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**The truth of the legend of successful criminal procedure reform in post-Saddam Iraq :
a critical analysis of pre-trial rights in the light of international human rights law**

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**The Truth of the Legend of Successful Criminal
Procedure Reform in Post-Saddam Iraq: A Critical
Analysis of Pre -Trial Rights in the Light of
International Human Rights Law**

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A thesis submitted for the degree of Doctor of Philosophy
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ABSTRACT

The current thesis intends to assess whether the post-Saddam reform in the Iraq criminal justice system is in line with international human rights standards, and particularly the International Covenant on Civil and Political Rights (ICCPR), to which Iraq is a state party. The aspects of reform on which the present research focuses are the rights of the accused person during the pre-trial phase - the right to be freed from arbitrary arrest and detention, the right of access to a counsel and an interpreter, and the right to be free from self-incrimination. Doctrinal legal research was adopted in the conduct of this research, and both primary and secondary data sources were assessed. The assessed data were drawn from scholarly works and other publications, as well as regional and international standards and Iraqi legislation.

The key findings unearthed by the current study are that even with the many welcome reforms to the Iraqi justice system over the last ten years, certain weaknesses remain. The criminal justice system in post-Saddam Iraq has failed to attain full compliance with the obligations of due process required by international law. Basic rights of accused persons, as enshrined in international standards, are far from being fully available to accused persons in Iraq. The research found a considerable gap between the law and international due process. A culture of violence, torture and impunity still prevails, particularly in the prosecution process, which means that the rule of law in Iraq is not fully applied. There is a wide gulf between the legislative framework and everyday working practice.

The current research concludes that the threat to the freedoms and liberties of Iraqis involves both the theoretical weakness of law and the routine maltreatment of individuals. It thus urgently advocates further reform of the justice system. The thesis also contains proposals for further work which needs to be done in order to ensure that the new Iraqi criminal justice system accords with the standard rules of due process. Above all, the study demonstrates that recognition of the primacy of the rule of law is crucial if the challenges confronting the Iraqi justice system are to be met. Little research has been conducted to explore whether the post-2003 reforms to due process have succeeded or failed, and the present research aims to fill an important gap in our understanding.

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TABLE OF CONTENTS

CHAPTER ONE	1
INTRODUCTION	1
1.1. THE PROCEDURAL SAFEGUARDS FOR PERSONS SUBJECT TO CRIMINAL PROCEEDINGS ..	2
1.1.1. <i>Human rights protection in the criminal process in the period 1968-2003</i>	3
1.1.2. <i>Human rights protection in the criminal process for the period 2003-present</i>	8
1.2. IRAQI OBLIGATIONS UNDER RELEVANT INTERNATIONAL HUMAN RIGHTS LAW	12
1.2.1. <i>Obligations under the ICCPR</i>	13
1.2.2. <i>Other relevant UN international instruments binding upon Iraq</i>	17
1.2.3. <i>Non-treaty obligations</i>	19
1.3. THESIS STATEMENT AND RESEARCH QUESTIONS	20
1.4. METHODOLOGY	22
1.5. STRUCTURE OF THE WORK	24
CHAPTER TWO	28
THE RULE OF LAW AND CRIMINAL JUSTICE REFORM IN IRAQ	28
INTRODUCTION.....	28
2.1. THE MEANING OF THE RULE OF LAW	29
2.2. LAW REFORM IN IRAQ	33
2.2.1. <i>Constitutional reform</i>	33
2.2.1.1. Brief history.....	33
2.2.1.2. Creating rule of law through the Constitution	35
2.2.1.3. International community efforts	42
2.2.2. <i>Criminal law reform</i>	43
2.2.2.1. Procedural criminal law reform.....	44
2.2.2.2. Substantive criminal law reform	46
2.3. REFORM OF THE IRAQI JUDICIAL SYSTEM	49
2.3.1. <i>The independence of the judiciary</i>	50
2.3.1.1. Establishment of the Higher Judicial Council	50
2.3.1.2. Judicial qualifications.....	52
2.3.2. <i>The reform of the criminal courts</i>	55
2.3.2.1. The marginalization of criminal courts under the Ba'athist regime	57
2.3.2.1.1. Revolutionary, National Security Courts and other Special Courts	57
2.3.2.1.2. Military Courts	59
2.3.2.2. Creation of new criminal courts	60
2.3.2.2.1. The Central Criminal Court of Iraq (CCCI).....	60
2.3.2.2.2. The Iraqi High Tribunal for Crimes against Humanity	62
2.3.3. <i>The Iraqi Federal Supreme Court</i>	66
2.4. REFORM OF OTHER INSTITUTIONS WITHIN THE IRAQI CRIMINAL JUSTICE SYSTEM	70
2.4.1. <i>Reform of the Department of Public Prosecution</i>	70
2.4.2. <i>Police reform</i>	71
2.5. HUMAN RIGHTS REFORM IN IRAQ.....	73
2.5.1. <i>The creation of the High Commission for Human Rights</i>	74
2.5.2. <i>The Council of Representatives (Parliament)</i>	77
2.5.3. <i>Creation of the Ministry of Human Rights</i>	78
2.5.4. <i>Encouraging civil society and NGOs</i>	79
2.5.5. <i>Other mechanisms for monitoring human rights</i>	81
ANALYSIS AND EVALUATION	86
CHAPTER THREE	90
THE REFORMED INVESTIGATIVE SYSTEM IN IRAQ	90

INTRODUCTION.....	90
3.1. OVERVIEW OF PRE-TRIAL INVESTIGATION	91
3.2. THE RELEVANT INVESTIGATIVE AUTHORITIES	96
3.2.1. <i>Investigations conducted by the Police</i>	96
3.2.2. <i>Public prosecution</i>	103
3.2.3. <i>The investigating judge and the judicial investigator</i>	106
3.3. THE DECISION TO REFER A CASE TO TRIAL	110
3.3.1. <i>Discretion to refer a case for trial</i>	111
3.3.2. <i>The right to be informed about an order to transfer a case for trial</i>	112
3.3.3. <i>Form of referral order for trial</i>	113
3.3.4. <i>The right to appeal against the order of referral for trial</i>	115
3.4. EVALUATION UNDER INTERNATIONAL HUMAN RIGHTS LAW	115
3.4.1. <i>Police</i>	117
3.4.2. <i>The public prosecutor</i>	120
3.4.3. <i>The investigating judge</i>	121
CHAPTER FOUR.....	124
THE RIGHT TO LIBERTY IN THE REFORMED IRAQI CRIMINAL JUSTICE SYSTEM.....	124
INTRODUCTION.....	124
4.1. INTERNATIONAL RULES	125
4.1.1. <i>Prevention of arbitrary arrest or detention</i>	125
4.1.2. <i>Right of a suspect to be informed about the reasons of an arrest</i>	130
4.1.3. <i>Right to be brought promptly before a judge</i>	133
4.1.4. <i>Right to review the legality of detention (Habeas Corpus)</i>	137
4.1.5. <i>Right to release on bail</i>	141
4.1.6. <i>Right to trial within a reasonable time</i>	143
4.2. IRAQI RULES AND PRACTICE	145
4.2.1. <i>Rights in relation to an arrest</i>	146
4.2.1.1. Lawful grounds for arrest	146
4.2.1.1.1. Arrest with a warrant from judicial authority.....	147
4.2.1.1.2. Arrest without a warrant.....	151
4.2.1.2. Right of the arrested person to be informed of the reasons for the arrest....	156
4.2.1.3. Detention following arrest.....	159
4.2.2. <i>Rights in relation to detention</i>	163
4.2.2.1. Detention is only to be ordered by the competent authority.....	163
4.2.2.2. Detention must be exceptional	166
4.2.2.3. Period of detention	168
4.3. EVALUATION UNDER INTERNATIONAL HUMAN RIGHTS LAW	173
CHAPTER FIVE.....	179
THIRD PARTY ACCESS RIGHTS IN THE REFORMED IRAQI CRIMINAL JUSTICE SYSTEM.....	179
INTRODUCTION.....	179
5.1. INTERNATIONAL RULES	180
5.1.1. <i>Right of access to a lawyer</i>	180
5.1.1.1. Right to legal assistance from the outset of the proceedings.....	181
5.1.1.2. Right of notification to access legal assistance	185
5.1.1.3. Meaningful access	186
5.1.1.3.1. Meaningful access: Role of right to a lawyer in protecting the right to silence and to be free from self-incrimination	186
5.1.1.3.2. Meaningful access: Right to have effective legal assistance.....	188
5.1.2. <i>Right of access to an interpreter</i>	191
5.1.2.1. Scope of the interpretation service	191

5.1.2.2. Free interpretation	193
5.1.2.3. Competent interpretation assistance	194
5.2. IRAQI RULES AND PRACTICE	194
5.2.1. <i>Right of access to a lawyer</i>	194
5.2.1.1. Right of access to a lawyer from the outset of the proceedings	196
5.2.1.2. Right of notification to access legal assistance	202
5.2.1.3. Guaranteeing high-quality legal assistance	206
5.2.1.4. Confidentiality of the client-legal adviser communications	211
5.2.2. <i>Right of access to an interpreter</i>	213
5.2.2.1. Scope of the right to interpretation	216
5.2.2.2. Competent interpretation assistance	217
5.3. EVALUATION UNDER INTERNATIONAL HUMAN RIGHTS LAW	219
5.3.1. <i>Right of access to a lawyer</i>	219
5.3.2. <i>Right of access to an interpreter</i>	221
CHAPTER SIX.....	222
THE RIGHT TO BE FREE FROM SELF-INCRIMINATION IN THE REFORMED IRAQI CRIMINAL JUSTICE SYSTEM.....	222
INTRODUCTION.....	222
6.1. INTERNATIONAL RULES	223
6.1.1. <i>The right to silence</i>	223
6.1.1.1. The right to silence during the pre-trial investigation stage	223
6.1.1.2. Drawing an adverse inference from the silence of the accused.....	225
6.1.2. <i>Unfairly obtained confession evidence and ill treatment</i>	227
6.1.2.1. Confessions improperly extracted by ill treatment.....	228
6.1.2.2. Proving alleged torture in order to exclude invalid confessions.....	235
6.2. IRAQI RULES AND PRACTICE	237
6.2.1. <i>The right to silence</i>	237
6.2.1.1. Notification of the right to silence.....	239
6.2.1.2. Adverse inference from remaining silent	243
6.2.2. <i>Unfairly obtained confession evidence and ill treatment</i>	248
6.2.2.1. Failure to fulfill the obligations under the rules of the UN Covenant against torture	251
6.2.2.2. Continued widespread mistreatment and the lack of prohibition	251
6.2.2.3. Failure to criminalize and penalize some forms of torture	255
6.2.2.4. The disconnection between law and practice	258
6.3. EVALUATION UNDER INTERNATIONAL HUMAN RIGHTS LAW	261
CHAPTER SEVEN	264
DISPELLING THE MYTH OF A SUCCESSFUL REFORM OF CRIMINAL PROCEDURE IN IRAQ AND PROPOSALS FOR FURTHER IMPROVEMENT ...	264
INTRODUCTION.....	264
7.1. SHATTERING THE MYTH OF THE SUCCESSFUL REFORM OF CRIMINAL PROCEDURE IN IRAQ	264
7.1.1 <i>Failure to meet due process standards in both theory and practice</i>	265
7.1.2. <i>Continuing weaknesses in the investigation system</i>	265
7.1.3. <i>Failure to modernize procedural safeguards to meet minimum international standards of due process binding on Iraq.</i>	267
7.1.4. <i>A lack of independence of the actors in the justice system</i>	269
7.1.5. <i>The continuing culture of abuse</i>	270
7.1.6. <i>Lack of accountability, and a culture of impunity for officials who violate human rights</i>	271
7.1.7. <i>A lack of capacity and resources</i>	275
7.1.8. <i>Corruption</i>	276

7.1.9. <i>Social attitudes</i>	277
7.1.10. <i>Lack of internal and international oversight</i>	279
7.2. PROPOSALS	281
7.2.1. <i>Addressing the shortcomings in national law and practice</i>	281
7.2.2. <i>Addressing weaknesses in the investigative system</i>	283
7.2.3. <i>Safeguards in criminal proceedings</i>	284
7.2.4. <i>Prioritizing accountability and impunity</i>	288
7.2.5. <i>Improving the performance of the High Commission for Human Rights</i>	291
7.2.6. <i>Funding the overhaul of the system</i>	291
7.2.7. <i>Combating corruption</i>	294
7.2.8. <i>Enforcing international rules domestically</i>	294
7.2.9. <i>Improving social attitudes and the political will to reform</i>	296
7.2.10. <i>Improving public confidence in the criminal justice system</i>	297
CHAPTER EIGHT	299
CONCLUSION	299
INTRODUCTION.....	299
8.1. MAIN FINDINGS OF THE RESEARCH	299
8.2. SUMMARY OF THE RESEARCH FINDINGS BY CHAPTERS.....	300
8.3. FURTHER SUGGESTED RESEARCH.....	309
8.4. CONCLUSION	310
BIBLIOGRAPHY	312

TABLE OF CASES

1. Jurisprudence of the United Nations Human Rights Committee:-

Abduali Ismatovich Kurbanov v Tajikistan UN Human Rights Committee Communication No (1096/2002) 6 November 2003.

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Saunders v the United Kingdom App no 19187/91 (ECtHR, 17 December 1996), (1997) 23 EHRR 313.

Schiesser v Switzerland App no 7710/76 (ECtHR, 4 December 1979), (1979-80) 2 EHRR 417.

Selmouni v France App no 25803/94 (ECtHR, 28 July 1999), (2000) 29 EHRR 403.

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Shabelnik v Ukraine App no 16404/03 (ECtHR, 19 February 2009).

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{المحكمة الاتحادية العليا}

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{محكمة التمييز الاتحادية}

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{محكمة التمييز الاتحادية}

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{محكمة التمييز}

Court of Cassation (*Mahkamat Al-Tamyeez*), Case number 641/Cassation/ 78 on 30/5/1978.

{محكمة التمييز}

Court of Cassation (*Mahkamat Al-Tamyeez*), Case number 14 / General Commission / 1980 published in the Ministry of Justice, “Judicial Judgments” (1980) *Journal of Judicial Judgments* 67.

{محكمة التمييز}

Central Criminal Court, (*Almahkama Aljnia Almrkzya aliraqia*), Baghdad, Second Branch, Case number 891 of 2009. Referred to by Amnesty International, *Iraq: A Decade of Abuses* (Index: MDE 14/001/2013, March 2013) 55, 56.

{المحكمة الجنائية المركزية}

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{المحكمة الجنائية المركزية}

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{المحكمة الجنائية المركزية}

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TABLE OF ABBREVIATIONS

ABA	American Bar Association
CAT	United Nations Committee Against Torture
CPA	Coalition Provisional Authority
CCCI	Central Criminal Court of Iraq
ECHR	European Convention on Human Rights 1952
ECtHR	European Court of Human Rights
EUJUST	European Union Integrated Rule of Law Mission for Iraq
HRC	United Nations Human Rights Committee
ICC RPE	Rules of Procedure and Evidence of the International Criminal Court
ICCP	Iraqi Code of Criminal Procedure 23 of 1971
ICCPR	International Covenant on Civil and Political Rights 1966
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICTR RPE	Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda.
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda
ICTY RPE	Rules of Procedure and Evidence of the International Criminal Tribunal for Yugoslavia
IPC	Iraqi Penal Code 111 of 1969
IST	Iraqi Special Tribunal
MCCP	Model Code of Criminal Procedure
NGOs	Non-Governmental Organizations
PACE	Police and Criminal Evidence Act 1984 [England and Wales]
SCSL Statute	Statute of Special Court for Sierra Leone
SCSL RPE	Rules of Procedure and Evidence, Special Court for Sierra Leone
UN	United Nations
UNCAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
UNAMI	United Nations Assistance Mission for Iraq
UNGA	United Nations General Assembly
UDHR	Universal Declaration of Human Rights
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
UNDP	United Nation Development Programme
UPR	Universal Periodic Review
USIP	United States Institute of Peace

CHAPTER ONE

INTRODUCTION

Two days before the invasion of Iraq in March 2003, the then President George W. Bush declared that,

“Many Iraqis can hear me tonight in a translated radio broadcast, and I have a message for them: in free Iraq there will be no more executions of dissidents, no more torture chambers and rape rooms. The tyrant will soon be gone. The day of your liberation is near [...] Unlike Saddam Hussein, we believe the Iraqi people are deserving and capable of human liberty, and when the dictator has departed, they can set an example to all the Middle East of a vital and peaceful and self-governing nation. The United States with other countries will work to advance liberty and peace in that region.”¹

The removal of Saddam Hussein’s regime is undeniably one of the most striking events in the history of modern Iraq. Having claimed the existence and threat of weapons of mass destruction as justification for the invasion of Iraq, the United States’ rationale for the removal of the regime was to transform the country into an exemplary model of democracy and protection of human rights in the Middle East.²

Following the downfall of the regime in 2003, Iraq’s transition to the rule of law has involved, among many things, moving forward in respecting human rights and improving justice. This thesis considers the criminal justice system reformation that has been one of the most pressing goals for entrenching the rule of law. With regard to assessing reforms to criminal proceedings, an unbiased approach is needed to examine whether post Saddam Iraq has been fully brought in the line with the standards of international human rights law. Of particular relevance, it focuses on the most urgent procedural safeguards during the pretrial stage of the criminal justice process.

¹ BBC News Channel, Tuesday, 18 March, 2003, 02:23 GMT, available at <http://news.bbc.co.uk/1/hi/world/americas/2859269.stm> accessed 15 August 2013.

² Ibid.

1.1. The procedural safeguards for persons subject to criminal proceedings

The procedural safeguards for the person undergoing criminal proceedings are universally recognized as an essential part of human rights protection that must be protected by sufficient means under national and international rules.³ At the same time, these rules which are relevant to the protection of citizens against a crime, and by which offenders can be promptly brought to justice, are of particular significance and play a vital role in the development of all human rights. It is commonly agreed that the criminal process in a criminal justice system must be conducted on the basis of striking a balance so as to ensure respecting the basic rights of accused persons on the one hand and protecting society on the other (Packer calls this the Crime Control Model and the Due Process Model).⁴

In this respect, the pre 2003 Iraqi criminal justice system suffered a systemic failure with regard to striking a balance between human rights protection for the person who is under criminal proceedings and the capacity of the state in the fight against crime.⁵ In the aftermath of the invasion, Professor Bodansky wrote that “it would be silly to deny that there are deep problems with the Iraqi judicial system.”⁶ Recently, in compliance with the rule of law and tackling the long-term accumulated problems within the justice system, efforts have been made to put an end to human rights violations and bring the system in line with international standards.⁷ For the purpose

³ These safeguards are enshrined in following most important international and regional instruments: Universal Declaration of Human Rights (adopted 10 December 1948, UNGA Res 217 A(III). International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, (adopted 10 December 1984 by UN General Assembly resolution 39/46, entered into force 26 June 1987).

International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010).

UN General Assembly Res 43/173 ‘The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment’ (9 December 1988).

African Charter on Human and Peoples’ Rights (adopted 27 June 1981 entered into force 21 October 1986).

American Convention on Human Right (adopted 22 November 1969, entered into force 18 July 1978).

European Convention on Human Rights, (adopted 1950, entered into force on 3 September 1953).

⁴ Herbert L. Packer, “Two Models of the Criminal Process” (1964) 113 *University of Pennsylvania Law Review* 1-60.

⁵ UN Human Rights Committee, ‘Concluding Observations/Comments: Iraq’ (Sixty-first session, 19/11/1997) UN Doc CCPR/C/79/Add.84.

⁶ Daniel Bodansky, “Establishing the Rule of Law” (2004-2005) *Georgia Journal of International and Comparative Law* 119, 133.

⁷ These projects have based on auspices of the International Community together with local knowledge and practice. They operated for the purpose of establishing the rule of law and rebuilding post-Saddam

of tracing the development of the present criminal justice system with regard to the development of human rights protection in criminal proceedings, it is particularly important to distinguish between two eras in Iraq's history:

1.1.1. Human rights protection in the criminal process in the period 1968-2003

It is self-evident that, for ordinary Iraqis, the violation of human rights in criminal proceedings was at its highest level throughout the duration of Saddam's Ba'ath regime. Throughout this era the criminal justice system was seen as a tool in the hands of official authority for the punishment of its enemies.⁸ The violations of human rights during the Ba'ath regime were facilitated by law. Iraqi law was designed to protect the regime.⁹ At that time, the Iraqi Revolutionary Command Council under the command of Saddam Hussein was the major legislative body in the country.

What followed was that the regime through successive amendments to the Iraqi Penal Code 111 of 1969 increased the penalty for political offences to capital punishment.¹⁰ Due to the control exercised by Ba'ath Party members over the justice sector, together with a lack of the rule of law, the justice system became an effective means of serving the purposes of the regime. Ba'ath Party members had authority to put persons under detention for a period that reached 3 years without judicial review.¹¹ With their options decreased by the dictation on the executive, judges played a role in supporting those in power.¹² Those in power could simply issue imperative commands to the

Iraq, particularly solving various tensions in the justice sector including legislature, judges, due process procedures, police and centres of detention and penal institutions. See Cyndi Banks, "Reconstructing Justice in Iraq: Promoting the Rule of Law in a Post-conflict State" (2010) *Hague Journal on the Rule of Law* 156.

⁸ According to Amnesty International, "Those suspected of any involvement in opposition activities can expect to be arrested without a warrant; held in secret detention, without access to family and lawyers; be brutally tortured and face execution" Amnesty International, *Iraq: Victims of Systematic Repression*, report (Index: MDE 14/010/1999 24 November 1999) available at < <http://www.unhcr.org/refworld/docid/3ae6a9cd10.html> > accessed 18 March 2012.

⁹ Articles 20, 21 and 22 of the Iraqi Penal Code 111 of 1969, published in the Official Gazette issue 1778 of 15 September 1969. The official English translation of the Code is available online at the homepage of the *Global Justice Project: Iraq* (GJPI) <<http://gipi.org/central-activities/judicial-independence/>> accessed 28 January 2014. {قانون العقوبات العراقي}

¹⁰ Ibid; see also Amnesty International, *Iraq: Victims of Systematic Repression* (n 8).

¹¹ Decree of the Revolutionary Command Council No. 74 of 1994 published in the Official Gazette, issue 3571 on 4 July 1974. The unofficial English translation of the decrees of the Revolutionary Command Council is provided by the present author. {قرار مجلس قيادة الثورة المنحل}

¹² Ash U. Bali, "Justice under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq" (2005) 30 *Yale Journal of International Law* 451.

agents of justice, even by telephone. Overseas experts who took part in the process of the system's reform in 2003 found that "the majority of the judiciary was corrupted by the system of Ba'ath party 'telephone justice' and endemic bribery."¹³ The Judiciary was under the control of the executive authority and any court decision could be overridden by the executive branch.¹⁴ At that time, international human rights groups and the Special Rapporteur regularly reported that "the courts are subject to the executive branch"¹⁵

In addition to the above, the rules of human rights in the area of criminal proceedings were grossly violated. This was contrary to due process under international human rights law where an accused person, regardless of the seriousness of the charge must be provided with sufficient rights and is considered innocent until proven otherwise after a fair hearing.¹⁶ The resort to arbitrary and excessive deprivation of liberty was a widespread phenomenon.¹⁷ Corruption prevailed in the judicial system.¹⁸ Torture

¹³ Daniel L. Rubini, *Justice in Waiting: Developing Rule of Law in Iraq*, Paper presented to Barnes Symposium held at the University of South Carolina Law School at February 2-3 2007, 14.

¹⁴ See, for example, following laws and decrees that in wide cases authorised judicial authority for civil government officials together with power of detention against individuals:

Decree of the Revolutionary Command Council 463 of 1989 published in the Official Gazette, issue 3266 of 31 July 1989 {قرار مجلس قيادة الثورة المنحل};

Decree of the Revolutionary Command Council 705 of 1981 published in the Official Gazette, issue 2834 of 15 June 1981 {قرار مجلس قيادة الثورة المنحل};

Decree of the Revolutionary Command Council 848 of 1987 published in the Official Gazette, issue 3177 of 23 November 1987 {قرار مجلس قيادة الثورة المنحل};

Decree of the Revolutionary Command Council 696 of 1987 published in the Official Gazette, issue 3167 of 14 September 1987 {قرار مجلس قيادة الثورة المنحل};

Decree of the Revolutionary Command Council 26 of 5 January 1971 published in the Official Gazette, issue 1560 of 18 January 1971 {قرار مجلس قيادة الثورة المنحل};

The Law of the Ministry of Justice No. 101 of 1977, Article 35 {قانون وزارة العدل الملغي};

The Iraqi Code of Criminal Proceedings, Article 137, published in the Official Gazette, issue 2004 of 31 May 1971. The official English translation is available online at the homepage of *the Global Justice Project: Iraq* (GJPI) <<http://gjpi.org/central-activities/judicial-independence/>> accessed 28 January 2014 {قانون أصول المحاكمات الجزائية العراقي};

The Customs Act No. 23 of 1984, Article 237, published in the Official Gazette, issue 2985 of 19 March 1984 {قانون الجمارك}; see also, American Bar Association, *Iraq legal development project, judicial reform index for Iraq* (2006-2007, the United States of America) 7; United States Department of State, *The Future of Iraq Project* (2005, Working Group on Transitional Justice in Iraq) 21.

¹⁵ United Nations Commission on Human Rights, (CHR), 'Report of the Special Rapporteur on the situation of human rights in Iraq, Max van der Stoep' (14 October 1999) A/54/466, para. 39.

¹⁶ *Gafgen v Germany* App no 22978/05 (ECtHR, 1 June 2010), (2011) 52 EHRR 1.

¹⁷ The right to liberty was violated through law provisions. Such provisions provided the Executive authorities with a wide power of deprivation of liberty against individuals and that was an explicit violence against the independence of the judiciary. Under these provisions, the release on bail of detainees was not allowed in many offences such as murder, embezzlement, theft, bribery, smuggling and some economic crimes, and handling of stolen goods or handling a vehicle derived from a felony. See (n 14); see also,

Decree of the Revolutionary Command Council No. 8 of 1983, published in the Official Gazette, issue 2921 of 24 January 1983 {قرار مجلس قيادة الثورة المنحل};

became a systemic phenomenon, widely used to obtain information and to extort evidence for the purpose of securing a conviction at trial.¹⁹ It was likely that a person under investigation would confess to crimes which they had not committed. In 2001, Amnesty International reported that “Torture became the norm and had a brutalizing effect on Iraqi society, and it created a “confession culture.”²⁰ In the initial stages of the process of reconstructing justice in 2003, various torture centres located inside institutions of justice were identified, such as at Abu Ghraib prison.²¹ Professor Banks, who participated in post-Saddam reform, noted that confessions in the Iraqi justice system were deemed “the only practical way to secure a conviction.”²²

The accused person, *inter alia*, had no opportunity to obtain a fair hearing throughout the criminal proceedings because “the laws failed to protect rights of defendants recognized under international human rights standards.”²³ These infringements were due not only to the routine breach of provisions for human rights in practice: but also to legal provisions which often facilitated these violations. Abhorrent laws and other

Decree of the Revolutionary Command Council No. 157 of 1996 published in the Official Gazette, issue 3651 on 6 January 1997 {قرار مجلس قيادة الثورة المنحل};

Decree of the Revolutionary Command Council No. 137 of 1996 published in the Official Gazette, issue 3647 on 9 December 1996 {قرار مجلس قيادة الثورة المنحل};

Decree of the Revolutionary Command Council No. 1333 of 1984 published in the Official Gazette, issue 3024 on 17 December 1984 {قرار مجلس قيادة الثورة المنحل};

Decree of the Revolutionary Command Council No. 1630 of 1981 published in the Official Gazette, issue 2864 on 28 December 1981 {قرار مجلس قيادة الثورة المنحل};

Decree of the Revolutionary Command Council No. 38 of 1993 published in the Official Gazette, issue 3448 on 8 March 1993 {قرار مجلس قيادة الثورة المنحل};

Decree of the Revolutionary Command Council No 76 of 1994, published in the Official Gazette, issue 3517 on 4 July 1994 {قرار مجلس قيادة الثورة المنحل}; see also United Nations Commission on Human Rights (CHR), ‘Report on the Situation of Human Rights in Iraq, submitted by the Special Rapporteur, Mr. Max van der Stoep’ (15 February 1995) E/CN.4/1995/56, para.32. In this report the Commission, expressed “its strong condemnation of the massive violations of human rights [...] the widespread routine practice of systematic torture; enforced or involuntary disappearances; routinely practised arbitrary arrests and detention.”

¹⁸ Daniel Bodansky, (n 6).

¹⁹ Joseph T. Thai, “Constitution Excluded Confessions: Applying America’s Lessons to a Democratic Iraq” (2005) *Oklahoma Law Review* 39; Daniel L. Rubini, *Justice in Waiting: Developing Rule of Law in Iraq* (National Security Report, July 2009) 46 available at <http://www.roa.org/site/DocServer/0907_NSR.pdf?docID=17781> accessed 2 April 2011.

²⁰ Amnesty International, *Iraq: Systematic torture of political prisoners* (Index: MDE 14/008/2001, August 2001); see also Amnesty International, *Iraq: A Decade of Abuses* (Index: MDE 14/001/2013, March 2013) 12.

²¹ The Foreign & Commonwealth Office, *The Annual Report on Human Rights* (2003 London) available at

<<http://www.hrdreport.fco.gov.uk/wpcontent/uploads/2011/01/human-rights-report-2003.pdf>> accessed 27 July 2013.

²² Cyndi Banks, (n 7) 167.

²³ Michael M. Farhang, “Reconstructing Justice: The Coalition Provisional Authority took Giant Steps to Guarantee Iraq a Functioning Criminal Justice System” (2004) *Los Angeles Lawyer* 46.

decrees with the force of law directly contradicted binding obligations under international human rights law, particularly those which are relevant to torture and other forms of cruel, inhuman, and degrading treatment or punishment. For example Iraqi law, as will be examined later in this thesis, allowed using confession against the accused person even if it resulted from torture or other invalid means during the investigation.²⁴ The various legal provisions were used to breach the right to liberty,²⁵ the right to remain silent was undermined by the provisions of law,²⁶ and the right of access to a lawyer was not sufficiently secured.²⁷ Along with these violations there were rules that conferred immunity from criminal proceedings for officials.²⁸ Worse, there were a number of statutes, as well as decrees carrying the force of law, which imposed the death penalty for many offences, such as political crimes, smuggling or possession of foreign currency not obtained through government exchanges.²⁹ Also the extremity of the cruel, inhuman, and degrading physical punishments, was rarely before witnessed by the international community when the judicial authorities used amputation.³⁰ As a result of this, the atrocity was not only seen in widely resorting to

²⁴ See Chapter Six, particularly our comment on Article 218 of the Iraqi Code of Criminal Procedure; see also Michael J. Frank, “Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq” (2006) 18 *Florida Journal of International Law* 3.

²⁵ Decrees of the Revolutionary Command Council, (n 17) {قرار مجلس قيادة الثورة المنحل}; see also the decree of the Revolutionary Command Council No 5 of 17 January 1998, published in the Official Gazette, issue 3706 of 26/01/1998, according to it the fine penalty had been replaced by detention for a period of between 24 hours and 3 months. {قرار مجلس قيادة الثورة المنحل}

²⁶ See Chapter Six, my analysis of provisions of the right to remain silent; see also Michael M. Farhang, (n 23).

²⁷ See Chapter Five, my analysis of provisions of access to a lawyer; see also Michael M. Farhang, (n 23).

²⁸ Article 136 of the Iraqi Code of Criminal Procedure {قانون أصول المحاكمات الجزائية العراقي}; Decrees of the Revolutionary Command Council No 1042, published in the Official Gazette, issue 2727 of 27 August 1979; No 749, published in the Official Gazette, issue 3117 of 29 September 1986.

{قرار مجلس قيادة الثورة المنحل}

²⁹ For example, Law No. 107 of 1974 published in the Official Gazette, issue 2390 of 22 August 1974; Law No.66 of 1971 published in the Official Gazette, issue 1989 of 20 April 1971; Law No. 111 of 1978 published in the Official Gazette, issue 2659 of 19 Jun 1978;

Decree of the Revolutionary Command Council No. 95 of 1994, published in the Official Gazette, issue 3521 of 1 August 1994 {قرار مجلس قيادة الثورة المنحل};

Decree of the Revolutionary Command Council No. 59 of 1994, published in the Official Gazette issue 3514 of 13 June 1994 {قرار مجلس قيادة الثورة المنحل}; see also UN Commission on Human Rights, ‘Report on the Situation of Human Rights in Iraq, submitted by the Special Rapporteur, Mr. Max van der Stoel’ (n 17) para. 25.

³⁰ For example Decree of the Revolutionary Command Council No. 13 of 1992, published in the Official Gazette issue 3389 of 20 January 1992 {قرار مجلس قيادة الثورة المنحل};

Decree of the Revolutionary Command Council No. 9 of 1993, published in the Official Gazette issue 3457 of 10 May 1993 {قرار مجلس قيادة الثورة المنحل};

Decree of the Revolutionary Command Council No. 114 of 1994, published in the Official Gazette issue 3526 of 5 September 1994 {قرار مجلس قيادة الثورة المنحل};

Decree of the Revolutionary Command Council No. 118 of 1994, published in the Official Gazette issue 3526 of 5 September 1994 {قرار مجلس قيادة الثورة المنحل};

the death penalty but also the most serious of these punishments included the severing of an ear or a hand at this time.³¹

Consequently, it can confidently be submitted that the power of authority which had been given under Iraqi law allowed the rights of persons facing criminal proceedings to be violated, particularly with regard to basic rights such as the right to liberty, access to a lawyer and to remain silent. The presumption of innocence had been undermined by a systemic failure. This stems from a lack of adequate due process and judicial review which undermined the integrity and reputation of the system.³² Even where there were some procedural safeguards embedded to some degree in the legal framework these were not applied.³³ Generally, the due process standard was provided only on paper; it was uncertain or difficult to obtain during every day legal practice. The fact was there were thousands of torture victims but it was very rare to see cases in which officials engaged in such practices were being brought to justice.³⁴

Given that the justice system was controlled by a dictatorial regime like that of Saddam, the above background may not cause surprise. Such regimes reject the notion that legislation should aim to protect the rights of human beings even if those rights are enshrined in international treaties.³⁵ This political outlook had a deleterious effect on the legal system and promoted a culture of violence, protecting those of its own authorities who engaged in repression of fellow citizens.³⁶ The justification for such ideology, in the opinion of the present author, is that it might have been believed,

Decree of the Revolutionary Command Council No. 16 of 1995, published in the Official Gazette issue 3552 of 27 February 1995. {قرار مجلس قيادة الثورة المنحل}

³¹ With regard to these forms of punishment, other details will be given during discussion of the reform of substantive criminal law in Chapter Two.

³² Amnesty International, *Amnesty International Report 1994 - Iraq*, 1 January 1994, available at: <<http://www.refworld.org/docid/3ae6a9f850.html>> accessed 5 November 2013; United Nations Commission on Human Rights, Report of the Special Rapporteur on the situation of human rights in Iraq, Max van der Stoep (n 15), para. 39.

³³ For example, torture and forcing an accused person to speak were prohibited under Iraqi law. However, allowing to use a confession against the accused person even if resulted from torture undermined these provisions; see Joseph T. Thai, (n 19); Daniel L. Rubini, (n 19) 46.

³⁴ The Foreign and Commonwealth Office, *Saddam Hussein: crimes and human rights abuses, report* (London, November 2002) 5 available at <<http://www.google.co.uk>> accessed 2 October 2010.

³⁵ UN Commission on Human Rights, 'Report on the Situation of Human Rights in Iraq, submitted by the Special Rapporteur, Mr. Max van der Stoep' (n 17) para. 32.

³⁶ Under Iraqi law, the Officials were above human rights when they guaranteed impunity against the prosecution. See Article 136 of the Iraqi Code of Criminal Procedure; Decrees of the Revolutionary Command Council Nos. 1042, 749, and 3117 (n 28). {قانون أصول المحاكمات الجزائية العراقي}

erroneously, that the sacrifice of individual liberties was necessary for the suppression of crime and the maintenance of public order; whereas in reality fighting crime became an excuse for abandoning many safeguards given to the accused person.

In light of the aforesaid, it becomes clear that the criminal justice system during the Ba'ath regime era failed to provide the minimum protection in the form of procedural safeguards for the benefit of accused persons in criminal proceedings. The outcome of this failure was a gulf between binding commitments under international human rights law and the Iraqi criminal justice system. This state of affairs adversely affected Iraq's position in the international community. Thus, if the Iraqi people wish their country to resume its place in international law and international relations, due attention must be given to bringing the system in line with international due process, and this must be accompanied by a clean break with the practices of the past. As will be seen below, after the removal of the Saddam regime attempts were made to respond to these needs in the period which followed.

1.1.2. Human rights protection in the criminal process for the period 2003-present

The second period of human rights in criminal process began when the regime ended in 2003. Removal of the regime provided an opportunity for Iraq to go through the process of the rule of law so that violations of the past would not be repeated. Since that time, in compliance with the rule of law, Iraq has been obliged to take the commitments of international due process more seriously. In 2007 for example, the Iraqi government in co-operation with the United Nations and the World Bank entered into a compact setting up a framework for involving the international community in Iraq.³⁷ It committed the Iraqi government to preventing human rights violations.³⁸

The vision was that the culture of violence must not return, repression would be replaced by a culture in which human rights prevail.³⁹ Iraq now has an elected

³⁷ United Nations, *The International Compact with Iraq: Mid-Year Progress Report* (20 July 2007, United Nations in New York); see also Eric De Brabandere, *Post-Conflict Administration in International Law* (2009, Martinus Nijhoff Publishers) 49.

³⁸ United Nations, *The International Compact with Iraq: Mid-Year Progress Report*, ibid 17.

³⁹ The national report has been submitted to the United Nations by the Iraqi government pointed out that "the Republic of Iraq is committed to achieving progress and prosperity as soon as possible, in

government and a democratic system unique to the Middle East, “founded on respect for pluralism and democratic principles.”⁴⁰ It now also has a permanent Constitution.⁴¹ Since the collapse of the Ba’ath regime, urgent steps have been taken to protect human rights and to prevent any violation of the accused person’s rights during criminal proceedings. As will be shown in detail, an important step in addressing the deficiencies of the system was the modification of the substantive and procedural criminal laws on which the Iraqi criminal justice system was founded.⁴²

Many Iraqi and foreign institutions have been engaged in new projects for reforming the Iraqi criminal justice system.⁴³ These projects were conducted by agencies such as the UN Development Program, the United Nations Office for Projects Services, the United Nations Commission on Crime Prevention and the Criminal Justice, Institute for International Law and Human Rights, the Office of Overseas Prosecutorial Development Assistance and Training, Office of Inspector General, the Iraqi Justice Integration Project, The Department's Bureau of Democracy, Human Rights and Labour, National Security Presidential Directive, the Iraq Reconstruction Management Office, US Army Civil Affairs, The Office of Inspector General, U.S. Agency for International Development, American Bar Association, United States Institute of Peace, National Democratic Institute, Department of Justice, European Union and other international entities.⁴⁴

order to free the Iraqi people from the deprivation caused by three decades of war, economic sanctions and deteriorating security... Strengthen efforts to bring domestic human rights legislation into line with international human rights law” United Nations General Assembly A/HRC/WG.6/7/IRQ/1, 18 January 2010, Human Rights Council, Working Group on the Universal Periodic Review, Seventh session, Geneva, 8-19 February 2010, report submitted in accordance with paragraph 15 (A) of the annex to Human Rights Council Resolution 5/1, para.42 and p. 26.

⁴⁰ United Nations General Assembly A/HRC/WG.6/7/IRQ/1, 18 January 2010, Human Rights Council, *ibid*, para.5.

⁴¹ Detail will be provided in Chapter Two particularly, in the discussions on the Iraqi Permanent Constitution 2005, Article 19.

⁴² Detail will be provided in Chapter Two below.

⁴³ International Community spent millions of dollars on these programs which were funded by the different international actors such as, World Bank, Agency for International Development (USAID) and other donor entities. See Kenneth Katzman, *Iraq: Post-Saddam Governance and Security*, report to Congress (June 2009, Congressional Research Service) 20 available at < <http://fpc.state.gov/documents/organization/125947.pdf>> accessed 27 July 2013; United States Department of State and the Broadcasting Board of Governors Office of Inspector General, US Embassy in Baghdad, *Inspection of Rule-of-Law Programs* (October,2005) Report Number ISP-IQO-06-0; Cyndi Banks, (n 7)156.

⁴⁴ *Ibid*.

These efforts which aimed to achieve the rule of law in post-Saddam Iraq, among other things, focused on:

a. Law reform:

- Drafting of a new Constitution
- Reforming criminal law and procedure
- Economic and Commercial frameworks

b. Institutional reform:

- Vetting and illustration - the De-Ba'athification
- Courts and related institutions including police
- Encouraging civil society, NGOs
- Army⁴⁵
- Human Rights education
- Government officials

c. Accountability:

- The Special Tribunal - trials of Saddam Hussein and other members of his Ba'ath Party
- Separate from the regular justice system, tied to dealing with the past

d. Entrenching human rights:

- In the Constitution
- Creation of institutions eg. Ministry of Human Rights and Higher Commission for Human Rights
- Encouraging civil society, NGOs
- In practice - training
- Human Rights education
- UN office and human rights

e. Other measures: These deal with the past, the idea is that they will help Iraq move forward towards the rule of law:

- Reparations
- Reconciliation Commission
- Memorisation

On the basis of these programs, the substantive and procedural criminal laws have been modified to give the accused person additional due process rights.⁴⁶ These modifications have removed offensive portions and inserted fundamental due process

⁴⁵ Bremer sacked the whole former Army without De-Ba'athification Commission. See CPA Order Number 2 on 23 May 2003; regarding how the decision was made see James Pfiffner, "US Blunders in Iraq: De-Baathification and Disbanding the Army" (2010) *Intelligence and National Security* 82.

