>	<p>KRG Parliamentary Committee on Human Rights</p> <p>Ministry of Justice Human Rights Offices and Complaint Boxes</p> <p>Ministry of Interior Inquiry into HRV carried out against civilians in Mosul by Special Forces (May – August 2017)</p>	<p>Human Rights Courts</p> <p>Iraq High Commission for Human Rights (Constitution)</p>

CHAPTER 4 / INDIVIDUAL CRIMINAL RESPONSIBILITY

A. Introduction

1. Legal Framework

Iraq is a state party to the Geneva Conventions, their additional protocols and the Genocide Convention. At present, Iraqi Law does not criminalise international crimes, such as genocide, crimes against humanity or war crimes, in its Penal Code or other laws.

While the Constitution specifically prohibits forced labour, slavery, slave trade, trafficking in women or children, and sex trade (Article 37(3)), the Penal Code and other laws do not fully criminalise or contextualise these as war crimes, crimes against humanity, or genocide. Some of these crimes may constitute CARSV in international law (provided the legal elements, and in particularly the contextual elements, are proven).

Previously, when addressing crimes after the coup in 1968 until the end of Saddam Hussein's rule in 2003, the Law on the Iraqi High Tribunal (IHT) included international crimes (using mostly customary international law definitions) within that court's jurisdiction (if committed between 17 July 1968 and 1 May 2003). However, those crimes do not appear elsewhere, and this law has now lapsed given the closing of the IHT. This law also included modes of liability for international crimes which were largely in line with the ICC Rome Statute. It is therefore possible that a national court could be given (through national legislation) jurisdiction over international crimes retrospectively (but see the note below on the Principle of Legality and retrospective application of criminal law in Iraq).³²

The laws set out in this Chapter reflect the position at the end of October 2017. Laws can be amended and new laws can be introduced at any time. Equally new avenues for accountability can be created, with new substantive, procedural and evidential provisions which may be more in line with international law.

In light of the recent conflict against Da'esh in Iraq, several accountability options have received attention:

- A referral by the UN Security Council to the ICC, ratification of the Rome Statute by the GOI, and/or a declaration by the GOI under Article 12 of the Rome Statute of the ICC of a recognition of ICC jurisdiction to a specific situation (see earlier notes about which avenues allow retroactive application).
- A hybrid *ad hoc* tribunal created through an agreement between the UN Security Council or General Assembly and the GOI.
- A national specialist chambers with international assistance (created through a new law either in Federal Iraq or by KRG).
- Reform of the Penal Code, Criminal Procedure Code and Evidence Laws to allow prosecution of international crimes with improved practice around evidential and procedural rules.
- Introduction of cumulative charging and flexible judicial interpretations of sexual offences in conjunction with terrorism offences.

NOTE: The Principle of Legality in Iraqi Law

Iraq has ratified the International Covenant on Civil and Political Rights, including Article 15 which provides an exception to the principle of legality in national law for international crimes: *"Article 15.2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."*

However, Article 15.2 is not reflected in Iraq's Constitution or national law (Constitution Art.19, Penal Code Arts.1-2).

The IHT addressed a challenge based on the principles of legality by referencing its obligations under international law including *jus cogens* and Iraq's ratification of the Genocide Convention, the 1949 Geneva Conventions I-IV, Additional Protocol I of 1977 to the Geneva Conventions, and the UN Charter.

This issue may arise again now that the IHT no longer exists and Law of the IHT has lapsed, and international crimes are absent again from Iraqi national law.

PART III /

ACCOUNTABILITY AVENUES AND REMEDIES

CHAPTER 4 / INDIVIDUAL CRIMINAL RESPONSIBILITY

B. Elements of Crimes

Main Crimes under Iraqi Law Relevant for Sexual Violence

The sexual violence crimes captured in the Iraqi law differ significantly from the international law set out in IP2 and in relevant treaty and customary international law. As domestic crimes, there is no requirement to prove any of the common or contextual elements of international crimes. In addition, many of these domestic crimes are gender specific and reflect social attitudes and values in relation to gender norms; as a result, unlike some but not all international law sources, many of the domestic crimes do not apply to both male and female victims or perpetrators equally – leading to the non-criminalisation of certain crimes against male victims, or by female perpetrators. Equally, mitigatory or defence provisions provide reduced sentences or no penalties in circumstances where Iraqi societal values allow men

to commit violence against women. Lastly, there is a lack of certainty and clarity regarding the elements of sexual violence crimes due to lack of definitions and use of imprecise language. Examples of how Iraqi law departs from international law and best practice (in relation to CARSV) are set out below (and highlighted in blue text).

Note: Criminal jurisdiction under the Iraqi Penal Code extends beyond territorial jurisdiction to active and passive personality jurisdiction – i.e. it applies to crimes committed by or against Iraqi citizens outside Iraq territory.³³ Further, Iraq may exercise jurisdiction over certain crimes that occurred outside the state when the perpetrator enters Iraq.³⁴ Trading in women, children, or slaves is one such crime, which may be of relevance for members of Da'esh who held Yazidi women and children in slavery in Syria and later enter Iraq or those who operated the cross-border trafficking network.

Sexual Violence Crimes in the Penal Code (amended to March 2010)

Rape: Article 393(1) 'sexual intercourse with a female without her consent'; OR 'commits buggery with any person without their consent'.

Aggravating circumstances include if: the victim is under 18 years old; the offender was a relative of the victim to the third generation; the offender is the guardian, protector or custodian of the victim or has authority over the victim; the victim is the offender's servant; the offender was a public official, religious leader, or doctor and used the power of his position or the trust in him; the offense is committed by two or more people in order to prevail over the resistance of the victim or if they commit the offense multiple times; if the victim contracts venereal disease as a result; or the victim loses her virginity as a result.

If the offence leads to the death of the victim, the penalty will be life imprisonment.

If the victim was a virgin, the court must order that she receive appropriate compensation.

Note:

- Gendered language clearly assumes female victims and male perpetrators, and may exclude acts by female perpetrators and many forms of sexual violence against male victims.
- 'Sexual intercourse' connotes penile-vaginal sexual relations and does not necessarily include all forms of sexual penetration as defined under ICC and general international law, such as oral or anal penetration and penetration with objects.
- Acts against male victims that are not "buggery" (undefined but assumed to be anal penetration with a penis) are excluded.
- Lack of definitions of the elements of crimes leaves uncertainty.
- In addition, some of the language used may be considered stigmatising, while the focus on virginity is not in line with international standards and may result in harmful questioning/"hymen testing" of the victim.

Sexual intercourse with a woman outside marriage/anal sex with consent: Article 394(1) 'Any person who, outside of marriage, has sexual intercourse with a woman with her consent or commits buggery with a person with their consent.' Same aggravating circumstances as in Article 393.

Note:

- Criminalises consensual sexual relations between adults outside of marriage.
- Unclear how proof of consent is shown.
- See above comments.

Sexual Assault: Article 396(1) ‘Any person who sexually assaults a man or woman or attempts to do so without his or her consent and with the use of force, menaces, deception or other means.’

Note: Lack of definition of “sexual assault” leaves uncertainty, for example: What does “without consent” mean, especially given the addition of ‘and with the force, menace, deception or other means’? Unclear whether this covers all coercive circumstances as defined in the Rome Statute and customary international law.

Immodest Act without consent: Article 400 ‘Any person who commits an immodest act with a man or woman and without his or her consent.’

Note: Lack of definition of what “an immodest act” is.

Immodest Public Acts: Article 401 ‘Any person who commits an immodest act in public.’

Note: See above comments.

Indecent Advances: Article 402(1)(a) ‘Any person who makes indecent advances to another man or woman.’

Note: Lack of definition of what “indecent advances” are.

Public assailing in immodest manner: Article 402(1)(b) ‘Any person who assails a woman in a public place in an immodest manner with words, actions or signs.’ Aggravating for repeat offenders.

Note: Lack of definition of what “assailing in an immodest manner” means. This does not apply to men being assailed in public.

Forced Abortion: Article 418(1) ‘Any person who wilfully procures the miscarriage of a woman without her consent.’ Aggravated if results in the death of the victim or the offender is a doctor, pharmacist, chemist, midwife or assistant of such person.

Sexual Violence against Children in the Penal Code

Endangering a child: Article 383(1) ‘Endangering a child under 15 years old directly or through another.’

Carnal knowledge of underage girl outside marriage: Article 385 ‘Any person who has carnal knowledge of a girl to whom he is not married without her consent when she has not yet reached the age of 18 years old. Aggravated if victim is forced or if she loses her virginity or contracts a venereal disease as a result or if the offender is responsible for upbringing or supervision or some measure of authority over her.

Note:

- Gendered language clearly assumes female victims and male perpetrators.
- Boys are not protected under this provision (from male or female perpetrators).
- Girls under 18 years old who are married are not protected, even when the act is without her consent.
- Lack of definition of “carnal knowledge”.
- Focus on virginity may result in harmful/stigmatising interactions with the victim.

Aggravated Rape: Article 393(1) see above – aggravated if the victim is under 18 years old.

Aggravated sex with a woman outside marriage/anal sex “with consent” Article 394(1) above – aggravated if under 18 years old.

Note: As this provision generally concerns consensual sexual relations outside of marriage/between men, this aggravating factor assumes that under-18 year olds can consent.

Aggravated Sexual Assault: Article 396(1) above – aggravated if under 18 years old.

PART III /

ACCOUNTABILITY AVENUES AND REMEDIES

CHAPTER 4 / INDIVIDUAL CRIMINAL RESPONSIBILITY

Sexual Assault on Minor (without force) Article 397 – Any person who sexually assaults a boy or girl under the age of 18 without the use of force, menaces or deception is punishable by detention.

Note:

- Unclear what the delineation between use of force and without use of force is.
- Non-recognition of coercive circumstances.

Inciting child to fornicate or resort to prostitution: Article 399 – Any person who incites a boy or girl under the age of 18 to indulge in fornication or resort to prostitution as a profession or assists him or her to do so. Aggravated if the offender is a person described Article 393(2) and intends to profit by his action or receives money for such action.

Note: Unclear what the legal elements and definition of “fornicate” are.

Other relevant crimes in Iraqi Law

Penal Code Forms of Murder and Unlawful Killing

Article 405 Murder

Article 406 Aggravated Murder

Article 410 Manslaughter

Article 411 Accidentally death/Negligent killing

Penal Code Forms of Assault

Article 412 Assault with intent to cause permanent damage

Article 413 Assault and aggravated circumstances

Article 414 Aggravated Assault

Article 415 Minor Assault

Article 416 Negligent Harm

Assaulting a Pregnant Woman: Penal Code Article 419 ‘Without prejudice to any greater penalty prescribed by law, any person who assaults a pregnant woman, while being aware of her condition, by beating or injuring her or with the use of violence or by administering to her toxic substances or by committing any other unlawful act without intending to procure the miscarriage of such woman and thereby causes her to miscarry.’

Unlawful detention by public official/agent: Penal Code Article 322 ‘Any public official or agent who arrests, imprisons or detains a person in circumstances other than those stipulated by law.’

Slave Labour by public official/agent: Penal Code Article 325 ‘Any public official or agent who engages slave labour in activities unconnected with the legally or constitutionally recognized public interest or activities other than those that are prompted by necessity or who obliges a person to engage in activities or circumstances other than those in which the law sanctions such activity.’

Cruel Treatment by public official/agent: Penal Code Article 332 ‘Any public official or agent who cruelly treats a person in the course of his duties thereby causing him to suffer a loss of esteem or dignity or physical pain.’

Torture by public official/agent: Penal Code Article 333 ‘Any public official or agent who tortures or orders the torture of an accused, witness or informant in order to compel him to confess to the commission of an offence or to make a statement or provide information about such offence or to withhold information or to give a particular opinion in respect of it: “Torture includes use of force and menaces.”

Note:

- Provision does not include reference to severe physical or mental pain or suffering. Does it fully recognise psychological and sexual torture?
- Does not include the full range of prohibited purposes of torture under international law, such as discrimination.
- Only applies to perpetrators who are public officials or agents.
- Only applies to victims who are accused persons, witnesses, or informants.

Kidnapping and Unlawful Detention: Penal Code Article 421 ‘Any person who seizes, detains or deprives a person of his liberty in any way without an order from a competent authority in circumstances other than those described in the laws and regulations to that effect is punishable by detention. Death penalty imposed when....

(1) If the offence is committed by a person who is wearing the uniform of a government employee without being entitled to do so or a distinctive official insignia belonging to such employee or assumes a false public identity or issues a false order for the arrest, imprisonment or detention of a person while claiming it to be issued by a competent authority.

(2) If the offence is accompanied by the threat of death or physical or mental torment.

(3) If the offence is committed by two or more persons or by a person openly carrying a weapon.

(4) If the period of seizure, detention or deprivation of freedom exceeds 15 days.

(5) If the motive for the offence is financial gain or the sexual assault of the victim or the taking of vengeance on the victim or on another.

(6) If the offence is committed against a public official or agent in the execution of his duty or employment or as a consequence of it.

Kidnap of child: Penal Code Article 422 ‘Any person who himself or through another kidnaps a person under the age of 18 without the use of force or deception.’ Aggravating circumstances and death penalty as per factors in Article 421.

Kidnap of a woman: Penal Code Article 423 ‘Any person who himself or through another kidnaps a woman over the age of 18 with the use of force or deception is punishable by a death sentence. If the kidnapping is accompanied **by any sexual intercourse with the victim or an attempt to have intercourse with her**, the penalty will be death or life imprisonment.’

Providing unlawful detention place: Penal Code Article 425 – ‘Any person who provides a location for unlawful detention or imprisonment while being aware of that fact.’