⁴⁶ Michael M. Farhang, (n 23) 49.

to protect the accused person in accordance with binding obligations under international law.

The critical issue with regard to these efforts of reform is whether they have achieved their goal in bringing the system in line with binding obligations under international human rights law. Due to limitations of time and scope, it is impossible for the thesis to assess all these reforms but focuses on those that are most relevant to pretrial rights. As already explained, this work endeavours to deal with the right to be free from arbitrary arrest and detention; the right of access to free legal assistance and interpreter, and the right to be free from self-incrimination. Reform impacting on these particular rights will therefore be examined, without neglecting the overall context within which it takes place.

Why does this thesis focus on the three identified rights? First and foremost, these rights in Iraq have received considerable attention from the international community. There has been a great deal of effort designed to enhance protection in this area in the post-Saddam era. However, there is a lack of debate about the recent reforms in this area and this comprises the originality of this thesis. The second reason is the importance of these rights. There is no doubt; they have a cross-cutting impact on the criminal justice system and other rights depend on their protection. Thirdly, individuals are in a particularly vulnerable position during the pre-trial stage. An additional benefit is that focusing on these critical and cross-cutting rights allows us a unique and invaluable window into the realities of the Iraqi criminal justice system. Thusly, these three pre-trial rights constitute a unique viewpoint for assessing some vital post conflict reforms in the criminal justice system.

This thesis purports an evaluation of these three safeguards along with their reform, considered in light of recent developments of procedural safeguards in international due process. In cases where reform has been judged as failing to achieve its purpose, the aim of the research will be to propose means to bringing the system in line with the binding obligations under international law. The thesis endeavours to solve the problem through giving an account of the failures and prescribing possible further steps by which any incompatibility between the reformed Iraqi criminal justice system and international due process can be properly redressed.

1.2. Iraqi obligations under relevant international human rights law

The fulfillment of obligations under international law is one of the most important elements of the rule of law.⁴⁷ As the UN Human Rights Committee pointed out, every State is under a duty to respect its international obligations.⁴⁸ Thusly, a State based on the rule of law must provide its citizens this protection under international law, particularly the obligations imposed under international human rights law. Abiding by human rights under international law has inspired some countries not only to bring legal provisions in line with international human rights standards but to also incorporate ratified treaties into national legislation.⁴⁹

It is true to say that international human rights law had little influence on the Iraqi justice system throughout the rule of Saddam. Despite the fact the regime even bound itself to several treaties, it did not respect these obligations. The treaties were signed so as not to appear as an unequivocal violator of human rights in the eyes of the international community. The regime did not heed its basic obligation under the doctrine of *pacta sunt servanda*.

Post-Saddam, however, Iraq pledges to continue making efforts to implement binding obligations under international human rights law in order to distance from the ethos of the previous regime.⁵⁰ In the area of pre-trial rights, Iraq is a State Party to the ICCPR, and has also recently become a State Party to an important UN treaty; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UN CAT). Both of these conventions are significantly concerned with the human rights of persons subject to criminal proceedings. Besides treaties, other non-treaty agreements provide universal guidelines regarding due process rights.

⁴⁷ Tom Bingham, *The Rule of Law* (2011, Penguin Books) 110.

⁴⁸ UN Human Rights Committee, 'Concluding Observations/Comments: Iraq' (n 5) paras.2 and 7.

⁴⁹ Human Right Act 1998 in the United Kingdome, for example, provides for direct applicability of the ECHR into the national legal system; Similarly, according to Article 19 of the Constitution 2008, Kosovo accepted direct applicability and superiority into the domestic legal system for not only human rights treaties but also for all ratified international treaties; the discussion about the Iraq practice of treaties implementation will be provided in the Chapter Two.

⁵⁰ See (n 39); see also United Nations, *The International Compact with Iraq: Mid-Year Progress Report* (n 37).

1.2.1. Obligations under the ICCPR

In recent history, the most influential protection of human rights at the international level has been found in the ICCPR, which was adopted in 1966 and came into force in 1976. The ICCPR obliges a State party to ensure that its law and practice comply with its obligations under the treaty.⁵¹ Within the scope of the present thesis, the context of the ICCPR together with interpretations of its provisions in case law by the jurisprudence of the Human Rights Committee (HRC) and the Committee's general comments, make clear all the binding obligations of the States parties with regard to the minimum protection of human rights during criminal proceedings and to the prevention of all kinds of violations at the hands of authority.⁵² Of particular relevance, these rights which the present thesis focuses on - the right to liberty, third party access rights (the right of access to a lawyer and an interpreter) and the right to be free from self-incrimination - are given effective protection, as will be analysed against the ICCPR throughout the proceeding chapters.

The right to liberty, in addition to the provisions of Article 9 of the ICCPR, is considered also under case law and the Committee's general comments.⁵³ Access to a lawyer is one of the most important rights to a person accused under provisions of a

⁵¹ ICCPR, Article 2.

⁵² The HRC is a monitoring body that is established by the ICCPR. It comprises 18 experts who have the competence to monitor the implementation of the ICCPR by States parties. There are four monitoring functions of the Committee: providing guidance on interpretation of the ICCPR via general comments on Articles; the first Optional Protocol to the ICCPR gives the Committee power to consider complaints of individuals against human rights violations by States parties to the Protocol; examination of States party's reports and the Committee has competence to consider petition that it may be made against one state party by another. For more detail see the official website of United Nations, Office of the High Commissioner for Human Rights at <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx> accessed 28 July 2013.

⁵³ ICCPR, Article 9 states that:

"1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

fair trial in accordance with Article 14(3) (b) (d) of the ICCPR. It may be argued here that the above cited Article considers the trial stage whereas, this thesis focuses on pre-trial proceedings. In this regard, from the outset, it must be made clear that in order to strengthen respect for human rights throughout criminal proceedings, significant rights of accused persons during pre-trial stage can be found under the provisions of this Article. This crucial point is expanded on in the jurisprudence of international human rights instruments' bodies.

The fact is that the text of the ICCPR under provisions of a fair trial in accordance with Article 14(3) entitles minimum guarantees only for a person against whom there is a criminal charge has been brought.⁵⁴ Thus, textually, these guarantees are not equally applicable to a person who is under criminal proceedings and he has not been actually charged with a criminal offence. What follows is that it is unclear under international rules as what does the notion of 'criminal charge' mean, and hence under these provisions of a fair trial, it is ambiguous as to whether these guarantees exist for a person under pre-trial investigation at the outset of criminal proceedings or not.

Given the above explanations, however, this does not mean that these rights only exist during trial stage and after formal criminal charge with a criminal offence. Some of these rights are equally essential at pre-trial stage from arrest stage. As will be explain further in subsequent chapters,⁵⁵ it is clearly mentioned under the jurisprudence of international instruments' bodies that some of the rights set out under the provision of a fair trial at trial phase are equally applicable to a person who is under criminal

⁵⁴ ICCPR, Article 14(3) states that: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt."

⁵⁵ In Chapter Five and Six.

proceedings in the pre-trial investigation stage from the outset of proceedings. Access to a lawyer, for example, justify above claim.

As a result, it can be observed that the right of a suspect to access to legal assistance at the pre-trial stage is not explicitly found in the ICCPR. However, according to the HRC the right of access to a lawyer, without addressing the notion of criminal charge, is also exist at pre-trial stages of criminal proceedings from arrest stage. On this specific issue, as will be discussed elsewhere in this work by reference to actual cases and general comments, guidance can be obtained from the jurisprudence of the HRC and the Committee's general comments that clearly interpreted these rights under the provisions of a fair hearing in a comprehensive sense to involve the pre-trial investigation stage and before any formal criminal charges.⁵⁶

The jurisprudence of ECtHR is illustrative in this respect and interprets the notion of criminal charge in very wide scope.⁵⁷ It is recognized by the ECtHR that some provisions of Article 6 of the ECHR should apply not only from the time of formal charge being brought against the accused person but from the outset of criminal proceedings being taken place by the police. For the purpose of these provisions under Article 6, the Court defined a 'charge' as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence."⁵⁸ As a result, Article 6 of the ECHR, which corresponds literally to that of Article 14 of the ICCPR, lays some provisions for all stages of criminal proceedings and specifically emphasised its applicability to the 'decisive' pre-trial stage of criminal proceedings and covers the criminal proceedings even before the formal charge is made from the moment that "he is substantially affected by the steps taken against him as a suspect."⁵⁹

⁵⁶ The right of access to a lawyer will be discussed at length in Chapter Five.

⁵⁷ *Deweert v Belgium* App no. 6903/75 (ECtHR, 27 February 1980), (1979-80) 2 EHRR 439 para 42; see also Stefan Trechsel and Sarah J. Summers, *Human Rights in Criminal Proceedings* (2006, Oxford University Press) 32; Robin C A White and Clare Ovey, *The European Convention On Human Rights* (5th ed., Oxford University Press) 246.

⁵⁸ *Eckle v Germany* App no 8113/78 (ECtHR, 15 July 1982), (1983) 5 EHRR 1 para 73.

⁵⁹ The ECtHR states that "even if the primary purpose of Article 6, as far as criminal proceedings are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the Article has no application to pre-trial proceedings...the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings." *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008), (2009) 49 EHRR 19

The right to have an interpreter free of charge at pre-trial stage is equally not expressly mentioned in the ICCPR. The provision made mention free interpreter at court but is silent about pre-trial stage.⁶⁰ However, according to the international bodies, a person under criminal investigation particularly at pre-trial stage has right to have free access to interpreter if he cannot understand or speak the language of proceedings.⁶¹ Likewise, in the determination of any criminal charge, the provisions of the ICCPR in Article 14(3) (g) states that an accused person has the right to be free from self-incrimination, which means the right of any person is protected under the provisions of ICCPR in Article 14(3) (g) and can also be applied to persons under criminal investigation from the outset of proceedings.⁶²

Iraq adopted the ICCPR for almost forty years but in sequence - first signed in 1969, ratified in 1970, and by 1976 came into force.⁶³ Iraq is one of the state parties that have made no reservations to their application of the ICCPR. However, Iraq engaged with neither the First nor Second Optional Protocols of the UN ICCPR.⁶⁴

As will be reiterated throughout this thesis, some of these provisions under the ICCPR, even those related to providing protection for human rights in criminal proceedings, the Iraq criminal justice system fell short of international obligations in multi-faceted ways. It will be argued that the systematic daily violation of the human rights of accused persons was one of the major reasons behind the deterioration of the human rights situation in Iraq. These violations were condemned by international

paras 50, 52; David Harris et al., *The Law of the European Convention on Human Rights* (2nd ed., 2010, Oxford University Press) 306.

⁶⁰ Article 14(3)(f) provides that “To have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

⁶¹ The right of access to an interpreter will be discussed at length in Chapter Five.

⁶² 14(3)(g) provides the right of a person to “Not to be compelled to testify against himself or to confess guilt.”

⁶³ Iraq ratified the ICCPR by Law 193 of 1970, published in the Official Gazette, issue 1926 of 7 October 1970, entered into force on 23 March 1976.

{قانون انضمام العراق للعهدين الدوليين الخاصين بالحقوق المدنية والسياسية}

In this respect, Chapter Two will provide some discussion on how the ratified international treaties are being implemented and whether they applicable as domestic law in term of Iraqi law or not.

⁶⁴ See the First Optional Protocol to the International Covenant on Civil and Political Rights, Adopted by the General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976. It provides an individual whose rights have been violated to submit a written complain to the HRC for consideration. See also the Second Optional Protocol to the International Covenant on Civil and Political Rights, Adopted by the General Assembly resolution 44/128 of 15 December 1989 and entered into force on 11 July 1991. It bans the capital punishment.

reports from reputable institutions on various occasions.⁶⁵ The system relied heavily on the death penalty to deter crime.⁶⁶ What made the situation worse was that the system was widely reliant on confession to secure conviction, even in capital offense cases.⁶⁷ In addition, because Iraq was not party to the First Optional Protocol of the UN ICCPR, victims whose human rights were abused by the public authority, having exhausted national remedies, could neither send their cases to the Human Rights Committee (the HRC) nor resort to it in order to redress the damages incurred.

The adoption of propositions aimed at progress towards the rule of law in Iraq is of particular importance. With respect to dealing with human rights of accused persons in the scope of this research during the pre-trial stage, the research will focus particularly on the programmes instigated since 2003 which were intended to bring about such reforms of the criminal justice system as would bring it into conformity with the binding obligations of international law and rule of law. Therefore, one should ask whether the growing willingness to reform over the last ten years has adequately fulfilled the task of achieving effective due process in accordance with international standards in the sphere of human rights, most notably with regard to the International Covenant on Civil and Political Rights, to which Iraq is a party.

1.2.2. Other relevant UN international instruments binding upon Iraq

Particular attention has been paid by the United Nations to combating one of the most serious violations of human rights, which is the infliction of torture or cruel, inhuman or degrading treatment. On this basis, the General Assembly on 9 December 1975 adopted the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁶⁸ The

⁶⁵ Human Rights Reports of the Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), and other international NGOs such as Amnesty International, Human Rights Watch dating to between 2004 and 2013.

⁶⁶ Statistics issued by the government show that there were 338 executions of convicted persons during the years 2009- 2012. See the Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Rights Report (2012, Baghdad) 47.

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الإنسان العراقية}

⁶⁷ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report: 2012 (Baghdad, June 2013) 14.

⁶⁸ UN General Assembly Res 30/3452 'Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 December 1975).

“Torture Declaration” was the starting-point for further endeavours to draw up a draft of international human rights treaty on this subject.⁶⁹ These endeavours resulted in the UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (UN CAT) in 1984 (it came into force in 1987).

By virtue of Article 17 of the Convention a mechanism to monitor the implementation by the State parties was established: the Committee against Torture (CAT). The Committee role is to examine the implementation of treaty obligations by State parties.⁷⁰ For this purpose, the General Assembly of the United Nations adopted an Optional Protocol to the Torture Convention which establishes a system of the international investigation against torture.⁷¹ In performing this duty a Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has been established on which the duty to visit places of detention in the States Parties and support compliance with the convention is entrusted.⁷²

The growing willingness to affect legal reform in Iraq apparently lies behind a recent development, the signing and ratification by the government of the Convention in July of 2011. As a consequence, it is important to bear in mind that various steps are required in order to implement binding obligations under the Convention. In the first place, special attention must be given to the adoption in absolute form of the provisions of the Convention with regard to domestic law, along with the criminalisation of various acts prohibited under the Convention;⁷³ the establishment of appropriate mechanisms of inquiry to investigate any alleged occurrence of ill

⁶⁹ Hans Danelius, *Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, Audiovisual Library of International Law (United Nation 2008) at <<http://untreaty.un.org/cod/avl/ha/catcidtp/catcidtp.html>> accessed 30 July 2013.

⁷⁰ The Committee can undertake its role through a number of duets listed by the Convention that:

“ (i) To receive, study and comment on periodic reports from the States parties on the measures they have taken to give effect to their undertakings under the Convention (article 19);

(ii) To initiate an investigation when there is reliable information which appears to contain well-founded indications that torture is being systematically practised in the territory of a State party (article 20);

(iii) To receive and examine complaints by one State party of violations of the Convention by another State party (article 21); and

(iv) To receive and examine applications by individuals claiming to be victims of a violation of the Convention by a State party (article 22).”

⁷¹ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199, entered into force on 22 June 2006.

⁷² Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 2.

⁷³ UN CAT, Articles 2, 4, 5, and 8.

treatment in the institutions of the criminal justice system;⁷⁴ the promulgation of the culture of human rights;⁷⁵ the improvement of the capacity of members of the public authority to deal properly with criminal proceedings in the light of international norms;⁷⁶ ensuring that evidence obtained by invalid means should be inadmissible,⁷⁷ and assisting the victim with free and effective remedy against any violation or ill treatment.⁷⁸

In this thesis there will be scrutiny of the relevant obligations under the ratified international treaties to ascertain whether they have been implemented at the domestic level. In the context of this thesis, it may safely be assumed that if failure to meet these obligations under the Convention is judged it will lead to the conclusion that the reforms fail to protect a person accused against being a victim of the criminal justice system. In recognition of this assumption, an attempt will be made in this thesis to ascertain whether or not the human rights examined under the reformed Iraq criminal justice system are in accordance with the obligations of international law.

1.2.3. Non-treaty obligations

In addition to the legal obligation under international binding instruments, there is a complementary protection for a person facing criminal proceedings.⁷⁹ It is important that protections loophole under international binding law in any aspect of international due process could be resolved by customary international law. Soft law also provides extra international commitments. Over time, even if it does not have the legal power of treaties could address particular issues in the sphere of international human rights.⁸⁰ Since these instruments could provide the Iraqi legal system with

⁷⁴ UN CAT, Articles 12, 13.

⁷⁵ UN CAT, Article 10.

⁷⁶ UN CAT, Articles 10, 11.

⁷⁷ UN CAT, Article 15.

⁷⁸ UN CAT, Article 14.

⁷⁹ Article 5(2) of the ICCPR states that “There shall be no restriction upon or derogation from any of the fundamental human rights recognised or existing in any state party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent.”

⁸⁰ Soft law includes numerous declarations, resolutions, decisions, and principles adopted by the UN General Assembly and other political bodies dealing with human rights, to guide states to comply with existing international standards. See for example Universal Declaration of Human Rights (adopted 10 December 1948, UNGA Res 217 A(III); UN General Assembly Res 34/169 ‘Code of Conduct for Law Enforcement Officials’ (17 December 1979); UN General Assembly Res 43/173 ‘The Body of

practical guidance for adherence to international standards of human rights some relevant soft law instruments will be adopted in the next chapters.

1.3. Thesis statement and research questions

As earlier examined, since the collapse of the Ba'ath regime in 2003, many Iraqi and foreign institutions have been working to reform the Iraqi criminal justice system. As a result, there is a widespread belief in Iraq that the reformed criminal justice system is now in accordance with international human rights standards. This thesis seeks to test the correctness of the proposition that the reformed Iraqi criminal justice system accords with international standards in the human rights area, notably the International Covenant on Civil and Political Rights, to which Iraq is a party. The study will focus on three pre-trial rights; the right to liberty, third party access rights and the right to be free from self-incrimination. The author explores Iraqi law with an open mind to test the proposition; without setting out to prove that the suspect's rights are violated in Iraq. Nevertheless, the research leads the author to the clear conclusion that the reformed criminal justice system has failed to fully protect rights in the three identified areas. The author, having identified the weaknesses and fault lines, examines the reasons why these exist and proposes concrete steps for further work to be done, including areas of law reform and training of criminal justice personnel. In this, he draws from the jurisprudence of the European Court of Human Rights as a kind of 'best practice' for guiding the Iraqi criminal justice system in the area of pre-trial rights.

Research in this area is necessary to assess whether the efforts to reform the Iraqi criminal justice system have met the objective standards of the ICCPR, which is

Principles for the Protection of All Persons under Any Form of Detention or Imprisonment' (9 December 1988); UN General Assembly Res 30/3452 'Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 December 1975); UN General Assembly Res 48/134 'Principles Relating to the Status of National Institutions (The Paris Principles)' (20 December 1993); UN Guidelines on the Role of Prosecutors, 1990 adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990; UN Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba, 27 August to 7 September 1990).

binding on Iraq as a State Party. The duty of every State to respect its international obligations is a fundamental principle in International Law and International Relations, and if Iraq is properly to retake its place in the international community it must pay heed to the standards it is expected to abide by. Further research in this area is essential for the future trajectory of Iraq. The rule of law is critical to the future of Iraq as it moves further and further away from the time of the Ba'ath regime.⁸¹ The author argues that there must be a clean break with the practices of the past if Iraq is to move forward, and argues that fundamental and effective reform of the criminal justice system will lay the foundations for an Iraq based on the rule of law and respect for humanity.

In light of recent efforts with regard to the reform of the Iraqi criminal justice system, the question which follows is this: has the desired objective for which the efforts of reform in the context of the post-Saddam Iraq have been exerted since 2003, brought the reformed criminal justice system in line with international norms? To put it a little differently, the thesis considers the question: does the Iraqi criminal justice system, having been reformed over the last ten years, meet the objective standards of applicable international law? Another question, which then follows, is that if it is the case that these efforts of reform have not been successful, what are the reasons behind the failure and what measures could be proposed to redress the defective areas in order to bring those procedural rights into conformity with international perspectives?

The scope of this work is limited to examining the three identified rights during the pre-trial criminal process. As mentioned previously, it would not be true to say that the reform encompassed only the three rights considered here. It is, however, not practical to attempt to investigate all the reforms comprehensively.⁸² Rather, the discussion will focus on the extent to which the three identified guarantees of accused persons in the criminal procedure system comply with the substantive commitments of Iraq under international law.

⁸¹ The rule of law is discussed at length in Chapter Two.

⁸² See the discussions on why does this thesis focus on the three identified rights in p 10-11.

1.4. Methodology

The study tests claims about the success of the reforms by examining the new Iraqi criminal justice against binding international standards in the realm of procedural safeguards for accused persons in pre-trial proceedings. To achieve its aims, it is reliant on rigorous doctrinal legal research. It adopts the standard legal analysis, of a 'black letter nature'. It also evaluates the studies of scholars and publications that are relevant to the topic, such as books and journals. The work examines primary sources, such as Iraq's legislation, and subjects them to analytical study. Where the author refers to Arabic language materials, he relies on the official, unofficial, or own translation. The Iraqi laws on which the present author is reliant are available in English versions under official translation. With regard to the Criminal Procedure Code No. 23 of 197, the Penal Code No. 111 of 1969, the Public Prosecutor Law No 159 of 1979, and the Judicial Organization Law No.160 of 1979 the present research will adopt a copy of the official English translation that is available online at the homepage of *the Global Justice Project: Iraq* (GJPI), carried out by the Iraqi government under the auspices of the United Nations in 2009.⁸³ With regard to the Iraqi Permanent Constitution 2005, the research will adopt a copy of the official English translation that is available online at the homepage of the Iraqi government.⁸⁴ Additionally, the primary sources on which the work basically relies are international rules, particularly the ICCPR, which is binding on Iraq as a State Party. For the purpose of identifying the potential gap between them, critical analysis methods of the Iraqi criminal justice system and the international standards of the Covenant (the ICCPR) and the guidance of the Human Right Committee are adopted throughout the work.

In the context of Iraqi sources, the author has faced difficulties in acquiring the appropriate sources and in discovering documents whereby the research can be substantiated. However, the research uses many national documents, domestic case-law and data obtained through private efforts from various governmental and non-governmental resources.

⁸³ Global Justice Project: Iraq (GJPI) العراق العدالة الشامل -مشروع, available at <<http://gypi.org/central-activities/judicial-independence/>> accessed 1 March 2012.

⁸⁴ The homepage of the Iraqi government, available at <<http://www.cabinet.iq/default.aspx>> accessed 20 November 2013.

For tracking the development of Iraqi criminal justice and human rights reform in law and practice, the study essentially relies on international sources, such as the reports which have been drafted and carried out by reputable international organisations and human rights groups, for example, UN special reports, the UN Commission on Human Rights, the UN Human Rights Council, the UN High Commissioner for Human Rights, and non-government organizations such as Amnesty International and Human Rights Watch. It is also important that, from the removal of Saddam's regime until the present time, the office of the UN High Commissioner for Human Rights in Baghdad (UNAMI) has regularly operated extensive fieldwork with regard to pre-trial detention, which has involved gaining access to places of detention, monitoring the proceedings and conducting personal interviews. These empirical resources have been greatly relied upon in the current research for the substantiation of the facts of daily practice in the post-Saddam criminal justice system. In addition, some of the methodology relies on multiple projects implemented by the international community in its efforts to reassert the rule of law in Iraq.

The study takes advantage of the experience of other domestic legal systems around the world, and other legal codes with relevance to the protection of human rights in criminal proceedings, and in particular the Model Codes for Post Conflict Criminal Justice, which have been developed and drafted by the United States Institute of Peace and the Irish Centre for Human Rights in cooperation with the Office of the High Commissioner for Human Rights and the United Nations Office on Drugs and Crime.⁸⁵ In this thesis, the research seeks to inspire solutions to problems relating to Iraqi law rather than on the analysis of the traditions of these various systems and national rules. It may be helpful to learn lessons by studying the experiences of those legal systems with regard to their dealing with pre-trial human rights; at the same time, those provisions that are by their nature inconsistent with the Iraqi legal system can be avoided and the research will not deal with them. The aim here is to examine with an open mind the defects in the post-Saddam reformed criminal justice system by giving relevant examples of other countries' systems with regard to procedural pre-

⁸⁵ Vivienne O'Connor & Colette Rausch (eds.), *Model Code for Post-Conflict Criminal Justice, Model Criminal Code Vol. I* (2007, United States, Institute of Peace Press).
Vivienne O'Connor & Colette Rausch (eds.), *Model Code for Post-Conflict Criminal Justice, Model Code of Criminal Procedure Vol. II* (2008, United States, Institute of Peace Press).

trial safeguards. In this way the aim of the research, to examine the post-Saddam reform, can best be served and also any deficiencies in the Iraqi procedures can be addressed to bring the reformed Iraqi justice system in line with international standards.

Any attempt to estimate the degree to which Iraqi post-2003 justice complies with its international obligations will necessarily involve an interpretation of the legal text of the ICCPR. In this, the work of the United Nations Human Rights Committee (HRC) is critical. Accordingly, this research mainly relies on HRC's jurisprudence and general comments. The HRC is regarded as setting a global standard for the protection of human rights and it is also a highly experienced interpreter of the rules of international law. These rules therefore provide a benchmark for measuring the extent to which the reformed Iraqi system fulfills its obligations under international law. It is the present author's hope that these methods will help in solving the stated problem with regard to the pre-trial human rights of the accused person and also in reaching the minimum standard.

In addition, the study relies on case law collocated from other international resources, particularly the jurisprudence of the European Court on Human Rights (ECtHR). It thus benefits from a rich store of case law dealing with the protection of pre-trial human rights. The on-going development of procedural safeguards under Strasbourg case-law can be invested and deployed as a guideline for Iraqis in order to identify fault lines and redress the weaknesses in the system and thus lay a foundation for further reforms to be carried out in the near future.

1.5. Structure of the work

The study comprises eight chapters. It starts with the present brief introductory chapter, which considers the background of the subject researched in order to justify this research. It also presents the statement of the thesis and the methodology adopted.

Chapter Two considers the rule of law reform in Iraq after 2003. In this chapter, the concentration is on the reforms which have taken place in the criminal justice system

in order to restore the rule of law and respect for human rights. This chapter argues that the resolution of the problem of systemic abuse of the three identified human rights is dependent not merely on an adequate legal framework but also on the adoption of a justice system under the effective rule of law. The chapter discusses in depth whether a particular rule or system has moved away from the past to fulfill its rightful function of protecting the basic rights of the accused person. It will reveal the key improvements with regard to the reform of law; reform of the judicial authority, including other actors or sectors linked with the criminal justice field; and reform of the system of protecting human rights. The reform programme encompasses more than the identified rights considered in the thesis and this necessitates the provision of an overall background to the topic prior to the discussion of the core of the thesis, which concerns the three identified guarantees of the accused person.

Chapter Three proceeds on the basis that discussion of the three identified rights must be preceded by an understanding of the workings of the Iraqi legal system, so that the issues examined in the subsequent chapters may be more clearly understood. The chapter therefore provides an overview of how the investigative system works in daily life. In addition, an attempt will be made to focus on particular issues in light of international rules and recent developments of the due process standard. The chapter also endeavours to identify those defective areas of the system that directly impinge on the aspects of human rights under research.

Chapter Four discusses whether or not the reforms have led to the prohibition of arbitrary arrest and detention. This chapter focuses on testing Iraqi law against the standard of international rules in order to illustrate those defective rules which grant officials wide discretion to deprive the accused person of liberty prior to any guilt being determined by a court.

Chapter Five endeavours to identify basic measures for the protection of the rights of a person accused in respect of access to a lawyer and an interpreter. It analyses the extent to which the reforms of the post-Saddam criminal justice system have contributed to rendering the provisions of Iraqi law and practice compliant with international due process and recent developments of safeguards in criminal procedure. The chapter focuses on testing the correctness of the claim that in Iraq the situation regarding the third party access rights during the initial investigation of the

pre-trial stage conflicts in multiple aspects with international standards for the protection of human rights.

Chapter Six examines in depth the provisions of reformed Iraqi law and practice regarding the right to be free from self-incrimination in the light of international due process. It aims to identify those provisions that are noncompliant with binding obligations under international law. This chapter explicates the components of the right: the right to silence, the right to be safe from ill-treatment and the right to be protected against involuntary confession. The chapter examines the possible situations in which an accused person has no absolute right to silence; and the possible situations in which protection against mistreatment and against self-incrimination is denied in order for confessions obtained from the accused to be admissible at a later stage during the trial.

This thorough and objective investigation leads the author to the unavoidable conclusion about the failure of the post-Saddam Iraqi criminal justice system and its reforms in protecting the human rights of a person accused during the pre-trial investigation stage. The study concludes that, contrary to basic standards of international human rights law, the three identified rights suffer from a lack of protection in law and practice within a system which is dysfunctional in its entirety. The focus on the three rights reveals the extent of the malaise across the board. For the purpose of achieving the target of study, and having found earlier throughout previous chapters that the new reform fails to achieve full compliance with obligations under international law, an attempt will be made in Chapter Seven to coordinate the findings.

To this end, it will be devoted to the shattering of the myth of a successful post-Saddam criminal procedure reform and is divided into two sections. The first section will be assigned to an analysis of some of the reasons why the reformed criminal justice system has failed and why the violation of suspects continues. The second section proposes further reforms so that the discovered shortcomings of justice are remedied and a new system is inaugurated which brings post-Saddam Iraq in accordance with international due process and with modern conceptions of human rights in criminal procedure. It shall be argued that the proposals for further reform

must be multi-faceted, involving changes to the law, institutional reform, improved education, training, monitoring and various other factors by which compliance with the international law of human rights can be ensured.

Chapter Eight will bring the findings of the previous chapters together to form a conclusion and will briefly summarize answers to the questions posed by the research, thus providing resolution.

CHAPTER TWO

THE RULE OF LAW AND CRIMINAL JUSTICE REFORM IN IRAQ

Introduction

As indicated previously, the criminal justice system in Iraq had struggled against an entrenched culture of violating human rights both in law and practice.¹ In 2003, Western influences have caused Iraq to change from an authoritarian regime to a democratic system. Serious efforts have been made to establish security, to reform the justice system, to instigate the mechanisms of oversight and accountability and to bring about the trial of criminals from the former regime. Thus, before examining, in the following chapters, the three identified guarantees of an accused, the present chapter will consider the progress of the reforms that have been made with the aim of improving the criminal justice system in post-Saddam Iraq.

A fair and effective justice system is recognized as the cornerstone in the construction of a society governed by the rule of law.² It has to be recognized that movement forward towards an efficient level of the rule of law in Iraq will require a considerable period of time. For the past ten years, the improvement of the justice system has been a major project, and various programmes have been suggested or implemented in this respect. The reforms made in order to establish human rights within the Iraqi criminal justice system will be discussed in the next five sections. The discussion will consider the concept of the rule of law itself and its applicability to post-Saddam Iraq. Following this, the discussion will move to a closer assessment of the different reforms by focussing on: the reform of the law in order to establish due process rights; reform of the judicial authority in order to create an independent criminal justice system; reform of other bodies linked with the justice system; and reform of non-judicial mechanisms for ensuring human rights.

¹ Chapter One particularly pages 3, 4, and 5.

² Professor Nachbar has convincingly maintained that “A society cannot be said to be governed by the rule of law if criminals are not adequately dealt with or if the state fails to treat those subject to its complete control in a humane, rational manner.” Thomas B. Nachbar, “Defining the Rule of Law Problem” (2009) 6 *The Green Bag* 310.

2.1. The meaning of the rule of law

Before directly deconstructing the main arguments with regard to Iraqi post-Saddam criminal justice reform, it is essential to review what the rule of law means.

The rule of law is a system that provides the rules and rights necessary for the organization of the life of the community and the establishment of a just society. It provides basic protection against violations of human rights, barriers to justice, arbitrary government and anarchy. Due process is one of the most important elements of the rule of law.³ At the same time, the rule of law is valuable for a person who is undergoing criminal proceedings. If the law does not exercise its power over the state authorities, any safeguards given to the accused person are likely to be ineffective. In the same way, the protection of human rights within the context of the criminal justice system is reliant not only on the amendment and reform of laws but also on respect for these rights in practice within the justice system. In other words, it is about law and practice. It goes beyond the individual instances, and concerns structures and systems.

Although scholars agree that the modern notion of the rule of law can be traced back to the 19th century,⁴ there is some disagreement regarding its scope and definition.⁵

³ See Thomas B. Nachbar, *ibid* 310; Tom Bingham, *The Rule of Law* (2011, Penguin Books) 66; Edda Kristjánsdóttir et al. (eds.), *International Law in Domestic Courts: Rule of Law Reform in Post-Conflict States* (2012, Intersentia) 28.

⁴ Professor A.V. Dicey used the term ‘the rule of law’ in 1885 in his influential work, *An Introduction to the Study of the Law of the Constitution*. Dicey described the meaning of the rule of law as follows: “1. No man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.

2. No man is above the law, and all are subject to the same law of the realm and amenable to the jurisdiction of the ordinary tribunals.

3. There remains yet a third and different sense in which the rule of law or the predominance of the legal spirit may be described as a special attribute of English institutions. We may say that the Constitution is pervaded by the rule of law on the ground that the general principles of the Constitution (as for example the right to personal liberty, or the right of public meeting) are with us as the result of judicial decisions determining the rights of private persons in particular cases brought before the court; whereas under many foreign Constitution the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the Constitution.” See Albert V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan and co., 1889) 175, 181 and 183. Available at

<<http://archive.org/stream/introductiontos04dicegoog#page/n110/mode/2up>> accessed 9 October 2013.

⁵ Thomas B. Nachbar (n 2) 304; Edda Kristjánsdóttir et al. (eds.), (n 3) 27; Suzannah Linton & Firew Kebede Tibe, “Judges and Rule of Law in Times of Political Change or Transition” M. Cherif Bassiouni et al. (eds.), *The Global Community Yearbook of International Law and Jurisprudence: Globe Trends* (2013, Oxford University Press) 173 at 178.

This can be attributed to the existence of different formulations of the concept.⁶ As a result there are two distinct categories or modes of the rule of law. The ‘thin’ version includes formal conceptions concerning the process of making the law and its attributes, such as its need to be clear, certain and predictable. The ‘thick’ version is a substantive conception of the rule of law that considers not only the format but also the content of the law and of human rights.⁷

Recently, theorists have largely inclined to follow substantive versions of the rule of law.⁸ Lord Bingham, for example, stated that, “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”⁹ This definition provides additional principles that replace the ‘thin’ interpretation of the rule of law with the ‘thick’ concepts that entail fundamental individual human rights but are also concerned with social and economic rights.

In the past two decades, reforming the rule of law in post-conflict societies has become a significant project in the international community.¹⁰ It follows that it is very important for the international community to understand the meaning of the rule of

⁶ Edda Kristjánsdóttir et al. (eds.), (n 3) 27.

⁷ Cyndi Banks, “Reconstructing Justice in Iraq: Promoting the Rule of Law in A Post-Conflict State” (2010) 2 *Hague Journal on the Rule of Law* 159; Edda Kristjánsdóttir et al. (eds.), (n 3) 27; Tom Bingham, (n 3) 66.

⁸ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (1st ed., 2004, Cambridge University Press) 91; Cyndi Banks, *ibid*; Edda Kristjánsdóttir et al. (eds.), (n 3) 28; Tom Bingham, (n 3) 37.

⁹ This approach to the substantive version of the rule of law provides general principles:

- “1. The law must be accessible and, so far as possible, intelligible, clear and predictable.
2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion- Law not Discretion (When the law ends the tyranny and arbitrariness starts).
3. The laws of the land should apply equally to all- Equality before the law, save to the extent that objective differences justify differentiation (thus, for example, children should be treated differently).
4. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.
5. The law must afford adequate protection of fundamental human rights (Human rights).
6. Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes that the parties themselves are unable to resolve (access to justice system).
7. Adjudicative procedures provided by the state should be fair (fair trial-equality of arms, etc.).
8. Compliance by the state, with its obligations in international as in national law.” See Tom Bingham, (n 3) 37.

¹⁰ United Nations Office on Drugs and Crime, *Criminal Justice Reform in Post-Conflict States - A Guide for Practitioners* (2011, Printed in Austria) 2 available at

http://www.unodc.org/documents/justice-and-prison-reform/11-83015_Ebook.pdf accessed 23 October 2012; see also Cyndi Banks, (n 7) 156.

law. The general problem here is not simply with regard to programmes and projects of rebuilding process in post-conflict societies. The international community occupies a significant role in implementing these projects to integrate the rule of law into the reconstruction process and to move these societies away from the past. Thus, as Sannerholm observed, without understanding the concept of the rule of law, what are its promoters promoting? The author adds that “Not knowing what to promote, yet still doing it, lead to confusion, contradictory result and a conflict of values ... [It] is not enough to act on the basis of I know it when I see it.”¹¹

However, this argument seems to be inconsistent with the clear model of the rule of law that was adopted by the United Nations in 2006. The United Nations in order to set a guide for international use, set a template of the rule of law which defined it as follows:

“[The rule of law] is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”¹²

This functioning definition, as Linton and Tibe suggest, involves the aim to restore peace and elevate the society to an ideal position.¹³ Hence, the current definition leads us to conclude that departing from violent conflict and realizing the above universal approach to the rule of law in post-conflict reconstruction requires, among other things, the highest standards in several areas, such as the justice system, democracy, good governance and human rights along with economic rights and social justice.¹⁴

Viewed in the light of the United Nation’s template of the rule of law, the case of Iraq reveals a clear contrast between the past era under the Saddam regime and the present

¹¹ Richard Sannerholm, “Legal, Judicial and Administrative Reform in Post-Conflict Societies: Beyond the Rule of Law” (2007) *Journal of Conflict & Security Law* 73.

¹² UN Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, 23 August 2004, S/2004/616, at 4, para. 6.

¹³ Suzannah Linton & Firew Kebede Tibe, “Judges and Rule of Law in Times of Political Change or Transition” (n 5)178.

¹⁴ See UN Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, 12 October 2011, at 1; UN Secretary-General, *United Nations Approach to Rule of Law Assistance: Guidance Note* (April, 2008).

time with regard to the rule of law. In Saddam's Iraq, it is safe to say that written laws and their implementation did not provide even minimal respect for the rule of law. The government and its officials were bound only by those that served the purposes of the regime, while disregarding all other laws. Their decisions were not amenable to legal challenge or internal check. Banks states that, at that time, jurisdiction over all serious offences was controlled by multiple security services.¹⁵ She also observes that "even this minimal concept [thin concept of the rule of law] did not exist in Iraq under the Saddam regime when, for example, conventional western style law enforcement was in the hands of the Iraqi National Police who operated under military oversight."¹⁶

However, to judge from the events of the past decade, the United Nation's conception of the rule of law has been difficult to establish. The fact is that there has been a piecemeal approach to the restoration of the rule of law in the country. The difficulties in achieving such an ideal conception of the rule of law can be attributed to the fact that it requires a wide variety of actors and holistic reforms,¹⁷ and its applicability has also been challenged at a domestic level.¹⁸

The reform process began by taking steps to provide the minimal substantive elements of the rule of law. Then the country gradually moved towards further reform, although providing the thicker version of the rule of law as defined by the United Nations has not yet been possible. The solid version of rule of law can only be applied in Iraq when the country has more fully addressed the needs to conform to the rule of law. In light of this perspective, improvement in the criminal justice system has been a major priority during the last ten years of efforts to realize a holistic vision

¹⁵ Cyndi Banks, (n 7) 159.

¹⁶ Ibid.

¹⁷ In favour of the same argument, de Goor & Veen state that "It is precisely such a broad definition, in our view, that impedes clear operationalisation, gives too many actors a stake in the game and prevents effective management of UN efforts. It also does not explicitly recognise critical linkages between justice and security." See Luc van de Goor and Erwin van Veen, *The Heart of Developmental Change: Rule of Law Engagements in Situations of Fragility*, p 66. Available at http://worldjusticeproject.org/sites/default/files/the_heart_of_developmental_change_goor_veen.pdf accessed 10 October 2013.

¹⁸ The disparity between the universal conception of the rule of law and its real applicability is beyond the scope of this research and needs deeper empirical study. Forthcoming pages in the current study will, however, provide a closer assessment of the reforms that have been undertaken with regard to due process in criminal procedure and the justice system in the endeavour to achieve the rule of law in post-Saddam Iraq.

of reform and to heal the wounds of the past. The following pages of this chapter will identify four central components of this reform project.

2.2. Law reform in Iraq

In order to conform to the UN definition, the rule of law requires legislation in which rules consistent with international human rights norms are established.¹⁹ Further, these rules must apply equally to the ruler and ruled. In this regard, efforts have been made in post-Saddam Iraq to build a new legal framework to enhance the rule of law. The Transitional Administrative Law (TAL) states that:

“The people of Iraq, striving to reclaim their freedom, which was usurped by the previous tyrannical regime, rejecting violence and coercion in all their forms, and particularly when used as instruments of governance, have determined that they shall hereafter remain a free people governed under the rule of law...”²⁰

The core protection for the rights of individuals who are under criminal proceedings can thus be seen in the new Constitution and the reformed criminal law, which will now be discussed.

2.2.1. Constitutional reform

2.2.1.1. Brief history

Coalition forces led by the United States and United Kingdom ended the dictatorship of Saddam and his repressive Ba’ath regime on 9 April 2003.²¹ The Coalition forces

¹⁹ UN Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, 23 August 2004 (n 12) para. 6; see also Cyndi Banks, “Reconstructing justice in Iraq: promoting the rule of law in a post-conflict state” (n 7) 161; see also United Nations Office On Drugs And Crime, *Criminal Justice Reform in Post-Conflict States - A Guide for Practitioners* (n 10); Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (n 8).