Law No. 28 of 2012 on Combatting Trafficking in Person (according to NGOs not fully funded or implemented yet)

Article 1 ‘recruiting, transporting, housing, or receiving individuals by force, threat to use force, or other means, including by coercion, kidnapping, fraud, deception, misuse of power, exchange of money, or privileges to an influential person in order to sell and exploit the trafficked individuals by means of prostitution, sexual abuse, unpaid labor, forced labor, enslavement, beggary, trading of human organs, medical experimentation.’

Aggravated (Article 5(2)) ‘(i) The use of any form of coercion, including blackmail, threat, and/or confiscation of travel or official documents. (ii) The use of fraudulent means to deceive or victimize victims. (iii) Giving or receiving money or privileges in exchange for approval from a person of authority or guardianship over the victim.’

Additional aggravating factors (Article 6) ‘(i) If the victim is under 18 years of age, (ii) if the victim is female, or disabled. (iii) if the crime was committed by an organized crime group or of international nature, (iv) the crime was committed by kidnapping or torture, (v) the perpetrator is an immediate or second relative, guardian, or spouse of the victim, (vi) the trafficking resulted in terminal illness or permanent disability to the victim, (vii) the trafficking affected multiple persons or for a multiple of times, (viii) the trafficking was carried out by a government employee or a person commissioned to public service, (ix) exploitation of influence or a victim’s weakness or need.’

Leading to death Article 8: death penalty applies.

PART III /

ACCOUNTABILITY AVENUES AND REMEDIES

CHAPTER 4 / INDIVIDUAL CRIMINAL RESPONSIBILITY

Associated crimes: Article 7 (i) Established or managed an internet website to engage in human trafficking, (ii) Engaged or facilitated a human trafficking contract using the internet.

Consent is not a defence: Article 9.

Terrorism Law 2005 (being used in prosecutions for Da'esh crimes): most relevant ones included here

Article 2(1): 'Violence or threats which aim to bring about fear among people or expose their lives, freedoms and security to danger and their money and properties to damage regardless of its motives and purposes which takes place in the execution of a terrorist act, individually or collectively organized.'

Article 2(3): 'Anyone who organized, chaired or participated in an armed terrorist gang that practices and plans for terrorism and also contributes and participates in this act.'

Article 2(8): 'Kidnap or impede the freedoms of individuals or detain them either for financial blackmailing for political, sectarian, national, religious or racially beneficial purposes that threaten security and national unity and promote terrorism.'

Law or Amendments applying to KRI only

KRI Law on Combatting Domestic Violence:

Article One, Third "Domestic Violence: Every act and speech or threat of doing so based on gender within family relationships constituted on marriage or blood to the fourth degree or whoever is legally included in the family, which may harm an individual physically, sexually and psychologically and deprive his/her freedom and liberties."

Article Two, First: 'Any person, bounded to a family relationship, is prohibited to commit a domestic violence act including physical, sexual and psychological violence within the family. The following acts are regarded as examples of domestic violence acts: 1 – forced marriage, 2- al-shighar (exchange) Marriage or Marriage of Minors, 3- Marriage in exchange for Ransom (blood money), 4- FGM, 5-Forced Divorce, 6- Cutting off kinship relations and disowning members of family, 7- husband forcing wife to engage in prostitution, 8- forcing family member to work or quit their jobs without their willingness, 9- forcing children to work or beg and drop out of school, 10-suicide due to domestic violence, 11-abortion due to domestic violence, 12-battering the children and family members under any justification, 13- assaulting, insulting and cursing family members, showing perception of inferiority to them, hurting them, putting psychological pressure on them, violating their rights and forced wife and husband sexual intercourses.'

Note:

- Penalties under the Act are extremely low (6 months – 3 years maximum).
- While there is supposed to be a specialised court, there is no specialised procedures, evidence or judges/personnel in place yet.
- The law emphasises the importance of mediation and reconciliation, which strongly influences practice and in many cases can lead to further harm to the victim.³⁵

Forced Marriage KRI Act to Amend the Personal Status Law: Article 6: 'The validity of paragraphs 1 and 2 of Article 9 of the law shall be suspended and replaced with the following:

1- No relative or non-relative has the right to force marriage on any person, whether male or female, without their consent. The contract of a forced marriage is considered void if the marriage is not yet consummated. Even if the marriage is consummated, the contract shall be suspended. Moreover, none of the relatives or other people has the right to prevent whoever is eligible for marriage from being married by virtue of the provisions of this marriage law.

2- A first degree relative who breaches the provisions of paragraph 1 of this article shall be sentenced to two to five years [minimum of two years and maximum of five years]. If the person who breaches this provision is not a first degree relative, he shall be sentenced to an imprisonment term varying from a minimum of three years to a maximum of ten years.'

Iraqi Law – Modes of Liability

The Iraqi modes of criminal liability should be compared with the modes of liability set out in the Rome Statute of the ICC: IP2, Chapter 4, Box 7 (p.54).

Individual Criminal Liability Under Iraqi Penal Code

Basic Elements for Criminal Liability under Iraqi law

There are two basic aspects to an individual’s responsibility for a crime: (i) their acts or omissions in relation to the crime (known as ‘*actus reus*’) and (ii) their knowledge or intention in relation to their acts, omissions or the crime (‘known as ‘*mens rea*’).

The Act:

It can be either an act or an omission by the accused. Penal Code Article 19(4).

The physical element of an offence is the criminal behaviour involved in the commission of a criminal act stipulated by the Code or failure to carry out an act stipulated by the Code. Penal Code Article 28.

A person is not responsible for an offence that did not result from his criminal behaviour but he is responsible for that offence if, together with his criminal behaviour, some other prior, contemporaneous or subsequent cause, even though he was unaware of it, played a part in its commission. However, if that cause alone is sufficient to effect the consequence of the offence, then the offender in this case is only responsible for the act that he has committed. Penal Code Article 29.

The Intent:

Penal Code Article 33 – (1) Criminal intent is the existence in the mind of the offender of an intention to commit the criminal act with a view to realizing the consequence of the offence that has occurred or any other criminal consequence.

(2) Intent maybe simple or premeditated.

(3) Premeditation is the resolute contemplation of the commission of an offence before it is committed and is far removed from an outburst of jealous rage or mental turmoil.

(4) Premeditation can be established whether or not the intent of the offender is directed towards a specific person or merely a person he has met or encountered or whether the intent is dependent on something happening or on some condition.

Penal Code Article 34 – An offence is premeditated if the offender has, criminal intent. An offence is therefore considered to be premeditated if:

(1) It is prohibited by law or by an agreement binding upon a person and he fails to act in accordance with that law or agreement, intending to commit the offence that results directly from such omission.

(2) If the offender foresees the criminal consequence of his action and embarks on that course of action, accepting the risk involved.

Penal Code Article 35 – An offence is not premeditated if the criminal consequence occurs as a result of a mistake on the part of the offender whether or not such mistake is due to negligence, thoughtlessness, lack of due care and attention or lack of consideration for any law, rule or regulation.

Documenters should be careful to ensure they gather sufficient evidence to demonstrate the link (or linkage element) between the suspect/accused and the crime. The main forms of individual criminal responsibility under Iraqi law are as follows:

PART III /

ACCOUNTABILITY AVENUES AND REMEDIES

CHAPTER 4 / INDIVIDUAL CRIMINAL RESPONSIBILITY

Modes of Liability: Iraqi Penal Code

Mode of Liability	Penal Code Article	Details
Principal	Article 47	(1) Any person who commits an offence by himself or with others. (2) Any person who participates in the commission of an offence that consists of a number of acts and who wilfully carries out one of those acts during the commission of that offence. (3) Any person who incites another in any way to commit an act contributing to an offence if that person is not in any way criminally liable for the offence.
Principal – Accessory present at crime or any act contributing to crime	Article 49	If he is present during the commission of that offence or any act contributing to that offence.
Inciting – accessory liability	Article 48(1)	Incites another.
Conspiring – accessory liability	Article 48(2)	Conspires with others (implies at least two others involved). See also Arts.55-56 crime of conspiracy (only needs one other).
Aiding and abetting – accessory liability	Article 48(3)	Knowingly supplies the principal to an offence with a weapon, instrument or anything else to commit an offence or deliberately assists him in any other way to carry out those acts for which he has received assistance.
Attempt	Article 30	This is the initiation of an act with intent to commit a felony or misdemeanour which is prevented or frustrated for reasons unrelated to the intentions of the offender. An attempt to commit an offence is considered to include all acts that are impossible to carry out and which are attempted with intent to commit a felony or misdemeanour whether or not it is for a reason relating to the object of the offence or to the means by which it is committed as long as the offender does not believe as a result of misconception or total ignorance that it is within his power to achieve the result of the offence. Merely the intention to commit an offence or preparations to do so are not considered an attempt unless otherwise stipulated by law.

Further provisions:

Article 50 – (1) Any person who participates in the commission of an offence as principal or accessory is punishable by the penalty prescribed for that offence unless otherwise stipulated by law.

(2) An accessory is punishable by the penalty prescribed by law, even though the principal is not punishable due to lack of criminal intent on his part or for other circumstances in respect of him.

Article 51 – If there exists material circumstances in the offence that would by their nature increase or decrease the penalty, then they will affect all parties to the offence, principal or accessory, whether they are aware of those circumstances or not. If there are personal aggravating circumstances which facilitated the commission of the offence, then they will not affect any person other than the person concerned, unless that other person is aware of them. Any other circumstance will not affect the person concerned, whether or not it is aggravating or extenuating.

Article 52 – If there exists any personal defenses which absolve one of the parties to an offence, whether as principal or accessory, from the penalty or which reduce that penalty, than it affects only the person concerned. Any material defense that absolves a party to an offence from the penalty or reduces that penalty will apply in respect of all parties to the offence.

Article 53 – A party to an offence, whether as principal or accessory, is only punishable by the penalty for the offence that has actually been committed even though he did not intend to commit the offence, as long as the offence that is committed is the probable consequence of his participation in it.

Article 54 – If the intent of a party to an offence, whether as principal or accessory, or if his knowledge of the offence differs from the intent of the other parties to that offence or the extent of their knowledge of it, then they will each be punishable according to their intent or the extent of their knowledge of the offence.

Under 2005 Terrorism Law

Commission	Article 4(1)	Anyone who committed, as a main perpetrator or a participant, any of the terrorist acts stated in the second & third articles of this law. Death penalty.
Inciting	Article 4(1)	Death penalty.
Planning	Article 4(1)	Death penalty.
Financing	Article 4(1)	Death penalty.
Assisting	Article 4(1)	Death penalty.
Aiding and abetting after the after	Article 4(2)	Any one, who intentionally covers up any terrorist act or harbours a terrorist with the purpose of concealment. Life imprisonment.

In addition to these individual modes of liability, there are also separate offences which are connected to the originating offence, for example, conspiracy (see Box below) and failure to give assistance to a victim of an offence: “*Any person who, without justification, refrains from or hesitates in giving assistance to a victim of a disaster or offence.*” Penal Code Article 370(2) (small penalty).

Conspiracy

Conspiracy to commit an offence is a separate crime in its own right. Penal Code Articles 55 – 59

- **“A criminal conspiracy”**: an agreement between two or more people to commit a felony or misdemeanour... whether or not it is a specified offence or arises out of acts that are aided and abetted, even though that agreement is in the initial planning stages or has been in existence only for a short time. The agreement is considered to be a criminal one whether the final objective is to commit an offence or to achieve a legitimate aim by the commission of that offence.
- **Modes of Liability for conspiracy**: (1) any member of a criminal conspiracy, even though he did not attempt to commit the planned offence, (2) any person who attempts to set up a criminal conspiracy or who plays a major part, (3) any person who gives assistance to a conspirator or facilitates the meetings of a group of conspirators or gives them shelter or helps them in any way knowing the aim of the conspiracy.
- **Defence**: Promptly notified the public authorities of the existence of a criminal conspiracy and of the participants before any offence is committed as a result of that conspiracy and before those authorities have begun to investigate the conspirators. If the authorities are notified after they have begun their investigations, then he is not exempted from the penalty unless the information leads to the arrest of the conspirators.

PART III /

ACCOUNTABILITY AVENUES AND REMEDIES

CHAPTER 4 / INDIVIDUAL CRIMINAL RESPONSIBILITY

Note: The major gaps between Iraqi national law and international criminal law relate to leadership cases – for ordering and command or superior responsibility. Practitioners in Iraq may have to consider using “inciting”, committing (with others) or conspiracy when pursuing criminal responsibility against those in leadership positions who may not have been present at crime scenes, including any (military) commanders or (non-military, i.e., civilian) superiors.

Defences under the Iraqi Penal Code (which generally do not reflect the strictly defined defences under international law):

Defences available in Iraqi Law		
Defence and Provision	Elements	Notes
Marriage to victim: Penal Code Article 398	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, then the sentence will be quashed. Legal proceedings will resume or the sentence will be reinstated, according to the circumstances if such marriage ends in 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.	Not a permitted defence under international law.
Exercising a Legal Right: Penal Code Article 41	There is no crime if the act is committed while exercising a legal right. The following are considered to be in exercise of a legal right: (1) The punishment of a wife by her husband, the disciplining by parents and teachers of children under their authority within certain limits prescribed by law or by custom. (4) An act of violence committed against any person caught in the act of committing a felony or misdemeanour with a view to apprehending him.	Reflective of status and position of women/wives in Iraqi society. No reference to public official use of force regulations or proportionality.
Public Duties: Penal Code Articles 39 -40	Article 39 – There is no crime if the act occurs in performance of a duty prescribed by the Code. Article 40 – There is no crime if the act is committed by a public official or agent in the following circumstances: (1) If he commits the act in good faith in the performance of his legal duty or if he considers that carrying it out is within his jurisdiction. (2) If he commits the act in performance of an order from a superior which he is obliged to obey or which he feels he is obliged to obey. It must be established in these circumstances that the belief of the offender in the legitimacy of the act is reasonable and that he committed the act only after taking suitable precautions. Moreover, there is no penalty in the second instance if the Code does not afford the official an opportunity to question the order issued to him.	
Self-Defence: Penal Code Articles 43, 45, 46	Article 43 – The right of legal self-defence does not permit murder unless it is intended that one of the following situations is to be avoided: (1) An act as a result of which it is reasonably feared that death or serious injury may occur. (2) Rape or buggery of a man or woman against his or her will. (3) Kidnapping.	

	<p>Article 45 – The right of legal defence does not permit the infliction of greater harm than is necessary and if the person concerned oversteps the limits of that right either deliberately or negligently or if he mistakenly thinks that he is in a situation of legal defence, then he will be responsible for the offence he commits. In this case, the court is only permitted to impose the penalty for a misdemeanour rather than that prescribed for a felony and the penalty for an infraction rather than that prescribed for a misdemeanour.</p> <p>Article 46 – The right of legal defence does not permit any person to resist a member of the public authorities in the execution of his duties even though he has overstepped the bounds of that duty while acting in good faith, unless it is reasonably feared that death or serious injury will result.</p>	
<p>Insanity, loss of reason or volition: Penal Code Articles 60-61</p>	<p>Loss of reason or volition</p> <p>Article 60 – Any person who, at the time of the commission of the offence, is suffering from a loss of reason or volition due to insanity or infirmity of mind or because he is in a state of intoxication or under the influence of drugs resulting from the consumption of intoxicating or narcotic substances given to him against his will or without his knowledge or due to any other reason which leads one to believe that he has lost his reason or volition is not criminally liable. However, if he is not suffering from any infirmity of mind nor is under the influence of intoxicating, narcotic or other substances but only from a defect of reason or volition at the time of the commission of the offence, then it is considered a mitigating circumstance. <i>[Unless self-intoxicated.]</i></p>	
<p>Compulsion: Penal Code Article 62</p>	<p>Any person who is compelled to commit an offence by force or under threat so that he is unable to resist is not criminally liable.</p>	
<p>Necessity: Penal Code Article 63</p>	<p>Any person who commits an offence out of the necessity to protect himself or others or his property or the property of others from a significant or imminent danger and who had not himself deliberately caused that danger and has no power to prevent it by any other means is not criminally liable provided that the act contributing to the offence is proportionate to the danger from which he is protecting himself. Any person who is required by law to confront that danger is not considered to be acting out of necessity.</p>	
<p>Age – under 9 years old at the time of the offence: Penal Code Articles 64-65</p>	<p>Criminal proceedings cannot be brought against any person who is under 9 years of age at the time of committing an offence. (Raised to 9 years old by Articles 47(1) and 108 of Juvenile Welfare Law No. 76 of 1983)</p> <p>Article 65 The age of a person should be officially recorded but the chief investigator or the court may ignore that official record if it is not in keeping with the juvenile's appearance. They may also submit him to a medical examination in order to establish his age by radiative, laboratory or other scientific means.</p>	
Mitigating or reduced sentence crimes against women		
<p>Mitigating Excuse: Penal Code Article 128</p>	<p>1) Legal excuse either discharges a person from a penalty or reduces that penalty. Excuse only exists under conditions that are specified by law. Notwithstanding these conditions, the commission of an offence</p>	<p>Used to mitigate sentence in honour killings (except in KRI).</p>

PART III /

ACCOUNTABILITY AVENUES AND REMEDIES

CHAPTER 4 / INDIVIDUAL CRIMINAL RESPONSIBILITY

	with honourable motives or in response to the unjustified and serious provocation of a victim of an offence is considered a mitigating excuse. (2) The court must identify in its decision the excuse that discharges a person from a penalty.	
<i>Killing adulterers: Penal Code Article 409</i>	Any person who surprises his wife in the act of adultery or finds his girlfriend in bed with her lover and kills them immediately or one of them or assaults one of them so that he or she dies or is left permanently disabled is punishable by a period of detention not exceeding 3 years. It is not permissible to exercise the right of legal defense against any person who uses this excuse nor do the rules of aggravating circumstance apply against him.	Note: gendered language clearly means that the provision does not apply to female perpetrators, despite the use of “any person”. Also, it is not clear what the definition of “adultery” is. Does it extend to non-consensual sexual acts committed against wife?
<i>Unaware of aggravating circumstances: Penal Code Article 36</i>	If the offender is unaware of the existence of an aggravating circumstance which changes the nature of the offence, then he is not responsible for it but can benefit from that excuse even though he is unaware of it.	Note: use of gendered language, which assumes male perpetrators.

C. Factual Scenarios

Using some of the examples of Iraq CARSV set out in Chapter 2, this table demonstrates the different types and possible charges in international criminal law and Iraqi law. It also shows the stark difference between the two sets of laws.

Factual Scenarios/ Indicators	War Crimes In the context of or associated with armed conflict		Crimes Against Humanity As part of a widespread or systematic attack directed against a civilian population		Genocide With the intent to destroy a specific group in whole or in part	Iraqi Law	
	Sexual Violence	Other	Sexual Violence	Other		Sexual Violence	Other
<i>Male detainees are forced to masturbate over others (detained as part of counter-insurgency or by occupying forces).</i>	If nexus to armed conflict, other forms of sexual violence?	Torture? Outrages on personal dignity?	If part of a widespread or systematic attack on civilians, other forms of sexual violence?	Torture? Illegal detention? Persecution? Other inhumane acts?		Art. 401 immodest act in public? – inciting but this criminalises victim as well.	Art.322 Unlawful detention by public official? Art.325 slave labour by public official (see wording)? Art.332 Cruel treatment by public official?
<i>A girl aged 9 years old is forced into marriage to a Da’esh fighter, who rapes her and then sells her on to another fighter.</i>	Rape? Sexual slavery? Other forms of sexual violence?	Outrages on personal dignity? Torture?	Sexual slavery? Forced marriage as an inhumane act? Rape?	Enslavement? Persecution? Other inhumane acts? Torture?	Causing serious bodily or mental harm to members of the group?	Art.383(1) endangering a child? Art.393(1) aggravated due to age but married – Art.398. KRG Law on Combatting Domestic Violence Article 2; forced marriage? ³⁶	Art.421 Kidnapping and unlawful detention, aggravated by sexual assault and financial gain? Art.423 aggravated kidnap of a woman under 18 years old?

							Law No.28 (2012) Trafficking in Persons, with aggravating factors including age, spouse, gender? Terrorism Law, Art.2 violence, participation in terrorist gang and kidnap?
<i>During systematic killings of men believed to be homosexual, a man is abducted by a militia and has glue forced into his anal cavity, resulting in his death.</i>	(no armed conflict)		Rape? Other forms of sexual violence? Torture?	Torture? Murder? Illegal detention? Persecution? Other inhumane acts?		Art.396 Sexual assault? Art.400 immodest act without consent?	Arts.412-415 assault? Arts.405-406 murder? Art.421 kidnapping and unlawful detention – aggravated by sexual assault? If can show public official/ agent, Arts.322-333 torture and cruel treatment by public official/agent?

D. Rules of Procedure and Evidence

This section covers both Iraqi law and practice (anecdotal). However, it should be noted that sexual violence cases are relatively rare in Iraqi courts, given the stigma surrounding the issue, the requirement for cases to be initiated by victims or their families and the preference for “resolution” through compensation/informally mediated settlements. It is also difficult to find and access court records which would indicate practice before the courts in these cases.

1. Consent

» While the Penal Code employs the concept of ‘without consent’, there is no guidance on how this is defined or should be interpreted by courts. There is additional language in the Penal Code for sexual assault “without consent and with the use of force, menaces, deception or other means” which would suggest these are somehow different and not covered within the concept of ‘without consent’.

» Since the system is based on complaints by victims, in order for it to work, victims need to be prepared and able to visit police to make the complaint. Very few sexual violence cases currently go to court, and virtually none end in conviction and punishment of the accused for sexual violence offences. There is little therefore in terms of practice to understand how this concept is interpreted or how a court approaches ‘consent’.³⁷

» Judges in KRI reported that the main evidence in court for sexual violence charges is the forensic report – which might imply that they are looking for signs of force.³⁸

» There is no reference in the Penal Code or CPC regarding coercive circumstances (see IP2, Box 10, p.59). However, it may be possible for lawyers in court to persuade a court that such circumstances negate any possibility of consent.

» There are no CPC rules specifically for sexual violence cases, and no real restrictions on questions which can be asked of victims in court, including on consent.

2. Corroboration

» Unlike the position in international criminal procedure, in Iraq, corroboration is required with no exceptions provided for sexual violence. (It bears repeating that under international law, corroborating evidence for sexual violence crimes is not a requirement as a matter of law, though it collecting such evidence in accordance with international law and best practice could eventually be helpful.)

PART III /

ACCOUNTABILITY AVENUES AND REMEDIES

CHAPTER 4 / INDIVIDUAL CRIMINAL RESPONSIBILITY

Corroboration under the Iraqi Criminal Procedure Code (and in KRI)

CPC Iraq and KRI Article 213 A.: “The court’s verdict in a case is based on the extent to which it is satisfied by the evidence presented during any stage of the inquiry or the hearing. Evidence includes admission reports, witness statements, written records of an investigation, other official discoveries, reports of experts and technicians, background information and other legally established evidence.

B. One testimony is not sufficient for a ruling if it is not corroborated by background information or other convincing evidence or an admission/confession from the accused. The exception to this rule is if the law specifies a particular way of proving a case, which must be followed.

C. The court can accept an admission/confession only if it is satisfied with it.”

3. Prior and Subsequent Sexual Conduct

» There are few restrictions placed on questioning a victim of sexual violence. Even in the KRI, where the Law on Com-

batting Domestic Violence established specialist courts, there are no special procedures, practice directions or even specialist trained judges and court actors.

Provisions in the Iraqi CPC on questioning witnesses

INVESTIGATING JUDGE STAGE

Iraqi and KRI CPC, Article 64 “A. No question may be addressed to a witness without the permission of the investigative judge or investigator and no questions may be put to a witness that are not relevant to the case or which impinge upon others. A witness may not be addressed in a declaratory or insinuating manner and no sign or gesture may be directed at him that would tend to intimidate, confuse or distress him.

B. A witness may not be prevented from giving evidence that he wishes to give and may not be interrupted while giving it, unless he speaks at undue length on matters not relevant to the case or on matters that impinge on others, offend common decency or infringe security.”

TRIAL STAGE

Iraqi and KRI CPC Article 168 “A. Before giving testimony each witness is asked to give his full name, profession, age, place of work and relationship to the parties. Before giving his testimony, he must swear that he will speak the truth and nothing but the truth. B. The witness gives his testimony orally and he may not be interrupted during its delivery. If he is unable to speak due to disability, the court will give him permission to write his statement. The court may ask any questions necessary in order to clarify the facts.” after completion of the testimony. The Public Prosecution, complainant, civilian plaintiff, a civil official and the accused may discuss the testimony and ask questions and request clarifications to establish the facts.

» Given that the loss of ‘virginity’ is considered an aggravating circumstance, questions relating to prior sexual conduct are relevant in relation to most sexual violence charges under Iraq law. Such questioning relating to sexual conduct can be harmful and distressing for the survivor. Forensic physical examinations can be compelled by a court order, and often

these orders include “virginity testing”. As noted in IP2, such tests are “degrading, discriminatory and unscientific” (WHO, Independent Forensic Expert Group).³⁹ Such compelled tests have been considered as amounting to sexual violence and a serious human rights violation in themselves. For further information, see below at Chapter 7.

Virginity Testing – Law and Practice in Iraq

CPC Iraq and KRI Article 70 “The investigative judge or [judicial] investigator may compel the plaintiff or accused in a felony or misdemeanor case to co-operate in physical examination or the taking of photographs, or through fingerprinting or analysis of blood, hair, nails, or other items for the purposes of the investigation. Physical examination of a female should/must be conducted by another female.”

The **Iraqi Law on Forensic Medicine** (amended 2013) requires a committee of three forensic experts to all conduct the forensic and genital examination, and then sign off on a joint expert report. In Dohuk, these rules have been altered by order of Appellate Judge.

Anecdotal reports from KRI forensic experts suggest court orders are issued for genital examinations when they would have no scientific relevance, and also regularly include “virginity” testing (by considering the size or opening of the hymen), where again this has no scientific

validity or purpose. It appears that there is little or no understanding of any forensic findings or their relevance by court actors including judges, and experts do not attend court to explain their reports or the science.⁴⁰

The Clinical Management of Rape Guidelines for Iraq (2016) notes that even when a genital examination is possible immediately following a rape, there are only identifiable findings or injuries in less than 50% of cases (literature suggests 30% figure in relation to lacerations). Examinations should identify any tears, abrasions, bruises, scratches, scars, and other trauma, injuries or infection. Examination of the hymen relates to tears/lacerations or scars. The Guidelines states, “The amount of hymenal tissue and the size of the vaginal orifice are not sensitive indicators of penetration. Do not carry out a digital examination (i.e. inserting fingers into the vaginal orifice to assess its size).”

4. Other Protective Measures

» *Structural*: While there is reference to specialist courts for domestic violence in KRI, these courts do not operate with different procedures or with specialist staff or judges with specialised training or experience managing sexual violence or gender crimes, or in managing traumatised or vulnerable witnesses. There is no fair representation of men and women in the judiciary.

» *Physical/Out of Court Witness Protection*: There are no out-of-court witness protection provisions in law or practice. Anecdotal reports suggest that sometimes survivors are provided with transport to the court. There are KRI Ministry of Labour and Social Affairs (MOLSA) shelters for women whose lives have been threatened, which can be accessed by court order (but have not always proven to be safe).

» *Procedural/in-court witness protection*: As mentioned above, the CPC contains no specific protections or procedures in relation to sexual violence cases.