²⁰ The Transitional Administrative Law (TAL), published in the Official Gazette issue 3981 of May 2004. The original text is in the Arabic language, and the official translation in English is available online at the homepage of *the Global Justice Project: Iraq* (GJPI) <<http://gipi.org/central-activities/judicial-independence/>> accessed 27 February 2014.

قانون ادارة الدولة للمرحلة الانتقالية:

{ ان الشعب العراقي الساعي الى استرداد حريته التي صادرها النظام الاستبدادي السابق. هذا الشعب الراض للتعنف والاكراه بكل اشكالهما. وبوجه خاص عند استخدامهما كأسلوب من أساليب الحكم. قد صمم على أن يظل شعبا حرا يسوسه حكم القانون }

²¹ On the question of whether or not the invasion was legitimate and lawful, see the argument by Tomasz Iwanek, “The 2003 Invasion of Iraq: How the System Failed” (2009) *Journal of Conflict & Security Law* 89-116.

became an occupying power with all of the attendant rights and responsibilities under the provisions of international humanitarian law.²² In June of the same year, the Coalition Provisional Authority (CPA) was established as the civil administration of Iraq, which in its turn took the initial steps to re-build the country towards an exemplary model of democracy and the protection of human rights in the Middle East.²³ The occupation formally ended on 28 June 2004. At that time, the CPA's tenure ended and the Security Council ruled that the occupation had ended and sovereignty was to be restored to Iraqis under the Iraqi Interim Government, appointed under the auspices of the United Nations.²⁴

The interim government administered the country under the Transitional Administrative Law.²⁵ Government approval was also given for the multi-national forces to remain indefinitely on Iraqi territory. A roadmap for the adoption of a permanent Constitution and an elected legislative was provided by the Security Council.²⁶ In accordance with the plan for free elections under the supervision of the United Nations, the Transitional National Assembly was elected in January 2005.²⁷ Their task was to produce the draft permanent Constitution and to form a Transitional Government of Iraq. Shortly thereafter, for the first time in Iraq's modern history, there was a free national referendum on the new draft Constitution. This was a major

²² The obligations of occupying powers have emerged in international humanitarian law, in the Hague Regulations of 1907 and the Geneva Conventions of 1949; see also the Resolution of Security Council by which the coalition force was deemed as an occupying power UNSC Res 1483 (2003) UN Doc S/RES/1483; see also UNSC Res 1511(2003) UN Doc S/RES/1511.

²³ President George W. Bush and Prime Minister Tony Blair, *Joint Statement on Iraq's Future*, 8 April 2003; available at <<http://www.whitehouse.gov/news/releases/2003/04/20030408-1.html>> accessed 12 September 2009; see CPA's Regulation 1, 16 May 2003, published in the Official Gazette, issue 3977 of 17 June 2003. The original text is in the English language, and the official translation in Arabic is available in the Official Gazette, issue 3977 of 17 June 2003.

²⁴ UNSC Res 1546 (2004) UN Doc S/RES/1546.

²⁵ The Transitional Administrative Law (TAL) states that "This Law is now established to govern the affairs of Iraq during the transitional period until a duly elected government, operating under a permanent and legitimate Constitution achieving full democracy, shall come into being." See (n 20)

{فقد اقر هذا القانون شؤون العراق خلال المرحلة الانتقالية الى حين قيام حكومة منتخبة تعمل في ظل دستور شرعي دائم سعيا لتحقيق ديمقراطية كاملة}

²⁶ The Security Council has held that "Endorses the proposed timetable for Iraq's political transition to democratic government including:

(a) formation of the sovereign Interim Government of Iraq that will assume governing responsibility and authority by 30 June 2004;

(b) convening of a national conference reflecting the diversity of Iraqi society; and

(c) holding of direct democratic elections by 31 December 2004 if possible, and in no case later than 31 January 2005, to a Transitional National Assembly, which will, inter alia, have responsibility for forming a Transitional Government of Iraq and drafting a permanent Constitution for Iraq leading to a Constitutionally elected government by 31 December 2005." See UNSC Res 1546 (2004), (n 24) para. 4.

²⁷ See UNSC Res 1546 (2004), (n 24), para.7.

advance in the trajectory of the rule of law reform and a notable sign of the success of transitional justice reforms.

The new Iraqi Constitution, termed the Iraqi Permanent Constitution, came into effect on 15 October 2005. In accordance with its provisions, the new, democratically elected government replaced the transitional administration.²⁸ Iraq was restored to its full independence, the multi-national force having completed its departure from the country at the end of 2011. The Constitution provides a progressive platform of political change towards a parliamentary democratic system. For the purposes of this research, it is important to note the strong human rights provisions in the Constitution, and these are discussed below.

2.2.1.2. Creating rule of law through the Constitution

The Iraqi Permanent Constitution is a major element in the establishment of a sustainable peace.²⁹ There are several provisions in the Constitution related to the subject of rights. It is prefaced with a declaration that:

“We, the people of Iraq, who have recently arisen from our stumble, and who are looking with confidence to the future through a republican, federal, democratic, pluralistic system, have resolved with the determination of our men, women, elderly, and youth to respect the rule of law, to establish justice and equality, to cast aside the politics of aggression, to pay attention to women and their rights, the elderly and their concerns, and children and their affairs, to spread the culture of diversity, and to defuse terrorism.”³⁰

With regard to the rule of law, Article 5 states that, “The law is sovereign. The people are the source of authority and legitimacy.”³¹ Article 6 states “Transfer of authority

²⁸ The new elected government under Prime Minister Al-Maliki was established in May 2006.

²⁹ The Constitution contains a Preamble and six Sections. Section (1) includes the “Fundamental Principles;” Section 2 covers the “Rights and Liberties;” Section 3 is devoted to the “Federal Powers;” Section 4 addresses the “Powers of the Federal Governments;” Section 5 defines the “Power of the Regions;” and Section 6 contains the “Final and Transitional Provisions.”

³⁰ The Iraqi Permanent Constitution 2005. The official translation in English is available online at the homepage of the Iraqi government at <<http://www.cabinet.iq/default.aspx>> accessed 20 November 2013.

{نحنُ شعبُ العراقِ الناهضُ نوراً من كبوته، والمتطلع بثقة إلى مستقبله من خلال نظامٍ جمهوريٍ اتحادي ديمقراطيٍ تعددي، عَقَدْنَا العزمَ برجالنا ونسائنا، وشيوخنا وشبابنا، على احترام قواعد القانون وتحقيق العدل والمساواة، ونبذ سياسة العدوان، والاهتمام بالمرأة وحقوقها، والشيخ وهمومه، والطفل وشؤونه، وإشاعة ثقافة التنوع، ونزع فتيل الإرهاب}

³¹ The Iraqi Permanent Constitution 2005, Article 5, see *ibid*.

{السيادة للقانون، والشعب مصدر السلطات وشرعيتها، يمارسها بالاقتراع السري العام المباشر وعبر مؤسساته الدستوري}

shall be made peacefully through democratic means”.³² Article 9 states “The Iraqi armed forces and security services will be composed of the components of the Iraqi people ... subject to the control of the civilian authority ... [They], shall not interfere in the political affairs, and shall have no role in the transfer of authority.”³³

Closely related to the right due process is that, in addition to enhancing the judicial mechanism for protecting accused persons, the Constitution lays the foundations for the establishment of other mechanisms for protecting human rights. Those mechanisms, in general, serve to protect human rights, and can also largely contribute to protecting accused persons in the criminal justice system.³⁴ Of particular importance is the High Commission of Human Rights, as will be discussed later, in Section Five of this Chapter. The Constitution contributes significantly to the reconstruction of the justice system and criminal justice policy. It contains a variety of provisions to prohibit agents of the state from resorting to human rights violations that were widespread in the past.³⁵ It points out that the right to a defence is sacred, and

³² The Iraqi Permanent Constitution 2005, Article 6, see (n 30).

{ يتم تداول السلطة سلمياً عبر الوسائل الديمقراطية المنصوص عليها في هذا الدستور }

³³ The Iraqi Permanent Constitution 2005, Article 9, see (n 30).

{ لا يجوز للقوات المسلحة العراقية وافرادهـا ... الترشيح في انتخابات لإشغال مراكز سياسية }

³⁴ Ibid, Article 102.

³⁵ Ibid, Article 19 states that:

“First: The judiciary is independent and no power is above the judiciary except the law.

Second: There is no crime or punishment except by law. The punishment shall only be for an act that the law considers a crime when perpetrated. A harsher punishment than the applicable punishment at the time of the offense may not be imposed.

Third: Litigation shall be a protected and guaranteed right for all.

Fourth: The right to a defence shall be sacred and guaranteed in all phases of investigation and the trial.

Fifth: The accused is innocent until proven guilty in a fair legal trial. The accused may not be tried for the same crime for a second time after acquittal unless new evidence is produced.

Sixth: Every person shall have the right to be treated with justice in judicial and administrative proceedings.

Seventh: The proceedings of a trial are public unless the court decides to make it secret.

Eighth: Punishment shall be personal.

Ninth: Laws shall not have retroactive effect unless stipulated otherwise. This exclusion shall not include laws on taxes and fees.

Tenth: Criminal laws shall not have retroactive effect, unless it is to the benefit of the accused.

Eleventh: The court shall appoint a lawyer at the expense of the state for an accused of a felony or misdemeanour who does not have a defence lawyer.

Twelfth:

A. Unlawful detention shall be prohibited.

B. Imprisonment or detention shall be prohibited in places not designed for these purposes, pursuant to prison laws covering health and social care, and subject to the authorities of the State.

Thirteenth: The preliminary investigative documents shall be submitted to the competent judge in a period not to exceed twenty-four hours from the time of the arrest of the accused, which may be extended only once and for the same period.” See (n 30)

{ أولاً: القضاء مستقل لا سلطان عليه لغير القانون .

ثانياً: لا جريمة ولا عقوبة إلا بنص. ولا عقوبة إلا على الفعل الذي يعده القانون وقت اقترافه جريمة، ولا يجوز تطبيق عقوبة اشد من

the judiciary is independent.³⁶ Analysis of the Constitution's provisions demonstrates that it has a direct influence on the due process rights of persons subject to criminal proceedings. It has created a standard which the rules of law have to meet in the new democratic system. For the purposes of this research, those due process rights mentioned in the Constitution and relevant to the current topic will be considered in detail in the coming chapters. The question will then be asked as to whether in both the ICCP and in actual practice, these constitutional rights have been protected in a way that complies with the provisions of the Constitution and the ICCPR.

In the view of this author, it is not appropriate to compare this new Constitution with that of the Saddam era, when Constitutions were established for largely political reasons and to mislead the international community, while in reality those rights were never enjoyed by Iraqis.³⁷ In addition, the Constitutions were established by an autocratic Ba'ath Party, out of line with the actual will of the Iraqi people. By contrast, the current Constitution was approved by the will of Iraqis through the democratic referendum of 2005. It should be clearly understood that the Constitution also encompasses the most binding human rights in the ICCPR, and under its provisions these are formally granted to Iraqi citizens. However, it would be naïve to think that these constitutional provisions in themselves secure the rights of Iraqis. These rights need to be observable in practice. The due process rights contained in the words of the Constitution are to be regarded as significant progress. However,

العقوبة النافذة وقت ارتكاب الجريمة .
ثالثاً: التقاضي حق مصون ومكفول للجميع .
رابعاً: حق الدفاع مقدس ومكفول في جميع مراحل التحقيق والمحاكمة .
خامساً: المتهم بريء حتى تثبت إدانته في محاكمة قانونية عادلة، ولا يحاكم المتهم عن التهمة ذاتها مرة أخرى بعد الإفراج عنه إلا إذا ظهرت ادلة جديدة .
سادساً: لكل فرد الحق في أن يعامل معاملة عادلة في الإجراءات القضائية والادارية .
سابعاً: جلسات المحاكم علنية إلا إذا قررت المحكمة جعلها سرية .
ثامناً: العقوبة شخصية .
تاسعاً: ليس للقوانين اثر رجعي ما لم يُنص على خلاف ذلك، ولا يشمل هذا الاستثناء قوانين الضرائب والرسوم .
عاشراً : لا يسري القانون الجزائي بأثر رجعي إلا إذا كان اصلح للمتهم .
حادي عشر: تنتدب المحكمة محامياً للدفاع عن المتهم بجناية أو جحة لمن ليس له محام يدافع عنه وعلى نفقة الدولة .
ثاني عشر:
أ- يحظر الحجز .
ب - لا يجوز الحبس أو التوقيف في غير الاماكن المخصصة لذلك وفقاً لقوانين السجون المشمولة بالرعاية الصحية والاجتماعية والخاضعة لسلطات الدولة .
ثالث عشر: تعرض اوراق التحقيق الابتدائي على القاضي المختص خلال مدة لا تتجاوز اربعا وعشرين ساعة من حين القبض على المتهم ولايجوز تمديدها الا مرة واحدة وللمدة ذاتها{

³⁶ Ibid, Article 19, paras. 1 and 4.

³⁷ Hatch described the Constitution in the Saddam era as merely hollow words. See Richard O. Hatch, *Restoring the Rule of Law in Post-War Iraq: Steps, Missteps, and a Call to Maximize International Support for Iraqi-led Processes*, report (U.S. Army War College, 19 March 2004) 3, available at <<http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA424378>> accessed 3 August 2013.

further examination of specific rights is necessary before a final assessment can be made, and this examination will occupy the chapters that follow. The words in the Constitution can only make a difference when the constitutional rights are fully observed in practice and are in line with the international due process.

Like many other constitutions, the Iraqi Permanent Constitution does not deal with the relationship between domestic and international law, including international human rights law. The Constitution does not make clear whether the international agreements are deemed to be a source of legislation or are separate from domestic law. Nor, does it make clear whether international treaties take priority over national laws if any contradiction emerges between them. In the same way, the Constitutional Court, which is also called the Federal Supreme Court, (*AlMahkamah AlAthadiah AlUlya*), has not so far debated these issues. This absence of clear provisions with regard to the status of international treaties within the new Iraqi legal system has negatively affected the domestic application of binding international human rights standards. In the case of Iraq, such Constitutional provisions that empower domestic courts directly to apply binding international treaties are of particular importance in order to put an end to the previous ineffectual attitudes, which resulted in a reluctance to apply international law before domestic courts. In this argument, two aspects need to be considered. The first level is a theoretical and the second concerns practice.

At a formal level, Iraq is considered as a ‘dualist’ rather than a ‘monist’ country regarding the implementation of international treaties. Even if an international treaty is ratified by Iraq, it is not possible for it to be directly applied by Iraqi judges or accepted as a part of the national law unless the treaty is incorporated into domestic law and published in the official gazette. However, national law does not necessarily prevail in cases where there is a contradiction between them.³⁸ What follows is, having been ratified and published in the Official Gazette, the courts can apply the ratified international treaties directly as with any other law. Of particular relevance to this topic is the fact that human rights under the ICCPR can be invoked and directly

³⁸ See Iraqi Law of Treaties No 111 of 1979, published in the Official Gazette, issue 2731 of 17 September 1979. For detail regarding dualist and monist theories, see for example Peter Malanczuk, *Modern Introduction to International Law* (7th ed., 1997, Routledge) 63.

{قانون عقد المعاهدات}

applied in criminal proceedings, and there is no valid reason to disregard its provisions.

In practice, however, there is a regrettable tendency for Iraqi judges in domestic courts to be reluctant to apply these ratified international treaties: they seem to feel that only codified laws should be applied in any event. Although Iraq is a signatory of major treaties on human rights, particularly the ICCPR, courts are quite reluctant to apply their provisions in practice unless those provisions are codified as domestic law. Iraqi judicial culture and practice takes the view that to apply international due process would be to employ “the extraneous use of material beyond the provision of the Code (ICCP).”³⁹ Hence, the international due process rights are not used in the Iraq criminal justice system even if they are entrenched in the treaties to which Iraq is signatory. Iraqi judges do not apply them unless they are clearly mentioned under Iraq domestic law. This means that, in order to bring the system in line with international human rights law, the Iraqi Code of Criminal Procedure needs to be adjusted in accordance with ratified international treaties rather than applying the international rules before national courts directly.

In favour of the same argument, Hamoudi wrote that the Iraqi legal tradition with regard to the relationship between international treaties and the national law stands as a stark anomaly.⁴⁰ He added that there is a regrettable tendency for ratified international law not to be directly applied by domestic courts and notes the unwillingness of courts to do so. With regard to the hope of resolving this problem in post-Saddam Iraq, he comments that “one would expect some level of encouragement of national courts to engage international law, and some willingness on the part of the courts to do just that. That nothing of the sort has happened [...] the courts themselves seem quite reluctant to use it in any event.”⁴¹

What follows is that the broader resistance of domestic courts to the application of international treaties to which Iraq is a party adversely affects due process in the criminal justice system. For example, the UN Convention against Torture and Other

³⁹ Haider Ala Hamoudi, *International Law and Iraqi Court*, Edda Kristjánsdóttir et al. (eds.), (n 3) 112.

⁴⁰ *Ibid* 107.

⁴¹ Haider Ala Hamoudi, *International Law and Iraqi Court*, Edda Kristjánsdóttir et al. (eds.), (n 3) 111.

Cruel, Inhuman or Degrading Treatment or Punishment 1984 (UN CAT) was ratified by Iraq in 2008, but regrettably its provisions are still not applied.⁴²

On the basis of the foregoing discussion, the proposal is that further reform should aim to divert the judicial culture from its aforementioned tendencies. For this purpose, the Constitution must provide clear provisions by which the international conventions prevail over national legislation. Lessons can also be drawn from other countries, such as South Africa, Bosnia and Herzegovina, and the Russian Federation. In these countries, newly adopted constitutions have clearly allowed the application of international law before domestic courts.⁴³ Obviously, providing Iraqis with binding rights under international human rights treaties requires further reform, and the Constitution should stipulate that Iraqis may invoke human rights under international law before the domestic courts. To put it a little differently, further proposed reform should make clear that, once Iraq ratifies an internationally recognized treaty, then its provisions have to be directly applied before the domestic courts. Furthermore, domestic provisions must be deemed as invalid in cases where they conflict with the rules of the treaty. The inclusion of such provisions in the Constitution will inspire judges to apply the international human rights law in domestic courts.

Another criticism that needs to be made is that, although the Iraqi Constitution is meant to be permanent, its shortcomings indicate that it was drafted prematurely and in too great a hurry. It is self-evident that a Constitution must delegate certain details as it cannot provide for everything. However, what is disconcerting in the view of the author is that many crucial issues that were supposed to have been determined by the Constitution have been left to legislative authorities. The issues that it has so far

⁴² Such provisions, as will be emphasized in Chapters Six and Seven, have special importance for the Iraqi legal system if it is to succeed in complying with international human rights standards, which the current study aims to ensure.

⁴³ See the Constitution of South Africa 1996, s.33 “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. S 39 “ When interpreting the Bill of Rights, a court, tribunal or forum- a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; b. must consider international law; and c. may consider foreign law”; the Constitution of Bosnia and Herzegovina 1995, Article 3(b); the Constitution of the Russian Federation 1993, Article 15(4); the Constitution of Kosovo 2008, Article 19; see also the French Constitution 1958 “treaties or agreements duly ratified or approved, upon publication, have an authority superior to that of laws, subject, in regard to each agreement or treaty, to its application by the other party.”; the German Constitution, Article 25; the Italian Constitution 1947, Article 10.

neglected to resolve must be resolved by the Constitution itself, rather than being delegated to others.⁴⁴

In regard to the present topic, for example, there are important laws that have a direct effect on improving human rights which have not yet been enacted. So far, there has been no law regulating the work of security services, or defining its duties and powers so that they accord with the principles of human rights.⁴⁵ Similarly, there has been no law governing the work of judicial organs, especially the Higher Judicial Council and the Federal Supreme Court, which were necessitated by Articles 90 and 92 of the Constitution.⁴⁶

In the same way, various provisions of the Constitution rely on the interpretation of the judicial authority rather than clear statements in the Constitution itself. Several authors have drawn attention to these areas of weakness in the Constitution.⁴⁷

There is much to criticize about the Constitution and it is the subject of ongoing debate. The Constitutional Review Committee was established in order that it should contribute the national debate on how to consolidate the areas of weakness.⁴⁸ Reports of screening committee meetings indicate that there have been wide-ranging discussions as to what further amendments are necessary, although, regrettably the present author has not found any discussions regarding due process and criminal

⁴⁴ In order to learn more about these issues, see Nathan J. Brown, *The Final Draft of the Iraqi Constitution: Analysis and Commentary* (2005, Carnegie Endowment for International Peace), available at <<http://carnegieendowment.org/files/FinalDraftSept16.pdf>> accessed 23 August 2013; United Nations Development Programme, *Governance in Iraq: Selected Topics* (2009) 6, available at <http://www.google.co.uk/?gws_rd=cr#fp=85177d2ca4155b73&q=governance+in+iraq> accessed 13 August 2013.

⁴⁵ See Article 84 of the Iraqi Permanent Constitution. {الدستور العراقي الدائم}

⁴⁶ More details will be provided in next pages during discussion the Federal Supreme Court.

⁴⁷ Mohamed Y Mattar, "Unresolved Questions in the Bill of Rights of the New Iraqi Constitution: How Will the Clash Between Human Rights and Islamic Law Be Reconciled in Future Legislative Enactments and Judicial Interpretation?" (2006) 30(1) *Fordham International Law Journal* 157; see also John McGarry & Brendan O'Leary, "Iraq's Constitution of 2005: Liberal Consociation as Political Prescription" (2007) 5(4) *International Journal of Constitutional Law* 670.

⁴⁸ The Constitutional Review Committee was established under a provision of Article 142 of the Constitution. For more detail with regard to the Committee meetings and discussions see website of the United States Institute of Peace at <http://www.usip.org/search/apachesolr_search/a%20Constitutional%20Review%20Committee> accessed 13 August 2013.

justice reform.⁴⁹ It is necessary to state, however, that although the Constitution is widely acknowledged as not having comprehensively satisfied the aspirations of Iraqis, it certainly represents, in the present author's view, an encouraging start to the creation of a culture that respects human rights and enhances the rule of law in Iraq. The Constitution is an important milestone in Iraq's journey towards the rule of law.

2.2.1.3. *International community efforts*

As noted earlier, one of the key features of the Constitution-making process is that it was achieved under the direct auspices of the international community. The interesting point is that from the beginning of the occupation period until the present time, the international community, particularly the U.S. Embassy and United Nations, has regularly supported the efforts of the country to restore the rule of law. The Constitution-making process clearly demonstrates this support.⁵⁰ The support took various forms, including multiple cooperative projects. Technical assistance was provided to the Iraqi Constitution Committee in order to facilitate the drafting process. International constitutional experts came to Baghdad and gave their assistance and shared their expertise.⁵¹ Also, the committee was provided with modern draft Constitutions, together with other relevant documents, as a reference or guide for achieving its task.⁵²

In addition, many facilities and services were provided for employees, such as printing, publishing, copying services and the means of distributing drafts.⁵³ With the assistance of the media and civil-society organizations, the draft Constitution was introduced into the public domain so that its contents could be openly and thoroughly

⁴⁹ See Global Justice Project: Iraq (GJPI), مشروع العدالة الشامل -العراق, available at <<http://gjpi.org/2009/08/26/Constitutional-review-committee-2/>> accessed 22 August 2013; see also website of United States Institute of Peace, *ibid*.

⁵⁰ Noah Feldman and Roman Martinez "Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy" (2006)75 *Fordham Law Review* 919.

⁵¹ For more on the drafting process see Global Justice Project (n 49); Nathan J. Brown (n 44); Jonathan Morrow, *Iraq's Constitution Process II: An Opportunity Lost*, Spatial Report by United States Institute of Peace (2005) available at website of the United States Institute of Peace (n 48).

⁵² See for example activities of the Rule of Law Center with regard to assisting Iraq in the Constitution-making process in accordance with USIP's Constitution-Making Program, available at website of the United States Institute of Peace (n 48).

⁵³ *Ibid*; see also activities of UNAMI at its website <<http://unami.unmissions.org/Default.aspx?tabid=2846&language=en-US>> accessed 13 October 2012.

discussed.⁵⁴ Most importantly, international efforts have produced financial resources for the creation for the present Constitution. For instance, the United States Institute of Peace spent approximately “\$10 million directly from the Congress, plus \$2.85 million from the Bureau of Democracy, Human Rights and Labor.”⁵⁵ This was to support the process of drafting the Constitution and to secure Iraqi participation in the process of dialogue and involvement in discussions of the issues involved.⁵⁶

Similarly, activities relating to the referendum were supported by European Commission funds under the auspices of the United Nations Development Program, the United Nations Development Group (Iraq Trust Fund) and the World Bank.⁵⁷ In accordance with these programmes, 170 domestic observers were trained by a team of experts in Jordan. The project was funded and implemented by the European Union, whose electoral experts worked with the Independent Electoral Commission in Iraq during that time.⁵⁸ These combined efforts subsequently produced the permanent Constitution, from which stems a theoretical framework for enhancing the rule of law, thus laying the foundations for a new era in Iraq.

2.2.2. Criminal law reform

The Iraqi criminal justice system was primarily founded on the Iraqi Penal Code No. 111 of 1969 (IPC) and Iraqi Code of Criminal Procedure No. 123 of 1971 (ICCP). It must be admitted that these codes were subject to abrupt changes under the Saddam regime.⁵⁹ The result was unequivocal noncompliance with international human rights law.

⁵⁴ United States Department of State and the Broadcasting Board of Governors Office of Inspector General, US Embassy in Baghdad, *Inspection of Rule-of-Law Programs* (October,2005) Report Number ISP-IQO-06-01,p10.

⁵⁵ Ibid 44.

⁵⁶ Ibid.

⁵⁷ EU Assistance for Iraq, *European Commission funding in 2005: €200 million (of which €10 million from the European Initiative for Democracy and Human Rights - EIDHR)*, available at <http://eeas.europa.eu/delegations/iraq/eu_iraq/tech_financial_cooperation/overview/eu_assistance_2005/index_en.htm> accessed 7 March 2012.

⁵⁸ EU Assistance for Iraq, *delegation of the European Union to the republic of Iraq*, available at <http://eeas.europa.eu/delegations/iraq/eu_iraq/tech_financial_cooperation/gephr/index_en.htm> accessed 7 March 2012.

⁵⁹ United States Department of State, *The Future of Iraq Project* (2005, Working Group on Transitional Justice in Iraq) 16.

After the fall of the Saddam regime, criminal law reform occupied an important place in advancing the rule of law. The human rights experts who outlined the practical steps for rebuilding the rule of law agreed that both codes stood in need of amendment in order to be capable of serving the needs of the Iraqi community in the new era.⁶⁰ As a result, the first important step in addressing the deficiencies of the Iraqi criminal justice system was the modification of the substantive and procedural criminal laws.

2.2.2.1. Procedural criminal law reform

As has already been noted, the provisions of pre-existing laws had been manipulated in order to protect and serve the purposes of the dictatorial regime. The ICCP had failed to protect the human rights of accused persons.⁶¹ Specifically, it granted extensive powers to state officials and ensured their immunity against prosecution.⁶² Extracting confessions via invalid means during the investigation stage came to be systemic in the Iraqi criminal justice system.⁶³ Torture and interrogation “were synonymous in Iraq.”⁶⁴ Even though these means were legally prohibited by Article 333 of the Penal Code, bringing the offender to justice under the provisions of the ICCP was not possible without the permission of the executive authority.⁶⁵ Worse still, such confessions were not excluded from trial, as will be seen.⁶⁶ Under the provisions of Article 218, confessions could be used by courts against the accused

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² ICCP Article 136, Decrees of the Revolutionary Command Council No 453, published in the Official Gazette, issue 2991 of 30 April 1984; No 1042, published in the Official Gazette, issue 2727 of 27 August 1979; No 749, published in the Official Gazette, issue 3117 of 29 September 1986.

{اشارة الى بعض قرارات مجلس قيادة الثورة المنحل}

⁶³ A review of the human rights reports of that time provides sufficient detail in this respect. For example, Amnesty International’s reports repeatedly mentioned that “Detainees are routinely physically and psychologically tortured during interrogation. Torture takes place immediately following arrest and methods can be as extreme as gouging out of the eyes. No investigation into torture has ever been reported.” Amnesty International, *Iraq: Victims of Systematic Repression*, report (24 November 1999) MDE 14/10/1999 available at

< <http://www.unhcr.org/refworld/docid/3ae6a9cd10.html> > accessed 18 March 2012.

⁶⁴ Joseph T. Thai, “Constitution Excluded Confessions: Applying America’s Lessons to a Democratic Iraq” (2005) *Oklahoma Law Review* 37.

⁶⁵ See (n 62).

⁶⁶ See Chapter Six below, particularly the comments on Article 218 of ICCP; see also Michael J. Frank, “Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq” (2006) 18 *Florida Journal of International Law* 3.

person even if the confession resulted from torture or other invalid means employed during the investigation.

Some provisions of the Code had maintained to a certain extent the right to be free from arbitrary detention by the investigative authority, but these were successively eliminated by repressive amendments under the Saddam regime. Pursuant to a series of decrees that were passed by the Revolutionary Command Council, these amendments prohibited the release on bail of detainees charged with various offences, such as murder, embezzlement, theft, bribery, knowingly handling stolen goods, or handling a vehicle derived from a felony.⁶⁷ Also, people could be kept in custody or investigated according to a decision issued by agencies other than the judicial authority.⁶⁸ The ICCP in cases of arrest also failed to indicate the length of the period of arrest. There were thus a clear infringements of the rights enshrined in the standards of due process and international human rights law, according to which an arrested person must promptly be brought before a judicial authority.⁶⁹

The ICCP did not outline clear details regarding the obligation of the arresting officer to inform suspects immediately of the reasons for the deprivation of their liberty, or details of other rights, such as the right to remain silent. Some observers also noted that “Iraq’s pre-existing criminal procedure code also failed to establish unequivocally the right to counsel.”⁷⁰

Despite these criticisms by commentators in post-Saddam Iraq of many pre-existing laws, the maintenance, with certain amendments, of the existing code of criminal procedure, was the preferred option of the majority of commentators, who rejected the

⁶⁷ Decrees of the Revolutionary Command Council No. 157 of 1996 published in the Official Gazette, issue 3651 on 6 January 1997; No. 137 of 1996 published in the Official Gazette, issue 3647 on 9 December 1996; No. 38 of 1993 published in the Official Gazette, issue 3448 on 8 March 1993.

{إشارة الى بعض قرارات مجلس قيادة الثورة المنحل}

⁶⁸ The Customs Act No. 23 of 1984, Article 237 {قانون الجمارك}; The Law of the Ministry of Justice No. 101 of 1977, Article 35 {قانون وزارة العدل الملغى}; The ICCP, Article 137 {قانون أصول المحاكمات الجزائية}; see also, decrees of the dissolved Revolutionary Command Council, such as No. 1333 of 1984, published in the Official Gazette, issue 3024 on 17 December 1984 {قرار مجلس قيادة الثورة المنحل}; No. 1630 of 1981 published in the Official Gazette, issue 2864 on 28 December 1981 {قرار مجلس قيادة الثورة المنحل}.

⁶⁹ ICCPR, 9(3).

⁷⁰ United States Department of State, *The Future of Iraq Project*, (n 59) 16; Michael M. Farhang, “Reconstructing Justice: The Coalition Provisional Authority took Giant Steps to Guarantee Iraq a Functioning Criminal Justice System” (2004) *Los Angeles Lawyer* 46; see also Travis Hall, “Address: Post-War Criminal Justice in Iraq” (2004) *Georgia Journal of International and Comparative Law* 160.

idea of abandoning it entirely and creating a new one.⁷¹ Accordingly, the old Code has continued to govern criminal proceedings, along with revisions undertaken in response to the criticisms mentioned. Many due process provisions were inserted into the ICCP and many provisions were removed.⁷² These reforms took place during the occupation and the transitional period and after to ensure justice and to promote the rule of law.⁷³

Domestic agencies such as the Iraqi Bar Association, judges, legal professors, numerous agencies and donor organizations have taken part in the reforms. These projects emphasized the importance of reforming the criminal justice system due to its significant role in establishing the rule of law.⁷⁴ It will be further argued elsewhere in the current work that these activities have had an impact on due process in Iraq. An examination of the ways in which these reforms have been applied in practice will raise the question of whether or not they have succeeded in bringing the system into full compliance with developments under international due process. There will be a focus on the right to be free from arbitrary arrest and detention, the right to free legal assistance and an interpreter, and the right to freedom from self-incrimination at the pre-trial stage.⁷⁵

2.2.2.2. Substantive criminal law reform

A penal code is a strong mechanism for the protection of human rights. Unfortunately, the previous regime made amendments to the Iraqi Penal Code 111 of 1969 that resulted in the violation of basic human rights. The Code became a tool in the hands of the regime for the imposition of its own control. It has been convincingly pointed

⁷¹ United States Department of State, (n 59) 16; see also Christopher J. Costantini, “Criminal Investigation under the Iraqi Code of Criminal Procedure” (2010-2011) 41 *Cumberland Law Review* 536; Michael J. Frank, (n 66) 28-29.

⁷² See the details of provisions which were inserted and removed in CPA’s Memorandum 3, signed 18 June 2003, published in the Official Gazette, issue 3978 of 17 August 2003. The original text is in the English language, and the official translation in Arabic is available in the Official Gazette, issue 3978 of 17 August 2003.

⁷³ International law gives the occupying power reasonable legal authority to reform the justice system so as to ensure “justice and the restoration of the rule of law.” See Article 64 of the Fourth Geneva Convention of 1949; Article 43 of The Hague Regulations IV of 1907; see also Michael A. Newton, “The Iraqi High Criminal Court: Controversy and Contributions” (2006) 88 *International Review of the Red Cross* 422.

⁷⁴ Cyndi Banks, (n 7) 157.

⁷⁵ These reforms will be discussed in Chapters, Four, Five, Six and Seven below.

out that the criminal law was used by the former regime “as a tool of repression in violation of internationally recognized human rights.”⁷⁶ After Saddam’s Ba’ath party came to power, these amendments of the Code ordained the death penalty and other forms of cruel, inhuman, and degrading treatment for many offences.⁷⁷ Some of these offences are widely recognized as not deserving of punishment at all, such as offences related to demeaning the dignity of the president, or his deputy, or members of the Revolutionary Command Council, or the Ba’ath Party, or the National Council or the government.⁷⁸ These punishments, because of their harshness, were unacceptable internationally, and perhaps even hard for the international community to envisage.⁷⁹ They included a brutality that testified to the nature of the regime, with practices such as amputation of the ear, tattooing of the face and amputation of a hand or a foot.⁸⁰

⁷⁶ See CPA’s Order 7, signed 10 June 2003, published in the Official Gazette issue 3978 of 17 August 2003. The original text is in the English language, and the official translation in Arabic is available in the Official Gazette, issue 3978 of 17 August 2003, as follows:

{قيام النظام السابق باستخدام احكام معينة من قانون العقوبات كأداة للقمع منتهكا بذلك معايير حقوق الانسان المعترف بها دوليا}

⁷⁷ See for example: Law No. 107 of 1974 published in the Official Gazette, issue 2390 of 22 August 1974; Law No. 66 of 1971 published in the Official Gazette, issue 1989 of 20 April 1971; Law No. 111 of 1978 published in the Official Gazette, issue 2659 of 19 Jun 1978; Decrees of the Revolutionary Command Council No. 95 of 1994, published in the Official Gazette, issue 3521 of 1 August 1994; No. 59 of 1994, published in the Official Gazette issue 3514 of 13 June 1994.

{اشارة الى بعض القوانين في عهد النظام السابق وقرارات مجلس قيادة الثورة المنحل}

⁷⁸ The Iraqi Penal Code 111 of 1969, Article 225. {قانون العقوبات العراقي}

⁷⁹ United Nations Commission on Human Rights (CHR), ‘Report on the Situation of Human Rights in Iraq, submitted by the Special Rapporteur, Mr. Max van der Stoel’ (15 February 1995) E/CN.4/1995/56; UN General Assembly, Res 51/106 ‘Situation of human rights in Iraq’ adopted on the report of the Third Committee (Fifty-first session, 3 March 1997) A/51/619/Add.3 and Corr.1, paras. 1, 9; UN Human Rights Committee, ‘Concluding Observations/Comments: Iraq’ (Sixty-first session, 19/11/1997) UN Doc CCPR/C/79/Add.84, para. 12 provided that “The Committee is deeply concerned that Iraq has resorted to the imposition of cruel, inhuman and degrading punishments, such as amputation and branding, which are incompatible with article 7 of the Covenant.”

See some examples of repressive punishment referred to by United Nations Commission on Human Rights: “Revolution Command Council Decrees No. 59 of 4 June 1994 prescribes: amputation of the right hand at the wrist for a first offence of theft over 5,000 Iraqi dinars (well under US\$ 10 at the present real rate of exchange); amputation of the left foot at the ankle for a second offence; and death for a third offence. Decree No. 109 of 18 August 1994 prescribes the "tattooing" or "branding" (it appears to be branding in practice) with an "X" between the eyebrows of all persons having suffered legally prescribed amputations. Decree No. 115 of 25 August 1994 prescribes the cutting off of the auricle of one ear of any person guilty of evading military service, deserting military service, or sheltering any evader or deserter from military service. Decree Nos. 59, 109 and 115 prescribe cruel and unusual punishments in violation of article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights. In addition, Decrees 109 and 115 are retroactive in their effects and thus constitute violations of Article 15 of the International Covenant on Civil and Political Rights.” United Nations Commission on Human Rights (CHR), ‘Report on the Situation of Human Rights in Iraq, submitted by the Special Rapporteur, Mr. Max van der Stoel’ (15 February 1995) E/CN.4/1995/56 paras. 32-44.

⁸⁰ See for example: Decrees of the Revolutionary Command Council No. 13 of 1992, published in the Official Gazette issue 3389 of 20 January 1992; No. 9 of 1993, published in the Official Gazette, issue 3457 of 10 May 1993; No. 114 of 1994, published in the Official Gazette, issue 3526 of 5 September 1994; No. 95 of 1994, published in the Official Gazette, issue 3521 of 1 August 1994; No. 118 of 1994,

When this regime was eventually removed, the demands of justice required adjustments that would bring the code into line with the new order. The Working Group on Transitional Justice reviewed many of the offences and penalties that had been authorized by the former regime, and recommended that these should be repealed in conformity with the original pre-Saddam penal code.⁸¹ In accordance with this perspective, the punishments for many crimes were changed. Amendments and decrees that had been issued to serve the interests of Saddam's regime were repealed, and initially the death penalty was suspended.⁸²

These changes met with the approval of international institutions and human rights lawyers around the world. For instance, in its memorandum on concerns relating to law and order in Iraq, Amnesty International stated that "it welcomes the fact that the US and UK governments, in exercising their authority as the occupying powers through the CPA, have made use of international human rights standards to inform the formation of new legislation and the suspension of certain provisions of Iraqi law which were inconsistent with such standards."⁸³ Gregor and Benson deemed these modifications to the Iraqi Penal Code to be a notable elimination of the mechanisms used by the regime to violate individual rights through the courts.⁸⁴

It should be borne in mind that the reform of substantive criminal law is not the focus of this research, but the author believes that reforms in this area are integral to the reform of the criminal justice system and the movement towards the rule of law. The reality is that after the Code was enacted in 1969, it became imbued with the values and standards of the Saddam regime. Hence, modernization has become necessary and the Code should be further reviewed in order to create modern justice system that

published in the Official Gazette, issue 3526 of 5 September 1994; No. 16 of 1995, published in the Official Gazette, issue 3552 of 27 February 1995. {إشارة الى بعض قرارات مجلس قيادة الثورة المنحل}

⁸¹ Ibid, see also details of these amendments in United States Department of State, *The Future of Iraq Project* (n 59) Appendix E/28; see also Chapter One.

⁸² Regarding these changes see the preamble of the current Iraqi Penal Code at Global Justice Project: Iraq (n 49), available at <<http://gipi.org/central-activities/judicial-independence/>> accessed 1 March 2012; CPA's Order 7, (n 76); CPA's Order 31, 10 September 2003, published in the Official Gazette, issue 3980 of 1 March 2004. The original texts are in the English language, and the official translation in Arabic is available in the Official Gazette, issues 3978 of 17 August 2003 and 3980 of 2004.

⁸³ Amnesty International, Iraq: *Memorandum on Concerns Relating to Law and Order, report* (23 July 2003) AI INDEX: MDE 14/157/2003 available at <<http://www.mafhoum.com/press5/155S30.htm>> accessed 9 September 2013.

⁸⁴ William J. Gregor & Kevin C. M. Benson, US School of Advanced Military Studies, *Rule of Law in Iraq: Transitional Justice under Occupation* (2004) 21; available at <<http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA429242>> accessed 6 March 2012.

provides Iraqis with comprehensive human rights and absolute protection against criminal violence.

For the purposes of modernizing the Code, the recommendations resulting from the author's research are that it should comply with the guarantees of the new Constitution and the obligations imposed by international law. In the same vein, the reform must reflect the requirements of the rule of law and confront problems inherited from the previous regime, for example, a long culture of immunity from prosecution and lack of protection for due process. Thus, fostering the rule of law in the criminal justice system requires a series of Articles that entrench its underlying principles.

Beyond the above, it may be helpful to suggest that a unique model of substantive criminal law can be taken into account for the purpose of modernizing the code. This substantive model was formulated by the United States Institute of Peace following extensive consultation with experts. It contains detailed provisions intended to assist states in post conflict situations to reform defective areas in pre-existing criminal law.⁸⁵

2.3. Reform of the Iraqi judicial system

It is clear that the legal safeguards given by the legislature to protect the human rights of a person under criminal proceedings are meaningless without a justice mechanism for their protection. Hence, the fairness of the legal process and protection of human rights is dependent on the fairness of the judicial system, the existence of which is a vital part of the state's obligation to implement the rule of law. There will be no place for the rule of law unless there is fairness in the system. To this end, an adequate system which can protect the rights of individuals has become a focal point of post-Saddam reform. In this context, reviewing post-Saddam reform requires discussion of the vital issues that follow.