» Iraqi and KRI CPC, Article 152: “Trial sessions must be open **unless the court decides that all or part should be held in private and not attended by anyone not connected with the cases, for reasons of security or maintaining decency.** It may forbid the attendance of certain groups of people.” This gives the potential for closed sessions, where members of the public are excluded from court. However, there are no in-court protections for the witnesses, such as screening, pseudonyms, remote testimony or to be accompanied or represented in court. There is no physical provisioning either – like separate entrances, waiting rooms, etc.

» Some NGOs had set up pro bono legal advice clinics for victims of sexual violence (at least in KRI) but they closed due to lack of funding and serious secondary stigmatisation and targeting.

» Judges, prosecutors, and defence counsel working on terrorism cases have been targeted in violent attacks over a number of years, showing a need for greater judicial protection measures.

Environmental and Societal Issues Surrounding Sexual Violence proceedings

Women’s NGO Response to Iraq 5th Report for Universal Periodic Review ICCPR 2015:

“Other forms of discrimination in the legal and criminal justice system, along with social stigma tied to rape, limit women’s recourse in the case of gender-based violence. A 2012 United Nations Development Program (UNDP) report found instances in Iraq in which the families of rape victims encouraged the victims to marry their aggressors. When these women refused these marriages, some families pressured judges to force the marriage between survivor and rapist. Rape victims in Iraq are unlikely to press charges against perpetrators and pursue legal remedies due to societal pressures and norms. Women who report sexual violence face harassment and abuse from Iraq’s police force, which is male-dominated; and may even be accused of adultery or prostitution. **Tellingly, more than 97% of women in one survey said they would not be willing to report gender-based violence to the police because of fear of damaging their reputation or the belief that law enforcement would not be able to solve the problem.**”⁴¹ (emphasis added)

Heartland Alliance (2011) Institutionalised Violence Against Women and Girls: Law and Practice in Iraq:

Many victims of sexual or GBV can face criminalisation or “protective detention.”⁴²

A 14 year old girl in KRG was trafficked and forced into prostitution. She did not receive any money in exchange for sex but the judge found that she received indirect benefits such as food and shelter. The judge stated that had she been forced she would have told someone at a checkpoint and would have brought the perpetrators to the police.⁴³

PART III /

ACCOUNTABILITY AVENUES AND REMEDIES CHAPTER 4 / INDIVIDUAL CRIMINAL RESPONSIBILITY

“In Baghdad, a girl was raped at the age of 12 and her family forced her to marry her rapist. As a husband, he was very abusive and beat and raped her repeatedly during their marriage. She filed for divorce and during the proceedings her husband, who did not agree to the divorce, stated to the judge “She was a bad woman but I saved her honour by marrying her.” The judge denied the woman a divorce and she tried to commit suicide by self-immolation. [...] although the rape case was never brought before the court, the case illustrates commonly held perceptions that victims are shameful, and that marrying them is an honourable practice.”⁴⁴

PART IV /

DOCUMENTATION IN PRACTICE: PREPARATION

CHAPTER 7 / DO NO HARM

A. Key Concepts

1. Harm

The key concepts and general types and sources of harm set out in IP2, Chapter 7 also apply to work in Iraq. The aim of this Chapter in the Supplement is to highlight some of the Iraq-spe-

cific harm, risks and context which may arise for documenters, investigators and survivors of CARSV and other forms of sexual violence.

Who causes harm to victims/survivors of sexual violence in Iraq?

Types of Harm/Who causes it	Examples from Iraq
Immediate Physical Harm » Perpetrators	» Acts of sexual violence that result in direct physical injury and/or death.
Secondary Physical Harm » Perpetrators » Institutions including doctors and judicial processes » Family and Community » Practitioners	» 'Honour' killings and violence (including against male victims or those suspected of being homosexual). » Self-immolation or burning. » Suicide. » Virginity testing. » Illegal abortions. » Ineffective medical treatment or lack of access to medical treatment (barriers include stigma and shame). » Mediation or marriage to perpetrator as a "resolution" can put survivors at further risk of repeat victimisations (physical and psychological).
Psychological Harm » Perpetrators » Institutions including doctors and judicial processes » Family and Community » Practitioners » Media	» Trauma from infliction of sexual violence. » Lack of professional, supportive mental health response and services for survivors. » Internalised stigma and shame. » Suicide (encouraged by family or community) » Stigma. » Virginity testing. » Poorly conducted and multiple interviews by documenters which trigger re-traumatisation and do nothing to manage or respond to this. » Mediation/conciliation or marriage as solution may cause further psychological harm. » Failure to manage or meet expectations, lack of follow-up and results from documentation, or false promises – leading to loss of trust and belief in people, institutions and systems.

<p>Socio-economic Harm</p> <ul style="list-style-type: none"> » Institutions including doctors and judicial processes » Family and Community » Practitioners » Media 	<ul style="list-style-type: none"> » Stigma. » Ostracism and outcast from family community, resulting in loss of social and economic support, and preventing work or education. » Lack of privacy, confidentiality or ethical standards by documenters, including media – causing exposure and consequences. » Lack of reparations – bribes or ransoms paid to get women or girls back from abductions. » Arranged/forced marriage to provide reintegration and acceptance back into the community.
<p>Legal Harm</p> <ul style="list-style-type: none"> » Institutions including doctors and judicial processes » Family and Community » Practitioners 	<ul style="list-style-type: none"> » Criminalisation of sexual intercourse outside marriage without reference to consent. » Defence or mitigatory provisions which encourage marriage between victims and perpetrators. Community and family pressures to find “conciliatory” resolution to criminal charged ‘to avoid shame or dishonour’ but which do not protect the victim. » Laws requiring compelled genital examinations and court ordered virginity tests (which have no scientific validity). » Lack of witness protection measures in court proceeding. » Lack of qualified, specially trained court personnel including judges. » Unco-ordinated documentation and investigative efforts which result in multiple interviews and different versions. » Lack of substantive criminal law provisions reflecting and adequately penalising CARSV. » Stigma, which can also affect those helping survivors in the legal process. » Lack of birth registration and legal protections for children born of rape.

Notes on Stigma and Attitudes Towards Sexual Violence in Iraq

Stigmatisation is a social process that leads to the marginalisation or labelling of individuals or groups. Stigma involves judging, blaming, discriminating, penalising or shaming of individuals, groups or communities for a characteristic, attribute or experience which is judged in some way as ‘transgressing’ the standards of their community or society. Sexual violence associated stigma is not only the expression of individual values, beliefs or attitudes; it is the forceful expression of social norms that are cultivated within a given society through the behaviours and actions of groups of people and institutions. It is an extension of the stigma that is present pre-conflict. CARSV-associated stigma is socially and culturally constructed around gender inequality, and expectations or perceptions of the role, behaviours and responsibilities of the traditional binary genders in society, such as that women and girls are the holders of virtue and honour for a family while men and boys are the protectors and guardians.

[Adapted from Principles for Global Action addressing and tackling Stigma associated with CRSGBV, September 2017]

In Iraq, cultural and societal beliefs strongly subscribe to a patriarchal and binary view of the roles and expectations of men and women. Women are the holders of honour, to be protected by dominant men whose role is to protect and uphold their family’s honour and reputation. Great value is placed on a woman’s ‘purity’ or virginity. Women’s behaviour should strictly align to the community expectations of ‘honour’, and it is the role of the male members of the family to control that behaviour or take ‘necessary steps’ to restore any lost ‘honour’. Other members of the family, the matriarch in particular, may also play a role in maintaining or restoring ‘honour’ (FGM, self-immolation and burning, encouraged suicides, etc.).

A woman’s freedom of choice and decision-making autonomy are very much curtailed, including her full voluntary consent regarding her relationships, personal interactions and acts of a

sexual nature, such as whether, when and to whom to marry, whether, when and with whom to engage in any acts of a sexual nature and decisions regarding her reproductive health and functions. Because ‘honour’ and ‘purity’ are tied to virginity, and ‘normal’ sexual relations are not necessarily viewed in terms of being consensual or not, victims of sexual violence are seen as ‘unclean’ or ‘dishonoured’ even though they took no active or consensual role in what took place.

A 2011 Iraq survey of male attitudes towards women is set out in Chapter 2, reflects widely-held beliefs about controlling women and girl’s behaviour through violence and force. It should be noted that these attitudes change over time, and are influenced by many other factors (known as *intersectionality*), such as access to education, social, economic, political and regional influences – including changing manifestations of religion.⁴⁵

These societal attitudes are reflected in law, as well as influencing all aspects of daily life for survivors and almost all institutional and individual responses to sexual violence. For example, forced marriage, child marriage and rape within marriage are not criminalised. Sexual relations outside marriage, adultery and abortion are. As noted above in Chapter 4, the Penal Code grants a defence to a husband exercising his legal right to punish his wife (Article 41), and mitigated, low

sentences to perpetrators “with honourable motives” (Article 128) or who catch their wife or girlfriend with a lover or in another man’s bed (Article 409). (The law is silent about whether the acts must be consensual on the wife or girlfriend’s part.) Perpetrators may also have a defence if they subsequently marry the victim (Article 398), an action viewed in most parts of the society as removing the ‘dishonour’.

These gender norms and expectations also drive and exacerbate the impact of sexual violence against men and people of sexual and gender minorities (SGM). In Chapter 2, the summary of types of CARSV in Iraq indicate at least the systematic use of sexual violence as torture against male detainees (whether detained by governmental or other forces) and sexual violence as part of a campaign in 2009 against men believed to be homosexual. Male sexual violence is an even bigger taboo in Iraq than that against women, resulting in almost no reporting, public denial of its existence, grave consequences for exposure and therefore no support or services for victims who are men or boys.

The secondary consequences for victims of sexual violence in Iraq are physical, psychological, social, economic and legal. Such are the strength and depth of these views, the dangers from stigma in Iraq are extremely grave and life-threatening.

Examples of the Repercussions of Stigma in Iraq

- | | |
|--|---|
| <ul style="list-style-type: none"> » abandonment; » exile from home; » confinement, control of their movements, and incarceration; » coercion; » removal from school, complete deprivation of education, schooling and employment; » forced divorce; and » public dishonouring. | <ul style="list-style-type: none"> » severe physical abuse and torturing, including stabbings, physical attack and punishment; » burnings, forced self-immolation; » mutilation, including cutting off women’s noses or ears; » rape and ‘corrective’ rape; » forced marriage, punitive marriages; » forced abortion/infanticide; » forced prostitution; » forced hymen repair; » FGM; » forced suicide; and » ‘honour’ murders. |
|--|---|

Examples taken from Begikhani, Nazand. Honour-Based Violence: Experiences and Counter-Strategies in Iraqi Kurdistan and the UK Kurdish Diaspora (pp.56-57), Taylor and Francis Publishers.

“Stigma kills: it is possible to survive sexual violence, but not survive the ensuing ostracism, abandonment, poverty, ‘honour crimes’, trauma that can lead to suicide or self-harm, unsafe pregnancies, and untreated medical conditions, including STIs [i.e., sexually transmitted infections] and HIV, that may result. There needs to be a heightened sense of urgency about fighting stigma because rape survivors are literally dying of shame.” **Letitia Anderson, Office of the UN SRSG on Sexual Violence, Wilton Park 2016, Principles for Global Action addressing and tackling stigma associated with CRSGBV, September 2017.**

Note: For the Yazidi Community, the issue of stigma was tackled to a degree due to the religious leader’s declarations that the sexual violence survivors are to be regarded as “clean” (believed to have been helpful regardless of this stigmatising language). Survivors have also been provided with an adapted baptism ceremony (at Lalish) as a healing ritual. In addition, children born to Yazidi women as a result of sexual violence by Da’esh have been registered as the leader’s children – to try to avoid the legal effect of not hav-

ing a registered father and to reduce the stigma of children born of rape. At present, this leadership around stigma and accepting survivors back into families and communities is restricted to the Yazidi community. It should also not be assumed that stigma does not exist in other forms against survivors within these communities.⁴⁶

Moreover, notwithstanding the acceptance of survivors at the community level, the extent of suffering due to the repercussions of stigma on victims of sexual violence by Da’esh, combined with other factors such as the loss of male members of the household, has necessitated the creation of special survivor care programmes which, in some cases, include relocation out of Iraq. This radical solution was required to address the high rates of suicidal ideation and other severe psychological and social problems faced by survivors, such as continuing unmarriageability, poverty and lack of education/work opportunities.

Risks Associated with Use of Mediation in Sexual Violence Cases in Iraq

GBV Standard Operating Procedures for Central and South Iraq and KRI

“Mediation is a process that is frequently used in customary law to solve disputes between community members, families and family members. Cases of IPV [intimate partner violence] and domestic violence are sometimes ‘settled’ by traditional or religious leaders, as it is considered a private family matter. **In general, mediation is not recommended as a response to IPV because of the safety risks that it poses for the survivor.** Survivors seeking help from organizations responding to GBV may want their cases to be handled through mediation because they want the violence to stop and may perceive mediation as a way to facilitate this. In some cases they may request that social workers carry out the mediation. Therefore, it is important that organizations have clear guidelines on how to respond to these requests in a way that is survivor-centered. Mediation is not a recommended response for most GBV cases because it is unlikely to stop the violence from happening in the long term and it has the potential to escalate violence, causing more harm to the survivor.

- The mediation process itself maintains and contributes to the abuser’s ongoing power and control over a survivor. The process of mediation presumes that both parties can speak freely, confidently and safely. However, given the tactics an abuser uses to maintain power and control over a survivor, and social norms that may not enable women to speak freely or consider their views to have equal weight or worth, it is unlikely that a survivor is going to feel that she can speak freely and without fear of consequences. It is also likely that just making a referral to mediation can cause harm to the survivor. The abuser may get angry that she has told others about the violence.
- Mediation rarely results in an end to the abuser’s violence, and can actually lead to an increase in violence.
- There is a high risk of survivor-blaming within the mediation process. The perpetrator, who is used to blaming the survivor, will have a platform to articulate his position, and given the cultural and social norms in place, and the fact the survivor may feel intimidated or scared to answer back, he may sound convincing. The survivor may be asked to change her behavior as a condition for violence reduction.”

A Note on the Legal Consequences for CARSV Survivors in Iraq

As noted above, there are a number of provisions which potentially criminalise the victims of sexual violence.⁴⁷ Documenters must be aware of this risk and put in place and follow appropriate risk avoidance and management procedures in order not to do harm.

» **“Adultery”** (*not defined; does it include non-consensual sexual acts with non-spouse?*): criminalised for a wife anywhere; only criminalised for a husband if done in the conjugal home. (Penal Code, Arts.377-379.) KRI Law no 9 2001 changed this to make provision equal – men outside home as well (Heartland Alliance, 2011 p.21).

» **Sexual relations outside marriage** (no reference to consensual).

» Appearing in a public place in an **indecent state** of undress (nothing about intent/voluntary): up to 10 days detention and a fine not exceeding 5 dinars. (Penal Code, Article 501).

» In addition, **abortion** ('procuring a miscarriage') is illegal in Iraqi Law (Penal Code, Article 417), regardless of whether the pregnancy was caused by rape. "Procuring her own miscarriage out of shame" is a legally mitigating circumstance.

» Some women who were forced into marriage or children who were kidnapped by Da'esh have been detained and accused of terrorism because of their association with Da'esh.

specialised knowledge and expertise. In addition, Iraqi laws and guidance should be consulted to understand lawful and best practice around obtaining informed consent when documenting CARSV or any other crimes by, against or otherwise involving children."

» **Iraqi Civil Code, Articles 93-103, 106** concerning capacity to enter into agreements, the age of majority (18 years old) and the role of the father as legal guardian.⁴⁸

Across Iraq, parent/caregiver's (or other responsible adult's) legal consent should always be obtained for children under 18 years of age. The GBV SOPs for KRI (updated 2017) and GBV SOPs for Central and South Iraq (2017) contain guidance for obtaining informed consent for survivors under 18 years old. This guidance combines international best practice and Iraqi legal requirements; nevertheless, relevantly experienced documenters planning to directly work with children should familiarise themselves with the cautionary IP2 content on working with children.

B. Informed Consent

Iraqi law on Informed Consent and Age

Note: "As underscored in IP2, directly working with people under the age of 18 for documentation purposes requires

GBV Standard Operating Procedures – KRI (updated 2017)

Section 4.7.1

"Obtaining consent when working with child survivors of GBV should be done as follows:

- Information should be shared in languages and formats appropriate to the child's age and capacity to understand. Service providers are responsible for communicating in a child-friendly manner and should encourage the child and their family to ask questions that will help them to make a decision regarding their own situation.
- The parent/caregiver's (or other responsible adult's) legal consent should be obtained for children under 18 years of age. However, if a child has reached the age of 15 years old and if the parent/caregiver is not able or willing to provide consent, the child's informed consent may be obtained instead of the caregivers. Otherwise the parent or caregiver should be included with the child's permission.
- Informed assent is expressed willingness to participate in services, and is sought from children who are by law or nature too young to give informed consent, but who are old enough to understand and agree to participate in services. Children between 6 and 15 years can provide informed assent; however, permission is also required from the parent or caregiver.
- Although it may not be possible to obtain informed consent or assent from younger children, efforts should still be made to explain in language appropriate to their age, what information is being sought, what it will be used for, and how it will be shared.
- Consent can be obtained in verbal or written form; however, written consent should always be sought where possible.
- Children and caregivers should be made aware of any relevant mandatory reporting requirements.
- There may be cases in which it is not appropriate to obtain parent/caregiver consent, including where the caregiver may be the perpetrator or complicit in the abuse, or where unaccompanied children are involved. In such cases, wherever possible the consent of another trusted adult should always be sought for children under 15 (for the purposes of these SOPs, a "trusted adult" is a related adult, or adult caregiver nominated by the child). For children above 6, they should participate in identifying this person. Where such person is not available, the case manager may have to provide consent for children under 15.
- Any decision to take consent from anyone other than the parent, caregiver, legal guardian or nominated trusted adult should be reviewed by a qualified person/supervisor. The process should also be documented on the consent form.

In general, permission to proceed with case management (and other case actions) should be obtained from the child, as well as the caregiver or another suitable adult (see below).”

Section 6.6

- “Parent/caregiver’s (or other responsible adult’s) legal consent should always be obtained for children under 18 years of age. For children 15-17 years old, child’s informed consent may be obtained instead of the caregivers if the parent/caregiver is not able or willing to provide consent;
- For younger children, their informed assent or willingness to participate should be provided, while for older children informed consent should be requested (see below for details);
- There may be cases in which it is not appropriate to obtain parent/caregiver consent, including where the caregiver may be the perpetrator or complicit in the abuse, or where unaccompanied children are involved. In such cases, wherever possible the consent of another trusted adult should always be sought for children under 16. For children above 6, they should participate in identifying this person. Where such person is not available, the case manager may have to provide consent for children under 16;
- Children and caregivers should be made aware of any relevant mandatory reporting requirements (see section on mandatory reporting).

6.6.1 Infants and Toddlers (ages 0–5):

- Informed consent for children in this age range should be sought from the child’s caregiver or another trusted adult in the child’s life, not from the child. Very young children are not sufficiently capable of making decisions about care and treatment.
- The service provider should still seek to explain to the child all that is happening in very basic and appropriate ways.

6.6.2 Younger Children (ages 6–11):

- Typically, children in this age range are neither legally able nor sufficiently mature enough to provide their informed consent for participating in services. However, they are able to provide their informed assent or willingness to participate.
- Children in this age range should be asked their permission to proceed with services and actions, which affect them directly. This permission can be provided orally by the child and documented as such on the informed consent form. For children in this age range, written parent/caregiver informed consent is required, along with the child’s informed assent.

6.6.3 Younger Adolescents (ages 12–14):

- Children in this age range have growing capacities and more advanced cognitive development, and may be mature enough to make decisions and provide informed assent and/or consent for continuing with services.
- According to standard practice, the caseworker should seek the child’s written informed assent to participate in services, as well as the parent/caregiver’s written consent.
- However, if it is deemed unsafe and/or not in the child’s best interest to involve the caregiver, the caseworker should try to identify another trusted adult in the child’s life to provide informed consent, along with the child’s written assent. If this is not possible, a child’s informed assent may carry due weight, if the caseworker assesses the child to be mature enough. In these situations, caseworkers should consult with their supervisors for guidance.

6.6.4 Older Adolescents (ages 15–17):

- Older adolescents, ages 15 years and above, are generally considered mature enough to make decisions. **In addition, in KRI / Iraq 18-year-olds are legally allowed to make decisions about their own care and treatment, especially for social and reproductive health care services.**

Older adolescents can give their informed assent in accordance with local laws. Ideally, supportive and non-offending caregivers are also included in care and treatment decision-making from the outset and provide their informed consent as well.”

Iraqi Law and Guidelines on Mandatory Reporting

Iraqi Law contains provisions which require certain persons to report any information suggesting an offence has been committed. As documenters or practitioners, these mandatory reporting laws affect how you interact with survivors. Informing a survivor about mandatory reporting obligations is a vital part of the informed consent process and should be discussed prior to any disclosure by the survivor. This section includes the legal provisions, as well as the guidelines provided in the Iraqi Clinical Management of Rape Guidelines (2016), the GBV SOPs for KRI (updated 2017) and the GBV SOPs for Central and South Iraq (2017).

Law on Mandatory Reporting of Crime

» **Iraqi Penal Code: Article 247** “Any person who is obliged by law to notify a public agent of a matter or matters known to him and who willfully refrains from doing so in the prescribed manner or at the time stipulated by law is punishable by detention or a fine. The same penalty applies to any public agent in charge of the investigation or prevention of an offence who neglects to report an offence that is brought to his attention.”

» **Iraqi Penal Code: Article 498** “Any professional medical practitioner who finds . . . while he is caring for a person

who is seriously injured any indication that death or injury has resulted from the commission of an offence or if there is evidence that leads him to be suspicious of the cause of death or injury and he does not notify the competent authorities is punishable by a period of detention not exceeding 3 months or by a fine not exceeding 30 dinars.”

» **Iraqi and KRI Criminal Procedure Code: Article 48** “Any public servant who, in the course of performing his duties or as a consequence of performing his duties, learns that an offence has been committed or suspects that an offence has been committed in respect of which proceedings have been instituted without a complaint, and any person who has given assistance in his capacity as a member of the medical profession in a case where there are grounds for suspecting that an offence may have been committed as well as any person who is present when a felony is committed must immediately inform one of the persons specified in Article 47.”

» **KRI Law on Combating Domestic Violence No. 8/2011, Article 3, Clause 2** “Workers in the domains of healthcare, education and official sectors shall have the right to report cases to help victims of domestic violence.”

Clinical Management of Rape Guidelines adopted in Iraq (2016)

This CMR protocol recognizes that mandatory reporting practices and/or procedures can impede survivors’ access to lifesaving health services regardless of whether the survivors decide to take legal action on their case or not, and whether medical service providers need to report the case to the police or not.

Within this CMR protocol, the following procedures and practices will be applied in order to ensure that lifesaving health care for survivors is prioritized and adhere to survivor centred principles.

“1- Survivors of sexual violence, including survivors of rape, regardless of whether they decide to pursue legal action or not must be provided with immediate medical responses: including medical examination offered, medications administered to them to prevent infections and unwanted pregnancy and consent based referrals to other specialized hospital departments, including for forensic examination (if requested), all according to the survivors’ wishes, decisions and consent.

2- Survivors of sexual violence should not be prevented from accessing health care because of not consenting to reporting to the police. The provision of adequate and timely health care to a survivor is the first PRIORITY.

3- Qualified and CMR trained medical staff can provide a primary medical report filled in by the clinician attending the survivor and kept confidentially in a safe place.

4- All medical staff providing care to survivors must provide services and referrals based on the informed consent from the survivor, confidentiality, safety, non-discrimination and respect that adheres to survivor-centred care. The needs, wishes and best interest of the survivor take precedence over any mandatory reporting to authorities.

5- Medical staff should adhere to GBV guiding principles for providing survivor centred care when performing further physical examinations, collecting forensic evidence, providing a medical certificate, informing the survivor of other services (such as counselling) and providing referrals. If available, women community health officers' accompaniment should be offered to the survivor for referrals to other services.

6- If the survivor chooses to take a legal action, the medical certificate can be used to fill information into other required legal forms on request after appropriate medical services have been provided.

7- Sexual violence survivors should be offered follow-up health and psychological care regardless of whether or not they decide to pursue legal action. All procedural and legal frameworks remain secondary to providing safe, confidential lifesaving health care for survivors of sexual violence.”

GBV SOPs for KRI and GBV SOPs for South and Central Iraq (2017)

“Confidentiality and informed consent should always be given priority. However, the rules of mandatory reporting are such that actors receiving information about certain types of violence are compelled by law or institutional policies to report this information to the police. It is important that survivors are made aware of these mandatory reporting rules, the types of information which may trigger them, and the possible consequences of reporting, **before beginning an interview**. After providing a survivor with this information, a survivor may choose not to disclose some information about the incident (such as the occupation of the perpetrator), which is within her/his rights. Services should still be provided according to the information that is shared and according to the wishes of the survivor.

All public servant (government employees) are required to report misdemeanors and felonies, which includes incidents of rape, according to Article 48 of the Iraqi Criminal Procedure Code No. 23 of 1971. Public servants who are obliged to report but willfully choose not to be subject to detention or fine under Article 247 of the Iraqi Penal Code No. 111 of 1969. According to the Ministry of Health CMR Protocol from 2017, the proposed procedure would be that “the medical response services to survivors should be immediate and unconditional to any mandatory reporting policies or procedures that constitute an impediment to access to these services. Additionally, the decision by the survivor to refrain from taking legal action should not have negative repercussions for survivor’s access to health services. The provision of lifesaving, timely and confidential health care to a survivor is the first priority”. If the survivor chooses to take a legal action, the medical certificate can be used to fill information into other required legal forms on request after appropriate medical services have been provided. Once a directive is issued by the federal Ministry of Justice or Ministry of Interior to suppose these proposed procedures, they will go into effect. In the meantime, health workers should provide care immediately, first before the police officer arrives.”

C. Mitigating Harm

1. Threat and Risk Assessments for Iraq

WARNING: The exercise contained in this section is simply to illustrate and emphasise some examples of higher threats and risks which are Iraq specific, to emphasise these for practitioners. **It is not comprehensive and it may not be accurate for any specific setting or locality. It is critical that each practitioner conducts full, detailed and regular threat and risk assessments in relation to their work overall and before each specific mission, activity or victim/witness contact for each locality or area of operation and impact. Threats and risks are location, time, date, person, organisation, action and victim specific, and can change dramatically from situation to situation. While this Supplement provides a general framework, risk assessment should be informed by up-to-date, task specific information from the ground.**

This table contains some examples with some indication of the relative level of possible threats and risks. It is a blend of

Forms 1 and 2 in Annex 2 of IP2. It reflects a pre-mitigation threat level. *These are examples only and must not be adopted by practitioners* – practitioners should conduct their own detailed and comprehensive threat and risk assessments and design and implement careful mitigation strategies and measures to avoid or sufficiently reduce any threats and risks.

2. Coordination Problems in Northern Iraq

As noted in IP2, coordination of accountability focused documentation and investigation efforts is critically important. Multiple efforts are often underway in areas where CARSV is believed to be prevalent.