⁸⁵ Vivienne O'Connor & Colette Rausch (eds.), *Model Code for Post-Conflict Criminal Justice, Model Criminal Code Vol. I* (2007, United States, Institute of Peace Press).

2.3.1. The independence of the judiciary

Next to statutory reform, the independence of the judiciary is the most important goal in the endeavor to instigate the rule of law. The rule of law is not attainable or achievable unless there is independence of the judicial authority, which has the capacity to apply the law equally to both ruler and ruled.⁸⁶ Since the independence of judicial authority was lost in the era of the previous regime,⁸⁷ steps were taken subsequently to enhance the independence of judges. A Higher Judicial Council was established and measures were taken to improve the quality of the judiciary through developing the competency of individual judges.

2.3.1.1. Establishment of the Higher Judicial Council

The Judicature Act No. 26 of 1963 set out judicial independence as a priority when it established a Council of Judges, who were to be entrusted with all judicial matters and were to conduct the judicial function independent of the control of the executive authority.⁸⁸ During the era of Saddam, the principle of the independence of the judiciary was breached, not only by the fact that the provisions of the law were frequently ignored in practice but also by the enactment of oppressive laws. The Law of the Ministry of Justice No. 101 of 1977 abolished the Council of Judges and replaced it with the Justice Council, through which the supervision of judicial affairs was entrusted to the executive authority, (that is, the Ba'ath party).⁸⁹

The current Chairman of the Higher Judicial Council, Judge Almahmuod, rightly claims that the abolition of the Council of Judges, followed by the establishment of a

⁸⁶ See the United Nations functioning definition of the rule of law (n 12).

⁸⁷ This was due to many reasons, particularly the actions of the Executive. It was difficult for Iraqi judges to do what was legally right in a manner that was independent of the wishes of those in authority. The process for the appointment of judges was under political control. See the interview with Faiq Zaidan , (an Investigating Judge in one of Baghdad's Central Criminal Courts, who has worked in the Iraqi legal system since 1999 - both before and after the rule of Saddam Hussein), by Temple Raston for her report, *Iraqis on Slow Road to Building Judicial System*, in Baghdad on 27 March 2008, available at <<http://www.npr.org/templates/story/story.php?storyId=89162530>> accessed 15 March 2012; see also, American Bar Association, *Iraq legal development project, judicial reform index for Iraq* (2006-2007, the United States of America) 14.

⁸⁸ The Judicature Act No. 26 of 1963, published in the Official Gazette, issue 802 of 14 May 1963.

{قانون السلطة القضائية}

⁸⁹ The Law of the Ministry of Justice No. 101 of 1977 published in the Official Gazette, issue 2602 of 01 August 1977. {قانون وزارة العدل}

Council of Justice under the control of the minister of Justice, represented a seismic disruption by which judicial independence was dissolved.⁹⁰ The chairman further alludes to the process by which the Ba'ath Party assumed total control over the judicial system. Almahmuod emphasizes that the Minister of Justice, as a member of the executive authority, was bound by the will of the executive, regardless of any conflict with the rights of individuals or the principle of judicial independence.⁹¹

Thereafter, the Judicature Act No. 26 of 1963 was entirely repealed and replaced by the Judicial Organization Law No. 160 of 1979, in which the principle of the independence of the judiciary was theoretically inserted.⁹² However, in the same year, by the Judicial Supervision law No. 124 of 1979, the task of supervision of judicial affairs was entrusted to a committee, which was not independent due to its direct relationship with the Ba'athist Minister of Justice.⁹³ Thus, the insertion of the principle of the independence of judges was never translated into practice.

As a consequence, the criminal justice system was subject to considerable shortcomings, among the worst of which was that judicial independence was grievously damaged. It is not easy to elaborate on all the cases of serious violations by the Iraqi judiciary under Saddam's regime because this requires further extensive research. However, it is sufficient to report that during an interview, one Iraqi judge reported that “during the Saddam era, justice wasn't independent. Before 2003, if a judge refused to listen to the suggestions of politicians, Saddam put him in jail [...] now; we have to convince people we operate differently, independently.”⁹⁴ In the same vein, Hamoudi reported that one judge was sentenced to two years in prison because he declared a particular piece of legislation to be unconstitutional.⁹⁵

⁹⁰ Medhat Almahmuod, *The Judicial System in Iraq*, (Jordan, Amman, October 2004) 33.

{مدحت المحمود, النظام القضائي في العراق (الأردن, عمان, 2004) 33}

⁹¹ Ibid.

⁹² The Judicial Organization Law No. 160 of 1979, Article 2 states that “Judicature is independent and no rule other than Law thereon.” published in the Official Gazette, issue 2746 of 17 December 1979. The official English translation is available online at the homepage of *the Global Justice Project: Iraq* (GJPI) <<http://gjpi.org/central-activities/judicial-independence/>> accessed 3 January 2014.

قانون التنظيم القضائي {القانون لا سلطان عليه لغير القضاء}

⁹³ The Judicial Supervision Law No. 124 of 1979, Article (3) published in the Official Gazette, issue 2735 of 08 October 1979. {قانون الاشراف العدلي}

⁹⁴ Interview with Judge Faiq Zaidan, (n 87).

⁹⁵ Haider Ala Hamoudi, *International Law and Iraqi Court*, Edda Kristjánsdóttir et al. (eds.), (n 3) 111.

Following the collapse of the Ba'ath regime, reform of the judiciary began to take place. Order No. 35 of the CPA declared the independence of the judiciary and established the Higher Judicial Council (*Majlis El-Qada Al-Alla*).⁹⁶ The Council is now responsible for all judicial matters and is intended to carry out its judicial function independent of the control of the Executive. Accordingly, the supervising power that was previously entrusted to the executive authority has been removed, demarcating judges from governmental control.⁹⁷ Such independence was subsequently confirmed by the provisions of the Iraqi Permanent Constitution of 2005, which stipulates that the judiciary is independent and no power is above the judiciary except the law.⁹⁸ What follows is that, according to the new legal framework, all aspects of the judiciary, functional, financial and administrative, are to be under the control of the judicial authority instead of the executive branch.

Additionally, the independence of the judiciary in Iraq, having been legally enacted by the legislature, also relies on the ability to choose members among those who have the appropriate judicial qualifications and competency, and who also possess the impartiality needed to base their decisions only on the rules of law.⁹⁹ Several issues arise from this, all relating to the handling of criminal procedure, which will be discussed in the following chapters.

2.3.1.2. *Judicial qualifications*

During the era of Saddam, the Ministry of Justice was responsible for the appointment of judges. These were political appointments, and subject to additional considerations, such as gender, religion, sect, ethnicity and political affiliation.¹⁰⁰ It is self-evident

⁹⁶ CPA's Order 35, 18 September 2003, published in the Official Gazette issue 3980 of 1 March 2004. The original text is in the English language, and the official translation in Arabic is available in the Official Gazette, issue 3980 of 1 March 2004.

⁹⁷ The Law of the Ministry of Justice No. 101 of 1977 (n 79).

⁹⁸ The Iraqi Permanent Constitution of 2005, Articles 19(1); see also Articles 87-94. The official translation in English is available online at the homepage of the Iraqi government at <<http://www.cabinet.iq/default.aspx>> accessed 20 November 2013. {الدستور العراقي الدائم}

⁹⁹ Currently, the appointment all judges is the responsibility of the Higher Council of Judges according to the CPA's Order No. 35 (n 96) s.3(c).

¹⁰⁰ American Bar Association, *Iraq Legal Development Project, Judicial Reform Index for Iraq* (n 87) 3 & 14.

that the appointments in this context largely breached international standards.¹⁰¹ As the American Bar Association noted, the crucial criterion for appointing the judges was their loyalty to the regime.¹⁰² Therefore, in response to the need to build a new independent judicial system, it was required that professional qualifications should be the primary consideration in choosing the individuals to be appointed as judges. According to an assessment by the American Bar Association and the Central East European Law Initiative, a person who is eligible to be a judge needs to be selected on the basis of “legal qualifications, competence, honesty, impartiality, good character, good professional conduct, good reputation, and a “respectable” social background, by a process that is considered fair.”¹⁰³ The assessment added that “this is in contrast to the Ba’ath regime era, when loyalty to or membership of the Ba’ath Party was a *sine qua non* condition of appointment, regardless, in many instances, of the professional and moral qualities of the appointee.”¹⁰⁴

Since 2003, there has been notable support for developing the Iraqi judicial system on the part of the international community and NGOs. For example, training programmes under the rule of law projects with the support of the United Nations Development Program (UNDP) have been inaugurated to improve judicial efficiency and “up until January 2011, more than 400 Iraqi judges attended these training courses”.¹⁰⁵ Similarly, in 2006 an independent association of judges was established under the support of an Iraqi legal development project run by the American Bar Association. This project also included many legal professional programs to improve the competency of Iraqi judges.¹⁰⁶

A further cause for concern that continued after the fall of the former regime is discrimination between males and females in employment in the judicial sector. In

¹⁰¹ Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the Basic Principles on the Independence of the Judiciary (Geneva, 1985 United Nations High Commissioner for Human Rights) para. 6; The Bangalore Principles of Judicial Conduct, The Hague, November 25-26, 2002, principle 6.

¹⁰² American Bar Association, *Iraq Legal Development Project, Judicial Reform Index for Iraq* (n 87) 3 & 14.

¹⁰³ American Bar Association, *Iraq Legal Development Project, Judicial Reform Index for Iraq* (n 87) 15.

¹⁰⁴ *Ibid.*

¹⁰⁵ The United Nations Development Programme (UNDP), *Protection and Human Rights* (9 February 2011) available at <<http://reliefweb.int/node/388315>> accessed 10 March 2012.

¹⁰⁶ American Bar Association, *Iraq Legal Development Project, Judicial Reform Index for Iraq* (n 87).

fact, in 1959, Iraq was among those countries in which a woman could become a judge. Then, in 1984 women were entirely prevented from becoming members of the Judiciary.¹⁰⁷ This employment discrimination based on gender in the judiciary function is contrary to the Constitution and breaches relevant international rules with regard to the principles of equality before the law and the unity of rights and duties.¹⁰⁸

In post-Saddam Iraq, the limited role of women in the judicial field was an incentive for progress in the justice system. Over the last few years, the number of Iraqi women who have become judges and prosecutors has increased. According to official statistic released in 2009, the number of judges reached 881, of whom 12 are women. In addition, there were 50 female prosecutors.¹⁰⁹ This is widely recognized as a step in the right direction, and one that can be developed in future in the interests of reforming the system and promoting civil and political rights in Iraq. At the same time, it must be admitted that such a limited number of women in the judicial system is far from the social ideal.

The ABA has offered specialized training programs for women judges, designed to increase their professionalism. These training schemes held in various countries outside Iraq have been implemented by specialists whose expertise covers various issues in the judicial field, including “judicial independence, international human rights law, challenges to women in the legal profession, public trust in the courts and media outreach to the public, and comparative investigative procedure.”¹¹⁰ Furthermore, as well as improving the competency of female judges, in the wider context since its establishment in 2005, the European Mission in Iraq has continued to work on promoting the rule of law. Its efforts are devoted to enhancing judicial

¹⁰⁷ Kholoud Ramzi, *Iraq's Female Judges: Second Class Citizens at Court* (Baghdad, 2011) <<http://www.niqash.org/articles/?id=2885>> accessed 28 February 2013; American Bar Association, *Iraq Legal Development Project, Judicial Reform Index for Iraq* (n 87) 3, 18.

¹⁰⁸ The Basic Principles on the Independence of the Judiciary states that “In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth, or status” see (n 101) principle 10; see also the United Nations General Assembly ‘Convention on the Elimination of All Forms of Discrimination against Women’ (18 December 1979) (entered into force September 3, 1981); Iraq acceded on 13 August 1986.

¹⁰⁹ Globule Justice Project-Iraq, العراق مشروع العدالة الشامل, <<http://gipi.org/central-activities/judicial-independence/>> accessed 1 March 2012.

¹¹⁰ American Bar Association, *Iraq programs*, available at <http://www.americanbar.org/advocacy/rule_of_law/where_we_work/middle_east/iraq/programs.html> accessed 9 March 2013.

independence and improving the skills of senior officials who work in the criminal justice system.¹¹¹

The above discussion provides an overview of the reforms carried out over the past decade with regard to the independence of the judiciary. These reforms demonstrate that some progress has been achieved. However, an assessment of the independence of judicial authority in post-Saddam Iraq cannot be efficiently made in isolation from other reputable but less favourable accounts. Over the last ten years there have been reports criticizing the judicial authority for its failures.¹¹² The post-Saddam legal reforms may comply with international principles in theory,¹¹³ yet the extent to which the reform is workable depends on its working in practice as well. In this connection, the failure or success of these efforts to reach their intended target cannot be assessed in isolation from a discussion of the extent to which the reforms have attained the international standard of due process standard with regard to the protection of human rights of a person accused during the pre-trial stage. This discussion will be the subject of subsequent chapters.

2.3.2. The reform of the criminal courts

The structure of the courts in the Iraqi criminal justice system is as follows:

1. The Investigating Courts (*Mahakim Al-Tahqeeq*)¹¹⁴

¹¹¹ Stephen White, *The EU Integrated Rule of Law Mission for Iraq "EUJUST LEX"*. (Published online: 15 December 2008) at <www.defenceandstrategy.eu> accessed 8 May 2012.

¹¹² For example, it has been stated that "Safety and security remains the fundamental issue for Iraqi judges. The independence of individual judges remains a concern. Judges face intense pressure from external forces and individuals. A number of problems in the Iraqi judiciary relate to an ongoing lack of respect for the courts' authority by other parts of government." American Bar Association, *Iraq legal development project, judicial reform index for Iraq*, (n 87) 2; see also the Human Rights Council, Report of the Working Group on the Universal Periodic Review Regarding Iraq, submitted to the UN General Assembly, Fourteenth session, A/HRC/14/14 on 15 March 2010; United Nations General Assembly, Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy, A/61/384 (61st Session 12 September 2006) available at <http://olddoc.ishr.ch/hrm/archive/GA/GA61/judges_61.pdf> accessed 2 February 2013.

¹¹³ Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, (n 101); the Bangalore principles of judicial conduct, (n 101).

¹¹⁴ The Judicial Organization Law (n 92), Article 35 states that Investigating Courts "are generally established in places where there is a court of first instance, and the judge of the court is the investigating judge, unless a special judge is appointed." In every province in Iraq, there are a number of investigative courts according to the needs of the location. In practice, the court is often conducted by a single investigating judge, and the provisions for special judges have not been put into practice.

2. The Misdemeanor Courts (*Mahakim Al-Junah*)¹¹⁵
3. The Felony Courts (*Mahakim Al-Jinayat*)¹¹⁶
4. The Juvenile Court (*Mahakim Al-Ahdath*)¹¹⁷, and
5. The Court of Cassation (*Mahkamat al-Tamyeez*)¹¹⁸

The above list of courts constitutes the ordinary criminal court system. Alongside this ordinary court system, the Ba'athist regime used a number of courts that were known as the Revolutionary Courts and the State Security Courts to deal with political offences. Also, there were a number of Special Courts to deal with certain ordinary offences, such as the smuggling of antiquities. In post- Saddam Iraq, for the purposes of rehabilitating the justice system and enhancing the rule of law, these Revolutionary Courts, the State Security Courts and all other Special Courts have been abolished, and new courts for the same purposes have been established:

These courts have a vital role in the investigation of crimes and are responsible for transferring offenders to be tried before the competent court, either a misdemeanour or a felony court. According to Article 134 A of the ICCP, the jurisdiction of these courts encompasses the minor offences, which are to be directly determined there.

{تشكل محكمة تحقيق او اكثر في كل مكان فيه محكمة بداءة ويكون قاضي محكمة البداءة قاضيا للتحقيق ما لم يعين قاض خاص لها، ويقوم بالتحقيق وفق احكام القانون}

¹¹⁵ The Judicial Organization Law (n 92), Article 31 states that Misdemeanour Courts are established along with certain courts of first instance. There are a number of Misdemeanour Courts in Iraq in every province, according to the needs of cities. Each court is conducted by single judge. The jurisdiction of these courts includes “cases of lesser offences and violations of regulations referred to it by the investigating court. There is one special type of such a court, which deals with traffic violations only. It is called the traffic court, consisting of one judge”; see American Bar Association, *Iraq legal development project, judicial reform index for Iraq* (n 87) 8.

{تشكل محكمة جناح او اكثر في كل مكان فيه محكمة بداءة وتختص بالنظر في الدعاوى المعينة لها وفقا لاحكام القانون}

¹¹⁶ The Judicial Organization Law (n 92), Article 29 states that Felony Courts “are established in the center of a governorate, and there can be more than one such court in one governorate.” A felony court includes a president and two other members nominated by the HJC. The jurisdiction of these courts includes serious offences. Cases involving serious crimes are referred by lower courts, investigating courts and misdemeanour courts. See also the ICCP, Article 139 (A).

{تشكل في مركز كل محافظة محكمة جنابات تنظر في الدعاوى الجزائية المعينة لها وفقا لاحكام القانون. يجوز تشكيل اكثر من محكمة جنابات في المحافظة}

¹¹⁷ There are Juvenile Courts for young persons accused of offences. According to Article 33 of the Judicial Organization Law, a juvenile court is conducted by a single judge alone or with assistants, according to the gravity of the offences. For more detail, see the Judicial Organization Law (n 92); also see the Protection of Minors Law No. 76 of 1983, published in the Official Gazette, issue 2951 of 01 August 1983.

{قانون رعاية الاحداث}

¹¹⁸ The Judicial Organization Law (n 92), Article 12 states that the Court of Cassation “is the final court of appeal in the country, and it exercises judicial control over all the courts in Iraq ... It is composed of a President, five Vice Presidents, and up to 24 other judges. It is situated in Baghdad ... The President of the Court is the Chief Justice in the country and serves as the head of the HJC.”

{محكمة التمييز هي الهيئة القضائية العليا التي تمارس الرقابة القضائية على جميع المحاكم ما لم ينص القانون على خلاف ذلك، وتتألف من رئيس وخمسة نواب للرئيس وقضاة لا يقل عددهم جميعا عن ثلاثين ويكون مقرها في بغداد}

2.3.2.1. The marginalization of criminal courts under the Ba'athist regime

2.3.2.1.1. Revolutionary, National Security Courts and other Special Courts

For the purpose of serving the dictatorship and dealing with political offences, courts such as the Revolutionary Courts and the Courts for the Security of the State were established. According to the UN Commission on Human Rights, extreme brutality was used by these courts against people who were deemed to be disloyal to the regime.¹¹⁹ Those whom the regime regarded as dissidents were referred to these courts, which treated the accused person as a menace to the security of the state and deserving of serious retribution. Amnesty International reported that:

“Political detainees in Iraq are subjected to the most brutal forms of torture. The bodies of many of those executed had evident signs of torture, including the gouging out of the eyes, when returned to their families. The most common methods of physical torture include electric shocks to various parts of the body, pulling out of fingernails, long periods of suspension by the limbs, beating with cables, *falaqa* (beating on the soles of the feet), cigarette burns on various parts of the body, and piercing of the hands with an electric drill. Psychological torture includes threats of bringing in a female relative of the detainee, especially the wife or the mother, and raping her in front of the detainee, threats of arresting and harming other members of the family, mock executions and being kept in solitary confinement for long periods of time.”¹²⁰

The use of confessions extracted under torture for the purpose of securing convictions was a notable feature of these courts. Reports of relevant international organizations indicated that “although torture is prohibited by the Iraqi legislations in practice, it is used systematically against detainees in Iraqi prisons and detention centres.”¹²¹ These courts, *inter alia*, violated fundamental human rights, including the right to a fair trial, and were known for their draconian punishments.¹²²

¹¹⁹ UN Commission on Human Rights, ‘Report on the Situation of Human Rights in Iraq, submitted by the Special Rapporteur, Mr. Max van der Stoel’ (n 79), para. 32.

¹²⁰ Amnesty International, *Iraq: Victims of Systematic Repression*, report (24 November 1999) (n 63).

¹²¹ Amnesty International, *Iraq: Victims of Systematic Repression*, report (24 November 1999) (n 63).

¹²² UN Commission on Human Rights, ‘Report on the Situation of Human Rights in Iraq, submitted by the Special Rapporteur, Mr. Max van der Stoel’ (n 79), para. 32; see UN General Assembly, UN General Assembly Res 43/173 ‘The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment’ (9 December 1988).

In addition to these violations, there were special ad hoc courts that dealt with political offences but also exercised jurisdiction over a non-exclusive list of ordinary crimes, usurping the functions of the ordinary court system. According to the Revolution Command Council Decree 565 of 30 April 1979, these special courts could deal with a list of normal crimes such as theft, corruption, currency speculation, trafficking and distribution of narcotic drugs, and political crimes. These and other crimes could be referred to the Minister of the Interior and the Office of the President to be dealt with in accordance with their discretionary authority.¹²³

The use of politicized special courts created by the regime to deal with ordinary and political offences marginalized the ordinary court system. Mavrommatis rightly observed that, “there was no specific need for such courts, as the regular courts would appear to have the capacity in all cases.”¹²⁴ The result was that courts of this kind radically undermined the rule of law and adversely affected the functions of international human rights law.¹²⁵ For example, the UN Commission on Human Rights on several occasions strongly condemned the serious violations condoned by these courts, particularly the resort to cruel and bloody punishments. In 1995, It reported that “Indeed, it is surely a rarity in the contemporary international community that a Government not only boldly pronounces laws which stipulate disfigurements of persons within its jurisdiction, but shamelessly announces and advertises the existence of these punishments.”¹²⁶ In the same vein, in 1998, the Commission observed that “the judicial system is incapable of dispensing independent and impartial justice which takes into account the full rights of the citizen.”¹²⁷

¹²³ Decree of the Revolutionary Command Council No. 565 of 30 April 1979, published in the Official Gazette, issue 2709 of 7 May 1979. {قرار مجلس قيادة الثورة المنحل}

See some examples of repressive punishments that were imposed by the courts, (n 79)

¹²⁴ United Nations Commission on Human Rights (CHR), ‘Report of the Special Rapporteur on the situation of human rights in Iraq, Andreas Mavrommatis’ (15 March 2002) E/CN.4/2002/44, para. 31.

¹²⁵ Basic Principles on the Independence of the Judiciary makes clear that “Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.” UN General Assembly, “Basic Principles on the Independence of the Judiciary.” Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, para. 5.

¹²⁶ UN Commission on Human Rights, ‘Report on the Situation of Human Rights in Iraq, submitted by the Special Rapporteur, Mr. Max van der Stoel’ (n 79), para. 32.

¹²⁷ United Nations Commission on Human Rights (CHR), ‘Report on the Situation of Human Rights in Iraq, submitted by the Special Rapporteur, Mr. Max van der Stoel’ (10 March 1998) E/CN.4/1998/67.

In response to the pressing need for the judicial system to improve its human rights record in Iraq, these types of courts were dissolved by the CPA in 2003,¹²⁸ and their former areas of jurisdiction were restored to the ordinary criminal courts. In 2005 the Iraqi permanent Constitution confirmed that these kinds of courts were totally forbidden in the new Iraq justice system and were to be permanently prohibited.¹²⁹ Their abolition has had a positive effect on the rule of law and human rights in the country, and corresponds to “the needs of a modern, democratic society.”¹³⁰

2.3.2.1.2. Military Courts

There was another type of repressive court, the military courts. These were staffed by unqualified lawyers,¹³¹ and thus the first issue of concern was their competency. They exercised jurisdiction over civilian as well as military personnel.¹³² Likewise, they exercised jurisdiction over civil and military offences when those accused of such offences were the members of the armed forces. The role of the civilian judicial system was therefore undermined by the exclusion of military personnel from the jurisdiction of ordinary courts.

As a result, in order to separate the present system from the practices of the past, the post-Saddam Constitution provides that the establishment of military courts must be made through enactment of a law and that they can only deal with crimes committed by military personnel on military duty. They can enforce only the military penal code and only members of the armed forces may come before such courts.¹³³

¹²⁸ CPA’s Order 2 signed on 23 May 2003, published in the Official Gazette, issue 3978 of 17 August 2003.

¹²⁹ The Iraqi Permanent Constitution 2005, Article 95 states that “The establishment of special or extraordinary courts is prohibited.” The official translation in English is available online at the homepage of the Iraqi government at <<http://www.cabinet.iq/default.aspx>> accessed 20 November 2013.

{يحظر انشاء محاكم خاصة أو استثنائية}

¹³⁰ US Institute of Peace, *Establishing the Rule of Law in Iraq*, special report (April 2003) 9 available at <<http://www.usip.org/publications/establishing-rule-law-iraq>> accessed 17 March 2012.

¹³¹ The repealed Military Criminal Procedure Code, No 44 of 1941, published in the Official Gazette, issue 1896 of 07 April 1941, Article 12. {قانون اصول المحاكمات العسكرية الملغى}

¹³² The repealed Military Criminal Procedure Code, *ibid*, Article 19; see also United States Department of State, *The Future of Iraq Project* (n 59) 21.

¹³³ Article 99 of the Iraqi Permanent Constitution 2005; see also United States Institute of Peace, *Establishing the Rule of Law in Iraq, Special Report* (n 130).

2.3.2.2 Creation of new criminal courts

2.3.2.2.1. The Central Criminal Court of Iraq (CCCI)

The CCCI was designed to be “the country’s flagship criminal justice institution.” It was aimed at the attainment of the rule of law and the development of a properly functioning judicial system in Iraq. This court was established in Baghdad in accordance with the CPA’s order No.13 (2004).¹³⁴ The CCCI consists of two chambers: an Investigative Court; and a Felony Court.¹³⁵ It is not different from other ordinary investigation and criminal courts, but specializes in trying certain types of cases:

- a- Terrorism
- b- Organized crime
- c- Government corruption
- d- Acts intended to destabilize democratic institutions or processes
- e- Violence based on race, nationality, ethnicity or religion
- f- Instances in which a criminal defendant may not be able to obtain a fair trial in a local court.

This court does not function under a separate legal regime. Substantive and procedural Iraqi criminal laws are applied without amendment throughout the stages of criminal proceedings, from the outset of arrest, pre-trial investigation, trial, conviction, punishment and appeals against verdict before the Court of Cassation.¹³⁶ The purpose behind the creation of the CCCI is “to prepare for implementing the rule of law through a system of independent courts.”¹³⁷ This court is supposed to be a model for other Iraqi courts with regards to the protection of human rights. Unfortunately, it seems to suffer from numerous shortcomings in this regard.

¹³⁴ CPA’s Order 13, signed 22 April 2004, published in the Official Gazette issue 3983 of 17 June 2004. The original text is in the English language, and the official translation in Arabic is available in the Official Gazette, issue 3983 of 17 June 2004.

¹³⁵ Ibid, section 1(2).

¹³⁶ Ibid, sections 4, 21 and 18.

¹³⁷ Michael J. Frank, (n 66) 11.

According to Amnesty International, the main problem concerning the court is that it issues death sentences.¹³⁸ It may be argued here that if the law imposes the death penalty, the court should not be blamed for imposing that sentence. It should be stressed here that even if the death penalty is enacted in Iraq law, the judges must ensure fair trials and they cannot absolve themselves of responsibility for flawed trials. The fact is that, there is criticism regarding a lack of due process and the widespread use of invalid evidence to obtain convictions at trial.¹³⁹ In particular, trials often rely on confessions to determine guilt even if they may have been extracted by invalid means during pre-trial interrogations.¹⁴⁰ Human Rights Watch, in a report released in 2008, stated that it had attended more than 70 investigative hearings and several trials, and met with Iraqi judges, lawyers, defendants and other officials. The report concluded that the CCCI fell far short of international standards of due process. The report called on the government to take immediate steps to protect detainees from the risk of torture and other abuses, and to ensure the availability of a defence for detainees. It recommended that hearings and trials should take place within an acceptable period of time and should not be subject to extensive delay.

In view of evaluation of the CCCI by means of human rights reports, it might reasonably have been claimed that its establishment is a notable achievement, insofar as primary goal of the establishment of the court, as set forth in CPA's Order 13, was to create a better model with regard to establishing respect for due process. Thus, after it had been established in Baghdad, the model of this specialized court has been extended to other provinces in Iraq over the last three years, in order to demonstrate that a fair trial can be capably conducted by the criminal justice system. However, there are human rights reports from reputable sources that challenge this optimistic assessment.¹⁴¹ According to these reports, the CCCI has not only failed in practice to

¹³⁸ See Amnesty International, *Annual Report* (2011) available at <<http://www.amnesty.org/en/region/iraq/report-2011>> accessed 24 March 2012.

¹³⁹ Ibid; see also for example, Central Criminal Court, (*Almahkama Aljnia Almrkzya aliraqia*) Baghdad, Second Branch, Case number 1479 of 2012, Branch 2 ruled on 3 December 2012. Referred to by Amnesty International, *Iraq: A Decade of Abuses* (Index: MDE 14/001/2013, March 2013) 37.

{المحكمة الجنائية المركزية}; confession extracted by torture will be discussed at length in Chapter Six.

¹⁴⁰ Such "confessions" are often broadcast on the screen of "The Iraqi", a satellite TV station affiliated with the government. Such practices undermine the principle of presumption of innocence, which is a basic human right. See Amnesty International, *Annual Report* (2011) (n 138).

¹⁴¹ Human Rights Watch, *Report on Lack of Due Process in Iraqi Justice System* (2009) available at <http://musingsoniraq.blogspot.co.uk/2009/01/human-rights-watch-report-on-lack-of_05.html> accessed 31 March 2011; Joseph Logan, *The Quality of Justice: Failings of Iraq's Central Criminal*

be “the country’s flagship criminal justice institution”¹⁴² it has also failed to meet the minimum standards to which is bound under international rules. This assessment is in accord with the author’s own research, from which it is concluded that the purposes motivating the establishment of these courts have not been achieved and can only be attained through further reforms. These measures must be aimed at achieving international due process standards.

2.3.2.2.2. The Iraqi High Tribunal for Crimes against Humanity

After the fall of Saddam’s regime in May 2003, the first step in rebuilding the rule of law in Iraq was to deal with the Ba’ath party’s violations of international humanitarian law and human rights law.¹⁴³ For this purpose, the Coalition Provisional Authority (CPA) in July 2003 delegated the function of legislation with regard to the court statute to the appointed Iraqi Governing Council. The Council, pursuant to the order of the CPA No (48), established the Iraqi Special Tribunal on 9 December 2003.¹⁴⁴ There were certain reasons for the necessity of a domestic special court, rather than some other kind of criminal tribunal. The most notable reason was the difficulty of establishing an ad hoc tribunal by the Security Council. At that time, France, Russia, and China, all permanent members of the UN Security Council, made clear their intention to veto any attempt to create such a court.¹⁴⁵ Likewise, resorting to the ICC to deal with the crimes of Iraq’s former leader was not an available option, since the Statute of Rome contains a ‘non-retroactivity’ clause that prohibits the court from dealing with crimes that occurred before June 2002 (i.e., before the court’s creation).

Court (2008, Human Right Watch, US) 38; Amnesty International, *New Order Same Abuses: Unlawful Detentions and Torture in Iraq* (September 2010) Index: MDE 14/006/2010,19. See also UNAMI, Human Rights Reports, dated up to 2013.

¹⁴² See preamble of the CPA’s Order 13, (n 134); see also Jaclyn Belczyk, *Rights Group Claims Iraq Courts Failing To Meet Due Process Standards* (JURSIT, Pittsburgh University, School of Law, 15 December 2008) at <<http://jurist.org/paperchase/2008/12/rights-group-claims-iraq-courts-fail-to.php>> accessed 20 February 2012.

¹⁴³ Ash U. Bali, “Justice under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq” (2005) 30 *Yale Journal of International Law* 457; M. Cherif Bassiouni, “Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal” (2005) *Cornell International Law Journal* 133.

¹⁴⁴ CPA’s Order 48, 12 October 2003, published in the Iraqi Official Gazette, issue 3980 of 1 March 2004 {امر سلطة الائتلاف}; the Iraqi Governing Council, Statute No. 1/2003, published in the Iraqi Official Gazette, issue 3980 of 1 March 2004. {قانون مجلس الحكم}

¹⁴⁵ Michael P. Scharf, “The Iraqi High Tribunal: A Viable Experiment in International Justice?” (2007) *Journal of International Criminal Justice* 261.

In any case, Iraq had not ratified the treaty, and the Statute of Rome provides that the jurisdiction of the court extends only to crimes committed in states that were signatories of the treaty.¹⁴⁶ Moreover, the Bush Administration wished to absolve itself of responsibility and embarrassments for a flawed trial, and so allowed Iraqis to conduct the criminal prosecutions.¹⁴⁷ In addition, a domestic prosecution through a national court within the Iraqi judicial system was the option preferred by Iraqis for bestowing the death penalty on Saddam and other former leaders. It was decided finally that the improved judicial capacity of the domestic court system made it the best option for the process of dealing with the crimes of the previous regime. The prosecutions subsequently became a controversial topic among legal experts and scholars, who have argued about many aspects of them.¹⁴⁸

¹⁴⁶ Rome Statute of International Criminal Court, Article 5 states the following: “Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes;
(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.” see also Bruce L. Ottley and Theresa Kleinhaus, “Confronting the Past: The Elusive Search for Post-Conflict Justice” (2010) *Irish Jurist* 118.

¹⁴⁷ U.S. military spokesman Gen. William B. Caldwell in Baghdad reported that “the hanging of Saddam Hussein was a disaster. But at least it wasn't our fault. That's not our decision. That's an Iraqi government decision.” This text was quoted in Romesh Ratnesar, *Saddam's Botched Trial* (5 January 2007), available at <<http://content.time.com/time/world/article/0,8599,1574349,00.html>> accessed 19 November 2013; see also Curtis F.J. Doebbler, “An Intentionally Unfair Trial” (2007) *Journal of International Criminal Justice* 267 & 268.

¹⁴⁸ Nehal Bhuta, “Fatal Errors. The Trial and Appeal Judgments in the Dujail Case” (2008) *Journal of International Criminal Justice* 39; Bernhard Kuschnik, “The Legal Findings of Crimes against Humanity in the Al-Dujail Judgments of the Iraqi High Tribunal: A Forerunner for the ICC?” (2008) *Journal of International Criminal Justice* 459; Miranda Sissons and Ari S. Bassin, “Was the Dujail Trial Fair?” (2007) *Journal of International Criminal Justice* 272; Michael P. Scharf, “The Iraqi High Tribunal: A Viable Experiment in International Justice?” (n 145) 258; M. Cherif Bassiouni, “Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal” (n 143) 101; Kevin Jon Heller, “A Poisoned Chalice: The Substantive and Procedural Defects of the Iraqi High Tribunal” (2006-2008) 39 *Western Reserve Journal of International Law* 261; Michael A. Newton, , “The Iraqi High Criminal Court: Controversy and Contributions” (n 73) 399; Ash U. Bali, (n 143) 455; John Laughland, *A History of Political Trials from Charles 1 to Saddam Hussein* (1st ed., 2008, Jon Peter Lang Ltd) 236, 242.

There is considerable criticism with regard to the legitimacy of the tribunal that was established.¹⁴⁹ It has been suggested that, although the Iraqi Governing Council had established the court, the authority really stemmed from the occupying powers. It was said that the CPA surpassed the limitations of its authority under international humanitarian law.¹⁵⁰ However, one may argue that the new Constitution in 2005 confirmed the role of the court.¹⁵¹ Later, a law passed by the newly elected Iraqi Parliament renamed the court as the Iraqi High Criminal Court (*Almahkamah Aljnia aliraqia Alulya*).¹⁵² Newton convincingly stated that, “in view of the revalidation of the Statute by Iraqi authorities following the return to full sovereignty, an analysis of its formation under the umbrella of the Coalition Provisional Authority becomes a moot point.”¹⁵³ The argument is that it is now to be regarded as legitimate, having been approved by the democratically elected representatives of Iraq.

There has been widespread criticism about the due process standards of the proceedings of the IST.¹⁵⁴ These criticisms point to significant fair trial issues, including the use of retroactive laws, the vagueness of the definition of domestic

¹⁴⁹ Ash U. Bali, *ibid* 456; M. Cherif Bassiouni, “Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal” (n 143) 136; John Laughland, *A History of Political Trials: From Charles 1 to Saddam Hussein* (n 148) 236.

¹⁵⁰ For more details see Curtis F.J. Doebbler, “An Intentionally Unfair Trial” (n 147) 268; M. Cherif Bassiouni, “Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal” (n 143) 137.

¹⁵¹ The Iraqi Permanent Constitution, Article 134 “The Iraqi High Tribunal shall continue its duties as an independent judicial body, in examining the crimes of the defunct dictatorial regime and its symbols” The official translation in English is available online at the homepage of the Iraqi government at <<http://www.cabinet.iq/default.aspx>> accessed 20 November 2013, as follows:

{تستمر المحكمة الجنائية العراقية العليا بأعمالها بوصفها هيئة قضائية مستقلة بالنظر في جرائم النظام الدكتاتوري البائد ورموزه ولمجلس النواب الغاؤها بقانون بعد اكمال اعمالها}

¹⁵² The High Iraqi Criminal Court Law No. 10 of 2005, published in the Official Gazette, issue 4006 of 18 October 2005 {المحكمة الجنائية العراقية العليا}; the official translation in English is available at the homepage of the *Global Justice Project: Iraq* (GJPI) <<http://gjpi.org/central-activities/judicial-independence/>> accessed 28 January 2014.

¹⁵³ Michael A. Newton, “The Iraqi High Criminal Court: Controversy and Contributions” (n 73) 415; human rights organizations such as Amnesty International support the principle of accountability “Amnesty International said it had greatly welcomed the decision to hold Saddam Hussain to account for the crimes committed under his rule” Amnesty International, *Amnesty International Deplores Execution of Saddam Hussain* (30 December 2006, Index: MDE 14/043/2006) available at <http://www.amnesty.org/ar/library/asset/MDE14/043/2006/ar/c40af316-d34c-11dd-a329-2f46302a8cc6/mde140432006en.html> accessed 10 September 2013.

¹⁵⁴ Amnesty International, *ibid*; *Human Rights Watch, Judging Dujail: The First Trial before the Iraqi Special Tribunal* (November 2006, Volume 18, No. 9 (e)), available at <http://www.hrw.org/reports/2006/iraq1106/iraq1106_webwcover.pdf> accessed 16 September 2013; Kevin Jon Heller, (n 148) 264; Curtis F.J. Doebbler, “An Intentionally Unfair Trial” (n 147) 264; M. Cherif Bassiouni, “Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal” (n 143) 133; Ash U. Bali, (n 143) 463; Zakia Afrin, “Post-Conflict Justice in Iraq” (2008) 14 *Annual Survey of International & Comparative Law* 28; Mark Ellis, the executive director of the International Bar Association (IBA), “News: News in Brief” (November 2006) 5 (4) *Law Society Gazette* 9.

crimes, the qualifications of the defence counsel, judicial independence and impartiality, and evidential problems. However, in view of the present author, there have also been some positive aspects. The point that is relevant to the current study is that this Court played a role changing the society by enhancing the rule of law in Iraq. One of the significant pillars of the rule of law was embodied in Saddam's trial, in that it demonstrated that no one is above the law, including dictators. Besides being held accountable, a suspect must in all circumstance be given rights that are enshrined in law. In this respect, it can at least be claimed that the work of the tribunal, even with its flaws, represented an improvement on the old system.

The High Iraqi Criminal Court Law states that it is a requirement to “ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with this Statute and the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”¹⁵⁵ The law has given complete independence to investigative judges as entities separate even from the Court itself and they are not to subjected to inquiries or requests or orders from any government agency. Similarly, the texts also show the independence of the prosecution. The law sets out guarantees to be available throughout all stages of the criminal proceedings, guarantees not previously found in Iraqi law. Article (19) of the law confirms that safeguards meeting international standards must be given to suspects in order to ensure a fair trial.

These guarantees conform to the rights established by the Universal Declaration of Human Rights in 1948, the International Convention on Civil and Political Rights, and the Statutes of international criminal tribunals.¹⁵⁶ Some of the guarantees given under the Law of the High Iraqi Criminal Court were contained in the ICCP. Others were either not contained in the ICCP or have a wider scope than those in it, for example, the right of the accused person to legal assistance, access to free translation

¹⁵⁵ IST Statute, Article 21(b).

¹⁵⁶ Regarding the rights that are relevant to this research, the law grants the accused: “ i. The right to legal assistance of his own choosing, including the right to have legal assistance provided by the Defence Office if he does not have sufficient means to pay for it.
ii. The right to have interpreting assistance if he cannot understand or speak the language used in questioning;
iii. The right to remain silent. In this regard, the suspect or accused shall be cautioned that any statement he makes may be used in evidence.” For comment upon these rights see Michael A. Newton, “The Iraqi High Criminal Court: Controversy and Contributions” (n 73) 412.

services and the prohibition of interrogations undertaken when no lawyer is present. It has rightly been stated that, “With respect to the procedures and guarantees of the rights of the defence, the IST is more favourable than existing Iraqi laws on criminal procedure under the 1971 Criminal Procedure Law.”¹⁵⁷

It is clear from the account given above that the event of holding a former dictator to account before an Iraqi court, using Iraqi laws and procedures, played a part in repairing the justice system, even though the trial was flawed. On the other hand, a clear lesson that Iraqis learned from the trials is that the due process must exist not only in theoretical legal frameworks but also in practice. Iraqis received support from the wider international community regarding the principle of accountability. Inequities were condemned, and the trials educated the public in the necessity to improve the local justice system so as to confront any violations caused by the government in the future. This experience has been widely recognized as invaluable for progress towards the rule of law in a just society. Despite the criticisms of the process, the trials of the Ba’ath Party and its leader at the IST marked an important milestone.