Prior to engaging any survivor of CARSV (and other serious crimes and violations), anyone deciding to embark on accountability focused documentation should take great care to find out who the mandated and non-mandated documentation and investigation and other relevant (such as medical and humanitarian) actors are (see definition of “mandated actor” in Chapter 1 above), what work has already been and is already being done and whether (further) documentation is

Potential Threats, by Origin & Risk to Survivor						
Risk/Threat	From Conflict Environment	From Armed Groups	From Family and Community	From Environment	From Institutions	From Documentation
To Survivor			 Stigma. Honour Killing. Rejection.		 Stigma if exposed. Duplication. Court ordered virginity testing. Criminalisation. Lack of best practice in care. Exposure/ lack of confidentiality	 Duplication, re-traumatisation, exposure and stigma.
To Family and Community	 Continuing presence of Da'esh fighters. Pockets of fighting and sporadic violence. Unexploded ordnance/ bombs/ remnants of war (UXO). Attack risk and travel risk depending on location.	 Ongoing captivity; risk of retaliatory measures if survivors' co-operation with documentation/ investigation becomes known.	 Stigma. "Dishonoured".			
To Staff			 Secondary stigma.			 Vicarious trauma (levels of SV)
To Evidence/ Information						 Contradiction from multiple, duplicate documentation

Levels:

 Very low risk
  Low risk
  Medium risk
  High risk
  Very High Risk
  Unacceptable

actually needed. In relation to Northern Iraq, a basic outline of current mandated actors is provided in Chapter 3. As a first step as part of this pre-assessment, consider contacting the GBV Sub-Cluster (coordinated by UNFPA⁴⁹) and ensure you know the mandated actors and good, safe, vetted referral pathways for all types of survivor support in your locality (see next section).

Especially if you are a non-mandated actor, please also take the time -- before and during any accountability focused documentation or investigation effort -- to ask yourself why you wish to document and for what purpose. This assessment should include whether the documentation work will actually benefit victims/survivors and the prospects of justice. Apart from interviews with survivors, what are the alternative sources

of information your work may need? Are there survivors and witnesses who have not yet had their experience documented? It should also map out the steps you can take to ensure any documentation you undertake will not actually or potentially undermine or duplicate existing justice efforts (approach, format, use). All too often well-meaning actors document or investigate CARSV without taking the time to work all of this out.

Please remember that it is not everyone's role to document CARSV (or other crimes and violations). Sometimes the proper role for lawyers, activists, first responders or those providing survivor support services is to inform survivors of the risks and benefits of documentation, different types of documenters including the mandated ones, and to ensure the survivor is able

to make a fully informed decision about whether they want to document their case and with whom. These people also have a critical role to play in holding documenting actors – including journalists – whom they introduce to survivors to account for the standards and procedures followed in the documentation process.

In the event that you are a non-mandated actor, if the experience of a survivor (or witness) has not been documented before, properly consider whether referral to a mandated actor may have more benefits for the survivor and their objectives, in which circumstances you can support and guide them in the documentation by the mandated actor and getting the support they need without doing harm.

For both mandated and non-mandated actors, accountability focused documentation and investigation efforts should truly prioritise the interests and rights of survivors. An ethical and responsible approach necessitates utmost care to avoid the potential -- and more often than not, real -- grave consequences of the lack of coordination, and especially of multiple interviews. Unless undertaken by highly experienced and well-resourced multi-disciplinary teams of practitioners, the consequences of uncoordinated documentation and repeated interviews almost unavoidably include causing further harm to survivors (such as re-traumatisation), and accounts of experiences that differ on important issues and end up being discredited and ignored by accountability mechanisms, something which also impacts on survivors.

In Northern Iraq in particular, there is currently a large number of (trained and untrained, experienced and inexperienced) mandated and non-mandated actors actively documenting CARSV in various forms – perhaps because there was a concern about a lack of documentation to begin with or because many actors believed it was necessary to advocate for an effective justice mechanism. For example, much has been done for the purpose of advocating for an ICC referral. However, much accountability focused documentation remains uncoordinated, ad hoc and without proper process and support for victims. Equally, much of the multiple and duplicating records produced -- including by journalists and other media reporters -- could undermine evidence in court or the value of that documentation in other accountability mechanisms. Considerable harm has been done to survivors through documentation practice, including media investigating and reporting of CARSV against Yazidi women.⁵⁰

Simply stated, especially in circumstances such as Northern Iraq's, documentation and investigation practitioners should not re-engage (directly or indirectly) with survivors (and other witnesses) of CARSV who have already had their experience documented for accountability purposes. Even if they have previously recounted their experience for non-accountability purposes, such as to journalists, academic researchers, humanitarian-aid providers, medical or psycho-social support personnel, great care still ought to be taken before and when engaging survivors for accountability focused documentation. Practitioners should endeavour to see the prior documentation or notes of such other actors in order to determine what the focus and content of the earlier accounts were, to know how to use prior accounts during the interview to avoid or minimise inconsistencies, and to be able to carefully consider whether further documentation is absolutely necessary. (Most survivors/ witnesses will not have a copy of earlier documentation of their case, and most documentation organisations will not want to or be able to share such documentation with you. You should check whether someone's experience has been covered in the media, including social media.)

Consider these below as the only two possible exceptions to not re-engaging. These require a thorough and honest assessment of the overall context (including whether there are other survivors who have not yet had their experience documented) and of the individual needs, wishes and circumstances of the survivor. These also require that you first put in place appropriate risk-avoidance and -management measures (including being trained and experienced in re-interview techniques), and that, once that is done, you carefully and fully explain all the risks of repeat documentation to the survivor. The two exceptions are:

- (1) if, as a mandated actor, you are legally obliged to or have another formal reason to do so (and you have otherwise complied with all applicable standards and law); or,
- (2) if you are a non-mandated actor, there is a truly justifiable, well-considered and documented reason to re-engage for the purpose of such documentation (and you have otherwise complied with all applicable standards and law).

On the last-mentioned exception, it is difficult to imagine what such reason would be in circumstances where there are or have been multiple documentation and investigation efforts, particularly where there are survivors who have not yet had their experience documented and where you are not highly skilled and part of well-resourced documentation or investigation teams.

4. Referrals in Iraq (men, women, girls and boys)

UNFPA and the GBV sub-cluster have a full set of referral pathways for many areas in Iraq. They have not been published here in order to protect the confidentiality of some of these services, and also because they change over time. There is also Iraq specific case management and referral guidelines. **It is critical that these should be consulted in the preparation stages and applied during any investigation stages.**

Generally, in Iraq there is a lack of access points and services for male survivors as well as for survivors from sexual and gender minorities (SGM), such as gay, lesbian and transgender individuals. As recommended in IP2, practitioners should take time to consider informal support networks and the specialised NGOs/service providers which could provide some guidance, support or services.

CHAPTER 9 / PLANNING

The whole of this Supplement provides a lot of relevant information for documentation planning purposes. Using the IP2 set of questions for research and analysis (Chapter 9, Box

2 (p.123), this particular section provides a cross-reference to the relevant sections within this Supplement and also a basic reading and on-line resource list for further research.

Guiding Questions for Research and Analysis

Preliminary Research into Specific Crimes

Question	Notes	Good research points, reports or reading.
Gender Dynamics in Area	See Chapters 2 and 7 above	<ul style="list-style-type: none"> • I-WISH Study (2011), pp.46-50, 53-57. https://reliefweb.int/sites/reliefweb.int/files/resources/I-WISH%20Report%20English.pdf • UNIRAQ Women in Iraq Factsheet (2013) http://www.uniraq.org/index.php?option=com_k2&view=item&id=498:women-in-iraq-factsheet&Itemid=626&lang=en • UNFPA Adolescent Girls Assessment KRI (2016) https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/assessments/adolescent_girls_assessment_report_kri_2016_002.pdf • CARE Rapid Gender Assessment – Mosul (2016) https://reliefweb.int/sites/reliefweb.int/files/resources/RGA%20Mosul_SECOND%20UPDATE.pdf • IILHR Women and the Law in Iraq (2011) http://www.iilhr.org/documents/womenandlawiniraqEN.pdf • HRW No One Is Safe Women in Iraq (2014) and Domestic Violence in Iraq (2017) https://www.hrw.org/report/2014/02/06/no-one-safe/abuse-women-iraqs-criminal-justice-system • UNICEF Gender Equality Profile Iraq (2011) https://www.unicef.org/gender/files/Iraq-Gender-Eqaulity-Profile-2011.pdf • HRW They Want Us Exterminated (2009) https://www.conseil-lgbt.ca/uploads/files/iraq0809webwcover.pdf • IGLHRC Iraq Baseline Study (2013) https://web.archive.org/web/20131003222620/http://www.iglhrc.org/sites/default/files/Iraq%20Baseline%20Study%20Final%20with%20Table%20of%20Contents%201.29.13.pdf
Nature and scope of Sexual Violence	See Chapter 2 above	<ul style="list-style-type: none"> • UNFPA The GBV Assessment of Conflict Affected Governorates (2016) http://iraq.unfpa.org/publications/gbv-assessment-conflict-affected-governorates-iraq • Iraq GBV Sub-Cluster Strategy 2016 https://reliefweb.int/sites/reliefweb.int/files/resources/gbv_sub-cluster_strategy_iraq_2016_full_endorsed.pdf • Amnesty International Escape from Hell (2014) https://www.amnesty.org.uk/files/escape-from-hell-torture-and-sexual-slavery-in-islamic-state-captivity-in-iraq-english-2.pdf • UNCOI Syria They Came to Destroy (2016) http://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/A_HRC_32_CRP.2_en.pdf • Nadje Al Ali Sexual Violence in Iraq (2016) • Henia Dakkak Tackling Sexual Violence in Iraq (2007) http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/FMR27/full.pdf

		<ul style="list-style-type: none"> • UNFPA Child Marriage KRI (2016) http://iraq.unfpa.org/sites/default/files/pub-pdf/Child%20Marriage%20Broucher%20English%20Final%20covers%206.pdf • Heartland Alliance FGM Baseline and Prevalence Surveys KRI (2015) http://www.stopfgmmideast.org/wp-content/uploads/2017/01/FGM-Prevalence-Survey-Report_Final_HAI.pdf https://reliefweb.int/sites/reliefweb.int/files/resources/20140908%20KAP%20Survey%20Key%20Findings%20HCWA%20UNICEF%20Final.pdf
Community understanding and attitudes to Sexual Violence	See Chapter 7 above	<ul style="list-style-type: none"> • Begikhani, Gill and Hague “Honour-Based” Violence (2015) KRI • WILFP & Ors. ICCPR Iraq Shadow Report GBV (2015) http://www.law.cuny.edu/academics/clinics/hrjg/publications/ICCPR-Iraq-Shadow-Report-GBV-ENG-PDF.pdf • Heartland Alliance Institutionalised Violence Against Women and Girls (2011) https://www.heartlandalliance.org/international/wp-content/uploads/sites/15/2017/02/Institutionalized-Violence-Against-Women-and-Girls-in-Iraq-Laws-and-Practices-January-2011.pdf
Security situation and obstacles to accessing accountability mechanisms	See Chapters 3, 7 and 9 above	<p>Up to date news sources (in English):</p> <ul style="list-style-type: none"> • iraqnews.com • Niqash.org page • UNAMI page • Relief Web Updates Iraq (multiple sources) • International Crisis Group Iraq and Crisis Watch Iraq page
How is Sexual Violence criminalised?	See Chapter 4 above	
How investigated?	See Chapter 3 above	
Different forms of justice	See Chapter 3 above	
Preliminary Research into the Context		
Political and Security Situation. Conflict and persecution history.	See Chapter 2 above	<ul style="list-style-type: none"> • UNAMI page • International Crisis Group Iraq and Crisis Watch Iraq page • Background reading: <ul style="list-style-type: none"> ◦ Yitzhak Nakash The Shi’is of Iraq ◦ Hanna Batatu The Old Social Classes and the Revolutionary Movement in Iraq ◦ Marion Farouk-Sluglett & Peter Sluglett Iraq Since 1958 ◦ Dexster Kilkins The Forever War ◦ Kanan Makiya Republic of Fear: The Politics of Modern Iraq ◦ Nadje Al Ali Iraqi Women: Untold Stories 1943 to Present
Who are the targets? How have different groups been targeted?		<ul style="list-style-type: none"> • Amnesty International Escape from Hell (2014) • UNCOI Syria They Came to Destroy (2016) • Yazda page https://www.yazda.org

Reports of other crimes? Patterns of crimes?

- **UNAMI** Reports http://www.uniraq.org/index.php?option=com_k2&view=item&layout=item&id=943&Itemid=637&lang=en
- **US State Department** Annual Country Reports Iraq (HRV reporting)
- **Amnesty International** Iraq page and publications
- **Human Rights Watch** Iraq page

Preliminary Research into Available and Accessed Services

» See Referral Pathways section above and annexes below.

o **UNFPA** <http://iraq.unfpa.org>

o **UNHRC Iraq** page on RefWorld: <http://www.refworld.org/country,,UNHCR,,IRQ,,,,0.html> and their Global Focus Iraq page <http://reporting.unhcr.org/node/2547>

» Obstacles to accessing services? See Chapter 7 (**on stigma and “honour” crimes**).

ANNEX I: EVIDENCE WORKBOOK USING IRAQI LAW

For this Supplement, the Evidence Workbook format from IP2 has been adapted for sexual violence crimes under the Iraqi Penal Code. It is recommended that practitioners working in Iraq and for the purposes of seeking accountability and redress in Iraq also use the IP2 Annex 1 Workbook format, guidance and examples to assess crimes against international criminal law. As noted in Chapter 4 above, there are larger differences between international and Iraqi national law.

It should also be noted that this Evidence Workbook setting out the elements of Iraqi sexual violence crimes is curtailed by (1) the lack of defined terms in the Iraqi law, and (2) the lack of access to case law and low number of sexual violence judgements which would help to determine what evidence Iraqi courts will accept to meet the elements of each crime.

As a result, practitioners are recommended to update this workbook template with their own court experience of these cases before Iraqi courts and if more case law and judicial interpretation emerges.

(The Evidence Workbook format from IP2 should ideally also be used by practitioners working in or on Iraq and who are documenting CARSV for the purposes of accountability and redress in third states, before other international criminal and/or human rights courts, commissions, inquiries, etc. -- or, in case Iraq, with or without international support, one day establishes a court or other mechanism to deal with past international crimes.)

Crime: Rape Article 393(1)			
Elements of Crimes	Components of Elements	Means of Proof	
		Types of Evidence	Your evidence
Specific Element: (a) sexual intercourse with a female or buggery with any person			
(a) "sexual intercourse" with a female or "buggery"	Insertion/penetration by the penis into the vagina. OR	<ul style="list-style-type: none"> Survivor victim evidence Eye witness evidence Medical expert evidence (possible lacerations, bruising, etc.): NOTE: this is not valid as evidence of lost virginity. OR Trace evidence such as semen swaps/DNA recovered. 	
	Insertion/penetration by the penis into the anus/anal opening.	<ul style="list-style-type: none"> Survivor victim evidence Eye witness evidence Medical expert evidence (possible lacerations, bruising, etc.) Trace evidence such as semen swaps/DNA recovered. 	
<p>Notes: It has been assumed that insertion/penetration (however slight) is sufficient under Iraq law.</p> <p>On plain reading, this does not include penetration or insertion of other objects (such as the fingers or inanimate objects) into the vagina or anus. It does not include insertion of the penis into other orifices (such as the mouth).</p> <p>GENDERED LANGUAGE of Iraqi law suggests only a man could be a physical perpetrator (see other modes of liability below).</p>			

Specific Element: (b) without consent

Without their consent	<p>Consent and without consent not defined in Iraqi law.</p> <p><i>In other provisions in the Code, there is additional reference to “and with the use of force, menaces or other means” – which would imply that these are different and additional to the concept of “without consent”:</i></p>	<ul style="list-style-type: none"> • Survivor evidence. • Eye witness evidence. • Medical expert evidence (possible lacerations, bruising, etc. – but note scientific literature indicates presence in only 33% of cases) • Evidence of coercive context and circumstances which removes possibility of genuine consent. 	
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Notes: In other national jurisdictions, “consent” has been defined to mean agreeing by choice with the freedom and capacity to make that choice voluntarily.

Unfortunately, often when national courts look for evidence regarding consent, rather than relying on evidence of an absence of express positive consent or evidence of coercive circumstances in which genuine consent is not possible, they incorrectly look for evidence of the use of force, a victim to have fought back or physically resisted or for the victim to have spoken against what was happening.

International interpretation of “without consent” would include “by force or threat of force, or coercion such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or against a person incapable of giving genuine consent” (based on ICC language).

Practitioners in Iraq are encouraged to document evidence according to international standards, and argue in Iraq courts that coercive circumstances would vitiate any consent and therefore meet the legal elements for this offence.

Aggravating Circumstances

Victim’s age	Victim is under 18 years of age	<ul style="list-style-type: none"> • Victims’ evidence. • Parent or relatives evidence. • Birth certificate. • Medical expert evidence (it is possible for medical experts to provide approximate age based on developmental stages). 	
Position of offender	<p>Relative of the victim to third generation/degree. OR</p> <p>Guardian, protector, custodian of victim or with authority over victim or is the master of victim as their servant. OR</p> <p>Public Official, religious leader, or doctor and used that position of trust.</p>	<ul style="list-style-type: none"> • Victim’s evidence. • Birth certificate(s) to show family relationship. • Legal or contractual papers to show other types of relationship or position. • Eye witness evidence including family members or community members to evidence relation or position. 	
Multiple offenders or multiple times	2 or more people OR multiple times.	<ul style="list-style-type: none"> • Victim’s evidence. • Eye witnesses evidence. • Trace evidence such as semen swaps/DNA. 	

		<ul style="list-style-type: none"> • Medical expert evidence possibly may show damage consistent with multiple time or offenders. (NOTE: absence of findings not proof to the contrary.) 	
Victim contracts a venereal disease as result	Presence of a venereal disease after the incidence where it was not present before. Lack of other source.	<ul style="list-style-type: none"> • Victim's evidence. • Medical report/test. 	
Victims loses virginity as a result		<ul style="list-style-type: none"> • Victim's evidence. • Circumstantial evidence. <p>NOTE: Hymen or virginity testing is not scientifically valid and any forced testing could amount to sexual violence in its own right.</p>	

Notes: Potentially harmful and stigmatising focus on virginity.

Crime: Sexual Intercourse outside marriage Article 393(1)

Elements of Crimes	Components of Elements	Means of Proof	
		Types of Evidence	Your evidence
Specific Element: (a) sexual intercourse with a female or anal sex with any person			
(a) "sexual intercourse" with a female or "buggery"	Insertion/penetration by the penis into the vagina. OR	Evidence <ul style="list-style-type: none"> • Eye witness evidence • Trace evidence such as semen swaps/DNA recovered. 	
	Insertion/penetration by the penis into the anus/anal opening.	<ul style="list-style-type: none"> • Survivor victim evidence • Eye witness evidence • Medical expert evidence (possible lacerations, bruising, etc.) • Trace evidence such as semen swaps/DNA recovered. 	

Notes: It has been assumed that insertion/penetration (however slight) is sufficient under Iraq law.

On plain reading, this does not include penetration or insertion of other objects (such as the fingers or inanimate objects) into the vagina or anus. It does not include insertion of the penis into other orifices (such as the mouth).

GENDERED LANGUAGE in Iraqi law suggests only a man could be a physical perpetrator (see other modes of liability below) and therefore this offence does not apply to the woman involved in this consensual act. In practice, it appears to apply to both, regardless of this legal technical element.

Specific Element: (b) without consent

(b) outside marriage	The two engaged in these consensual acts are not married to each other.	<ul style="list-style-type: none"> • Eye witness testimony including spouses, family members. 	
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		<ul style="list-style-type: none"> • Accused testimony/confession. • Absence of marriage registration. • <i>If the accused are both men, marriage is not legal between them under Iraqi Law.</i> 	
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Notes: There are situations in Iraq where marriages may not be formally registered. Note that underage marriage (below 18 years old) is a legally recognised form of marriage for those fifteen years or above if there is judicial consent. In 2014 and 2017, a draft law was before the Iraqi Parliament (known as the “Jafaari Personal Status Law”) which would bring the age down to 9 years old for girls. It was withdrawn in the face of opposition.

Specific Element: (c) with consent

With consent	Consent not defined in Iraqi law.	<i>Eye witness evidence is unlikely but perhaps provides circumstantial evidence of acts and words.</i> <i>[Accused testimony/confession.]</i>	
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Notes: In other national jurisdictions, “consent” has been defined to mean agreeing by choice with the freedom and capacity to make that choice voluntarily.

Aggravating Circumstances: see above for Rape, Article 393.

Crime: Sexual Assault Article 396(1)

Elements of Crimes	Components of Elements	Means of Proof	
		Types of Evidence	Your evidence

Specific Element: (a) sexual assault or attempt to sexually assault

(a) Sexual assault or attempt to sexually assault.	Undefined in law.	<ul style="list-style-type: none"> • Survivor victim evidence. • Eye witness evidence • Medical expert evidence (possible bruising, etc.). But NOTE: not necessary to show injury. • Trace evidence such as DNA recovered. 	
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Notes: Because of the lack of definitions and the vague wording, it is difficult to determine the difference between sexual assault and an immodest act. Practitioners could argue for a broad definition in line with international law – any act of a sexual nature, including penetration, contact, exposure, threats, words or causing in others.

Specific Element: (b) without consent. See above for rape Art.393.

Crime: Immodest Act without consent Art.400

Elements of Crimes	Components of Elements	Means of Proof	
		Types of Evidence	Your evidence

Specific Element: (a) immodest act

(a) immodest act	Undefined in law.	<ul style="list-style-type: none"> • Survivor victim evidence • Eye witness evidence. 	
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Notes: Again, without definitions or clearer wording, it is difficult to determine what amounts to an immodest act.

Specific Element: (b) without consent. See above for rape Art.393.

Crime: Immodest Act in Public Art.401

Elements of Crimes	Components of Elements	Means of Proof	
		Types of Evidence	Your evidence
Specific Element: (a) immodest act. See above for Art.400.			
Specific Element: (b) in public			
In public.	It is not clear where the line is between public and private space is in Iraq law.	<ul style="list-style-type: none"> • Eye witness evidence. • Victim evidence. 	

Crime: Indecent Advances Article 402(1)(a)

Elements of Crimes	Components of Elements	Means of Proof	
		Types of Evidence	Your evidence
Specific Element: indecent advances			
Indecent advances towards another man or woman.	Undefined in Iraq law.	<ul style="list-style-type: none"> • Survivor victim evidence • Eye witness evidence. 	

Notes: Without definition or clearer language, it is difficult to determine what the elements of “indecent advances” are and how it differs from the other offences, such as sexual assault, immodest acts, etc.

Crime: Public Assailing in an Immodest Manner Article 402(1)(b)

Elements of Crimes	Components of Elements	Means of Proof	
		Types of Evidence	Your evidence
Specific Element: (a) assails a woman			
Assails a woman	Undefined.	<ul style="list-style-type: none"> • Survivor victim evidence • Eye witness evidence • Medical expert evidence (possible bruising, etc.) 	
Specific Element: (b) in an immodest manner			
In an immodest manner with words, actions or signs	Undefined.	<ul style="list-style-type: none"> • Survivor victim evidence • Eye witness evidence 	
Specific Element: (c) in a public place			
In a public place	Undefined.	<ul style="list-style-type: none"> • Survivor victim • Eye witness evidence 	

Notes: As noted above, without definitions or more clarity of language, it is hard to determine what acts or conduct would amount to “assailing” “in an immodest manner”, and how this can be distinguished from the other acts such as sexual assault, indecent advances, or immodest acts.

Crime: Forced Abortion Article 418(1)			
Elements of Crimes	Components of Elements	Means of Proof	
		Types of Evidence	Your evidence
Specific Element: (a)			
Wilfully procures a miscarriage of a woman	Procuring a miscarriage. (causing the loss or termination of a pregnancy)	<ul style="list-style-type: none"> • Survivor victim evidence. • Eye witness evidence • Medical evidence. • Pregnancy test results, medical records, or eye witness testimony. 	
	Wilful state of mind.	<ul style="list-style-type: none"> • Eye witness evidence as to the words or actions of accused. • Circumstantial evidence as to intent. • [Accused testimony/ confession.] 	
Specific Element: (b) without consent. See above for rape Art.393.			
Aggravating Circumstances			
If victim dies		<ul style="list-style-type: none"> • Death certificate and post mortem/forensic report. • Eye witness evidence including family member. 	
Position of offender	Doctor, pharmacist, chemist, midwife or assistant of such person	<ul style="list-style-type: none"> • Victim's evidence. • University qualification or contractual papers to show profession. • Eye witness evidence including family members or community members to evidence position. 	
Mode of Liability: Principal Articles 47 and 49			
Elements of Crimes	Components of Elements	Means of Proof	
		Types of Evidence	Your evidence
Commission OR	Physical commissions of offence by self or with others.	<ul style="list-style-type: none"> • Victim evidence. • Eye witness evidence. • Documentary evidence. • Authenticated video evidence (unlikely in sexual violence cases but possible). • DNA/trace forensic evidence. • [Accused testimony/ confession.] 	

Participation OR	<p>1) Participation in an offence which consists of a number of acts AND</p> <p>2) Wilfully carrying out one of those acts during the commission of the offence.</p>	<ul style="list-style-type: none"> • Victim evidence. • Eye witness evidence. • Insider witness evidence. • Documentary evidence. • Authenticated video evidence (unlikely in sexual violence cases but possible). • [Accused testimony/ confession.] 	
<p>Incitement (where physical perpetrator not criminally liable)</p> <p>NOTE: indirect perpetration/use of tools</p> <p>OR</p>	<p>Incitement in any way to commit an act contributing to an offence if that other person is no way criminally liable for the offence.</p> <p>NOTE: for e.g. where the physical perpetrator is unaware, or is coerced.</p>	<ul style="list-style-type: none"> • Physical perpetrator evidence or other insider witness evidence. • Victim evidence. • Eye witness evidence. • Documentary evidence. • Authenticated video evidence (unlikely in sexual violence cases but possible). • Authenticated intercepts or communication evidence. 	
An accessory (under Art.48) who is present at the crime scene or when a contributing act is committed. Penal Code, Article 49	<p>(a) Accessory (see below) AND</p> <p>(b) Presence.</p>	<ul style="list-style-type: none"> • Victim evidence. • Eye witness evidence. • Insider witness evidence. • Documentary evidence (e.g. logistics records, personnel records, orders). • Authenticated video evidence (unlikely in sexual violence cases but possible). 	

Mode of Liability: Accessory – Aiding and Abetting Article 48(3)

Elements of Crimes	Components of Elements	Means of Proof	
		Types of Evidence	Your evidence
Knowingly supplies the principal with a weapon instrument or anything else to commit the offence OR	<p>1) Knowingly</p> <p>2) supplies a weapon, instrument or anything to commit the offence</p> <p>3) to the principal</p>	<ul style="list-style-type: none"> • Eye witness evidence. • Insider witness evidence. • Documentary evidence (e.g. logistics records, orders). • Physical and trace evidence. 	
Deliberately assists the principal in any other way to carry out those acts for which he has received assistance.	<p>1) Deliberate</p> <p>2) Assistance in any way to carry out acts</p> <p>3) To the principal</p>	<ul style="list-style-type: none"> • Eye witness evidence. • Insider witness evidence. • Documentary evidence (e.g. logistics records, orders, reports). 	