2.3.3. The Iraqi Federal Supreme Court

Under the previous regime there was no judicial entity empowered to review the constitutionality of laws and regulations or to determine issues arising from the application of laws and the interpretation of legal texts. There was a written Constitution but no Constitutional Court. After the demise of the Ba’ath regime in 2003, the Federal Supreme Court (*AlMahkamah AlAthadia AlUlya*) was established with the task of overseeing the constitutionality of laws, resolutions, regulations and instructions issued by the legislative and executive powers.¹⁵⁸ This was to ensure the principle of the separation of powers and to ensure respect for the Constitution and the enforcement of the rule of law.¹⁵⁹ Its aim was also to prevent human rights and public freedom being breached by the legislature. According to the Iraqi Permanent

¹⁵⁷ M. Cherif Bassiouni, (n 143) 137.

¹⁵⁸ The court was established according to the Article 44 of the Transitional Administrative Law (2004) and the Federal Supreme Court Law No (30) of 2005, published in the Official Gazette, issue 3996 of 17 March 2005. {قانون المحكمة الاتحادية العليا}

¹⁵⁹ Article 4 of the Federal Supreme Court Law, *ibid*.

Constitution 2005, decisions of the Court are final, i.e., not subject to appeal in any way and binding for all.¹⁶⁰ Concerning the formation of the Court, Article 92 of the Constitution states that

“The Federal Supreme Court shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars, whose number, the method of their selection, and the work of the Court shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives.”¹⁶¹

What can be derived from an analysis of this Article is that the Constitution only identified the general framework for the composition of this Court, leaving the door open for parliament to decide on the configuration of the court by enacting the law mentioned under the provisions of the Article. It must be admitted that this vagueness regarding the establishment of the Court is a notable reason why the law has not yet been enacted. The Constitution identified the general framework for the composition of this Court, but without stipulating specific numbers of judges, experts in Islamic jurisprudence and jurists. This is not to say that the current (pre- 2005) formation of the Court is inefficient but, as has already been noted, leaving these important issues to be resolved by legislative authorities has adversely affected Iraq’s journey forwards sustainable peace and the rule of law.

The main cause for concern is that the Constitution did not specify the status of the experts in Islamic jurisprudence in terms of their right to participate in the decisions issued by the court and their right to vote, nor did it decree that they should have only a consultative role. What follows from this lack of clarity is that the inclusion of experts in Islamic jurisprudence in the judiciary and allowing them to vote, as Islamic political parties in the current parliament have demanded, would create various problems. For example, selecting those experts from both the Sunni and the Shi’ite community means that there will be a jurisprudential dispute over any issue placed before the Court. In such a case of jurisprudential disagreement, the work of the Court would be problematic. It would open the door for the intrusion of endless religious debate into the work of the Court. This would be the case even when all the disputants

¹⁶⁰ The Iraqi Permanent Constitution 2005, Article 94.

¹⁶¹ The Iraqi Permanent Constitution 2005, Article 92 (Second). The official translation in English is available online at the homepage of the Iraqi government at <<http://www.cabinet.iq/default.aspx>> accessed 20 November 2013, as follows:

{تتكون المحكمة الاتحادية العليا من عدد من القضاة وخبراء في الفقه الاسلامي وفقهاء القانون، يحدد عددهم وتنظم طريقة اختيارهم وعمل المحكمة بقانون يسن بأغلبية ثلثي اعضاء مجلس النواب}

belonged to the same religion. Iraq, however is religiously pluralistic, and many citizens belong to religions other than Islam. Thus, clerics from the Christian, Sabean, Yazidi and other minorities should all have representation in the Court. As a result, unsettled disputes inside parliament regarding the religious aspects are a primary reason why the law mentioned under Article 92 has not yet been enacted.

The Federal Supreme Court, at the present time, consists of 9 judges without expertise in Islamic jurisprudence and legal scholarship. Among other areas of authority, the Court exercises judicial control over the constitutionality of laws to ensure the protection of rights and freedoms.¹⁶² In this context, the procedural rules of the Federal Supreme Court give individuals whose rights may have been violated by unconstitutional rules the right to lodge a complaint before the Court and to ask for these rules to be quashed on the basis of unconstitutionality. This is similar to the right provided in many legal systems, and is included in the Constitution of the Federal Republic of Germany.¹⁶³

It is important to note that disputing the Constitutionality of laws before the Court can take place even if there is no case of litigation before the ordinary courts.¹⁶⁴

According to the rules of procedure for the Federal Supreme Court, lower courts may, during the consideration of any case of litigation, spontaneously request the Federal Supreme Court to decide on the constitutionality of a law, legislative decision, regulation or instructions relating to the case.¹⁶⁵ Since the formation of the Federal Supreme Court, its work has played a major role in public life and it has become a protective tool for the rights and freedoms of Iraqi citizens against the exercise of unconstitutional legislations. This protection was the essential ground for the

¹⁶² Article 4 of the Federal Supreme Court Law (n 158).

¹⁶³ Basic Law of the Federal Republic of Germany, Article (93) states that “4a. on Constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103, or 104 has been infringed by public authority;

4b. on Constitutional complaints filed by municipalities or associations of municipalities on the ground that their right to self-government under Article 28 has been infringed by a law; in the case of infringement by a Land law, however, only if the law cannot be challenged in the Constitutional court of the Land.” Available at <<http://www.iuscomp.org/gla/statutes/GG.htm#93>> accessed 27 March 2012.

¹⁶⁴ According to Article (5) of the Rules of Procedure of the Court No (1) of 2005 and Article (4) 2 of the Federal Supreme Court Law (n 158).

¹⁶⁵ Article (5) of the Rules of Procedure of the Court No (1) of 2005.

establishment of the court.¹⁶⁶ It is worthwhile to give an example here. In 2011, the Investigating Court, (*Mahakimt Al-Tahqeeq*), requested from the Higher Judicial Council a statement of opinion about a decision issued by the Director General of Customs, who had arrested a number of persons on the basis of the Customs Act.¹⁶⁷ The lower court asked the Federal Supreme Court to consider Article 237 of the Customs Act. This authorized the Directorate of Customs General, or any person acting on his behalf, to detain individuals in certain cases. This seemed contrary to Article 37 of the Iraqi Permanent Constitution, according to which the power of arrest is granted only to the judicial authority. The Federal Supreme Court in its turn decided that the customs law in question was unconstitutional.¹⁶⁸

In light of the above, it can be concluded that although the Federal Supreme Court is a recent development, it has potential to protect the constitutional rights of individuals. Recent cases brought before the court clearly demonstrate that it can play a prominent role in protecting the human rights encompassed by the Constitution.

In view of the above, the author concludes that the creation of a court whose task is to guard and preserve constitutional rights reflects a collective concern to provide further safeguarding of rights. It further reflects a genuine concern for another important step towards fostering the rule of law and eradicating the violation of human rights in the new democratic Iraq. However, in assessing whether the court has achieved the purposes for which it was established, further research on the impact of the Federal Supreme Court is necessary, and this is outside the scope of the present research.

¹⁶⁶ There is a number of cases in this respect, for example:

Federal Supreme Court (*AlMahkamah AlAthadia AlUlya*), Case no.6 /2010 on 3 March 2010, published in the High Judicial Council, *the Judicial Bulletin* (No. 17, the fourth year 2011, March and April) 11.

{المحكمة الاتحادية العليا}

Federal Supreme Court (*AlMahkamah AlAthadia AlUlya*), Case number 43 /2011 on 10 August 2011 published in the High Judicial Council, *The Judicial Bulletin* (No. 19, the fourth year 2011 July-August and September) 42.

{المحكمة الاتحادية العليا}

Federal Supreme Court-Iraq-Baghdad (*AlMahkamah AlAthadia AlUlya*), Case no. 40 /2012 on 15-1-2013 promulgated at the official website of the Judiciary.

<http://www.iraqja.iq/2012f.php?pageNum_Recordset1=1&totalRows_Recordset1=74> accessed 2 March 2013.

{المحكمة الاتحادية العليا}

¹⁶⁷ Federal Supreme Court (*AlMahkamah AlAthadia AlUlya*), Case number 15 /2011 on 22 February 2011 published in the High Judicial Council, *The Judicial Bulletin* (No. 17, the fourth year 2011 March and April) 16.

{المحكمة الاتحادية العليا}

¹⁶⁸ Federal Supreme Court (*AlMahkamah AlAthadia AlUlya*), Case no.15 /2011, *ibid*.

2.4. Reform of other institutions within the Iraqi criminal justice system

The public prosecution service and the police force are substantive elements of the criminal justice system, and they played a major part in the past regime's repression and violation of citizens' rights. Therefore, justice today cannot be achieved without their reform and efforts to enhance the rule of law in the post-Saddam criminal justice system must involve scrutiny of these significant institutions.

2.4.1. Reform of the Department of Public Prosecution

The Department of Public Prosecution was established in accordance with the Public Prosecutors Law No.159 of 1979 in order to represent the public interest. According to the law, it is tasked with a significant duty during the pre-trial investigation stage, which is to "Lodge the criminal case to be investigated by investigative judge [...] and observing the criminal case throughout the proceedings."¹⁶⁹

The important reform relating to the Department of Public Prosecution is that, having previously been a branch of the executive authority under the Ministry of Justice, it has now become linked to the Higher Judicial Council.¹⁷⁰ The implications of this are that public prosecutors they are not regarded as judges, although all the reforms that have been indicated relating to judges with regard to autonomy and independence, administrative and financial resources, infrastructures and equipment, and professionalism or the qualification and training of personnel similarly apply to the members of the public prosecution department. This is clearly an important step forward for the reform of the justice system in Iraq.

However, as this research reveals, there are many shortcomings in the pre-investigative system that is part of the function of the public prosecution. The tension between the public prosecution and the investigative system in Iraq will be shown in

¹⁶⁹ Article 2 of the Law of Public Prosecutor, published in the Official Gazette, issue 2746 of 17 December 1979. The official translation in English is available online at the homepage of *the Global Justice Project: Iraq* (GJPI) <<http://gjpi.org/central-activities/judicial-independence/>> accessed 27 February 2014.

{اقامة الدعوى بالحق العام ... مراقبة التحريات عن الجرائم وجمع الادلة التي تلزم للتحقيق فيها}

¹⁷⁰ Article (1), Law No. 10 of 2006 amending the Public Prosecution Law No. 159 of 1979, published in the Official Gazette, issue 4028 of 13 November 2006.

detail in the next chapter, which focuses on one of the criticisms of the present Iraqi investigative system. The next chapter will show that impartiality, independence and competency are undermined, in some cases, because the public prosecution, which is empowered to instigate the initial public charge against the suspect, may also undertake the investigation of criminal offences. This represents a conflict of interests.

2.4.2. Police reform

The police force is an executive branch and is under the leadership of the Ministry of the Interior. The police are responsible for the safety of the Iraqi public and their protection against crime. After 2003, the CPA disbanded the army and yet allowed the Ministry of Interior, and thus the police, to remain in service.¹⁷¹ Subsequently, the police force rapidly grew in numbers and its reform received wide support in a coordinated and collaborative effort between national and international institutions.¹⁷²

Different programmes have been initiated to promote comprehensive reform and to strengthen Iraq's police.¹⁷³ The first core aspect of reform included increasing the number of additional police forces. Other aspects of reform included the advancement of training programmes by the Coalition and by the 'embedding' of international officials in Iraq, particularly those of the UNDP, UNAMI and the European Union Integrated Rule of Law Mission for Iraq (EUJUST LEX).¹⁷⁴ With the assistance of

¹⁷¹ James Dobbins et al., *Occupying Iraq: A History of the Coalition Provisional Authority* (2009 Rand Corporation) 71; Robert Perito and Madeline Kristoff, *Iraq's Interior Ministry: The Key to Police Reform* (United States Institute of Peace, July 2009) 3, available at http://www.usip.org/sites/default/files/iraq_interior_ministry_perito_kristoff.pdf accessed 1 February 2012.

¹⁷² Ibid.

¹⁷³ Stephen White, (n 111); see also U.S. Government Accountability Office, *Stabilizing and Rebuilding Iraq: Iraqi Revenues, Expenditures, and Surplus* (August 2008) available at www.Gao.gov/new.items/d081031.pdf; see also European Union, *Police Tactical Investigation Course in Baghdad* http://www.consilium.europa.eu/media/1348213/october_newsletter.pdf accessed 24 April 2012.

¹⁷⁴ Ibid; see also; United Nations Development Programme (UNDP), *Annual Report 2010, Global Programme on Strengthening the Rule of Law in Conflict and Post Conflict Situations* (2011, New York, US) 80, available at http://www.undp.org/content/dam/undp/library/crisis%20prevention/UNDP%20Rule%20of%20Law_web_FINAL_PRINT.pdf accessed 22 April 2012.

professional teams, Iraqi police received multi-faceted training.¹⁷⁵ In 2009, it was reported that these major efforts to improve the police force had resulted in some improvements across the country.¹⁷⁶ However, armed violence is still a notable challenge to the police in their work of establishing security in Iraq.¹⁷⁷

Another core aspect of reforms to the policing system is related to human rights. It is of vital importance that those who plan programmes to enhance the rule of law in post-conflict States should include plans to develop the capacity of the Ministry of Interior regarding the accountability of the officials involved in abuses.¹⁷⁸ Experts from the United States Institute of Peace, in their observations of the reforms to the Iraq police system, expressed the view that “holding employees accountable for their actions is an important step toward institutionalizing capacity within the ministry.”¹⁷⁹ The reform effort in post-Saddam Iraq has given attention to the decisive role of the police in terms of the criminal justice system and in the administration of justice. In 2008, an inspection commission created by the Ministry of Interior was entrusted to the task of investigating alleged violations of human rights during detention.¹⁸⁰ In 2009, the United States Institute of Peace reported details regarding investigations conducted by the committee into allegations of abuse of human rights.¹⁸¹ It must be borne in mind that the disclosure of such details within domestic reports is of particular significance in providing transparency, improving public confidence in the system and raising awareness of human rights issues.

It is widely recognized that some progress has been made, but there is also an awareness that the reforms have not been fully successful in practice. According to reputable reports, as will be elaborated throughout this work, the abuse of human rights at the hands of the police is still a systemic problem, and it arises, in part, from

¹⁷⁵ Regarding some examples of these training programmes, see Robert Perito, *The Iraq Federal Police* (United States Institute of Peace, 18 October 2011) available at <http://www.usip.org/sites/default/files/resources/SR291_The_Iraq_Federal_Police.pdf> 30 August 2013.

¹⁷⁶ Robert Perito and Madeline Kristoff, *Iraq's Interior Ministry: the key to police reform* (n 171) 5.

¹⁷⁷ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), *Human Rights Report: 2012* (Baghdad, June 2013).

¹⁷⁸ United Nations Office on Drugs and Crime, *Criminal Justice Reform in Post-Conflict States: A Guide for Practitioners* (n 10) 74; Robert Perito and Madeline Kristoff, (n 171) 4.

¹⁷⁹ Robert Perito and Madeline Kristoff, (n 171) 4.

¹⁸⁰ Robert Perito and Madeline Kristoff, (n 171) 4.

¹⁸¹ Robert Perito and Madeline Kristoff, (n 171) 4.

flaws within the Iraqi criminal justice system.¹⁸² These reports have described forms of police misbehaviour, including abuse of power, corruption and sectarianism, all of which have had a negative impact on human rights.¹⁸³ In resolving this problem, police reform needs to respond both to the needs of law enforcement and the need to safeguard the human rights of citizens. It is also important, as the UNAMI recommended in 2013, to “Establish an independent oversight body, such as an ombudsman or police disciplinary tribunal, to investigate allegations of abuse of authority or breach of professional standards by police.”¹⁸⁴

An assessment of current reforms from the point of view of international due process reveals that these varied programmes have not yet succeeded in establishing a police force that is fully consistent with the modern notions of the role of police in society and the holistic needs of citizens. This is because the reforms have failed to focus on a central cause for concern, which is the role of the police during the investigation stage. Problems in this area have remained outside the scope of the reforms. The tension between the police and the investigative system in Iraq will be discussed later in the next chapter, and the discussion will consider situations in which the investigation of criminal offences is sometimes undertaken by police, rather than investigating judges or judicial investigators.

2.5. Human rights reform in Iraq

Entrenching respect for human rights in the post- Saddam era is another aspect of the reform of the Iraqi criminal justice system. At the time of writing, the High Commission for Human Rights, an independent mechanism for human rights protection has been recently established. Furthermore, recent reform has involved several other mechanisms for the supervision and protection of human rights in Iraq. Clearly these are positive steps towards improving justice and combatting human rights violations in order to bring the system in line with international standards.

¹⁸² See for example UNAMI, Human Rights Reports, Reports of the Iraqi Ministry of Human Rights, and other international NGOs, such as Amnesty International and Human Rights Watch, dated between 2004 and 2013.

¹⁸³ Ibid.

¹⁸⁴ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report: 2012 (Baghdad, June 2013).

A number of the reform mechanisms will now be examined in order to determine the degree of progress achieved within the new system and also to assess whether these mechanisms have served the task for which they were established.

2.5.1. The creation of the High Commission for Human Rights

The new Iraqi Permanent Constitution 2005 declared the creation of an independent mechanism for human rights monitoring, and its establishment was to be delegated to the Council of Representatives.¹⁸⁵ In response, Law No. 53 was enacted for the High Commission for Human Rights in 2008. This law is concerned with the important task of activating and strengthening the principles of human rights in Iraq. Its approach is largely influenced from the basic principles underpinning the national commissions approved by the General Assembly of the United Nations in 1993, the so-called “Paris Principles,” which have become a reference for the establishment and functioning of national institutions for human rights.¹⁸⁶ The law identifies the main objectives of the High Commission’s work on human rights in Iraq as to investigate human rights violations, with the aim of bringing the perpetrators to justice; to establish and maintain a prevailing culture of human rights; to monitor national legislations and assess their compliance with human rights principles;¹⁸⁷ and to monitor the implementation of international conventions on human rights.¹⁸⁸

The drafting of Law No. 53 involved two years of dialogue between the Council of Representatives and the government, civil society, the United Nations and international organizations. To date, the Commission has not fully launched its work. The commission was determined by the Constitution 2005 and yet it was not until 2008 that a law was enacted to prescribe the functions of the commission, three years

¹⁸⁵ Article (102) of the Iraqi Permanent Constitution states that “High Commission for Human Rights ... considered independent commissions subject to monitoring by the Council of Representatives, and their functions shall be regulated by law.” The official translation in English is available online at the homepage of the Iraqi government at <<http://www.cabinet.iq/default.aspx>> accessed 20 November 2013.

{تعد المفوضية العليا لحقوق الانسان والمفوضية العليا المستقلة للانتخابات، وهيئة النزاهة، هيئات مستقلة تخضع لرقابة مجلس النواب، وتنظم اعمالها بقانون}

¹⁸⁶ UN General Assembly Res 48/134 ‘Principles Relating to the Status of National Institutions (The Paris Principles)’ (20 December 1993).

¹⁸⁷ Law of the High Commission of Human Rights No. 53 of 2008, published in the Official Gazette, issue 4103 of 30 December 2008. {قانون المفوضية العليا لحقوق الانسان}

¹⁸⁸ Ibid, Articles 4, 5.

having elapsed since its formation was called for. Thereafter, a further three years elapsed before the members of the commission were chosen in 2012. Political and financial obstacles are a primary reason why it was marked by a difficult birth, eight years after its conception. Problems dating from the early history of the Commission led many to the conclusion that the reform had failed to serve the task it embarked upon. However, in more recent years there have been greater efforts to bring this important institution to fruition.

The Commission commenced its operations and had its budget endorsed only in 2013. It is now vital that sufficient resources and all relevant facilities should be provided to the Commission in order to enable it to carry out its functions adequately. The UN High Commissioner for Human Rights, Navi Pillay, has called for further efforts to empower the Iraqi High Commission for Human Rights and to reduce interference by political blocs.¹⁸⁹ The report of the UNAMI in 2013 also makes recommendations in this regard, with Pillay further adding that “I urge the Government of Iraq to do everything possible to implement the recommendations made in this report.”¹⁹⁰

In the view of the present author, no institution is more crucial for establishing an independent mechanism to promote and protect human rights. The international community that has been in partnership with Iraqis to enhance the rule of law has also expressed willingness to provide assistance in relation to the issues of the Commission. The Country Director of UNDP suggested that:

“Independent Human Rights Commission will be critical for the development of an effective and sustainable national human rights protection system in a democratic Iraq [...] going forward, there are a number of strategic opportunities that we need to build upon together [...] adhere to Law 53.”¹⁹¹

The Universal Periodic Review considers the establishment of the Commission as an important step forwards in human rights protection and made recommendations in this

¹⁸⁹ United Nation News Centre, *Mounting Violence in Iraq Erodes Progress on Human Rights* (27 June 2013) available at <http://www.un.org/apps/news/story.asp?NewsID=45293&Cr=iraq&Cr1=human+rights#.UpAlfV9FDIV> accessed 23 November 2013.

¹⁹⁰ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), *Human Rights Report: 2012* (Baghdad, June 2013).

¹⁹¹ Peter Batchelor, *International Human Rights Day* (13 December 2011) available at http://iq.one.un.org/documents/366/PBatchelor_Speech_International_Human_Rights_Day_clean.pdf accessed 14 March 2012.

regard.¹⁹² The UNAMI has supported the government in preparing to draft the law by supplying guidance, capable recommendations and advice on precise human rights issues; it went so far as to take part in the selection of commissioners.¹⁹³ Along with the international community's efforts, the UK's Foreign and Commonwealth Office has emphasized the need to support the Iraqi government in establishing the High Human Rights Commission as soon as possible, and has expressed the "hope that the process of selecting the commissioners will be completed soon so that the commission can begin its important work."¹⁹⁴

After the appointment of the members of the Commission in 2012, the international community continued to give its support to the new measures. In 2012 the Institute for International Law and Human Rights conducted a project, the objective of which was to assist the Commission to design appropriate "regulations, procedures, and protocols that dictate the function of the Commission in the future."¹⁹⁵ Furthermore, under the auspices of the UNAMI, the Commissioners have received training on practical skills in different countries.¹⁹⁶

The creation the Commission as part of the post- Saddam reform programme has been an important achievement with regard to human rights in Iraq. At the same time, it should be said it is still too early to comment on the quality of the Commission's work in practice, and to judge its impact on Iraqi society. It is a strong mandate; much support is needed to make a difference. For this purpose, the UNAMI's

¹⁹² United Nations General Assembly A/HRC/WG.6/7/IRQ/1, 18 January 2010, Human Rights Council, Working Group on the Universal Periodic Review, Seventh session, Geneva, 8–19 February 2010, report submitted in accordance with paragraph 15 (A) of the annex to Human Rights Council Resolution 5/1, para. 91.

¹⁹³ OHCHR in Iraq at <<http://www.ohchr.org/EN/Countries/MenaRegion/Pages/IQIndex.aspx>> accessed 14 March 2012.

¹⁹⁴ The Foreign & Commonwealth Office, *Human Rights and Democracy: report* (2010) p16 available at <<http://fcohrdreport.readandcomment.com/human-rights-in-countries-of-concern/iraq/>> accessed 18 March 2012.

¹⁹⁵ The Institute for International Law and Human Rights, *Iraq's High Commission for Human Rights: Bylaws, Regulations and Legal Framework* (1st edition, 2012. Beirut, Lebanon).

¹⁹⁶ The UNAMI's report of 2013 provides details in this respect. The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), *Human Rights Report: 2012* (Baghdad, June 2013) 34.

recommendations are of the utmost significance in strengthening this body, so that it operates in accordance with the international standards and Paris Principles.¹⁹⁷

2.5.2. The Council of Representatives (Parliament)

In the new democratic Constitutional Iraq, Parliament is a group of elected representatives of the people who have been given the power to act on behalf of Iraqis through the development of policies and decision-making on issues of national importance. Parliament is entrusted with the responsibility for making the laws that govern society, and for the supervision of the government in order to ensure responsible governance. It therefore represents the interests of the people in general, and acts as a bridge between the people and the government. Its role in the protection of human rights has arisen as a consequence of its original purpose, the enactment of laws, as well as through its role in monitoring the government. For these purposes, the Iraqi Council of Representatives established the Parliamentary Human Rights Commission in 2006.

The Parliamentary Human Rights Commission is another important mechanism for the protection of human rights. Its task is to defend human rights and to identify potential shortcomings in the existing legal rules so as to ensure effective safeguards against their violation. Its role is also to suggest to parliament further necessary laws regarding human rights, including laws to protect the rights of women and the rights of suspects, and laws to ensure religious freedom and minority rights. In addition, it has the duty of monitoring government agencies in order to ascertain the extent of their commitment to human rights. It also receives complaints, observations, and the reports of fact-finding committees concerning alleged violations of human rights. Its task is then to find the appropriate solution to these problems. From what is mentioned above, it is clear that this Commission is another national human rights body that plays a central role in improving the justice system in post-Saddam Iraq.

¹⁹⁷ Ibid; see also United Nation News Centre, *Mounting Violence In Iraq Erodes Progress on Human Rights* (27 June 2013) (n 189).

2.5.3. Creation of the Ministry of Human Rights

One of the most important new institutions is the Ministry of Human Rights, which was formed on 3 September 2003.¹⁹⁸ This branch of government has been entrusted with observing and investigating, in conjunction with other bodies, issues related to human rights across the country in order to prevent their violation. As will be shown during the course of this research, the Ministry has submitted important reports over a ten year period regarding arbitrary government actions and alleged violations in the field of justice, particularly those occurring in detention facilities and prisons.¹⁹⁹

Nevertheless, the ministry's work has encountered a number of obstacles.²⁰⁰ In 2010, US Department of State reported that "Limited resources and poor co-operation from other ministries limited the ministry's effectiveness."²⁰¹

These limitations must be taken into account in any assessment of its effectiveness. It must also be borne in mind that the Ministry of Human rights is a part of the Iraqi government, and this affects its supposedly independent nature. Although this body of government has made significant progress in implementing its task through various activities related to human rights, particularly in the criminal justice system, the author takes the view that this Ministry should be terminated after the full

¹⁹⁸ See CPA's Order 60, 19 February 2004, published in the Official Gazette issue 3980 of 1 March 2004, para. 2. {امر سلطة الائتلاف المؤقتة}

¹⁹⁹ The Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Right Report (Baghdad, 2007).

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الانسان العراقية}

The Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Right Report (Baghdad, 2008).

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الانسان العراقية}

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{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الانسان العراقية}

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{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الانسان العراقية}

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{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الانسان العراقية}

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{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الانسان العراقية}

²⁰⁰ US Department of State, *Human Rights Report: Iraq* (2010) available at <<http://www.state.gov/j/drl/rls/hrrpt/2010/nea/154462.htm>> accessed 18 February 2012.

²⁰¹ Ibid.

establishment of the High Commission of Human Rights. The justification for this view is that the Commission has greater autonomy. It would achieve its duties more effectively as it is better able to remain free from governmental influence.

2.5.4. Encouraging civil society and NGOs

In Iraq, although there were several laws regarding civil society,²⁰² independent NGOs did not exist during the Saddam era. After the removal of the regime, the reforming parties considered the role of these organizations to be ineffectual.²⁰³ An attempt to resolve the problem started remarkably soon after the fall of the regime, with the issue of the Order of Non-Government Organization No. 45 of 2003, by which a large number of these Non-Government Organizations were to be created for the purpose of working in the field of human rights. Then, in 2010, on the basis of the Constitution, the Council of Representatives adopted a new law, the Law of Non-Governmental Organizations No. 12, which replaced the CPA's Order.²⁰⁴ As the International Centre for Not-for-Profit Law explains, the new law enabled NGOs to work more openly, both domestically and with the international community. They attained more freedom in their mode of operation, with less restrictions by government inspections.²⁰⁵

Thus far, these non- governmental organizations have had a significant influence on the new system with regard to defending human rights in a more realistic way, and they have provided reports on human rights to United Nations bodies and other international institutions.²⁰⁶ The evidence of the success of these institutions in

²⁰² Law No. 34 of 1962, published in the Official Gazette issue 693 of 18 July 1962.

{قانون تأسيس الجمعيات ذات العلاقة بالأجانب}; Law No. 13 of 2000, published in the Official Gazette, issue 3813 of 24 February 2000. {قانون الجمعيات}

²⁰³ The Law of Non-Governmental Organizations No. 12, published in the Official Gazette, issue 4147 of 9 March 2010; the Iraqi Permanent Constitution, Article 45 provides that, "The State shall seek to strengthen the role of civil society institutions and to support, develop and preserve their independence in a way that is consistent with peaceful means to achieve their legitimate goals, and this shall be regulated by law."

{تحرص الدولة على تعزيز دور مؤسسات المجتمع المدني، ودعمها وتطويرها واستقلاليتها، بما ينسجم مع الوسائل السلمية لتحقيق الاهداف المشروعة لها، وينظم ذلك بقانون}

²⁰⁴ Ibid.

²⁰⁵ The International Centre for Not for Profit Law (ICNL), *NGO Law Monitor: Iraq* (11 September 2013) at

< <http://www.icnl.org/research/monitor/iraq.html> > accessed 5 March 2014.

²⁰⁶ Ibid.

serving the function for which they were intended can clearly be seen in the details of these reports. Their alternative reports, so-called shadow reports, are submitted along with official government reports to the International Community, and describe the human rights situation in the country. This procedure appears to be succeeding, for the present, in providing a more accurate portrayal of human rights in the country.²⁰⁷ Hence, the law is an important advocacy device for protecting human rights and it is said that “The law is generally considered as one of the best and most liberal NGO laws in the region.”²⁰⁸

Civil society organizations have been engaged with international donors and with the UN in a process of helping the Iraqi people “to foster a culture based on the rule of law and respect of human rights.”²⁰⁹ For example, a two-year project was launched under the auspices of the UNAMI in April 2009, during which experts from the Centre for Human Rights Law at the University of Nottingham in Britain, provided many programmes.²¹⁰ They held training sessions for representatives of Iraqi civil society organizations on how to submit reports about the situation of human rights to the relevant United Nations bodies.²¹¹ Innovative projects for developing civil organizations have also been implemented by the United Nations Development Group Iraq Trust Fund.²¹²

Despite the more accurate depiction of the human rights situation, there is a gap in the law addressing the NGOs’ capacities and resources, along with a failure to fully empower them to play an active role in bringing to court complaints against human rights violations.

²⁰⁷ See several reports that have been submitted in the Universal Periodic Review in 2010.

²⁰⁸ NGO Coordination Committee in Iraq, 13 March 2011 at <<http://reliefweb.int/node/391928>> accessed 3 April 2012.

²⁰⁹ UN Assistance Mission for Iraq (UNAMI), Human Rights Report 1 September –31 October 2005, 3.

²¹⁰ UN Assistance Mission for Iraq UNAMI, *Iraqi Civil Society Organizations Trained on Human Rights Reporting*, available at <<http://www.un.org/arabic/news/fullstorynews.asp?newsID=14111>> accessed 19 July 2012; see also Human Rights Law Centre in the Nottingham University, *the Future of Human Rights Protection in Iraq: Empowering Civil Society* (Autumn 2010) available at <<http://www.nottingham.ac.uk/hrlc/documents/publications/newsletter/hrlcnewsletterautumn2010.pdf>> accessed 24 November 2013.

²¹¹ UN Assistance Mission for Iraq’s UNAMI, *Iraqi Civil Society Organizations Trained on Human Rights Reporting* (n 210).

²¹² United Nations Development Group Iraq Trust Fund (March 2011) at <<http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Iraq/pdf/Reports/Quarterly/F8-13%20UNESCO-UNOPS%20HR%20Defenders%201st%20Quarter%202011.pdf>> accessed 19 April 2012.

2.5.5. Other mechanisms for monitoring human rights

The United Nations has an important role to play in supervising and controlling the implementation of international conventions in general, and agreements relating to international law of human rights in particular. What has been seen with regard to the international monitoring of fair trials and due process in Iraq reveals that the monitoring mechanism of international human rights law has fulfilled its function in highlighting the human rights situation. The treaty bodies have come to play a clear role in this respect. For example, the Working Group on Arbitrary Detention has received complaints regarding some alleged incidents of arbitrary arrest and detention in Iraq and reached decisions on these cases.²¹³ The Special Rapporteur on the Independence of Judges and Lawyers has looked at the situation in Iraq and commented on certain issues there.²¹⁴

The most obvious example of the role of the UN with regard to the regular empirical evaluation of human rights in Iraq is demonstrated by the UNAMI. The UNAMI's office in Iraq, over the last ten years, has played a notable role in investigating and monitoring human rights violations in the country. It assists the government in undertaking various activities to promote human rights in post-Saddam Iraq. Throughout the forthcoming chapters reference will be made to the findings of the many reports submitted by the UNAMI.

In view of the above account, it is surprising to discover that Iraq has had no engagement with the Human Rights Committee (the HRC) since its last report in 1998. There are reasons for this lapse, some of which involve the Iraqi government, while others involve the Committee itself.

The failure of Iraq to submit reports to the Committee may have been the main reason why Iraq has had no recent engagement with it. The Committee depends on the

²¹³ The Working Group was established by the UN Commission on Human Rights in 1991 in order to consider alleged cases of violations of the right to liberty, including arbitrary arrest and detention, to be investigated according to international rules. Regarding its work in relation to Iraq, see UN Human Rights Council, 'Report of the Working Group on Arbitrary Detention' (A/HRC/16/47/Add.1, 2 March 2011) 70.

²¹⁴ United Nations Commission on Human Rights (CHR), 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy: addendum: situation in specific countries or territories' (27 March 2006) E/CN.4/2006/52/Add.1, 52.

reports of State parties for the implementation of its role in monitoring the human rights situation. For this purpose, under Article 40 of the Covenant, there is a binding obligation for State parties to provide regular reports to the Committee.²¹⁵ In this respect, the assumption is that Iraq has breached its obligations under Article 40, even taking into account the difficult conditions endured by the country, which have hindered the performance of the Human Rights Committee's monitoring functions since 1998. These adverse conditions cannot fully justify such failure, particularly during recent years, when the wider situation and national security have significantly improved. Consequently, it can reasonably be claimed that the main reason for the absence of engagement with the HRC since the last report in 1998 is the failure of the Iraqi government to implement its binding obligations under international human rights law to provide these reports.

The Committee's function of monitoring the human rights situation relies on the receipt and assessment of complaints referred to it by individuals or by other States, which indicate that the State concerned is in violation of rights protected under the Covenant.²¹⁶ Iraq is not party to the First Optional Protocols of the UN ICCPR, and hence the victims whose human rights were abused by the public authority, having exhausted national remedies, cannot send petitions to the Committee seeking redress. This leads to the clear conclusion that one of the reasons behind the absence of recent engagement in Iraq with the UN Human Rights Committee is that the country has not yet acceded to the First Optional Protocols of the UN ICCPR. The reform process in Iraq has suffered because insufficient attention has been given the lack of engagement with the HRC over a long period (since 1998). In the view of the present author this shortcoming needs to be addressed in the near future.

The Committee performs its functions with regard to monitoring the situation of human rights in the states of the parties concerned by relying on various special procedures (such as the Working Group on Arbitrary Detention, mentioned earlier).²¹⁷

²¹⁵ See the ICCPR, Article 40.

²¹⁶ Ibid, Article 41; see also the First Optional Protocol of the ICCPR.

²¹⁷ The Committee decided in 2001 that "a State's record under the Covenant could be examined at the Committee's discretion in the absence of a report, and if necessary in the absence of a delegation from a State party" See Office of the United Nations High Commissioner for Human Rights, *Human rights, Civil and Political Rights: The Human Rights Committee*, (May 2005, printed at the United Nations,

Regardless of whether or not a report is submitted by Iraqis, the Committee should in any case deal with the engagement of Iraq vis-à-vis the human rights situation in the country.

The issue of concern is that, the Committee's reports have indicated that the Iraqi government has made no contact and hence there was negligence on the part of the government with regards to its lack of engagement with the committee. The government has consistently failed to submit the reports that were requested.²¹⁸ This accumulating problem was compounded by the committee's failure to exert its power to address the situation. This is not to say that the UN took a passive role. On the contrary, it made a difference in Iraq, particularly with regard to the work carried out by the UNAMI. However, the Iraqi government's renewal of contact with the Committee would impact positively on improving the human rights situation in the country.

Let us now consider another improvement that has been recently carried out by way of reform in post-Saddam Iraq. For the first time, Iraq has engaged with the Universal Periodic Review, an international mechanism for monitoring human rights and the rule of law.²¹⁹ It should be noted that under UN General Assembly Resolution No 60/251, the Human Rights Council was established on 15 March 2006 to replace the Commission on Human Rights.²²⁰ Under the same Resolution the UPR has been created to be under the auspices of the UN Human Rights Council. By virtue of the Universal Periodic Review, the commitments of all member States of the UN regarding respect for human rights are to be reviewed and evaluated every four years. Each state is subject to review by the UN member states. The members ask questions and make recommendations to the Government of that state in an interactive dialogue. A "Statement of Results" is then issued, which adopts a list of recommendations and shows which of these recommendations have received the consent of the State concerned.

Geneva) 2, available at <<http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf>> accessed 30 September 2013.

²¹⁸ UN General Assembly 'Report of Human Rights Committee' Official Records Sixty-second session 2007 Supplement No. 40 (A/62/40) 17.

²¹⁹ Ibid, para. 5(e).

²²⁰ UN General Assembly Res 60/251 'Human Right Council' (3 April 2006) para. 1.

The reviews of the States are seen by some as a constructive means to address violations and to engage the public at the international level, and as an opportunity for governments to disclose their plans to improve the situation of human rights based on recommendations made by international community.²²¹ The implementation of commitments that have been formulated by the international community under the Universal Periodic Review is the responsibility of governments themselves, but the review mechanism has some powers to intervene if the state fails to improve the situation.²²² The Universal Periodic Review is issued every four years, the progress of each a country in the implementation of the recommendations is considered and the Council deals with cases of non-cooperation by the relevant States. The legal framework of the Universal Periodic Review ensures that the parties involved play an active role in implementing the recommendations, through advocacy and technical support.²²³ In addition, the Council's Universal Periodic Review may help to coordinate financial and technical support for the process of implementing the recommendations.²²⁴

Iraq appeared before the Human Rights Council as part of the Universal Periodic Review in February 2010. During this review, both the official and shadow reports, from the Ministry of Human Rights and NGOs concerning human rights (including the rights of accused persons) were presented.²²⁵ The review emphasized that in recent years there have been many positive and comprehensive developments in the field of human rights, based on the new Constitution and other aspects of the National Agenda, along with binding obligations under international rules and the conventions ratified by Iraq.

²²¹ Ibid; see also Sara Wyatt, *United Nations Universal Periodic Review, Guide to the UPR*, available at <http://www.ifex.org/campaigns/tools_resources_upr/> accessed 30 March 2012.

²²² Ibid.

²²³ Human Rights Council, 'Institution-building of the United Nations Human Rights Council' (Resolution 5/1), Annex 1.

²²⁴ Ibid.

²²⁵ United Nations General Assembly A/HRC/WG.6/7/IRQ/1, 18 January 2010, Human Rights Council, Working Group on the Universal Periodic Review,(n 192); see also, United Nations General Assembly, A/HRC/WG.6/7/IRQ/2, 1 December 2009, Human Rights Council, Working Group on the Universal Periodic Review, Seventh session, Geneva, 8-19 February 2010, Compilation Prepared by the Office of the High Commission for Human Rights, in accordance with paragraph 15 (B) of the annex to Human Rights Council Resolution 5/1; see also United Nations General Assembly A/HRC/WG.6/7/IRQ/3, 1 December 2009, Human Rights Council, Working Group on the Universal Periodic Review, Seventh session, Geneva, 8-19 February 2010, Summary Prepared by the Office of the High Commission for Human Rights, in accordance with paragraph 15 (C) of the annex to Human Rights Council Resolution 5/1.

The 2010 review illustrates the international community's belief that political, economic, social and cultural rights in Iraq should be embedded in legislation and policies and other practices that define the individual's relationship with the government. The report of the review included a total of 176 recommendations. Nine of these recommendations emphasized the requirement for Iraq to become a party to international agreements and additional urgent protocols. Seven of the recommendations discussed the need to harmonize the new Iraqi Constitution with binding obligations under international treaties and international law. Twenty- six of these recommendations involved respect for the right to life and the abolition of the death penalty. Twelve focused on offering invitations to special reporters. Nine highlighted prevention of torture and improvement of the justice system and conditions of detention, (these being particularly relevant to the present research). Twelve included recommendations for fair trial guarantees and independence of the judiciary. Four of the recommendations emphasized the need to combat the culture of impunity and also included some recommendations with regard to human trafficking. Finally, one recommendation concerned the need to combat terrorism. The numbers of recommendations accepted by the Iraqi delegation was 135, while 27 recommendations were rejected, almost all of which focused on the abolition of the death penalty.²²⁶

Iraq nonetheless pledged to continue to make further efforts in other areas: to promote human rights in the cultural practices of Iraqi society; to attempt to incorporate these efforts into national legislation; and to continue its efforts to include in its national law the provisions contained in human rights treaties ratified by Iraqi. It further pledged to strive to investigate thoroughly all violations of human rights, especially allegations of torture; to strive to amend of national legislation in order to eliminate the death penalty; and to reduce the limitations imposed by national legislation, including those which gave impunity to the perpetrators of the crime of torture, who should be subjected to deterrent punishments.²²⁷

²²⁶ Human Rights Council, *Universal Periodic Review, Iraq* (16 February 2010) available at <<http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights16February2010am.aspx>> ; see also <<http://www.ohchr.org/EN/HRBodies/UPR/Pages/IQsession7.aspx>> accessed 31 March 2012.

²²⁷ Human Rights Council, Report of the Working Group on the Universal Periodic Review regarding Iraq is submitted to the UN General Assembly, (n 112) 23.

After the completion of the Universal Periodic Review, on Iraq, the government began to work expeditiously for the implementation of these recommendations. With that aim in mind, it was decided to hold a national conference and to invite reporters from the UN to visit Iraq in order to prepare a national plan to follow up the recommendations of the international community contained in the UPR.²²⁸ The international community was to finance projects in Iraq, to be conducted by the United Nations Office for Project Services. In addition to funding, the objective was to bring the UPR into the public consciousness and to encourage citizens' participation in the UPR projects. These projects are intended to encourage in a variety of ways the building of Iraqi civil society organizations. In particular, they are seen as encouraging the efforts of NGOs to conduct their task of creating an improved civil rights environment in Iraq.

Analysis and evaluation

It has been argued in this chapter that, under Saddam's regime, the rule of law was devastated by repression, corrupt policy and war, and that consequently the most vital task in the post-Saddam era Iraq is to rebuild a new society and to embed the rule of law as defined by the UN, thus distancing the country from its past. The chapter reviewed the many efforts made to match the benchmarks for the rule of law and for international human rights. It has considered the reforms that have been made regarding the criminal justice system, in the form of structural changes, (such as creating new bodies and institutions), and the reform, repeal and adoption of new laws. The discussion focused on human rights during criminal proceedings. It has demonstrated that improvements in the justice system are of paramount importance and that without them a successful transition from dictatorship to the rule of law will fail to take place.

²²⁸ Wijdan Salim, Minister for Human Rights of Iraq, said that "a national conference would be held to discuss a draft road map for the implementation of the recommendations approved by Iraq ... the Government approach was moving towards rooting the rule of law and respect and protection of human rights through a number of measures based on human rights principles and included in the Constitution. The Governmental system had now become strong and capable enough to protect people from torture and involuntary disappearance and the Government had improved a number of procedural reforms." quoted from the Minister's speech before the Human Rights Council on 11 June 2010; at <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10144&LangID=E>> accessed 1 February 2012.

After the removal of the regime, fundamental reforms were made to the criminal justice system, and these have had a positive effect on the rule of law and the protection of human rights. The argument has focused on what has been made to entrench the rule of law in the area of human rights and criminal justice system. The argument has focused whether these reforms have been a complete success. The discussion leads us to the clear conclusion that, in contrast to the situation under the former regime, in which rights were not only violated, but were also enabled by the law, now respect for the human rights of the person under criminal proceedings is embodied in the Constitution. The new Iraqi Constitution theoretically provides guarantees for human rights. Steps have been taken to improve the judicial system in both its organization and its personnel, so that it is based on the rule of law, a condition that should be the objective aim of all good governance. In a major development, a notable attempt has been made to establish an independent judicial authority, and structural improvements have been applied to the courts and other criminal justice institutions.

Most notably, the Federal Supreme Court (*AlMahkamah AlAthadia AlUlya*) has been created. This court plays a significant role in maintaining the rights of individuals by opposing legislation that conflicts with Constitutional human rights and freedoms, and by fostering a culture of law by creating a balance among the various state authorities. In addition, improvements have been made to the Department of Public Prosecution, investigating agencies and law enforcement bodies, such as the police. Attempts have also been made to address the systematic lack of protection for human rights in Iraq. The post-2003 reforms included the establishment of international and national mechanisms for the protection of human rights. At the national level these institutions have been established in order to support and promote a culture of human rights and to protect and deal with any violations of these rights. Most notable among these are the Ministry of Human Rights, the Commission on Human Rights of the Iraqi Council of Representatives, the High Commission for Human Rights, together with support for civil society and non-governmental organisations. At the international level, human rights organizations now closely monitor the human rights situation, and Iraq is also subject to regular reviews by UN member states under the auspices of the UN Human Rights Council.

In summary, the legal human rights of a person currently facing the criminal justice system are much more secure than in the days of the former regime. Returning, however, to the initial question as to whether the rule of law as defined by the UN has been achieved in Iraq, it is the author's view that, despite the efforts made, the reforms to the new justice system have not fully achieved their aim. The arguments related to the new Constitution have revealed that, even if it is a significant move in the right direction, further changes are necessary if it is to assume a fully effective role in the new life of the country. It remains to be seen whether discussion and theory can be translated into the reality.

There is also doubt as to whether the reforms have comprehensively redressed all the shortcomings of the legal framework and the structure of the courts. Further reform will be necessary for the improvement of justice in this respect. Similarly, debates concerning the accountability of the former regime have revealed further inadequacies in the reforms. Although the policy of holding the former regime to account is essential to the rule of law, the fairness of the trials themselves has been widely criticized by the international community, on the grounds that building a new nation is required to be on the basis of the rule of law rather on moving from one form of injustice to another. Furthermore, there are shortcomings in the investigative system and its personnel which require attention, but which are beyond the scope of these reforms. These will be discussed in greater detail in the next chapter.

Finally, in spite of the fact that ambitious national and international projects have been implemented to establish mechanisms for monitoring and dealing with violations of human rights, serious obstacles stand in the path of improvement. The situation has been exacerbated by the fact that, although the Iraqi Permanent Constitution enabled the creation of the High Commission for Human Rights in 2005 as an independent mechanism for monitoring human rights violations, the Commission's functions have been subject to long delay and many obstacles.

Attempts to evaluate the success of reforms inevitably result in mixed conclusions. The scale of the problems facing the reform project in the context of a society undergoing major change needs to be acknowledged. The effectiveness of the reforms

is best measured by a consideration of specific questions regarding the extent to which these efforts have reflected international human rights standards. This research therefore will pursue this analysis in the following chapters by scrutinizing three pre-trial rights. These three rights are the right to liberty, third party access rights, and the right to be free from self-incrimination. They will be closely studied in terms of law and practice in order to establish whether international standards of justice have been attained in these areas.

CHAPTER THREE

THE REFORMED INVESTIGATIVE SYSTEM IN IRAQ

Introduction

The current study focuses on three rights during the pre-trial investigation stage, and a review of the investigative system in Iraq is necessary for an understanding of how that system works. Because the investigative system has a significant impact on the rights of persons under criminal investigation, an explanation of its workings will be necessary so as to form a basis for the analysis in subsequent chapters of these three identified rights of the accused person at the pre-trial stage.

In the preceding chapter, the operation of criminal justice institutions - the police, public prosecutors, and investigating judges- all of which have been reformed, were assessed. The claim here is that, even though these reforms are deemed to be a step in the right direction, they fall significantly short. The present chapter endeavours to identify some of the deficiencies that have been overlooked by previous reviews of the processes of legal reform, and also to identify whether the system works in accordance with international human rights standards that are binding on Iraq. This is done with the aim of identifying opportunities for improvement in relation to the requirements of the UN's broad definition of the rule of law.

The chapter is divided into four sections. The first section provides a brief overview of procedural law in pre-trial investigations. The second section examines the role of the actors in the pre-trial criminal investigation within the Iraqi criminal justice system. Subsequent sections consider the determining of the end of the investigation stage and the general requirements for referring a case to trial. The concluding part reviews the entire Iraqi pre-trial investigation process.

3.1. Overview of pre-trial investigation

According to the Iraqi Code of Criminal Procedure (ICCP), when a crime is allegedly committed criminal proceedings are initiated through the submission of an oral or written complaint, or by reports from several possible parties.¹ It is stated that:

“Criminal proceedings are initiated by means of an oral or written complaint submitted to an investigative judge, a [judicial] investigator, a policeman in charge of a police station, or any crime scene officer by an injured party, any person taking his place in law, or any person who knows that the crime has taken place. In addition any one of those listed can notify the Public Prosecution unless the law says otherwise. In the event of a witnessed offence the complaint may be submitted to whichever police officers or sub-officers are present.”²

The public prosecution, victims or their representatives, or public officials may report the crime, as can any other persons who witness or become aware of an offence.³ These witnesses may be exposed to legal liability if they do not report their knowledge of the offence to the authorities.⁴ A complaint or a report of an offence is reviewed by an investigating judge or judicial investigator. The investigating judge or judicial investigator instructs the police to initiate an investigation.⁵ Investigations undertaken by police conducted under supervision of the public prosecutor consist of several procedures.⁶ These include collecting evidence by such means as recording statements of the complainant and collecting relevant items in order to gather efficient

¹ See (Chart 1) below that includes overview of the process of pre-trial investigation stage.

² ICCP, Article 1. The official English translation is available online at the homepage of *the Global Justice Project: Iraq* (GJPI) <<http://gjpi.org/central-activities/judicial-independence/>> accessed 28 January 2014.

{تحرك الدعوى الجزائية بشكوى شفوية او تحريرية تقدم الى قاضي التحقيق او المحقق او اي مسؤول في مركز الشرطة او اي من اعضاء الضبط القضائي من المتضرر من الجريمة او من يقوم مقامه قانونا او اي شخص علم بوقوعها او بأخبار يقدم الى اي منهم من الادعاء العام ما لم ينص القانون على خلاف ذلك. ويجوز تقديم الشكوى في حالة الجرم المشهود الى من يكون حاضرا من ضباط الشرطة ومفوضيها}

³ ICCP Articles 1, 47(a), 48; Article 2 of the Law of Public Prosecutor No 159 of 1979, published in the Official Gazette, issue 2716 on 16 January 1980. The official English translation of the law is available online at the homepage of *the Global Justice Project: Iraq* (GJPI) <<http://gjpi.org/central-activities/judicial-independence/>> accessed 28 January 2014.

⁴ Article 243 of the Iraqi Penal Code No. 111 of 1969. The official English translation of the Code is available online at the homepage of *the Global Justice Project: Iraq* (GJPI) <<http://gjpi.org/central-activities/judicial-independence/>> accessed 28 January 2014.

⁵ ICCP, Article 49(a).

⁶ Police officers also, as will be discussed in the next pages, have power of investigation in accordance with situations under Articles 50 and 52 of the ICCP.

information about the alleged crime.⁷ These procedures are required to be recorded and brought to the investigating judge.⁸

All of the information gathered by the police and the public prosecutor must be reported without delay to the investigating judge in a “dossier.” The case will be verified by the investigating judge who, after checking the collected information and evidence, will determine whether to proceed or, if there is insufficient evidence that a criminal offence has occurred, to terminate the proceedings. In the case of the former, investigative measures can be taken by the investigating judge or other parties under his direction and control (police officers and judicial investigators). Initially, it is not necessary to open the investigation against a specific person. Given that an offence has been committed it is not necessary to identify offender at this early stage of the proceedings. In cases where a specific person is suspect, the investigating judge may either issue a summons to the person under investigation as a suspect, or order an arrest warrant if there is probative evidence to reinforce the suspicion against the person who is being complained about.⁹ All steps that are taken during the investigation must be recorded in the “dossier”.

During this procedure, the person under investigation, otherwise known as the ‘accused,’ is held at, or is required to report to, a police station. This process can be voluntary or through the implementation of an arrest warrant by the police. The investigator in police station takes the accused’s statement regarding the accusation.¹⁰ As will be discussed later in this thesis, access to legal assistance at police station remains an obstacle in practice, particularly in the case of more vulnerable citizens.¹¹

Upon completion of the initial investigations, the whole dossier is submitted to a competent investigating judge. The accused is brought before the investigating judge, in the presence of a lawyer.¹² If the accused cannot afford a lawyer, then the investigating judge will assign a lawyer at public expense.¹³ During this phase of the

⁷ ICCP, Article 43.

⁸ ICCP, Article 43.

⁹ ICCP, Articles 87, 92.

¹⁰ ICCP, Article 97.

¹¹ See discussions about right of access to a lawyer in Chapter Five.

¹² ICCP, Article 123.

¹³ ICCP, Article 123.

proceedings, investigating judge decides whether to release the accused, with or without bail.¹⁴ The accused could be released on bail based on a collateral term decided by the judge. Bail conditions, however, are determined by the gravity and the circumstances of the accusation.¹⁵ Alternatively, the judge may order the detention of the accused for a period not exceeding fifteen days (this time frame may be reviewed fortnightly).¹⁶ The judge also determines the decisions that are deemed necessary to complete the investigation.

It should be noted that Iraqi law authorizes mandatory investigation only in felony cases, such as murder and manslaughter, and misdemeanour offences, such as traffic offences. In minor offences (infractions), the investigation is discretionary, unless the judge decides that there should be compensation or a return of assets.¹⁷ Accordingly, the ICCP states, “the investigative judge must make an immediate decision on infraction cases in which there is no claim for compensation or return of property, without taking a decision to transfer the case to the Court of Misdemeanour.”¹⁸ In this matter, it seems Iraqi law empowers the same agency to be investigator, accuser and judge.

It must be recognised that, when the role of an investigating judge shifts to that of a judge in the actual trial of the same case he has already dealt with, this situation is not in line with the principle of impartiality and independence of the judiciary under the Iraqi Permanent Constitution and international law.¹⁹ The function of investigation and prosecution must be independent of the authority that decides the matter on its

¹⁴ ICCP, Articles 109, 110.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ ICCP, Article 134; According to the Iraqi Penal Code, Article 27 an infraction is “an offence punishable by one of the following penalties: Detention for a period of between 24 hours and 3 months.”

{المخالفة هي الجريمة المعاقب عليها بإحدى العقوبتين التاليتين: الحبس البسيط لمدة اربع وعشرين ساعة الى ثلاثة اشهر}

¹⁸ ICCP, Article 134.

{على قاضي التحقيق، ان يفصل فورا في جرائم المخالفات التي لم يقع فيها طلب بالتعويض، او برد المال دون ان يتخذ قرارا بإحالتها على محكمة الجنج}

¹⁹ The Iraqi Permanent Constitution 2005, Article 19(6) “Every individual has the right to be treated in a just manner in all judicial and administrative procedures.” The official translation in English is available online at the homepage of the Iraqi government at <http://www.cabinet.iq/default.aspx> accessed 20 November 2013. {لكل فرد الحق في أن يعامل معاملة عادلة في الاجراءات القضائية والادارية}

merits.²⁰ The HRC recognises that “judges must not harbour preconceptions about the matter put before them.”²¹ This is therefore a problem.²²

At the end of the pre-trial investigation stage, the investigating judge hears the accused, the allegation of the complainant and the testimony of the witness or witnesses, and examines the experts’ reports.²³ If there is insufficient evidence to send the accused to trial, the judge releases the accused person.²⁴ Otherwise, if the investigating judge finds there is a *prima facie* evidence to send the case to trial, the accused will be referred to a competent court, either a felony court or a misdemeanour court.²⁵

²⁰ *Arvo O. Karttunen v Finland* UN Human Rights Committee Communication No (387/1989) 23 October 1992 para 7.2.

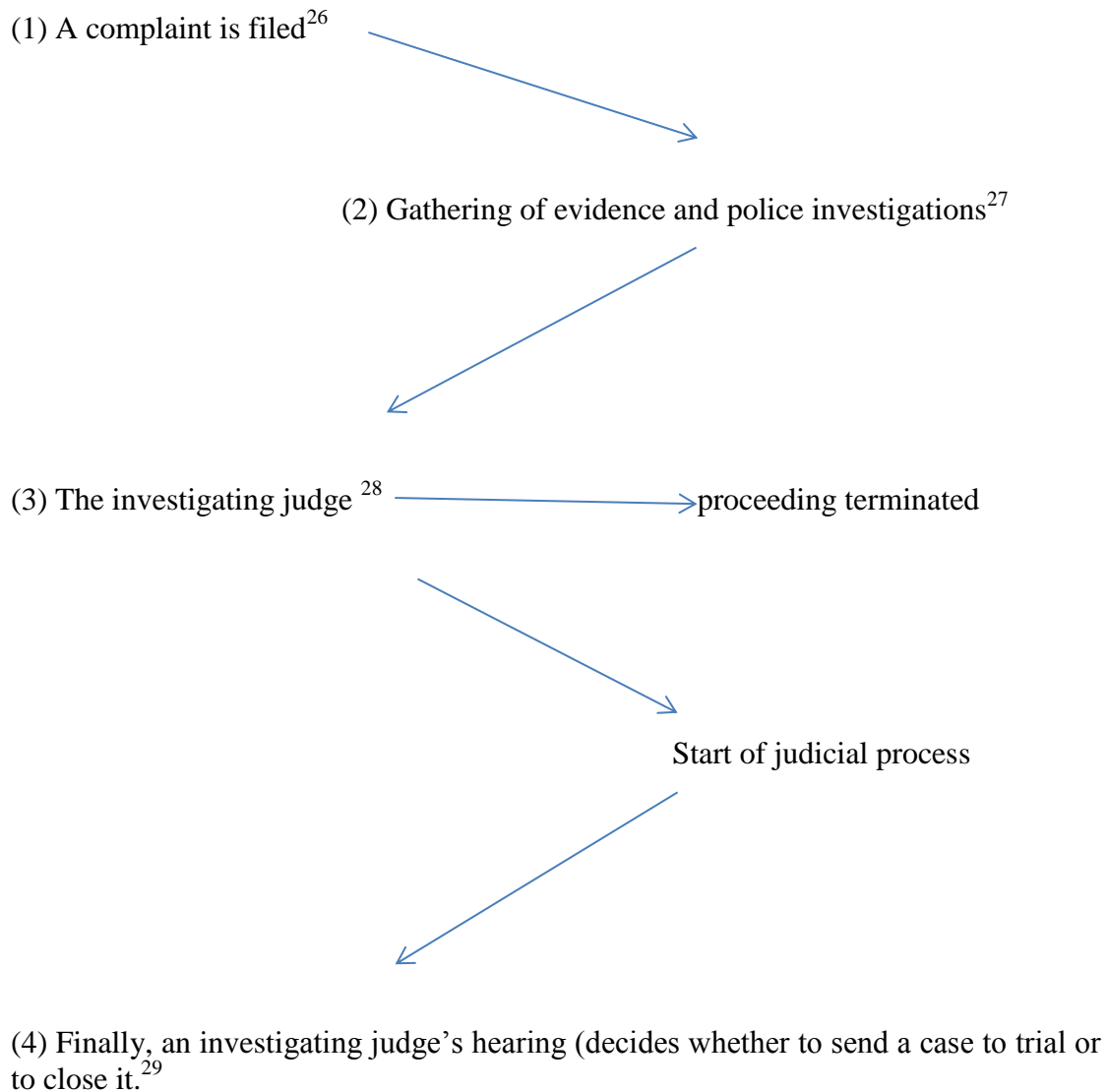
²¹ *Ibid.*

²² It should be noted that in France, another country following the civil law model, the French Code of Criminal Procedure guarantees “a separation between those authorities responsible for prosecuting and those responsible for judging.” The French Code of Criminal Procedure, preliminary Article, inserted by Law n° 2000-516 of 15 June 2000 Article 1 Official Journal of 16 June 2000; see also Article 49 of French Code of Criminal Procedure in which the investigating judge is explicitly prohibited from judging the case, which he already dealt with as investigating judge, it states “he may not take part in the trial of the criminal cases he dealt with in his capacity as investigating judge, under penalty of nullity.”

²³ ICCP, Articles 47, 58, 69.

²⁴ ICCP, Article 130.

²⁵ *Ibid.*



(Chart 1) overview of the process of the pre-trial investigation

²⁶ The criminal case is opened by reporting a crime or a complaint, from the victim, law enforcement officials or public prosecutor or others.

²⁷ Police and civilian support staff investigate criminal offences under the supervision of the public prosecutor and then pass the information and evidence to the investigating judge. Police officers also have power of investigation in accordance with situations under Articles 50 and 52 of the ICCP.

²⁸ The investigating judge verifies the case either to terminate proceedings or to complete the investigations that should be carried out under his control.

²⁹ Finally, an investigating judge's hearing takes place inside his office at the Investigation Court.

3.2. The relevant investigative authorities

Criminal investigations in Iraq during the pre-trial stage are mainly conducted by investigating judges, who are granted wide authority commensurate with such a significant duty. This is in contrast to the lesser authority given to the public prosecutor, who nonetheless has exceptional powers to conduct investigations at a crime scene.³⁰ Also, under the direction of the investigating judge, the police have a crucial role in undertaking investigative measures at the earliest stage of the proceedings and later under the order of the investigating judge. In addition, the ICCP enables police to act without the direction of the investigating judge in urgent cases.³¹ There are also judicial investigators who conduct investigations under the control and direction of the investigating judge.³²

3.2.1. Investigations conducted by the Police

Once an offence occurs, the law enables police officers or civilian support staff to gather evidence under the supervision of the public prosecutor and the control of the investigating judge.³³ Crime scene officers carry out evidence collection at this stage and must report all information to the investigating judge promptly.³⁴ The ICCP includes general references to the procedures that need to be carried out by police in order to fulfil their duty prior to the start of judicial involvement, without prescribing particular actions appropriate to this stage of the proceedings. What can be derived from the words of the ICCP is that crime scene officers are to use all possible means to preserve evidence of an offence.³⁵ In some cases, particularly in cases where the offence is of a *flagrante delicto* character, they have broad powers of questioning,

³⁰ The Public Prosecutors Law, Article 3.

³¹ ICCP, Articles 50, 52.

³² ICCP, Article 51.

³³ ICCP, Article 40; The supervision of law enforcement officials is not feasible on the basis that there are no provisions in Iraqi law by which disciplinary sanctions can be imposed by the public prosecutor or the investigating judge against law enforcement officers in cases of neglect of duty.

³⁴ ICCP, Article 41.

³⁵ ICCP, Article 42 stated that “Crime scene officers are required to use all possible means to preserve evidence of an offence”

{على اعضاء الضبط القضائي ان يتخذوا جميع الوسائل التي تكفل المحافظة على ادلة الجريمة}

arrest and search for the purpose of combatting crime and bringing offenders to justice.³⁶

In case the offence is not *flagrante delicto*, these broad powers under Iraqi law are normally delegated to the judicial authority (the judicial authority at the pre-trial stage consists of an investigating judge and a judicial investigator), which has responsibility for conducting investigations in the second stage of proceedings after collection of evidence by a crime scene officer.³⁷ In particular, the innovations of 2005 introduced under the Iraqi Permanent Constitution clearly confirm that the judicial authority is the sole authority entitled to direct the investigation and to prescribe detention.³⁸ The Constitution states that

“Every individual has the right to enjoy life, security and liberty. Deprivation or restriction of these rights is prohibited except in accordance with the law and based on a decision issued by a competent judicial authority.”³⁹

“A. Unlawful detention shall be prohibited. B. Imprisonment or detention shall be prohibited in places not designed for these purposes, pursuant to prison laws covering health and social care, and subject to the authorities of the State.”⁴⁰

“No person may be kept in custody or investigated except according to a judicial decision”⁴¹

However, unlike the situation under the Iraqi Permanent Constitution 2005, the role of the police in pre-trial criminal investigations under the ICCP demonstrates that they not only have the powers to collect evidence about alleged and discovered offences; they are also empowered to investigate cases.⁴² When a crime is reported they are empowered to investigate cases at initial stage of proceedings before bringing a person under investigation before investigating judge.⁴³ Thus, under the ICCP the

³⁶ ICCP, Articles 49, 43. Police powers of arrest will be discussed at length in Chapter Four; ICCP, Articles 43, 44, 103.

³⁷ Law enforcement officials are given more power, such as questioning, an arrest and searching of persons, in cases where the offence is *flagrante delicto*. See ICCP, Articles 43, 44, 102.

³⁸ Iraqi Permanent Constitution 2005, Articles 37(b).

³⁹ The Iraqi Permanent Constitution 2005, Article 15; see also the ICCP, Article 92.

{لكل فرد الحق في الحياة والأمن والحرية، ولا يجوز الحرمان من هذه الحقوق أو تقييدها إلا وفقاً للقانون، وبناءً على قرار صادر من جهة قضائية مختصة}

⁴⁰ The Iraqi Permanent Constitution 2005, Article 19 (12).

{أ- يحظر الحجز. ب- لا يجوز الحبس أو التوقيف في غير الأماكن المخصصة لذلك وفقاً لقوانين السجون المشمولة بالرعاية الصحية والاجتماعية والخاضعة لسلطات الدولة}

⁴¹ Ibid, Article 37. {لا يجوز توقيف احد أو التحقيق معه الا بموجب قرار قضائي}

⁴² ICCP, Articles 49, 50, 52; also see power of police regarding an arrest under Articles, 41, 102 and 103.

⁴³ Ibid.

police officers serve as one of the three criminal investigation authorities during the pre-trial stage, the other two authorities being the judicial investigator and the investigating judge. The question is whether such power of investigation given to police officers is in line with the principles of human rights.

In this respect, it is clear that the investigation of criminal cases in many jurisdictions is delegated to the police. However this practice seems to be particularly prevalent in countries operating a common law system. In the context of Iraq, responsibility for the investigation of criminal cases lies with the investigating judges or with [judicial] investigators. The ICCP provides that “The initial investigation shall be conducted by investigative judges or by [judicial] investigators acting under the supervision of investigative judges.”⁴⁴ Despite this, the power of police officers including arrest, search and questioning has caused a clear effect on individuals’ rights.

The ICCP differs from the Codes of other civil law countries in providing the police with wide powers in this area. For example, in many Arab countries under inquisitorial systems, such as Egypt, Libya and Bahrain, in which the task of investigation is given either to investigating judges or public prosecutors, the police are barred by explicit rules from interrogating the accused person under any circumstances. They do not have the authority to do so even if they are delegated by the investigative authority to conduct some acts of investigation in specific situations.⁴⁵ As a general rule, the, restriction of freedom outside *flagrante delicto* by arresting, searching, and detaining individuals is prohibited at this stage of proceedings and a crime scene officer must use only limited powers in collecting information.

Egyptian law, for example, empowers police officers to restrict the freedom of persons under investigation by means of temporary detention (less than 24 hours) in order to prevent them from absconding prior to the involvement of the investigative authority and the acquisition of a warrant of arrest.⁴⁶ Even these legal provisions, which provide a very limited power of arrest, were deemed unconstitutional when the

⁴⁴ ICCP, 51. {يتولى التحقيق الابتدائي قضاة التحقيق وكذلك المحققون تحت اشراف قضاة التحقيق}

⁴⁵ The Egyptian Code of Criminal Procedure, Article 70; the Libyan Code of Criminal Procedure, Article 55. The Bahraini Code of Criminal Procedure, Article 85.

⁴⁶ The Egyptian Code of Criminal Procedure, Article 35.

Egyptian Court of Cassation, pursuant of its duty to review unconstitutional legal texts, decided that this sort of temporary detention outside the scope of *flagrante delicto* was contrary to the Article 41 of the Egyptian Constitution, and that those provisions were therefore unconstitutional.⁴⁷

In Iraq the ICCP empowers police officers even outside the scope of *flagrante delicto* to conduct the investigation without the need to obtain permission from the judicial investigator or the investigating judge or even to notify them of the matter.⁴⁸ As such, the provisions of Article 50 give police officers, including those who have no investigator's qualification, the authority to conduct the investigation and to question the accused person: this in turn undermines the provisions of Article 51 of the ICCP.

The fact is that despite Article 51 of the ICCP classifies investigation as a judicial function; police officers are empowered to conduct investigations and to question the accused person at an early stage of proceedings before judicial process. At the same time, the police can compel a person under investigation to come to a police station, or to be held there, pending the completion of investigation proceedings, without a warrant being issued by an investigating judge. Confessions of accused persons which are often happen at this stage of the proceedings are much relied upon to base convictions.⁴⁹

Article 50 empowers a police officer to undertake the investigative function into any offence in cases if "he considers that referring the informant to an investigative judge or [judicial] investigator would delay necessary action and result in evidence of the offence being destroyed or lost, the course of the investigation being impaired or the

⁴⁷ The Egyptian Court of Cassation (*Mahkamat Al-Niked*), Case number 3294/63 on 15 February 1995; Ahmad Lutfi Alsaid, *Procedural Legitimacy and Human Rights* (2004, Law School, University of Mansoura) 114. {أحمد لطفي السيد, الشرعية الاجرائية وحقوق الانسان (كلية الحقوق جامعة المنصورة 2004) ص 114}

⁴⁸ ICCP, Articles 50.

⁴⁹ Court of Cassation (*Mahkamat Al-Tamyeez AlAthadia*), Case number 505, General Commission on 24/5/2010 {محكمة التمييز الاتحادية}; Central Criminal Court, (*Almahkama Aljnia Almrkzya aliraqia*) Baghdad, Second Branch, Case number 891 of 2009. Referred to by Amnesty International, *Iraq: A Decade of Abuses* (Index: MDE 14/001/2013, March 2013) 55, 56. {المحكمة الجنائية المركزية} Central Criminal Court, (*Almahkama Aljnia Almrkzya aliraqia*) Baghdad, Third Branch, Case number 2082 of 2012. Referred to by Amnesty International, *Iraq: A Decade of Abuses* (Index: MDE 14/001/2013, March 2013) 55, 56. {المحكمة الجنائية المركزية} Similarly, about past practice during Saddam era see Court of Cassation (*Mahkamat Al-Tamyeez*), Case number 641/Cassation/ 78 on 30/5/1978. {محكمة التمييز}

suspect fleeing.”⁵⁰ In addition, the second paragraph of Article 50 authorizes police officers to conduct investigations into any offence in cases where an authorisation has been issued by the investigating judge or judicial investigator; and a person under investigation may also be subject to the police force throughout pre-trial detention when a police officer delegated by the investigating judge conducts a particular action on the latter’s behalf.⁵¹ In these cases, the investigation conducted by the police has the same legality as the inquiry of a judicial authority. This gives law enforcement officials the powers to arrest, search, and question accused persons without authorization, even though such power lies outside their jurisdiction.⁵²

These broad circumstances are used by police to arrest, search and question persons under investigation even without prior direction from an investigating judge.⁵³ Some authors have pointed out that, according to the accounts of investigating judges, law enforcement officials in the new justice system are, as in the past, able in practice to invoke any excuse to conduct the investigation, even without being previously delegated by the investigating authority.⁵⁴ Investigating judge Al-Zaidi reported that in practice the police commonly conduct criminal investigations and that this exception under Article 50 has become the norm, rather than the exception.⁵⁵

It is worth mentioning here that this situation in the Iraqi system is created by legislation, which elevates police officers to the rank of judicial investigators and

⁵⁰ ICCP, Article 50(a).

{يقوم المسؤول في مركز الشرطة بالتحقيق في اية جريمة اذا صدر اليه امر من قاضي التحقيق او المحقق او اذا اعتقد ان احالة المخبر على القاضي او المحقق تؤخر به الاجراءات مما يؤدي الى ضياع معالم الجريمة او الاضرار بسير التحقيق او هرب المنهم }

⁵¹ Similarly see ICCP, Article 52(1).

⁵² From a brief study of the laws of Arab states adhering to the civil law system, it seems unique to Iraq that such a wide power is given to the law enforcement officials in criminal proceedings. (See Egyptian Code of Criminal Procedure 1950, Libyan Code of Criminal Procedure, Jordan Code of Criminal Procedure, Lebanon Criminal Proceedings Code 1950, United Arab Emirates Criminal Procedure Code 1992, Oman Criminal Procedure Code 1999, Bahraini Code of Criminal Procedure 2002).

⁵³ ICCP, Article 50.

⁵⁴ Ahmed Alaa Eldin Hussein, *Aides of A Judicial Investigator*, Published research on the official page of the Iraqi judiciary <<http://www.iraqja.iq/view.1885>> accessed 4 November 2013;

{احمد علاء الدين حسين, اعوان المحقق القضائي, بحث منشور على الصفحة الرسمية للسلطة القضائية الاتحادية, ص 9,10} Kadhim Abd Jassim al-Zaidi, “The Role of the Police in Criminal Investigation” Iraqi Newspaper Justice *Al-Adala* (Baghdad, 27 September 2007) 1733, available at <<http://www.aladalanews.net/index.php?show=news&action=article&id=30521>> accessed 21 November 2013.

{كاظم عبد جاسم الزبيدي, دور الشرطة في التحقيق الجنائي, جريدة العدالة العراقية 27 ايلول (2007) 1733}

⁵⁵ Ibid.

allows them to conduct investigation in accordance with Article 51 of the ICCP.⁵⁶ In this instance, it is assumed that a police officer is acting as a judicial investigator under the ultimate control of the investigating and became under the management of the courts, while other police officers are under the administration of the Ministry of Interior. The cause for concern with regard to Article 50 of the ICCP is that a police officer is empowered to investigate criminal cases without an order or instruction from a judicial authority or ranked to the status of a judicial investigator.⁵⁷

In this context, it can be argued that the criminal investigation is one of the core functions in a legal system. Thus, persons capable of conducting criminal investigations must have the minimum level of educational qualification and training. The task also requires expertise, a background knowledge of law and forensic science, and an awareness of ethical standards and human rights.⁵⁸ The provisions under Article 50 seem to neglect these requirements, as they give an investigative capacity to police officers who are not elevated to the position of judicial investigator as required by Article 51 of the ICCP and who have not undergone the training necessary for the conduct of a criminal investigation.

Of course, police officers in many countries conduct criminal investigations; however, the circumstances in Iraq are different. In Iraq, the police handling criminal

⁵⁶ ICCP, Article 51 states that:

“E. The [judicial] investigator shall be appointed by order from the Ministry of Justice, provided he possesses a recognized qualification in law or holds a recognized diploma from the legal department of the technical institutes. Police officers and sub-officers and legal officers of the Ministry of Justice may be granted the powers of a [judicial] investigator by order from the Minister of Justice.

F. No [judicial] investigator may perform the functions of his office for the first time unless he has passed a special course of the Judicial Institute of no less than three months if he obtained a recognized law degree or no less than a full calendar year if he holds a recognized diploma from the legal department of the technical institutes and he has sworn the following oath before the President of the Court of Appeal: ‘I swear by Almighty God that I shall perform the functions of my office with justice and shall apply the law faithfully’ pursuant to CPA Memorandum 12, Section 7 published in the Official Gazette, issue 3985 of 1 July 2004, the term Minister of Justice in this Article is replaced with the High Judicial Council. The original text is in the English language, and the official translation in Arabic is available in the Official Gazette, issue 3985 of 1 July 2004.

{د- يعين المحقق بأمر من وزير العدل على ان يكون حاصلًا على شهادة في القانون معترف بها او حاصلًا على شهادة دبلوم الادارة القانونية من هيئة المعاهد الفنية، ويجوز منح ضباط الشرطة ومفوضيها وموظفي وزارة العدل من القانونيين سلطة محقق بأمر من وزير العدل. و- لا يمارس المحقق اعمال وظيفته لأول مرة الا بعد اجتيازه دورة خاصة في المعهد القضائي لا تقل مدتها عن ثلاثة اشهر اذا كان حاصلًا على شهادة في القانون معترف بها ولا تقل عن سنة تقويمية كاملة اذا كان حاصلًا على شهادة دبلوم في الادارة القانونية من هيئة المعاهد الفنية وحلفه امام رئيس محكمة الاستئناف اليمينية الاتية "اقسم بالله ان اؤدي اعمال وظيفتي بالعدل واطبق القوانين بأمانة"}

⁵⁷ ICCP, Article 50.

⁵⁸ Office of the United Nations High Commissioner for Human Rights, *Human Rights Standards and Practice for the Police Expanded Pocket Book on Human Rights for the Police* (United Nations, New York and Geneva 2004).

investigations are inadequately supervised and their investigations are marked by the failure to maintain even minimal standards. The Iraqi justice system has over a long period struggled to meet the necessary standards regarding the protection of citizens' rights. Human rights reports have shown that police personnel in Iraq use coercive means (torture) to obtain evidence of criminal offences, and that courts do not, as they should, reject their admissibility.⁵⁹

In annual reports compiled by the Iraqi Ministry of Human Rights, it has been conceded that the Iraqi police use coercive means to obtain testimonial evidence from accused persons.⁶⁰ Moreover, these reports highlighted the negative consequences of police investigative powers upon citizens' human rights. Many cases of police ill-treatment or torture in the course of investigations have been reported.⁶¹ The loophole in the legal framework has been exploited, and the fact is that procedural safeguards are often violated by the police during the pre-trial phase of criminal proceedings. This view was echoed by the UN Human Rights Office in Baghdad. UNAMI (2012) drew Iraq authorities' attention to the implications of Article 50 in relation to the protection of accused persons' rights. It stated that a "part of the problem is Article 50 ... investigation should be undertaken by judicial officers directly who are properly educated and experienced"⁶²

In the light of this situation, the author's proposal to the Iraqi legislature is that the function of investigation should be entrusted solely to competent criminal justice personnel from the judicial authority – the judicial investigator and the investigating judge. As will be discussed in subsequent chapters, the reform of criminal justice system recognises three rights under consideration only in judicial process when a person under investigation is brought before judicial authority. In contrast, these

⁵⁹ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Bagdad, January 2011) 18; Reports of International NGOs such as Human Rights Watch and Amnesty International; the Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Rights Reports التقرير السنوي لأوضاع السجون ومراكز الاحتجاز وزارة حقوق الانسان العراقية - dating to between 2004 and 2013.

⁶⁰ The Annual Report of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Rights Report, التقرير السنوي لأوضاع السجون ومراكز الاحتجاز وزارة حقوق الانسان العراقية (Baghdad, 2008) 74; see also Amnesty International, *Iraq: A Decade of Abuses* (n 49) 42, 37.

⁶¹ Ibid.

⁶² The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, January 2012) 5.

rights are equally overlooked during investigations carried out by police officers at time of arrest or in the police station.

This study further suggests a review of the clause under Article 50, which seems to pose the challenges observed above. Iraq police should not be empowered to act alone in obtaining evidence against persons under criminal investigation. The suggestion is made with a view to curtailing or reducing brutality and excessive use of power on the part of the police.

In a similar vein, the mechanisms of the initial investigation proceedings need to be overhauled and criminal investigations need to be carried out by a competent judicial authority. In essence, the powers of law enforcement officers in relation to criminal investigation should be closely monitored and restricted. Arguably, one of the ways through which the three due process rights of an accused person can be safeguarded is by ensuring that criminal investigation proceedings are handled by competent judicial investigators and investigating judges, rather than by police officers. It is also important that police power efficiently controlled and supervised by judicial authority.⁶³

3.2.2. Public prosecution

It was explained in Chapter Two that the public prosecutor was previously subordinate to the executive authority and did not enjoy equal rights with judges, including the right to payment. A process of reform was started in 2003 to bring the Iraqi system in line with the international human rights obligations. The consequences of this reform with regard to public prosecutors are that members of the public prosecutors' service became fully freed from the influence of the executive authority and enjoy the same privileges as professional judges. In other words, in post-Saddam Iraq, having become members of the judiciary they enjoy the same level of autonomy and rights as judges.⁶⁴ However, the outcome of this change does not impact on their role in criminal procedure.

⁶³ The Annual Report of Prisons and Detention Facilities, 2008, (n 60) 74

⁶⁴ See Chapter Two.

From the outset it should be noted that one of the important characteristics of the office of public prosecutor is to defend the interests of justice and to act as the guardian of society. Accordingly, whenever a crime has been committed the function of the public prosecutor within the criminal justice system is to present the complaint against the perpetrator.⁶⁵ In this regard, it is for the public prosecutor to decide, in the light of his responsibility to serve the public interest, whether or not to submit the complaint. Additionally, in accordance with Article 7 of the Public Prosecutor Law, it is the duty of the public prosecutor to consider and follow-up citizens' complaints and to present them to a court on behalf of society.

It must be understood that, although lodging suits of general rights and following up citizens' complaints are the functions of public prosecutors, this does not mean that they constantly act against accused persons throughout the criminal proceedings and seek conviction at the trial stage. Conversely, their first responsibility in the Iraqi criminal system is to serve the interests of society and to secure justice either by assuring a conviction or by supporting the accused person. Given that they act on behalf of society, it is not surprising that, in accordance with their own findings in the case, they sometimes oppose the findings of judges and support the accused person, either before the Investigating Court (the judicial investigator and the investigating judge) or during trial. This is possible if there are insufficient grounds for the accusation. Hence they may decline the accusation and demand from the court the release of the accused in the interests of justice; or alternatively they may incline to demand that the courts take appropriate action against the accused person. In such instances, if the response of the court is negative they may decide to initiate their own action by appealing against the decision of the court.

The above is not a complete account of the role of the public prosecutor in the criminal justice system. Even though the public prosecutor is not the investigative authority and has no role with regard to referring accused persons to trial, since this belongs to the jurisdiction of the investigating judges after the final pre-trial investigation, he is given a significant role in criminal proceedings at the pre-trial stage. At the initial stage of the proceedings the criminal inquiries are conducted

⁶⁵ The Public Prosecutors Law, Article 2; ICCP, Article 1.

under his monitorship.⁶⁶ Likewise, the duty of law enforcement officials when a crime is suspected and during the evidence collection stage is carried out under his supervision.⁶⁷

During the preliminary investigation of criminal cases under Iraqi law, the public prosecutor does not normally exercise the task of investigation, since the latter is under the jurisdiction of the investigating judge, but he may do so on an exceptional basis, in accordance with the provisions of Article 3 of the Public Prosecution Law.⁶⁸ Also, the role of the public prosecutor is limited according to the inquisitorial nature of the Iraqi criminal justice system to overseeing the work of the investigators and monitoring the decisions taken by the investigating judge.

In this context, it should be asked whether or not Article 3 of the Public Prosecutor Law, which enables the public prosecution to carry out an exceptional investigation, is compliant with the inquisitorial nature of the Iraqi criminal justice system.

In view of its shortcomings, Article 3 of the Public Prosecutor Law needs to be annulled or to undergo corrective measures. It is self-evident that a complainant who is empowered to accuse by submitting a complaint and initiating criminal proceedings should be disqualified from carrying out an investigation, owing to a conflict of interests. On the one hand, the power of investigation given to the public prosecutor at the crime scene terminates with the arrival of the investigating judge. For this reason, such power is limited. On the other hand, for the public prosecutor to discharge his role properly, there should be separation between the powers of accusation and those of investigation. In particular, it must be remembered that, according to the provisions of Article 3, the investigating judge may request the public prosecutor to continue the

⁶⁶ The Public Prosecutors Law, Article 2.

⁶⁷ ICCP, Article 40; the Public Prosecutors Law, Article 35(3).