		<ul style="list-style-type: none"> • Authenticated video evidence (unlikely in sexual violence cases but possible). • Authenticated intercepts or communication evidence. 	
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Mode of Liability: Accessory - Inciting Article 48(1)

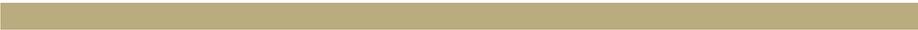
Elements of Crimes	Components of Elements	Means of Proof	
		Types of Evidence	Your evidence
Incites another NOTE: difference between principal inciter (non-liable physical perpetrator) and accessory inciter (criminally liable physical perpetrator/ principal).	Incites another to commit an offence, and	<ul style="list-style-type: none"> • Physical perpetrator evidence or other insider witness evidence. • Victim evidence. • Eye witness evidence. • Documentary evidence (e.g. orders, reports). • Authenticated video evidence (unlikely in sexual violence cases but possible). • Authenticated intercepts or communication evidence. 	
	Offence is committed on the basis of incitement (some nexus required between incitement and offence).		

Mode of Liability: Accessory – Conspiring Article 48(2)

Elements of Crimes	Components of Elements	Means of Proof	
		Types of Evidence	Your evidence
Conspiring with others NOTE: Also offence of conspiracy under Article 55.	Conspiring with Others (at least 2) NOTE: Article 55 definition may inform “conspiring”: would include any agreement including initial planning stages and even if short period of time. AND	<ul style="list-style-type: none"> • Insider witness evidence. • Eye witness evidence. • Documentary evidence (e.g. orders, reports, agreements, contracts). • Authenticated intercepts or communication evidence. 	
	Offence is committed as a basis of the conspiracy. NOTE: requirement to show a nexus between conspiring and offence.		

Mode of Liability: Attempt Article 30

Elements of Crimes	Components of Elements	Means of Proof	
		Types of Evidence	Your evidence
Initiation of an act with intent to commit an offence which is frustrated or prevented for reasons unrelated to the intention of the accused	Initiation of an act:	<ul style="list-style-type: none"> • Insider witness evidence. • Eye witness evidence. • Victim evidence. • Documentary evidence. 	
	With intent to commit an offence		



	<p>Prevention or frustration of act for reasons unrelated to intent of accused.</p> <p>This can include impossibility.</p>	<p>This can include impossibility.</p> <ul style="list-style-type: none">• Insider witness evidence.• Eye witness evidence.• Documentary or communications evidence (e.g. reports, intercepted communications).	
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ENDNOTES

¹ IP2 is published by the Foreign & Commonwealth Office (FCO) of the government of the United Kingdom of Great Britain and Northern Ireland (UK), and its lead authors are Sara Ferro Ribeiro & Danaé van der Straten Ponthoz. IP2 can be downloaded from the website of the FCO, at www.gov.uk/government/publications/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict.

² Among other names, also known as the Islamic State of Iraq and Syria (ISIS), the Islamic State of Syria and the Levant (ISIL), Islamic State, and the Islamic State of Iraq and al-Sham.

³ As an additional example, following the Gulf War in 1991, some laws and policies were amended or enacted which reduced women's rights, as the regime tried to secure support from tribal and religious leaders. During that time, mitigation provisions in Iraqi law for cases of "honour" killing were expanded. See Human Rights Watch, *No-one is Safe: Abuses of Women in Iraq's Criminal Justice System*, 2014, p.17.

⁴ Human Rights Watch, *Domestic Violence in Iraq, Human Rights Watch Commentary on the draft Law on Anti-Domestic Violence in Iraq*, 2017, p.1 ("The Iraq Family Health Survey (IFHS) in 2006/2007 found that one in five Iraqi women have been subject to physical domestic violence."). https://www.hrw.org/sites/default/files/supporting_resources/iraq_dv_formatted_memoirandum_final_english.pdf

⁵ See e.g. UK Home Office, *Country Policy and Information Note Iraq: Kurdish 'Honour' Crimes*, August 2017, at Section 7.3 Prevalence. <https://www.justice.gov/eoir/page/file/995246/download>

⁶ Graphic from UNIRAQ. *Women in Iraq Fact Sheet* (2013) http://www.uniraq.com/index.php?option=com_k2&view=item&id=498:women-in-iraq-factsheet&Itemid=626&lang=en

⁷ Such views have been shared with the author in the course of her work on Iraq.

⁸ See Nadjé Al-Ali, *Sexual Violence in Iraq: Challenges for Transnational Feminist Politics*, *SOAS University of London European Journal of Women's Studies*, 2016, p.11.

⁹ See Al-Ali (2016), p.10.

¹⁰ Katherine Ranharter and Gareth Stansfield, *Acknowledging the Suffering caused by State-Mandated Sexual Violence and Crimes: An Assessment of the Iraqi High Tribunal*, *Middle Eastern Studies*, 2015, quoting from Al-Dujail Case no 1/9 First/2005 (as translated by Mizna Management LLC) Document, Document 3 of 6, p.48, pp.37/38 73 and Document 4 of 6, p.11 (relevant to this paragraph).

¹¹ See Ranharter and Stansfield above, and Al-Ali (2016), p.12 ("systematic sexual violence including rape against Kurdish women in detention centres"). See also Choman Hardi, *Gendered Experiences of Genocide: Anfal Survivors in Kurdistan-Iraq*, 2011

¹² See Al-Ali (2016), p.12.

¹³ See Al Ali (2016), p.16. Both criminal gangs and Iraqi police were believed to be involved in forced trafficking to other Middle Eastern states.

¹⁴ Henia Dakkak, *Tackling Sexual Violence, Abuse and Exploitation*, *FMR Special Edition*, 2007, p.39 (<http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/FMR27/full.pdf>); Human Rights Watch, *Climate of Fear: Sexual Violence and Abduction of Women and Girls in Baghdad*, 2003.

¹⁵ Heartland Alliance, “Institutionalized Violence Against Women and Girls: Laws and Practice in Iraq”, 2011. <https://www.heartlandalliance.org/international/wp-content/uploads/sites/15/2017/02/Institutionalized-Violence-Against-Women-and-Girls-in-Iraq-Laws-and-Practices-January-2011.pdf>

¹⁶ See Amnesty International, *Beyond Abu Ghraib: Detention and Torture in Iraq*, 2006 (<https://www.amnesty.org/en/documents/mde14/001/2006/en/>); Human Rights Watch, *The Road to Abu Ghraib*, 2004, pp.26-27 findings of the Taguba Report (US Forces); Al Ali (2016), p.19.

¹⁷ See e.g. Helen Benedict, *The Lonely Soldier: The Private War of Women Serving in Iraq*, 2015, Beacon Press.

¹⁸ See Human Rights Watch, *No One is Safe: Abuses of Women in Iraq’s Criminal Justice System*, 2014 (<https://www.hrw.org/report/2014/02/06/no-one-safe/abuse-women-iraqs-criminal-justice-system>). See also US Department of State, *Country Report for Iraq 2013* (“In its May report on prisons and detention facilities, the Ministry of Human Rights recorded three allegations of rape and 13 allegations of sexual abuse of women, as well as 14 allegations of rape and 47 allegations of sexual abuse of men in Ministry of Justice facilities.”).

¹⁹ See e.g. Human Rights Watch, *They Want Us Exterminated: Murder, Torture, Sexual Orientation and Gender in Iraq*, 2009 (<https://www.hrw.org/report/2009/08/17/they-want-us-exterminated/murder-torture-sexual-orientation-and-gender-iraq>); IGLHRC, *Iraq Baseline Study*, 2013, pp.9-13 (<https://web.archive.org/web/20131003222620/http://www.iglhrc.org/sites/default/files/Iraq%20Baseline%20Study%20Final%20with%20Table%20of%20Contents%201.29.13.pdf>).

²⁰ US Department of State (2017) *Iraq Country Report for 2015*, p.52; <https://www.state.gov/documents/organization/253137.pdf>. Amnesty International (2014) *Escape from Hell: Torture and Sexual Violence in Islamic State Captivity in Iraq*; <https://www.amnesty.org.uk/files/escape-from-hell-torture-and-sexual-slavery-in-islamic-state-captivity-in-iraq-english-2.pdf>. UNCOI for Syria (2016) “They Came to Destroy”: ISIS Crimes Against the Yazidis. http://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/A_HRC_32_CRP2_en.pdf.

²¹ IICI disapproves of the death penalty. There is a growing body of law, practice and opinion around the world against the death penalty.

²² See Al-Ali (2016), pp.12-13.

²³ US Department of State, *Country Report for Iraq 2015*, 2017, p.54. (<https://www.state.gov/documents/organization/253137.pdf>). See also, US Department of State, *Country Report for Iraq 2013*, p.50, reporting 58% of women in Erbil and Sulaymaniyah (<https://www.state.gov/documents/organization/220565.pdf>). But see Heartland Alliance International, *FGM Prevalence Survey Report*, 2015, p.8 (finding similar figures for mothers, but noting a decline to 16.7% and 11.2% respectively for these areas for daughters/new generation).

²⁴ This table *generally* mentions examples that are not listed in IP2. Some IP2 examples are also relevant to Iraq.

²⁵ Iraq Constitution, Article 121.

²⁶ Note: CPC, Art. 53(B): If the offence took place outside Iraq the investigation into it shall be conducted by an investigative judge appointed for the purpose by the Minister of Justice. CPC, Art.54 Article 54A. If a complaint or allegation against a suspect is lodged with two or more of the competent authorities investigating the offence, the papers on the case must be passed to the authority with which the complaint or allegation was lodged first. B. If there are several suspects for an offence and a complaint or allegation against some of them has been lodged with one competent investigating authority and against others with another such authority, the papers on the case must be passed in the authority with which the complaint or allegation was lodged first. Art.55 conflicts referred to Court of Cassation.

²⁷ See US Department of State, *Country Report for Iraq 2016*, 2017, p.20.

²⁸ UNCOI for Syria (2016) *“They Came to Destroy”: ISIS Crimes Against the Yazidis*. http://www.ohchr.org/Documents/HR-Bodies/HRCouncil/ColSyria/A_HRC_32_CRP.2_en.pdf

²⁹ UNHRC, *“Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups”* A/HRC/28/18, 15 March 2015.

³⁰ See IP2, p. 33, Box 2 Universal Jurisdiction as a Tool to Fight Impunity.

³¹ See HRW, Q&A: First Cracks to Impunity in Syria, Iraq, Refugee Crisis and Universal Jurisdiction Cases in Europe, 2016. <https://www.hrw.org/news/2016/10/20/qa-first-cracks-impunity-syria-iraq>

³² See Iraqi Constitution, Article 95 (no special or extraordinary courts). But specialised chambers and the IHT have been created within the court system in Iraq.

³³ See Iraqi Penal Code, Arts.6-15.

³⁴ See Iraqi Penal Code, Art.13.

³⁵ See e.g. Heartland Alliance (2011) *Institutionalised Violence Against Women and Girl: Law and Practice in Iraq*, p.8. <https://www.heartlandalliance.org/international/wp-content/uploads/sites/15/2017/02/Institutionalized-Violence-Against-Women-and-Girls-in-Iraq-Laws-and-Practices-January-2011.pdf>

³⁶ At least in KRI under the Domestic Violence law, forced marriages (such as Da’esh) marriages could be annulled and considered illegal. Any sexual violence carried out during the forced marriage would then not be considered as occurring between a married couple.

³⁷ See Heartland Alliance, *Institutionalised Violence Against Women and Girls: Law and Practice in Iraq*, 2011. <https://www.heartlandalliance.org/international/wp-content/uploads/sites/15/2017/02/Institutionalized-Violence-Against-Women-and-Girls-in-Iraq-Laws-and-Practices-January-2011.pdf>

³⁸ UK PSVI Expert, Iraq, November 2016.

³⁹ See IP2, p.62 Box 12.

⁴⁰ UK PSVI Expert, Iraq, November 2016.

⁴¹ <http://www.law.cuny.edu/academics/clinics/hrgj/publications/ICCPR-Iraq-Shadow-Report-GBV-ENG-PDF.pdf>

⁴² pp.15-16, 21, 25. <https://www.heartlandalliance.org/international/wp-content/uploads/sites/15/2017/02/Institutionalized-Violence-Against-Women-and-Girls-in-Iraq-Laws-and-Practices-January-2011.pdf>

⁴³ p.18 (many victims of sex trafficking are charged with prostitution p.20).

⁴⁴ p.27.

⁴⁵ See Al Ali (2016), pp.4-9.

⁴⁶ See Principles for Global Action on Addressing and Tackling Stigma Associated with Conflict Related Sexual Violence, pp.23-23, 38. <https://www.gov.uk/government/publications/launch-of-the-principles-for-global-action-on-tackling-the-stigma-of-sexual-violence-in-conflict>

⁴⁷ See Heartland Alliance, *Institutionalised Violence Against Women and Girls: Law and Practice in Iraq*, 2011, pp.21, 25. <https://www.heartlandalliance.org/international/wp-content/uploads/sites/15/2017/02/Institutionalized-Violence-Against-Women-and-Girls-in-Iraq-Laws-and-Practices-January-2011.pdf>

⁴⁸ See also Minor's Care Law No. 78/1980, Arts.27-33; The Juvenile Welfare Law, Arts. 3-5.

⁴⁹ See, as an example, https://www.humanitarianresponse.info/system/files/documents/files/gbv_subcluster_organogram_and_contacts_february2017.pdf.

⁵⁰ See, e.g., Foster, J & Minwalla, S (2018) *Voices of Yazidi Women: Perceptions of Journalist Practices in Reporting on ISIS Sexual Violence* Women's Studies International Forum, Vol.67, pp.53-64. <https://www.sciencedirect.com/science/article/pii/S0277539517301905>







Institute for International
Criminal Investigations

✉ Anna Paulownastraat 101
2518 BC Den Haag
The Netherlands

☎ +31 70 364 4660

@ info@iici.global