⁶⁸ The Public Prosecutors Law, Article 3 states that “Members of the Public Prosecution shall exercise the power of an investigative judge, in his absence at the crime scene, but this power shall be removed upon the arrival of the competent investigative judge, unless he is asked to continue in part or whole the investigation he has started.” The official translation in English is available online at the homepage of *the Global Justice Project: Iraq* (GJPI) <<http://gjpi.org/central-activities/judicial-independence/>> accessed 27 February 2014.

{يمارس عضو الادعاء العام، صلاحية قاضي التحقيق في مكان الحادث، عند غيابه، وتزول تلك الصلاحية عنه، عند حضور قاضي التحقيق المختص، ما لم يطلب اليه مواصلة التحقيق كلا او بعضا فيما تولى القيام به}

process of investigation.⁶⁹ It could be argued that an investigation being conducted by the public prosecutor, even under exceptional circumstances, raises doubts about the fairness of the proceedings. To say otherwise would be to deny the prosecutor's responsibility to act as a complainant on behalf of the whole Iraqi people, his function as a member of a supervisory body and his duty with regard to monitoring the legitimacy of the proceedings.

Initiation of the complaint against the accused person at the initial stage of proceedings presents a conflict of interest with the task of investigation. This is because the investigation must seek the truth through the collection of evidence both for and against the accused person. By contrast, the complainant usually looks for evidence against the person accused. Hence, the cause for concern in the present context is that combining the authorities of investigation and accusation in a single agency is likely to damage the impartiality required from the investigating authority.

Consequently, in the view of the present author, Article 3 of the Public Prosecutor Law is not practical. Iraqi law is certainly at fault with regard to the provision enacted under Article 3 of the Public Prosecutors Law, which empowers the public prosecutor rather than the investigating judge to conduct the investigation, and it is particularly at fault with regard to the provisions which empower the public prosecutor to continue the investigation process when requested by the investigating judge. It follows that a change in the law is necessary in order to reform such a defect and to avoid the conflict between the function of public prosecution and the function of conducting investigations, particularly given the existence of an investigating judge who is the competent authority of investigation.

3.2.3. The investigating judge and the judicial investigator

In the Iraqi criminal justice system the duty of conducting an investigation is vested in the investigating judge, whose role dominates the pre-trial stage. In this respect, the

⁶⁹ The Public Prosecutor Law, Article 3.

Iraqi legal tradition is like most countries with a civil law system, in that the investigating judge represents the interests of justice.⁷⁰

Once a criminal offence has been committed, there is a duty on the part of the investigating judge to evaluate the available information and facts collected by police and the public prosecutor in order to initiate a formal investigation. The initiation of the investigation should be predicated on the assumption that there is a reasonable suspicion that a criminal offence has been committed.

For the purpose of fulfilling the duty to trace all relevant evidence, the investigating judge, after initiating the investigation, is empowered to interrogate an accused person, to question victims or other persons, to hear the testimony of witnesses, to consider forensic or other non-testimonial evidence and to use other coercive powers such as those of arrest, detention, seizure, and search. These processes lead to the creation of a dossier and finally to a decision as whether or not to take the case forward and send the accused person to trial.⁷¹

At this stage of judicial proceedings, in order to combat excessive use of pre-trial detention, it may well be that, as under the provisions of French law, the functions of investigating and detaining the person under investigation must be independent of each other. In the Iraqi criminal process, as in the French Criminal Procedure Code, there are two phases of the pre-trial investigation, the police phase and the judicial phase. In the police phase, the latter have a significant role in conducting inquiries in order to obtain the evidence necessary to determine the truth. The judicial phase determines whether the case will be referred to trial or closed. However, in contrast to Iraqi law, during the judicial inquiry stage of the French system, the investigative judge conducting the investigation is not empowered to detain a suspect. Rather, the investigating judge needs to refer this order to be determined by another judge, called “the liberty and custody judge”, and only this judge is empowered to make the

⁷⁰ Dan E. Stigall, “Comparative Law and State-Building: The “Organic Minimalist” Approach to Legal Reconstruction” (2007) 29 *Loyola of Los Angeles International and Comparative Law Review* 10.

⁷¹ ICCP, Article 130.

decision about pre-trial detention, and does so in the light of the requirements of each case, and at his own discretion.⁷²

Law 2000-516 of 15 June 2000, Article 48 of the French Criminal Procedure Code added a significant reform to the pre-trial investigation stage through the creation in France of a Liberty and Custody judge, (JLD). The parliamentary report on the reform emphasized that

“The JLD was created precisely to add a second pair of eyes to the procedure, including incriminating and exculpatory elements, and not just to perform a simple juridical verification with respect to the criteria for remanding into detention.”⁷³

According to Human Rights Watch the French model of “the liberty and custody judge” as part of the investigation process constitutes “an important improvement and a critical safeguard against arbitrary detention.”⁷⁴

In the light of the present research, it can be asserted that this French innovation would be a useful addition to the Iraqi investigative system. Even though it is true that an investigating judge and a judge who has been delegated the duty to decide on the matter of detention belong to the same institution, transferring the power of detention to a specialist judge would result in increased respect for the concept of the presumption of innocence. This improves the safeguards of a person under investigation and renders the competent authority of detention independent of both the prosecution and the investigation authority, allowing the question of detention to be decided with all the necessary discretion and circumspection.

Most importantly, Article 51 of the ICCP provides that “the initial investigation shall be conducted by investigative judges or by [judicial] investigators acting under the supervision of investigative judges.” In light of this provision, it could be deemed a

⁷² Article 137 of the French Criminal Procedure Code, created by Law 2000-516 of 15 June 2000, art. 48.

⁷³ National Assembly Law Commission, Report No. 3499 on the bill concerning training and responsibility of judges, by Representative Philippe Houillon, December 6, 2006, p. 221, in Human Rights Watch, *Pre-empting Justice: Counterterrorism Laws and Procedures in France* (July 2008) 31, available at <http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/02_07_08_frenchterror.pdf> accessed 8 December 2013.

⁷⁴ Human Rights Watch, *Pre-empting Justice: Counterterrorism Laws and Procedures in France*, Ibid, 30.

defect in the Iraqi criminal justice system that, in practice, law enforcement officials are often given a broad authority to conduct preliminary proceedings at the investigation stage. This is defective because, according to the provisions described, the authority of the police to conduct an investigation is given only in exceptional circumstances. The correct procedure according to the ICCP is that the investigating judge has the primary duty to conduct the investigation, although judicial investigators under his control are also given this authority at the pre-trial stage.

It could be stated here that the cause for concern in the current Iraqi criminal justice system is the lack of procedural safeguards for a person under arrest during police questioning. Thus, the first concern must be that significant safeguards are in place during questioning conducted by police. The second concern is that the practice of investigations conducted by police is widespread, whereas it should be uncommon and permitted only in exceptional situations. Over the last ten years, independent reports on human rights have described widespread violence against persons under police investigation, and it has become apparent that supervision from the judicial authority and public prosecutors has not been adequate in this respect. Consequently, the provision of a sufficient number of judicial investigators, along with a number of extra procedural safeguards, are of particular importance for dealing with violence against individuals during the initial stage of the proceedings of the criminal justice system.

It may be necessary to adopt such reforms due to the fact that, whereas before 2003 judicial investigators were appointed by the government, now the Higher Judicial Council selects them from among those who have an appropriate competency. Thus direct monitoring and control of judicial investigators during the performance of their duties can be exerted by investigating judges, since the judicial staff are under the management of the courts, while the police are under the administration of the Ministry of Interior and in practice not under the direct control of investigating judges. In other words, police officers who are empowered to conduct criminal proceedings in some instances are less supervised and controlled by investigating judges from investigations of judicial investigators.

In addition, in post- Saddam Iraq, the Iraqi Permanent Constitution 2005 designates the judiciary as the sole authority enabled to deal with freedoms and liberties. Therefore, the investigating judge and judicial investigators, to whom the system has granted a broad power of investigation, should be the guarantors of the individual's rights when acting on behalf of the judiciary during the pre-trial stage.⁷⁵ It follows that, in order to protect human rights at the initial stage of the proceedings, the investigating judge must entrust the power of investigation solely to highly qualified judicial investigators, rather than to police officers.

In the same way, in the view of the present author, the legislature should remove the exceptional powers of the police that enable them to conduct investigations at the initial stage of the proceedings without order from the judicial authority. These powers in practice have been abused and employed to obtain confessions under duress, and this in turn has undermined confidence in law enforcement.⁷⁶ Hence, it is suggested that if, under exceptional circumstances, some limited power is given to the police to conduct proceedings, then due process and adequate judicial control should govern those proceedings. In addition, the questioning of a person under investigation should not be carried out by police but only by the judicial authority, since the questioning may result in a confession that adversely impacts on that person's position during the next stages of proceedings.⁷⁷

3.3. The decision to refer a case to trial

Following the completion of the investigation, the evidence for or against the person under investigation is collected, and the pre-trial investigation stage is terminated by order of the investigating judge, who then decides whether to refer the accused person for trial or to close the case. The most important issues relevant to procedural safeguards are described below.

⁷⁵ See Article 51 of the ICCP in (n 56)

⁷⁶ Amnesty International, *Iraq: A Decade of Abuses*, (n 49) 28.

⁷⁷ "The evidence is sufficient and compelling to convict the accused [including] based on his confession during the investigation period, which is relied upon because it was given closer to the date of the incident than his later statement" Resafa Criminal Court, Baghdad, justifying the use of a "confession" allegedly obtained under torture in a verdict that imposed the death penalty, May 2010 to which referred by Amnesty International, *Iraq: A Decade of Abuses*, (n 49) 28.

3.3.1. Discretion to refer a case for trial

Pre-trial investigations having been completed, investigating judge should order the case to be referred to trial if there is sufficient *prima facie* evidence that the person under investigation is involved in the crime. In such cases, sending the accused person before a public trial is not discretionary, and the investigating judge has no option but to refer the accused person to trial. However, it is the view of the present author that, although the Iraqi legal system has in principle adopted the practice of a mandatory referral to trial, the principle is in reality less firm than it seems. This is due to the fact that even when the investigating judge is satisfied, on a *prima facie* basis, of the involvement in the crime of the person under investigation, in some cases the referral to public trial does not take place.

For example, the investigating judge can determine not to refer a case for trial owing to the provision of impunity, because the government, as will be seen in other chapters,⁷⁸ can place influence on the decisions of investigating judges in this regard. The investigating judge can determine not to refer a case for trial for various reasons. For example, it might be decided that the case will not be sent for trial on the grounds that the victim has granted forgiveness to the person accused, or has received compensation⁷⁹; or it may simply be that the evidence to charge the person is deemed to be insufficient, particularly in the case of less serious crimes; or it may be that during the investigation the accused person has been sufficiently cooperative in providing evidence against other offenders involved in the committed crime.⁸⁰

Because of the seriousness of the decision not to refer a case for trial, there is a statutory duty upon the investigating judge to give a reasoned justification for it.⁸¹ By virtue of Article 265(a) of the ICCP, Iraqi law also provides supervisory oversight of the decision to close the case, and the decision issued can be subjected to an appeal before the Felony Court, either by the victim or by the public prosecutor.

⁷⁸ Chapters 6 and 7.

⁷⁹ ICCP, Article 195(a).

⁸⁰ ICCP, Article 129.

⁸¹ ICCP, Article 130(b).

It is worth noting that, under Iraqi law, when the decision not to refer a case for trial is made, the accused person must be released immediately if he was under detention, and the case against him must be closed.⁸² Such a decision has several implications. The most notable of these is that, under the provisions of the ICCP any future actions and measures against the accused person by the authorities are prohibited. However, if the discontinuance of the proceedings was due to insufficient or inadequate evidence, the case can be reopened again if sufficient and reasonable new evidence is presented within two years of the date of the closure of the case.⁸³ In the view of the present author, this provision, which makes the closure of the case provisional and subject to re-opening if sufficient new evidence is presented within two years, meets the requirements of justice while safeguarding the rights of accused persons.

3.3.2. The right to be informed about an order to transfer a case for trial

Article 14(3) (a) of the ICCPR, provides that a suspect is entitled “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”⁸⁴

This right is very important for a person under investigation whether he is in detention or not. For the purpose of an effective defence, the accused must be notified in writing and verbally about the reality of the charge against him. Under international rules, the right is of particular significance for a fair hearing.⁸⁵ The right to have adequate time and facilities for the preparation of a defence should not be assessed in isolation from this right of notification.⁸⁶ The latter is also protected under the rules of the international criminal courts, which require the accused to be informed about it “in a language which he understands.”⁸⁷ Most national systems similarly, respect this right. As an example, the French Code of Criminal Procedure explicitly grants this guarantee in Article 183.

⁸² ICCP, Article 130(d).

⁸³ ICCP, Article 302(c).

⁸⁴ See the ICCPR, Article 14(3) (a); see also UN General Assembly Res 43/173 ‘The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment’ (9 December 1988) principle 10; ECHR Article 6(1).

⁸⁵ Ibid, the ICCPR Article 14(3) (a).

⁸⁶ Hakan Friman et al., “Chapter 4. Charges” in Goran Sluiter et al. (eds.), *International Criminal Procedure Principles and Rules* (1st ed., 2013, Oxford) 455.

⁸⁷ See ICC Statute Article, 67(1) (a); for more details see *ibid*, 456.

However, this is not the case in Iraqi law. Under the provisions of the ICCP, there is no statutory duty upon the authorities to inform an accused of the decision of transfer for trial. In this respect the Code only provides that

“A decision of transfer should list the name of the accused, his age, profession, place of residence and the offence of which he is accused as well as the time, date and location of its occurrence and the Article of the law which applies, the name of the victim and the evidence obtained, along with the date of issue of the decision, signed by the investigative judge and stamped by the court.”⁸⁸

However, under the provisions of the Public Prosecutor Law, “The investigative judge must brief the appointed or assigned member of the Public Prosecution on his decisions within 3 days of the date of issuance.”⁸⁹ It should be emphasized that such a guarantee under international standards provides an important statutory safeguard, by means of which the accused can be notified promptly and in full detail, verbally and in writing, of the decision to transfer his case to trial. The accused person’s communication with the defence lawyer needs to be similarly protected so as to enable an adequate defence of the accused person or to prepare an appeal against the decision.

3.3.3. Form of referral order for trial

As mentioned above, an investigating judge is empowered at the end of the investigation stage to refer a case to trial. It is self-evident that protection against an arbitrary transmission for trial requires that persons under investigation should have the opportunity to obtain more information on the process of sending their case to trial. In this respect, the procedures under international human rights standards ensure that the nature and cause of the charge are comprehensively brought to the knowledge of an accused person. The specific requirements of this provision involve notifying the accused of the reasons for the prosecution. In this connection the HRC states that:

“The right of all persons charged with a criminal offence to be informed promptly and in detail in a language which they understand of the nature and

⁸⁸ ICCP, Article 131.

{يبين في قرار الاحالة اسم المتهم وعمره وصناعته ومحل اقامته والجريمة المسندة اليه ومكان وزمان وقوعها ومادة القانون المنطبقة عليها واسم المجني عليه والادلة المتحصلة مع تاريخ القرار وامضاء القاضي وختم المحكمة}

⁸⁹ The Public Prosecutor Law, Article 6(3).

cause of criminal charges brought against them, enshrined in paragraph 3(a), is the first of the minimum guarantees in criminal proceedings of Article 14.”⁹⁰

In the opinion of the Committee:

“This right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based.”⁹¹

Other international documents and international bodies impose the duty to formulate the appropriate form of an indictment. For example, the indictments of international criminal procedures provide comprehensive details including “the nature of the charge’ is the precise legal qualification of the offence and the ‘cause of the charge’ refers to the underlying facts.”⁹²

To be consistent with international standards, national laws on criminal procedure must prevent unwarranted or abusive orders of referral for trial, and therefore sufficient reasons must be cited, and the process must be authorized by a competent legal authority. This is of particular importance in order for a defendant to be able to appeal these reasons before the competent court. In most civil law countries, the accused must be informed of such reasons. The French Code of Criminal Procedure, for example, explicitly respects this guarantee. It states that

“The orders made by the investigating judge in accordance with the present section include the surname, first names, date and place of birth, domicile and profession of the person under judicial examination. They state the legal qualification of the actions he is charged with and state precisely the grounds for which there is or is not sufficient evidence against him.”⁹³

Iraqi law, however, differs in this respect. There is no statutory duty that obliges the investigating judge to set out his reasons when ordering the referral to trial of a person

⁹⁰ UN Human Rights Committee, General Comment No. 32, (CCPR/C/GC/32, 23 August 2007) “Right to Equality before Courts and Tribunals and to A Fair Trial (Article 14)” adopted on 27 July 2007, para 31; see also *Desmond Williams v Jamaica* UN Human Rights Committee Communication No (561/1993) 8 April 1997 para 9.2.

⁹¹ Human Rights Committee, General Comment No 13, (Twenty-first session, 1984) “Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article 14)” adopted on 12 April 1984, para. 8. Bearing in mind that the general comment No 13 is replaced by the general comment No 32, *ibid*.

⁹² See Rule 47 (C) ICTY RPE; Rule 47 (C) ICTR RPE ; Rule 47 (C) SCSL RPE ; see also case law - Kuperskic et al., AC, ICTY, 23 October 2001, para. 88; Ntagerura et al., TC, ICTR, 25 February 2004, para. 29 in Hakan Friman et al., “Chapter 4. Charges” (n 86) 463 & 485.

⁹³ Article 184 of the French Code of Criminal Procedure.

under investigation. A different approach is taken when, on the contrary, the accused is not sent to trial at the end of the pre-trial investigation: here, the reasons for closing the case must be given.⁹⁴ It is suggested that the precise grounds for sending a case to trial should be cited in the order of referral for trial, so as to provide greater protection against unwarranted or abusive orders, this being particularly necessary in cases where the decision is subsequently subject to an appeal.

3.3.4. The right to appeal against the order of referral for trial

Iraqi law provides an accused person with the right to appeal a decision to send the accused for trial. This right is secured under the provisions of the ICCP.⁹⁵ By virtue of these provisions the application for an appeal against an order of referral for trial must be submitted within thirty days from the day following the date of the issue of the order.⁹⁶ The accused or the defence lawyer acting on his behalf can appeal the order. Application of appeal must be submitted before the Felony Court, which reviews the case file without the presence of the defendant or his legal representation. As a result, the review of the investigating judge's decision before the three judges of the Felony Court may be considered sufficient safeguard for protecting the accused person against arbitrary referral of his case to trial, as well as satisfying the requirements of justice.

3.4. Evaluation under international human rights law

International human rights law does not place express obligations on a state regarding the way in which its investigative system should be structured, nor does it offer much guidance in this respect.⁹⁷ However, generally speaking, respecting the obligations of

⁹⁴ ICCP, 130(b).

⁹⁵ ICCP, Articles 265(a) “Appeal before an appropriate Felony Court is permissible in decisions issued by the investigative judge, within 30 days, starting from the day following the date of issue.”

{ – يجوز الطعن تمييزاً امام محكمة الجراء الكبرى من ذوي العلاقة في الاحكام والقرارات والتدابير الصادرة من محكمة الجراء في دعاوى المخالفات وفي القرارات الصادرة من قاضي التحقيق خلال ثلاثين يوماً تبدا من اليوم التالي لتاريخ صدورها }

⁹⁶ Ibid, Article 265.

⁹⁷ Nonetheless, it must be borne in mind that some exceptions can be noted in this regard. Most importantly, under human rights law the function of investigation and judging must be strictly separated in order to protect the impartiality of judges. Karel de Meester et al “Chapter 3. Investigation, Coercive Measures, Arrest, and Surrender” in Goran Sluiter et al. (eds.), *International Criminal Procedure Principles and Rules* (1st ed. 2013, Oxford) 203.

international human rights law requires that a state must provide an investigative system under which compliance with a minimum standard of justice can be guaranteed. A functioning justice system in any country is an indispensable aspect of the protection of human rights and respect for the rule of law. In dealing with post-conflict reform, the broad UN definition of the rule of law affirmed such a fact. Indeed, it should be noted that an effective legal mechanism to ensure justice in criminal proceedings and civil claims is a key factor in establishing the rule of law in post-conflict settings.⁹⁸ From the perspective of the UN's functional definition of the rule of law, a justice system is only acceptable to the international community when it avoids arbitrariness and is capable of providing a minimum standard of justice and certain due process rights.⁹⁹ The established legal systems exhibit different approaches regarding the structure of the investigation phase of criminal proceedings. Some jurisdictions have adopted the civil law style of proceedings (the inquisitorial model) and others the common law style (the adversarial model).

Iraq adopted an inquisitorial criminal justice system and empowered investigating judges to conduct the pre-trial investigation stage and to determine the submission of the case to trial. The Iraqi system has undergone various attempts at reinforcement, carried out with the assistance of international organizations such as the UNDP and the USIP. With respect to the investigative system, these reforms focused upon training those who were to be responsible for conducting the process and building the institutions. These efforts, however, have been at the expense of legal reform.

The defective areas, which have been indicated in the previous pages, have been overlooked during these reforms and have not been given sufficient attention. Consequently, certain critical problems within the investigative system have not been identified by those reviewing the system under the process of reform after 2003, and so these problems remain unsolved. This conclusion can be demonstrated by a review of the functions of the three main actors involved in criminal procedure at the pre-trial stage, with reference to the international human rights rules binding on Iraq.

⁹⁸ UN Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, 23 August 2004, S/2004/616, para 35.

⁹⁹ Suzannah Linton & Firew Kebede Tibe, "Judges and Rule of Law in Times of Political Change or Transition" M. Cherif Bassiouni et al. (eds.), *The Global Community Yearbook of International Law and Jurisprudence: Globe Trends* (2013, Oxford University Press) 173 at 178.

3.4.1. Police

In the Iraqi investigative system, the power to carry out criminal investigation at the pre-trial stage lies with the investigating judge and judicial investigators (see Article 51 of the ICCP). However, according to the ICCP, police officers are also empowered to carry out investigation proceedings, either with or without authorization from investigating judges or judicial investigators.¹⁰⁰

Empowering Iraq police to conduct investigations, particularly without an order of judicial authority adversely affects the due process rights of persons under investigation. To begin with, the problem is one of legal qualification. Article 51 of the ICCP provides that police officers are deemed to have the necessary expertise to be granted the rank of judicial investigator when they have successfully completed a training programme.¹⁰¹ However, it is possible that the investigation is conducted by someone without the rank of judicial investigator, as is the case under Article 50 of the ICCP, which means losing confidence in the justice system. This is because authority has been vested in public officials who are incapable of conducting this crucial function due to a lack of expertise and basic qualifications.¹⁰²

As already has been shown that another problem associated with police investigations is the lack of supervision from the judicial authority. Consequently, in practice, persons accused in the hands of the police during the pre-trial stage of the investigation are often abused and intimidated. An array of reports has shown that the police have been used as instruments of repression rather than of justice, and are linked with corrupt practices and discriminatory treatment.¹⁰³ Jane Stromseth et al. have pointed out that “more often, existing police forces are poorly trained and disciplined, distrusted by the public, and often notorious for criminal activity and

¹⁰⁰ ICCP, Articles 49, 50, 52.

¹⁰¹ See Article 51 of the ICCP in (n 56)

¹⁰² Office of the United Nations High Commissioner for Human Rights, *Human Rights Standards and Practice for the Police Expanded Pocket Book on Human Rights for the Police* (n 58).

¹⁰³ The Reports of Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI); Reports of International NGOs such as Human Rights Watch and Amnesty International dating to between 2004 and 2013; The Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human rights report (Baghdad, 2011) 62.
{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز- وزارة حقوق الانسان العراقية}

abuse of human right.”¹⁰⁴ In the same context, the Independent Commission on the Security Forces of Iraq has confirmed that the Ministry of the Interior is crippled by corruption and sectarianism, and poses the main obstacle to developing an effective police force in Iraq.¹⁰⁵

The limited number of judicial investigators capable of carrying out criminal investigations remains an issue in Iraq. Even though the quantity of competent police officers could be an explanatory factor, the limited number of competent judicial investigators should not mean that criminal proceedings are conducted by those with inadequate qualifications and expertise, to the detriment of professional standards and human rights.

Furthermore, the Iraq justice system has not put in place an independent mechanism to check police misconduct during investigations. According to reputable human rights reports, all the allegations of abuse and denial of due process involve persons held in police detention and subjected to excessive police powers during the initial investigation.¹⁰⁶

In order to move towards a possible solution it should be recognised that police investigations are highly undesirable and need to be kept to a minimum. The investigations should only be carried out by qualified investigators under the firm control of the investigating judge and at the earliest opportunity. Criminal proceedings should not be conducted by the police except when the latter are equipped with the necessary minimum of professional skills in law, human rights, and technical knowledge, and their conduct in criminal investigations must be in keeping with recognized international guidelines.¹⁰⁷

¹⁰⁴ Jane Stromseth, David Wippman and Rosa Brooks (American Society of International Law), *Can Might Make Rights? Building the Rule of law After Military Interventions* (2nd ed., 2006, Cambridge University Press) 208.

¹⁰⁵ Robert Perito and Madeline Kristoff, *Iraq's Interior Ministry: The Key to Police Reform* (United States Institute of Peace, July 2009) available at http://www.usip.org/sites/default/files/iraq_interior_ministry_perito_kristoff.pdf accessed 1 February 2012.

¹⁰⁶ Amnesty International, *Iraq: A Decade of Abuses*, (n 49) 42; the Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report: 2012 (Bagdad, June 2013) 6.

¹⁰⁷ See UN General Assembly, “Code of Conduct for Law Enforcement Officials” Adopted by resolution 34/169 of 17 December 1979 para 10; Amnesty International, *Basic Human Rights Standards for Law Enforcement Officials* (December 1998 AI Index POL 30/04/98).

It is worth mentioning here that improved respect for human rights during police inquiries would represent an important move forward with regard to the UN's conception of the rule of law. All procedural safeguards given to a person facing criminal proceedings before an investigating judge must also be given to those undergoing police investigations. The human rights standards guaranteed by the ICCPR require that the rights of due process should be available "as soon as a suspect is questioned by the police at a police station, and categorically requires it once the suspect is arrested or detained ... and perhaps even earlier."¹⁰⁸ The fact is that, as will be seen in next chapters, the reforms to the rights of due process are applied only when the accused person is under judicial authority, while the due process rights related to police investigation are neglected and overlooked. In particular, there is no obligation to provide an audio/video tape recording during questioning at police station or to provide a lawyer. Despite the lack of procedural due process at this stage of proceedings, observers note that statements given to the police have been regarded the core evidence that used by courts to base convictions in numerous cases.¹⁰⁹

In conclusion, the important elements of reform that need to be undertaken in order to validate police involvement in inquiries are those that provide basic respect for human rights, ensure the attainment of adequate professional skills and guarantee police accountability in regard to malpractice against individuals and breach of procedural rules. In all cases, police investigations should be subject to an actual and effective supervision. Finally, the ICCP must define clearly the limits to the powers of the police when they are carrying out inquiries. In particular, they are to be prohibited from conducting interviews with a person under investigation and their arrest powers limited to cases of *flagrant delicto*, and there must be real remedies in the event of abuse of persons under investigation.

¹⁰⁸ Kevin Jon Heller, "A Poisoned Chalice: The Substantive and Procedural Defects of the Iraqi High Tribunal" (2006-2008) 39 *Case Western Reserve Journal of International Law* 270.

¹⁰⁹ Amnesty International, *Iraq: A Decade of Abuses* (n 49); The Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human rights report (Baghdad, 2009) 80.

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الانسان العراقية}

3.4.2. The public prosecutor

International human rights law considers the independence and impartiality of the prosecutor to be one of the fundamental pillars of justice and indispensable for the maintenance of due process in criminal justice systems and the rule of law. There are many significant aspects to the duties of public prosecution authorities in criminal proceedings.¹¹⁰ However, it is likely that under international rules and practice of the HRC it is unclear whether it is possible for the public prosecutor to be a complainant against an accused person and to be the investigator at the same time.

In any case, the scope of Article 3 of the Public Prosecutor Law is the cause of concern. If a public prosecutor responsible for formulating the complaint is also able, in certain situations, to conduct the investigation, then the impartiality of the proceedings may be affected due to a conflict of interests.¹¹¹ The impartiality of the investigation may be open to doubt because the prosecutor who has the authority to lodge a complaint in the public interest will be seeking incriminating evidence, whereas an investigator must seek every kind of evidence, both for and against the person under investigation. As a result, in the view of the present author, Article 3 of the Public Prosecutor Law is not practical and it needs to be repealed.

It has been observed that under international law there are no explicit provisions that are relevant to the fair conduct of the proceedings during pre-trial stage. It is to be recommended that the fair conduct of proceedings during the pre-trial proceedings should be under the protection of international human rights law and brought into line with the practice of international bodies.¹¹² Similar provisions that are relevant to the fair conduct of the judicial proceedings during trial, as described in Article 14 of the ICCPR, could be brought to bear on the current problem and applied at the pre-trial

¹¹⁰ UN Guidelines on the Role of Prosecutors, 1990 adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990.

¹¹¹ In the view of the HRC “it is inherent in the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issue dealt with.” See *Sandzhar Ismailov v Uzbekistan* UN Human Rights Committee Communication No (1769/2008) 25 March 2011 para 7.3; see also *Youzef Gapirjanov v Uzbekistan* UN Human Rights Committee Communication No (1589/2007) 18 March 2010 para 8.4; *Iskandarov v Tajikistan* UN Human Rights Committee Communication No (1499/2006) 30 March 2011 para 6.5; *Pavel Kirpo v Tajikistan* UN Human Rights Committee Communication No (1401/2005) 27 October 2011 para 6.2.

¹¹² Article 14 of the ICCPR provides that “in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

stage of the proceedings.¹¹³ By this means the impartiality of the proceedings and the provisions for a fair trial would be reinforced. It is illustrative here to mention the practice of the ECtHR. The latter states that

“Even if the primary purpose of Article 6, as far as criminal proceedings are concerned, is to ensure a fair trial by a “tribunal” competent to determine “any criminal charge”, it does not follow that the Article has no application to pre-trial proceedings...the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings”¹¹⁴

This practice of the ECtHR could be used as a model for protecting the impartiality of the proceedings during the pre-trial stage, and on the modelled on the same procedural rights, which are important to the fair conduct of judicial proceedings, could be provided in all criminal proceedings, as well as in the proceedings of the pre-trial phase.

3.4.3. The investigating judge

Let us now consider some problematic issues regarding Iraqi investigating judges. In the Iraqi system, the investigating judge undertakes many functions, such as investigation, detention and referral of the accused person to trial, and is involved in the final judgment in less serious crimes. These functions have conflicting interests, and it is possible that the investigating judge could be influenced by his initial judgment when deciding whether to detain the suspect and commit him to trial. The Human Rights Committee, however, held that, in the interests of a fair hearing, “impartiality of the court implies that judges must not harbour preconceptions about the matter put before them.”¹¹⁵ In contradiction of this principle, the Iraqi legal system, under Article 134 of the ICCP, empowers the investigating judge to judge a person accused of infractions.¹¹⁶ It seems fair to say that, even in less complicated

¹¹³ The HRC stated, “in order to safeguard the rights of the accused under paragraphs 1 and 3 of article 14, judges should have authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution.” UN Human Rights Committee, General Comment No 13, (n 91). It should be borne in mind that the general comment No 13 is replaced by the general comment No 32, (n 90).

¹¹⁴ *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008), (2009) 49 EHRR 19 paras 50, 52; also see Stefan Trechsel & Sarah J. Summers, *Human Rights in Criminal Proceedings* (2006, Oxford University Press) 33.

¹¹⁵ *Arvo O. Karttunen v Finland* UN Human Rights Committee Communication, (n 20) para 7.2.

¹¹⁶ ICCP, Article 134 (n 18).

cases, the judgment will be biased, the judge having already acted as an investigating judge in the same case.¹¹⁷ This is a shortcoming that needs to be redressed due to its adverse effects on the right to a fair trial clearly guaranteed under the rules of international human rights law.¹¹⁸

Furthermore, as mentioned previously, wide powers and a combination of functions are invested in the investigating judge in the pre-trial investigations. Amongst these different judicial functions or powers are those permitting him to investigate, to detain and to refer an accused person to trial. Thus the question arises as to whether the impartiality of the investigating judge may be undermined as a result of this combination of functions. This issue of concern is relevant not only to the Iraqi legal system but also to other countries with civil law jurisdictions in which the investigating judge holds the same status as in Iraq. International human rights law is silent regarding this question. However, there is good reason to suppose that difficulties will arise when any agency combines various functions of the kind in question while under a duty to maintain its independence throughout the stages of the investigation proceedings. Heller expresses the same view when he states that

“An investigative judge faced with the decision to detain a suspect he has personally investigated cannot be expected to have no preconceptions about the correct choice; allowing the suspect to go free would be tantamount to admitting that his investigation was inadequate ... such a conflict of interest is incompatible with the *appearance* of impartiality, which Article 14 expressly forbids ... the investigative judge can both interrogate and detain creates an unacceptable risk that he will use the threat of detention to coerce a suspect into confessing.”¹¹⁹

Independence, competency and impartiality will be damaged when the same agency or authority undertakes these different functions of the investigatory system. This may be the reason why the French system upholds the separation of the agencies that conduct the criminal proceedings as being necessary for the attainment of both the welfare of the suspect and the interests of justice. In the French system of civil law,

¹¹⁷ Case law confirmed this point on many occasions, for example: *De Cubber v Belgium* App no 9186/80 (ECtHR, 26 October 1984), (1985) 7 EHRR 236 para 23; for more detail, see the comment on the European Court of Human Rights decision in *Fey v Austria* by Stefan Trechsel & Sarah J. Summers, *Human Rights in Criminal Proceedings* (n 114) 70; *Fey v Austria* App no 14396/88 (ECtHR, 24 February 1993) para 16.

¹¹⁸ Article 14 of the ICCPR; for more detail see Stefan Trechsel & Sarah J. Summers, *Human Rights in Criminal Proceedings* (n 114) 69.

¹¹⁹ See Kevin Jon Heller, (n 108) 275.

the investigating judge who is responsible for conducting the investigation is separate from the judge who is responsible for the decision concerning detention.¹²⁰

In the Iraqi legal system, the investigative judge is authorized both to investigate the case and to decide whether to transmit it to the competent criminal court at the end of the investigation stage. There are clearly grounds for recommending to the Iraqi legislature that the authority to refer the accused to trial, particularly in more serious cases, should be invested in specialist judges.¹²¹

With regard to the order of referral for trial, the discussion has shown that there is a discrepancy between Iraqi law and binding international rules. The procedure for ordering a referral for trial should be adjusted in order to meet international standards, and there should be a statutory duty upon the investigating judge to explain in clear language the reasons for ordering the case to be sent to trial. When the reasons for the order to send the case to trial have been clearly stated, the accused should be notified in an appropriate manner.

¹²⁰ The French Code of Criminal Procedure, 2000.

¹²¹ This is of the utmost importance to the securing of human rights in Iraq, particularly since the current criminal legal system is highly reliant on the death penalty. Indeed, the decision to refer the case to trial should be in the hands of those judges who can “perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights.” See UN Guidelines on the Role of Prosecutors, 1990 adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990, guideline 12.

CHAPTER FOUR

THE RIGHT TO LIBERTY IN THE REFORMED IRAQI CRIMINAL JUSTICE SYSTEM

Introduction

Previous chapters have ascertained that since 2003, major efforts have been made to reform the post-Saddam justice system in Iraq. This chapter argues that even though these changes in the new Iraqi system were expected to have adequately covered the right to liberty, the law and its implementation may still be as in the past - inconsistent with international due process. In any case, the answer to this claim can only be determined through the measuring of the post-Saddam criminal justice system against international due process rights. The main concerns lie with inadequate provisions that give law enforcement officials wide discretion to deprive a person of his liberty prior to any guilt being determined by the court. Remedying the defective measures of arrest and detention is of crucial importance in order to bring the new Iraqi system in line with binding international human rights law.

Thusly, the question to be addressed here is whether the post-Saddam reforms in law and working practice secure the basic measures necessary to protect human rights during the denial of the suspect's liberty in the course of arrest and detention. In order to achieve this objective the first section of this chapter endeavours to set out international human rights standards. This will pave the way for dealing with inadequacies in the national rules and the critical issues, in the context of proceedings of arrest and detention, which will be identified in the subsequent two sections. Section two considers the inadequacy of procedural safeguards in the reformed Iraqi criminal justice system regarding protection of the right to liberty. This comes in two subsections: the process of arrest and the process of detention. Section three draws the previous discussion together by applying the international human rights rules and clarifies any disparity between these rules and the situation in Iraq.

4.1. International rules

Understanding international rules in light of case-law is necessary for pinpointing the defective areas in the Iraq reformed justice system to see where it fails to comply. In this regard, the ICCPR confers what the essential rights are for a person who is under criminal process. The right to liberty is contained in the provisions of Article 9 which states “...No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.” By virtue of this Article, several human rights are available to a suspect during the process of deprivation of liberty, which could be underlined as follows:

4.1.1. Prevention of arbitrary arrest or detention

Within the concept of “lawful arrest or detention” in the ICCPR, there is an obligation imposed on every State party to enact effective legal provisions to protect the rights of individuals from arbitrary arrest or detention. In the view of the jurisprudence of the HRC, national legal texts must clearly include all given guarantees in light of the provisions of Article 9 of the ICCPR, and any violation must be redressed.¹ Through the notion of “liberty and security”, this Article secures for everyone, even outside the context of formal deprivation of liberty, both safety against harm to the body and freedom of the body against confinement.²

¹ It has been stated that “the State party has undertaken to ensure to all individuals within its territory or subjected to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established”, *Aboussedra v Libyan Arab Jamahirya* UN Human Rights Committee Communication No (1751/2008) 25 October 2010 para10; *Antti Vuolanne v Finland* UN Human Rights Committee Communication No (256/1987) 7 April 1989 para 9.5; *Sarma v Sri Lanka* UN Human Rights Committee Communication No (950/2000) 16 July 2003 paras 9.4, 11; see also the General Comment No. 31, para. 15 which states, “failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant”, Human Rights Committee, General Comment No. 31, (CCPR/C/21/Rev.1/Add.13, 26/05/2004) “The nature of the General Legal Obligation Imposed on States Parties to the Covenant” adopted on 29 March 2004.

² *Antti Vuolanne v Finland*, *ibid*, para 9.3; *Bakhtiyari v Australia* UN Human Rights Committee Communication No (1069/2002) 29 October 2003 para 9.5; *Delgado Páez v Colombia* UN Human Rights Committee Communication No (195/1985) 23 August 1990 paras 5.4, 5.6; *Mariam Sankara et al v Burkina Faso* UN Human Rights Committee Communication No (1159/2003) 28 March 2006 para 12.3; *Carlos Dias v Angola* UN Human Rights Committee Communication No (711/1996) 20 March 2000 para 8.3; see also UN Human Rights Committee, Draft General Comment No 35, (107th session, Geneva, 11-28 March 2013) “Article 9: Liberty and security of person” para. 2, 3.

In *Conteris v Uruguay*, the HRC recognised that the manner of an arrest may violate the rights of persons deprived of liberty under Article 9(1).³ A similar interpretation of this provision can be derived from the jurisprudence of the ECtHR, when it determined in the case of *Bozano v France* the security of a person during the process of arrest is protected under the rules of the convention.⁴ Hence, the scope of protection is extended to encompass the right to liberty and is applicable to the right of security as well, so as to keep an arrested person safe against abuse.

The right to liberty is not absolute but at the same time, arbitrary deprivation of liberty is prohibited. State parties have duties to provide adequate legal rules against wrongful deprivation of liberty and appropriate measures should be taken in national law to redress any violation in this regard.⁵ Exercising powers of arrest or detention without the adopted adequate provisions may constitute a violation of the binding international provisions that protect the liberty of persons.⁶ The HRC recognised that “the arrest or detention that lacks any legal basis is arbitrary ... they must be carried out with respect for the rule of law.”⁷ However, the previous statement does not mean that national law must handle every event since some degree of discretion is given to the domestic authority in carrying out the deprivation of liberty, as long as it is carried out in good faith and on an objective basis.⁸ Also, under the provisions of Article 4 of the ICCPR, the right to liberty may be derogated in emergency situations when it is necessary to protect the nation.⁹ Applicable laws could be subjected to temporary

³ *Conteris v Uruguay* UN Human Rights Committee Communication No (139/1983) 17 July 1985 para 10.

⁴ *Z and others v the United Kingdom* App no 29392/95 (ECtHR, 10 May 2001), (2002) 34 EHRR 3 para 54; *Madoui v Algeria* UN Human Rights Committee Communication No (1495/2006) 28 October 2008 para 7. 2.

⁵ UN Human Rights Committee, ‘Concluding observation: Algeria 1998’ (Sixty-third session, 18 August 1998) CCPR/C/79/Add.95 para. 12(b); UN Human Rights Committee, ‘Concluding observation: Guatemala 2012’ (104th session, 9 April 2012) CCPR C/GTM/CO/3 para. 16.

⁶ Keir Starmer, *European Human Rights Law* (1999, Legal Action Group) 101; see also, David Harris et al., *The Law of the European Convention on Human Rights* (2nd ed., 2010, Oxford University Press) 122.

⁷ UN Human Rights Committee, ‘Concluding observation: Algeria 1998’ (n 5) para. 12(a); UN Human Rights Committee, Draft General Comment No 35, (n 2) paras 11, 12; *Bousroual v Algeria* UN Human Rights Committee Communication No (992/2001) 30 March 2006 para 9.5; *Yklymova v Turkmenistan* UN Human Rights Committee Communication No (1460/2006) 31 July 2009 para 7.2.

⁸ *Z and others v the United Kingdom* (n 4) para 103; *A and other v the United Kingdom* App no 39692/09, 40713/09 & 41008/09, (ECtHR, 15 March 2012) para 60; *Bozano v France* App no 9990/82 (ECtHR, 18 December 1986), (1987) 9 EHRR 297 para 55.

⁹ Similarly see Article 15 of the ECHR.

derogation under specified conditions.¹⁰ For these reasons, the surrounding circumstances may play a vital role in rendering the conduct of an arrest in accordance with or contrary to Article 9.

The prohibition of arbitrariness requires that deprivation of liberty must be predictable, reasonable and appropriate. As a consequence, the deprivation of liberty may be deemed unlawful under international standards even if it is in compliance with national law.¹¹ The HRC held that “Arbitrariness is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.”¹² Bearing in mind that the permissible reasons for depriving a person of liberty are not elaborated on by international rules, however, these reasons must comply with the required necessity.¹³ The HRC has identified proportionality along with predictability as basic principles to conduct any procedure of arrest or detention. It clarified that “the grounds and procedures prescribed by law must not be unreasonably or unnecessarily destructive of the right to liberty of person.”¹⁴

Added to that, the scope of discretionary power given to the authorities must be clearly mentioned by law and must be subjected to independent judicial oversight. Any vagueness in this regard may render the arrest arbitrary and unlawful.¹⁵ The HRC

¹⁰ Article 4(1) of the ICCPR: “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed...”; see also UN Human Rights Committee, General Comment No. 29, (CCPR/C/21/Rev.1 /Add. 11) “States of Emergency: (article 4)” adopted on 24 July 2001.

¹¹ The HRC reiterated that “deprivation of liberty is permissible only when it takes place on such grounds and in accordance with such procedure as are established by domestic law and when this is not arbitrary” *Iskandarov v Tajikistan* UN Human Rights Committee Communication No (1499/2006) 30 March 2011 para 6.4; see also *Erkalo v Netherlands* App no 89/1997/873/1085 (ECtHR, 2 September 1998), (1999) 28 EHRR 509 paras 52, 56.

¹² UN Human Rights Committee, Draft General Comment No 35, (n 2) para 13; see also *Gorji-Dinka v Cameroon* UN Human Rights Committee Communication No (1134/2002) 1 April 2005 para 5.1; *Hugo Van Alphen v The Netherlands* UN Human Rights Committee Communication No (305/1988) 23 July 1990 para 5.8.

¹³ UN Human Rights Committee, Draft General Comment No 35, (n 2) para 15; see also *Borisenko v Hungary* UN Human Rights Committee Communication No (852/1999) 14 October 2002 para 7.4.

¹⁴ UN Human Rights Committee, Draft General Comment No 35, (n 2) para. 15; *Fardon v Australia* UN Human Rights Committee Communication No (1629/2007) 10 May 2010 para 7.3.

¹⁵ Human Rights Committee, General Comment No. 8, (Sixteenth session, 1982) “Right to Liberty and Security of Persons: (Article 9)” adopted on 30/06/1982, para.1; see also *Olsson v Sweden* App no 10465/83 (ECtHR, 24 March 1988), (1989) 11 EHRR 259 para 61(c) which states “A law which confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard

held that “interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.”¹⁶ As a result, the restricting of liberty must not exceed what is prescribed by law. At the same time, proportionality should be an essential ingredient of domestic procedural rules.

Furthermore, an arrest should not be conducted unless an official authority on a reasonable suspicion establishes it.¹⁷ Under international rules, the conduct of an arrest is forbidden, except where there is reasonable suspicion that a person has committed an offence, necessary to prevent committing an offence or to prevent fleeing after having committed an offence.¹⁸ The requirement of reasonable suspicion is a notable safeguard by which people are protected against arbitrary deprivation of liberty. In the view of the HRC, the deprivation of liberty must not only compliance with domestic rules but also “reasonable in all the circumstances”¹⁹

In case law, attention has been concentrated on the circumstance at the moment of arrest as a vital resource to determine the objective test of reasonableness of deprivation of liberty. In the case of *Fox, Campbell and Hartley v UK* the European Court found that the arrest should be based on rational information or facts regardless of whether the person who made the arrest acted in genuine and honest faith, and whether the person arrested is an offender or not.²⁰ Hence, the reasonable suspicion leading to arrest is greater than merely honest belief. The suspicion might be considered unreasonable regardless of what was in the mind of the police at the moment of arrest. A subjective test in this regard leaves wide opportunity to breach the right to liberty under the excuse that the person arrested may have committed the offence.

to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.”

¹⁶ Human Rights Committee, General Comment No. 16, (Twenty-third session, 1988) “Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies” U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994), para. 4.

¹⁷ *Fox, Campbell and Hartley v the United Kingdom* App no 12244/86; 12245/86; 12383/86 (ECtHR, 30 August 1990), (1991) 13 EHRR 157 para 33.

¹⁸ Similarly see ECHR, Article 5(1) (c) that explicitly states this right in its text.

¹⁹ *Hugo Van Alphen v The Netherlands* UN Human Rights Committee, (n 12) para 5.8.

²⁰ *Fox, Campbell and Hartley v the United Kingdom*, (n 17) para 33; see also Helen Fenwick, *Civil Liberties and Human Rights* (4th ed., 2007, Routledge - Cavendish Publishing) 1152.

On the basis of existing case-law it is right to conclude that what might justify an arrest in some cases is not always deemed so in others, since the circumstances vary between cases.²¹ In the case of *Feraru v Moldova* it was held that “What may be regarded as ‘reasonable’ will however depend upon all the circumstances.”²² Therefore, in serious offences like crimes of terrorism such as in the case of Fox, the reasonableness of suspicion may be satisfied, even if the grounds for arrest might be built on information from secret sources for security reasons. The justification lies in the special nature of threats that such crimes pose against society. It has been held that the procedural safeguards should not be applied in such a manner as to put disproportionate difficulties in the way of the public authority in taking effective measures to counter serious crimes.²³ However, this does not mean violating substantive due process. It is about striking the right balance. The same argument could be applied to the requirements of the approach to serious crimes. In cases of serious crime, where the measure of reasonable grounds for arrest may be more flexible, it is crucial for upholding the right to liberty that this flexibility doesn’t supersede the bounds of what is reasonable.²⁴

The normal requirements of reasonable suspicion at the time of arrest by police neither need to establish that an offence has actually occurred, nor the precise nature of the offence. This is acceptable as long as there are reasonable reasons for taking a person into custody.²⁵ It is not relevant whether the suspect is eventually charged or not.²⁶ In addition, the amount of required reasonable suspicion in the process of arrest

²¹ *Murray v the United Kingdom* App no 14310/88 (ECtHR, 28 October 1994), (1995) 19 EHRR 193 para 55; *O’Hara v the United Kingdom* App no 37555/97 (ECtHR, 16 October 2001), (2002) 34 EHRR 32 paras 44, 50; see also, Ben Emmerson & Andrew Ashworth, *Human Rights and Criminal Justice* (1st ed., 2001, London Sweet& Maxwell) 181.

²² *Feraru v Moldova* App no 55792/08 (ECtHR, 24 January 2012) para 50.

²³ *Ahmet Özkan and Others v Turkey* App no 21689/93 (ECtHR, 6 April 2004) para 390; *İpek and Others v Turkey* App no 17019/02, 30070/02 (ECtHR, 3 February 2009) para 30; see also Bedri Eryilmaz, *Arrest and Detention Powers in English and Turkish Law and Practice in the light of the European Convention on Human Rights* (2000, Martinus Nijhoff Publishers) 218.

²⁴ *Murray v the United Kingdom*, (n 21) para 52; Fox, Campbell and *Hartley v UK*, (n 17) para 32.

²⁵ *Borisenko v Hungary* UN Human Rights Committee, (n 13) para 7.2; see also *O’Hara v the United Kingdom*, (n 21) paras 34 & 36, in this case the suspicion against the applicant who had been arrested on suspicion of terrorist murder, was based on specific information that he was involved in the crime of murder and the purpose of the detention was to confirm or dispel that suspicion. The Court thus agreed with the domestic courts’ assessment regarding the legality of the arrest and detention, and deemed that the procedures comply within the provision of the convention, Article (5); see also Steve Foster, *Human Rights and Civil Liberties* (2003, Person Education Limited) 75.

²⁶ *Murray v the United Kingdom*, (n 21) para 55; *O’Hara v the United Kingdom*, (n 21); see also Ben Emmerson & Andrew Ashworth, *Human Rights and Criminal Justice* (n 21) 181.

is less than required to charge the suspect or to justify conviction at the end.²⁷ It is important to keep in mind that, the deprivation of liberty to collect more information as the ultimate purpose is prohibited.²⁸ To do otherwise would mean affording too much power in the hands of the investigator to arrest on the vague grounds that “we are investigating.” What follows is that police can investigate without depriving the liberty of a person and that the suspect should be released if it appears during the inquiry that he is neither responsible, nor has committed the criminal offence for which he has been arrested.

4.1.2. Right of a suspect to be informed about the reasons of an arrest

Under international rules even though an arrest is based lawfully on reasonable grounds, it should be conducted in accordance with other requirements in order to be valid. Notably, an arrested person must be informed at the time of arrest, the reasons for the arrest.²⁹ This guarantee should be satisfied by the official who conducts the proceedings, through using understandable language for this purpose. Several issues need to be considered here: whether this information should be given to the suspect directly at the moment of arrest or at a specific time. In addition, we need to consider whether there is a minimum amount of information to be given in this regard or not, and whether or not the notification should be in writing.

The practice of the HRC makes clear that the amount of information should include the general legal basis of the arrest, and must be given immediately upon arrest.³⁰ The purpose is to enable the suspect to be aware of the exact reason for arrest, in order to challenge the lawfulness of the accusation and detention at the earliest opportunity.³¹ The HRC thus held that “One major purpose of requiring that all arrested persons be

²⁷ *Brogan v the United Kingdom* App no 11209/84; 11234/84; 11266/84; 11386/85 (ECtHR, 29 November 1988), (1989) 11 EHRR 117.

²⁸ *Fox, Campbell and Hartley v the United Kingdom*, (n 17); see also *Cebotari v Moldova* App no 35615/06 (ECtHR, 13 November 2007) para 48; *İpek and Others v Turkey*, (n 23) para 30.

²⁹ The ICCPR, Article 9(2) stipulates that “anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.” Similarly ECHR, Article 5(2) stipulates that “everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.”

³⁰ *Drescher Caldas v Uruguay* UN Human Rights Committee Communication No (43/1979) 21 July 1983 para 13.2.

³¹ Stephen Grosz et al., *Human Rights* (2000, Sweet & Maxwell) 210; see also *Wilson v The Philippines* UN Human Rights Committee Communication No (868/1999) 30 October 2003 para 7.5.

informed of the reasons for the arrest is to enable them to seek release if they believe that the reasons given are invalid or unfounded.”³² The significance of the right concerned should not be underestimated because its impact may affect the whole proceedings, in particular, if the case is being sent to trial. Subsequently, a defect in this regard may irretrievably affect fair trial proceedings under Article 14(2) of the Covenant.

Notifying a person of the reason for arrest need not be made in writing or by formal notification, so long as it is done clearly in the initial process of arrest.³³ The HRC has deemed the provisions of the ICCPR to be breached when the suspect was informed of the reason for his arrest after a considerable time had elapsed.³⁴ In *Peter Grant v Jamaica*, the HRC took the position that the one week delay in informing the applicant of the reality of the reasons of his arrest infringed due rights. In this case, the Committee provided that “the State party is not absolved from its obligation under article 9, paragraph 2, of the Covenant to inform someone of the reasons of his arrest and of the charges against him, because of the arresting officer's opinion that the arrested person is aware of them.”³⁵ However, what can be derived from the HRC finding such as in *Borisenko v Hungary* is that some delay in giving such information may be justified under certain circumstances surrounding each case.³⁶ The ECtHR recognised a similar finding in *Murray v the United Kingdom* “the period of several hours during which the reasons for the arrest emerged from the police questioning cannot be regarded as falling outside the constraints of time imposed by the notion of promptness.”³⁷

Let us consider the information that must be given to the arrested person. Bearing in mind that this is regarding the grounds for taking a person's liberty, the question arises whether, in order to render a suspect safe from arbitrary arrest, it is reasonable

³² UN Human Rights Committee, Draft General Comment No 35, (n 2) para 25; *Campbell v Jamaica* UN Human Rights Committee Communication No (248/1987) 30 March 1992 para 6, 3.

³³ *Peter Grant v Jamaica* UN Human Rights Committee Communication No (597/1994) 22 March 1996 para 8; UN Human Rights Committee, Draft General Comment No 35, (n 2) para 26; *Lutsenko v Ukraine* App no 6492/11 (ECtHR, 3 July 2012), (2013) 56 EHRR 22 paras 77, 78; *Lamy v Belgium* App no 10444/83 (ECtHR, 30 March 1989), (1989) 11 EHRR 529 para 31.

³⁴ *Campbell v Jamaica* UN Human Rights Committee, (n 32) para 6.3.

³⁵ *Peter Grant v Jamaica* UN Human Rights Committee, (n 33).

³⁶ *Borisenko v Hungary* UN Human Rights Committee, (n 13) paras 4.2, 7.3.

³⁷ *Murray v the United Kingdom*, (n 21).

to demand that the arrester informs the suspect about the precise nature of the offense at the time of arrest. As already noted, the police may not always be able to convey a detailed reason, beyond the nature of the charge e.g. theft, murder etc. The most common reason is that the requisite data is not necessarily in the hands of the arresting officials, but would be possible to be provided at a later stage. The fact is that the international standard is flexible and is applied to the particular circumstances in each case. Some flexibility regarding the delay or amount of notification might be permissible depending on the circumstances. Consequently, it has been claimed that “the extent of the information required will depend on the circumstances.”³⁸ Yet, the abiding rule is that, as soon as possible according to the circumstances, a suspect should be informed in broad terms about the legal and actual reason for the deprivation of his liberty.³⁹ Further, for the purpose of this right, an interpreter should be provided immediately when the suspect does not speak the language of the arrester.⁴⁰

Accordingly, under the practice of the HRC a period of a few hours between the arrest and providing the reasons for arrest did not violate the right of a suspect to be informed of the reasons for his arrest promptly.⁴¹ Bearing in mind, the amount of information in this regard must be sufficient. The HRC recognised that “it was not sufficient simply to inform the authors [arrestees] that they were being arrested for breach of State security, without any indication of the substance of the complaint against them.”⁴² The ECtHR also held that it is not enough to comply with the requirements of the right in the event of the applicants simply only being told that they must surrender to arrest on suspicion of being terrorists.⁴³

It seems that flexibility is applicable whenever the reasons behind the arrest and detention of the suspect are for emergency or security reasons. It may be sufficient for

³⁸ *Nowak v Ukraine* App no 60846/10 (ECtHR, 31 March 2011) para 63; *Fox, Campbell and Hartley v the United Kingdom*, (n 17) para 40; see also Ben Emmerson & Andrew Ashworth, *Human Rights and Criminal Justice* (n 21) 184.

³⁹ See a consistent line of ECtHR cases under Article 5(2), for example *Nowak v Ukraine*, (n 38) para 64; *Z.H. v Hungary* App no 28973/11 (ECtHR, 8 November 2012) para 41.

⁴⁰ *Borisenko v Hungary* UN Human Rights Committee, (n 13) para 7.3.

⁴¹ *Hill v Spain* UN Human Rights Committee Communication No (526/1993) 2 April 1997 para 12.2

⁴² *Wenga and Shandwe v Democratic Republic of the Congo* UN Human Rights Committee Communication No (1177/2003) 31 March 2006 para 6.2; *Nowak v Ukraine*, (n 38) para 64; *Fox, Campbell and Hartley v the United Kingdom*, (n 17) paras 38, 41.

⁴³ *Fox, Campbell and Hartley v the United Kingdom*, *ibid.*

the purposes of informing the suspect about the reality of his arrest to merely inform him about the section of the act under which he has been arrested as long as adequately notified the facts of the alleged offences promptly in police station.⁴⁴ The case of *Fox, Campbell and Hartley* showed that being questioned in relation to specific named allegations was enough to comply with the requirement that people should be informed promptly.⁴⁵ Similarly, in *Murray v the United Kingdom* it was held that a period of a few hours between the arrest and providing the reasons for the arrest was not an infringement of the right concerned, as long as the suspect was subsequently informed sufficiently of such reasons during interrogation at the place of detention.⁴⁶

Some academic research argues that the flexibility of procedural safeguards in this regards adversely influences the right to liberty. It “encourages the police to arrest individuals on vague personal suspicion, not knowing the precise offence of which they are suspected, but hoping to obtain evidence about the commission of offence by asking questions.”⁴⁷ The present author takes the position that the international rules and case law have clearly indicated that the arrested person must be promptly and sufficiently informed of the reasons for deprivation of liberty during the limited time at the beginning of the arrest proceedings. Thus, even if there is a specific view regarding the right concerned in exceptional situations, this does not mean giving undesirable restriction to the suspect’s rights. In any case, even though the standard is flexible according to surrounding circumstances, the breach of the right is prohibited under international law. The flexibility regarding urgent or exceptional situations must not be exaggerated and it must be consistent with the factual requirements of the situation and the safeguards which exist.

4.1.3. Right to be brought promptly before a judge

Article 9(3) of the ICCPR provides that “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to

⁴⁴ *Fox, Campbell and Hartley v UK*, *ibid*, para 41.

⁴⁵ *Fox, Campbell and Hartley v UK*, *ibid*, para 41.

⁴⁶ *Murray v the United Kingdom*, (n 21).

⁴⁷ Bedri Eryilmaz, (n 23) 230.

exercise judicial power...”⁴⁸ This Article stipulates the fundamental obligation, on the state to bring the detained suspect before a judge or other officer who is authorised by law to exercise judicial power promptly. The goal of this obligation is the right to liberty of persons to be free from any wrong interference from the official authority. This cannot be achieved without considering the person’s case by an independent, objective and impartial authority. In the view of the HRC police custody creates “too great a risk of ill-treatment.”⁴⁹ Thus, the right under consideration makes clear that detention, after arrest, can only be ordered by and under the control of the judicial authority. It has been held that “judicial control of interference by the executive with the individual’s right to liberty is an essential feature of the guarantee [...] which is intended to minimize the risk of arbitrariness.”⁵⁰

It is worthy to mention here that the right under consideration does not prevent pre-trial detention altogether, and nobody can deny the significance of detention in relation to a criminal investigation but this must be done in accordance with the law and the rights of individuals. In any case, the detention must not be for the purpose of hidden punishment. Detention is sometimes indispensable in the interest of society and “the effective operation of criminal justice system.”⁵¹ Thus, it must be reasonable, justified, and under the supervision of the competent authority.⁵² For this purpose, the person arrested should be provided with sufficient safeguards. Having been brought into the police station, he has to be brought before a judge or judicial authority promptly.⁵³ Such procedures must be undertaken at an early stage, regardless of

⁴⁸ Similarly ECHR, Article 5(3) provides that “Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ...”

⁴⁹ UN Human Rights Committee, Draft General Comment No 35, (n 2) para 37.

⁵⁰ *McKay v the United Kingdom* App no 543/03 (ECtHR, 3 October 2006), (2007) 44 EHRR 41 para 32; *Brogan v the United Kingdom*, (n 27) para 58; *Bozano v France*, (n 8) para 54.

⁵¹ Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (2nd ed., 2010, Cambridge) 448.

⁵² *Bashasha v Libyan Arab Jamahirya* UN Human Rights Committee Communication No (1776/2008) 20 October 2010 para 7.6; *Medjnoune v Algeria* UN Human Rights Committee Communication No (1297/2004) 14 July 2006 para 8.5; *Schiesser v Switzerland* App no 7710/76 (ECtHR, 4 December 1979), (1979-80) 2 EHRR 417 para 31.

⁵³ *Otabek Akhadov v Kyrgyzstan* UN Human Rights Committee Communication No (1503/2006) 25 March 2011 para 7.4; see also *Brogan v the United Kingdom*, (n 27) para 58.

whether the suspect has applied for redress or not.⁵⁴ At the same time, this is not an alternative for the potential release of the suspect without judicial review.⁵⁵

Having been brought physically before the judicial authority, the arrested person must be given the opportunity to present his defence against alleged offences and to state mistreatment in custody.⁵⁶ The hearing, according to the right under consideration, includes reviewing the legal basis for the arrest to decide whether the arrested person should be released or detention is necessary.⁵⁷

Regarding the notion of promptness, the question that arises is whether there is any specific time by which the promptness can be satisfied. It is important to note that, in some countries domestic laws fix specific time limits; mostly no more than forty-eight hours.⁵⁸ However, the specific time is not laid down by the rules of international law under the ICCPR, but is interpreted and determined on a case-by-case basis. The HRC makes clear that the official must bring an arrested person before a judicial authority within a few days, but there is no unified time because this relies on the specific circumstances of each case. For instance, on one occasion, it was found that a delay of three days before bringing the suspect in front of a judicial authority, without the account from the side of State was a violation of the right concerned.⁵⁹ Whilst, in another case, *McLawrence v Jamaica*, it was found that the delay in bringing the suspect before the judge for one week was a violation of the right concerned.⁶⁰ In its observations on the periodic report of Gabon, the HRC stated that later than a two day period is not permissible.⁶¹

⁵⁴ *McLawrence v Jamaica* UN Human Rights Committee Communication No (702/1996) 18 July 1997 para 5.6; see also Human Rights Committee, General Comment 8, (n 15) para. 2; *T.W. v Malta* App no 25644/94, (ECtHR, 29 April 1999), (2000) 29 EHRR 185 para 43.

⁵⁵ *Ibid.*

⁵⁶ UN General Assembly Res 43/173 ‘The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment’ (9 December 1988) principle 37; UN Human Rights Committee, Draft General Comment No 35, (n 2) para. 35.

⁵⁷ UN Human Rights Committee, Draft General Comment No 35, (n 2) para. 37.

⁵⁸ UN Human Rights Committee, Draft General Comment No 35, (n 2) para. 34.

⁵⁹ *Borisenko v Hungary* UN Human Rights Committee, (n 13) para 7.4, in this case the Committee notes that “the author [suspect] was detained for three days before being brought before a judicial officer. In the absence of an explanation from the State party on the necessity to detain the author for this period, the Committee finds a violation of Article 9, paragraph 3 of the Covenant”; see also Ralph Crawshaw et al., *Human Rights and Policing* (2nd ed., 2007, Brill) 202.

⁶⁰ *McLawrence v Jamaica* UN Human Rights Committee, (n 54) para 5.6.

⁶¹ UN Human Rights Committee, ‘Concluding Observation: Gabon’ (10/11/2000) CCPR/CO/70/GAB, para. 13.

In consequence, it can be observed that a specific time has not been set and therefore there is a margin of discretionary power according to the circumstances of each case separately. In this regard, one notable issue needs to be taken into account by an official authority that "... the scope for flexibility in interpreting and applying the notion of 'promptness' is very limited"⁶² and so the mentioned discretion must be no more than a few days to be in compliance with the sense of international due process. For instance, the HRC has upheld that "the term promptly in Article 9, paragraph 3, must be determined on a case-by-case basis ... delays should not exceed a few days."⁶³ What can be drawn from the above is that extraordinary circumstances in the particular case particularly in serious crimes may justify delay. Otherwise, the HRC recognised that an arrested person must be brought before the judicial authority without any unjustified delay.⁶⁴

Similarly, under the jurisprudence of the ECtHR, in cases involving exceptional circumstances, especially terrorist activities, the domestic authority may be given a degree of flexibility in bringing the suspect before a judicial authority. However, consideration should be given that the assertions of involving terrorist activities do not mean that the investigation authorities in the process of questioning are free from effective control by the domestic courts or supervisory institutions.⁶⁵ In some cases, even in terrorist cases, the ECtHR found the promptness, which is stipulated by Article 5(3) of the ECHR, should not be stretched over a period of four days.⁶⁶

It follows from the foregoing that, with regard to the scope of flexibility in interpreting and applying the notion of promptness, the jurisprudence of the international treaty bodies abstained from fixing precise time for bringing arrested people before judges. This rationale for this is that the requirements of each case's circumstances are the most important factor in assessing the situation. In addition, delay in bringing the arrested person before the judicial authority is justified under

⁶² *Brogan v the United Kingdom*, (n 27) paras 59, 62.

⁶³ *McLawrence v Jamaica* UN Human Rights Committee, (n 54) para 5.6.

⁶⁴ *Levinov v Belarus* UN Human Rights Committee Communication (1812/ 2008) 26 July 2011 para 7.5; UN Human Rights Committee, Draft General Comment No 35, (n 2) para. 34.

⁶⁵ *Nuray Sen v Turkey* App no 41478/98 (ECtHR, 17 June 2003) para 23; see also Daniel Moeckli, *Human Rights and Non-discrimination in the 'War on Terror'* (2008, Oxford University Press) 85.

⁶⁶ *Brogan v the United Kingdom*, (n 27) para 62.

specific circumstances, otherwise any unjustified delay may conflict with the present right under international rules.⁶⁷

4.1.4. Right to review the legality of detention (*Habeas Corpus*)

Article 9(4) of the ICCPR provides that “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay the lawfulness of his detention and order his release if the detention is not lawful.”⁶⁸ This right is separate from the duty on the state to bring the arrested person before the judge and is considered one of the most effective means of inhibiting arbitrary detention. It is rightly stated that it must not be suspended or rendered impracticable under all circumstance even in states of emergency.⁶⁹

By virtue of this right, a detained individual can apply to the court at any stage of pre-trial detention to examine the lawfulness of detention and to order prompt release in the event of the detention being illegal. When the application is considered by the judicial authority, the evidence upon which an individual has lost his liberty must be examined. In this context, the domestic court must obtain any relevant information to decide whether the detention was justified or not.⁷⁰ It seems that as long as the aim of *habeas corpus* is to protect a suspect against arbitrary deprivation of liberty, this ends once the police release the suspect from detention, and thereafter the rules of this right are no longer applicable.

⁶⁷ The HRC stated that the detention of a suspect for two weeks before being brought in front of the judge to challenge the lawfulness of his detention was a violation of the ICCPR’s provisions under Article 9; see also *Otabek Akhadov v Kyrgyzstan* UN Human Rights Committee Communication, (n 53) para 7.4; see also *Medvedyev and others v France* App no 3394/03 (ECtHR, 29 March 2010), (2010) 51 EHRR 39 para 130; *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 May 2005), (2005) 41 EHRR 45 paras 104, 105; Steve Foster, *Human Rights and Civil Liberties*, (n 25) 77; UN Human Rights Committee, ‘Concluding Observation: Gabon’ (n 61) para. 13.

⁶⁸ Similarly ECHR 5(4) provides that “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if a detention is not lawful.”

⁶⁹ UN Human Rights Council, ‘Report of the Working Group on Arbitrary Detention’ (A/HRC/7/4, 10 January 2008) para 64; UN Human Rights Council, ‘Report of the Working Group on Arbitrary Detention’ (E/CN.4/2004/3, 15 December 2003) para. 84.

⁷⁰ *Chahal v the United Kingdom* App no 22414/93 (ECtHR, 15 November 1996), (1997) 23 EHRR 413 paras 130, 131, in this case, the ECtHR held that the domestic courts’ inability to access the information which was the basis of the government’s claim of national security, coupled with the lack of procedural safeguards in the advisory panel’s proceedings, meant that there had been a violation of Article 5(4); see also Steve Foster, *Human Rights and Civil Liberties*, (n 25) 78.

This right has been confirmed by case law. In this context, three requirements can be suggested that need to be considered by a domestic court during its review of the application for *habeas corpus* in order to satisfy international rules.⁷¹ Firstly, the review must be by a court that embraces the essential components of a fair hearing, in particular it must be “independent of the executive and of the parties to the case.”⁷² In addition, it is important that the domestic court within the meaning of international rules must not have merely advisory functions, but must have the competence to decide the lawfulness and to order release if the detention is deemed unlawful.⁷³ Consequently, there is an obligation on the domestic court to carry out all substantive requirements of international rules in order that the lawful detention or release of the suspect can be decided.

Secondly, the ambit of this review in respect of *habeas corpus* is deemed deficient unless the suspect is adequately afforded relevant procedural rights that are available under international and domestic law. For instance, the failure to provide access to legal assistance and reasons for detention may negatively affect the effectiveness of a *habeas corpus* application.⁷⁴ It must be mentioned that, reviewing the lawfulness of detention is not a trial yet it requires hearing the person accused in person with legal assistance on his behalf and then for the state to justify detention. Therefore, it is rightly stated that “*habeas corpus* is closely linked to the right of access to legal counsel and effective legal assistance.”⁷⁵ In *Sanchez-Reiss v Switzerland* it has been

⁷¹ *Brogan v the United Kingdom*, (n 27) para 65; see also Ben Emmerson & Andrew Ashworth, *Human Rights and Criminal Justice* (n 21) 188.

⁷² *M. I. Torres v Finland* UN Human Rights Committee Communication No (291/1988) 2 April 1990 para 7.2; see also *Benjamin and Wilson v the United Kingdom* App no 28212/95 (ECtHR, 26 September 2002), (2003) 36 EHRR 1 para 33; see also for more details Stephen Grosz et al., *Human Rights* (n 31) 217.

⁷³ *Danyal Shafiq v Australia* UN Human Rights Committee Communication No (1324/2004) 31 October 2006 para 7.4; *Aboussedra v Libyan Arab Jamahiriya* UN Human Rights Committee, (n 1) para 7.6; *Saed Shams et al v Australia* UN Human Rights Committee Communication No (1255/2004 & 1256/2004 & 1259/2004 & 1260/2004 & 1266/2004 & 1268/2004 & 1270/2004 & 1288/2004) 20 July 2007 para 7.3; *Svetoslav Dimitrov v Bulgaria* App no 55861/00 (ECtHR, 7 February 2008) para 71; *X v the United Kingdom* App no 7215/75 (ECtHR, 5 November 1981), (1981) 4 EHRR 188 para 61.

⁷⁴ *Mooren v Germany* App no 11364/03 (ECtHR, 9 July 2009), (2010) 50 EHRR 23 para 124; *Akwanga v Cameroon* UN Human Rights Committee Communication No (1813/2008) 22 March 2011 para 7.4; see also *Athary v Turkey* App no 50372/09 (ECtHR, 11 December 2012) para 40; Richard Clayton & Hugh Tomlinson, *The Law of Human Rights* (2nd ed., 2009, Oxford University Press) 649.

⁷⁵ UN General Assembly, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, (n 56) A/RES/43/173, Principles 11, 17 and 18; see also Javaid Rehman, *International Human Rights Law* (2nd ed., 2010, Person Education Limited) 203; see also Dato’ Param Kumaraswamy & Manfred Nowak, *Human Rights in Criminal Justice Systems*, 9th Informal ASEM Seminar on Human Rights (2009, Strasbourg, France) 24, at

indicated that the possibility of submitting written comments would have been an appropriate procedure in proceedings to challenge the lawfulness of detention.⁷⁶ It seems that the right allows a detainee to express himself and a court must take that into account when determining its decision.

Thirdly, the judicial review of detention should be done in speedy fashion.⁷⁷ While this is not strictly designed for applications of *habeas corpus*, expeditiousness applies to all proceedings. The HRC makes clear that “persons deprived of liberty are entitled not merely to take proceedings, but to receive a decision, and without delay.”⁷⁸ In this regard, from various cases it can be noted that the reasonable speed in which the process of *habeas corpus* must be carried out may rely on the circumstances.⁷⁹ It must be born in mind that undue delay, even in exceptional situations does not absolve the domestic authority from its obligation to respect the right of having the legality of detention promptly reviewed.⁸⁰ In a similar vein, the right is a continuous one. In other words a detainee can demand to review the legality of his detention many times. However, it may be reasonable to disallow this until a reasonable time has elapsed between previous review and the new request, and to require the application to be based on different grounds than those submitted at previous review. In case the court decides that the detention is lawful, and the suspect is not to be released from detention, this does not bar a further challenge, but it has to be on new grounds.

In light of the aforesaid, the object of the right to bring the person before a judge after arrest is to review the legality of his detention, and the state is obliged to provide a detainee with such right. In addition, it is important that when the continued detention is necessary, regular periodic review of detention must take place regardless of the

<<http://www.asef.org/images/docs/9thHRBackgroundPaper.pdf>> accessed 4 May 2012.

⁷⁶ *Sanchez-Reisse v Switzerland* App no 9862/82 (ECtHR, 21 October 1986), (1987) 9 EHRR 71 para 51; see also Stephen Grosz et al., *Human Rights* (n 31) 216.

⁷⁷ *Dermitt and Hugo Haroldo Dermitt Barbato v Uruguay* UN Human Rights Committee Communication No (84/1981) 21 October 1982 para 10; see also *Athary v Turkey* (n 74) para 41; *Şevk v Turkey* App no 4528/02 (ECtHR, 11 April 2006) para 40, in this case the court decided that Article 5(4) has been breached when 41 days have been elapsed between applying for habeas corpus and the actual hearing.

⁷⁸ UN Human Rights Committee, Draft General Comment No 35, (n 2) para 41.

⁷⁹ *Dimitrios Dimopoulos v Greece* App no 49658/09 (ECtHR, 9 October 2012) para 60; *Mooren v Germany* (n 74) para 106; John Wadham et al., *Blackstone's Guide to the Human Rights Act 1998* (4th ed., 2007, Oxford University Press) 134.

⁸⁰ *Jablonski v Poland* App no 33492/96 (ECtHR, 21 December 2000), (2003) 36 EHRR 27 para 92.

option of the person under detention whether requests this review or not. For example, the ECtHR held that “monthly review of detention was regarded as reasonable.”⁸¹

Conversely, the process of *habeas corpus* to be carried out relies on the claim of detainees that the detention is not lawful. In case this claim takes place by a detainee the state is then obliged to bring him before a court in order to review the legality of detention. In other words, the person who has been deprived of his liberty needs to invoke the right concerned to initiate proceedings of a *habeas corpus* himself, or by another person on his behalf such as friends, a relative or a lawyer. Accordingly, it has been held that “where there was no evidence that either the author [detainee] or his legal representative applied for such a writ; the Committee was unable to conclude that the former was denied the opportunity to have the lawfulness of his detention reviewed in court without delay.” What follows is the holding of the suspect in detention with the denial of his right to communicate is a violation of the right concerned.⁸²

As a result, one of the implications of the right to have a review of the legality of detention is that it is established by virtue of a detainee’s claim. Also, it is a mandatory right i.e. the official authority should bring the case before the competent court to review the lawfulness of detention during a reasonable period. The HRC deemed the provision of Article 9(4) to be violated if detainees have not been granted the right concerned during due time.⁸³ As a result, either the detainee or another on his behalf can invoke this right. It is one of the notable safeguards that belongs to the suspect that may well help him to be protected against arbitrary deprivation of liberty and needs to be conducted without unreasonable delay.

⁸¹ *Miminoshvili v Russia* App no 20197/03 (ECtHR, 28 June 2011) para 101; *Bezicheri v Italy* App no 11400/85 (ECtHR, 25 October 1989), (1990) 12 EHRR 210 para 21.

⁸² *Benjamin Manuel v New Zealand* UN Human Rights Committee Communication No (1385/2005) 18 October 2007 para 7.2; see also *Leopoldo Buffo Carballal v Uruguay* UN Human Rights Committee Communication No (33/1978) 27 March 1981 para 13; see also *Campbell v Jamaica* UN Human Rights Committee, (n 32) para 6.4; see also *Dermitt and Hugo Haroldo Dermitt Barbato v Uruguay* UN Human Rights Committee, (n 77) para 10.

⁸³ *Campbell v Jamaica* UN Human Rights Committee, (n 32) para 6.4.

4.1.5. Right to release on bail

The ICCPR, in Article 9(3) also deals with the right of a suspect who is under detention to be released with or without bail pending trial. It provides that “... It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.”

It seems that the default position will always be liberty but this position can be overridden. If detention is sought, the onus is on the state to show that it is clearly justified.⁸⁴ From the HRC’s point of view,⁸⁵ and similarly jurisprudence of the ECtHR, the reasons which can justify the denial of bail to a suspect are the following grounds:

- a. The risk that the suspect will fail to appear again.
- b. The risk that the suspect may interfere with the course of justice; for example destroys evidence or threatens witnesses and victim.
- c. The risk of further offences that may be committed by the suspect.
- d. The preservation of public order.

Accordingly, the right to bail is deemed to be a notable application of the presumption of innocence. In this regard, case law mentioned that a detainee “ must be presumed innocent and the purpose of the provision ... is essential to require his provisional release once his continuing detention ceases to be reasonable.”⁸⁶ According to the practice of the HRC, a suspect shall normally not be detained unless there are acceptable reasons, as discussed above. Mere suspicion or doing more investigations shall not justify continuing detention. The HRC held that.

⁸⁴ *Kwok Yin Fong v Australia* UN Human Rights Committee Communication No (1442/2005) 23 October 2009 para 9, 3.

⁸⁵ *W.B.E. v The Netherlands* UN Human Rights Committee Communication No (432/1990) 23 October 1992 para 6.3 provides that “With regard to the author’s allegation that his pre-trial detention was in violation of Article 9 of the Covenant, the Committee observes that Article 9, paragraph 3, allows pre-trial detention as an exception; pre-trial detention may be necessary, for example, to ensure the presence of the accused at the trial, avert interference with witnesses and other evidence, or the commission of other offences. On the basis of the information before the Committee, it appears that the author’s detention was based on considerations that there was a serious risk that, if released, he might interfere with the evidence against him.”

⁸⁶ *Neumeister v Austria* App no 1936/63 (ECtHR, 27 June 1968), (1979-80) 1 EHRR 91 para 4.

“Pre-trial detention should be the exception, and bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party.”⁸⁷

The HRC in *Barroso v Panama* makes clear that denying bail must be based on proper weighting.⁸⁸ Accordingly, when challenging a bail request, the judicial authority has to explicitly explain the main reasons behind such a decision. Bearing in mind that detention and denying a bail may be reasonable at the beginning but it may later become unjustified.⁸⁹ Thus, releasing the detainee must take place without delay when reasons that are attributable to refuse the bail no longer exist.⁹⁰

Moreover, ongoing detention must be avoided as much as possible.⁹¹ For this purpose, the judicial authority should consider other alternatives to detention to release people from custody. It must be noted that releasing detainees is a general rule and imposing suitable guarantees of appearance is only required if necessary in a particular case to secure the appearance of a suspect at any stage of proceedings. Alternatives to detention are favourable due to the fact that avoiding the caveats indicated above (a, b, c, and d) is possible when the release of persons from detention can be exchanged for other guarantees of appearance, such as bail, electronic bracelets.⁹² Other conditions of release such as the suspect being held within a limited area, submit the appropriate documents, and under the supervision of official authority. As a result, the tendency of case law is greatly in favour of alternatives to detention.⁹³ What follows is that the conditions imposed to release the detainee on bail must be proportionate to

⁸⁷ *Juan Peirano Basso v Uruguay* UN Human Rights Committee Communication No (1887/2009) 19 October 2010 para 10.2; *Michael and Brian Hill v Spain* UN Human Rights Committee, (n 41) para 12.3; see also UN Human Rights Council, ‘Report of the Working Group on Arbitrary Detention’ (A/HRC/10/21, 16 February 2009) para. 75.

⁸⁸ *Barroso v Panama* UN Human Rights Committee Communication No (473/1991) 19 July 1995 para 8.2; *Levința v Moldova* (no 2) App no 50717/09 (ECtHR, 17 January 2012) para 40.

⁸⁹ *Neumeister v Austria*, (n 86).

⁹⁰ Gilles Dutertre, *Key Cases- Law Extracts, European Court of Human Rights* (3rd ed., 2003, Council of Europe Publishing) 137; see also *Juan Peirano Basso v Uruguay* UN Human Rights Committee, (n 87); *Michael and Brian Hill v Spain* UN Human Rights Committee, (n 41).

⁹¹ *Taright et al. v Algeria* UN Human Rights Committee Communication No (1085/2002) 15 March 2006 para 8.3; UN Human Rights Committee, Draft General Comment No 35, (n 2) para. 38.

⁹² UN Human Rights Committee, ‘Concluding Observations: Argentina’ (Ninety-eighth session, 31 March 2010) CCPR/ C/ARG/CO/4, para. 16; *Smantser v Belarus* UN Human Rights Committee Communication No (1178/2003) 3 October 2008 para 10.3; UN Human Rights Committee, Draft General Comment No 35, (n 2) para. 39.

⁹³ *Castravet v Moldova* App no 23393/05 (ECtHR, 13 March 2007) para 30.

the public interest in order to balance the public interest and that person to be released from detention.

4.1.6. Right to trial within a reasonable time

The ICCPR, in Article 9 (3) provides that “anyone arrested or detained ... shall be entitled to trial within a reasonable time or to release.”⁹⁴ According to this right, the person who is charged with a criminal offence; whether free on condition or under detention, must be either tried or released without undue delay. In this context, it must be taken into consideration that, the right to release a suspect on bail pending trial does not extinguish the right to trial within a reasonable time. One can also argue that the position of the detainee being deprived of liberty is more serious and may require even greater expeditiousness. The main concern in this regard is about the expeditiousness of the proceedings because the ICCPR mentions neither the precise length of period of pre-trial proceedings nor factors in the assessment of the reasonableness of this period and therefore, its account is a critical point. An observation of case law reveals that on the whole, the factors for reasonableness encompass the seriousness of the alleged offences, the performed proceedings by state, and the conduct of the suspect during investigation. In its General Comment and case-law, the HRC has reiterated that:

“All stages of the judicial proceedings should take place without undue delay, and concludes that a lapse of 30 months between arrest, and the start of the trial constituted in itself undue delay, and cannot be deemed compatible with the provisions of article 9, paragraph 3, and 14, paragraph 3 (c), of the Covenant, in the absence of any explanation from the State party justifying the delay or as to why the pre-trial investigations could not have been concluded earlier.”⁹⁵

From the perspective of case law, these factors can be adopted for determining whether any delay is justified or not and also whether conducting of proceedings were

⁹⁴ Similarly the Body of Principles states that “A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.” UN General Assembly, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, (n 56) principle 38; also ECHR, Article 5(3) states that “everyone arrested or detained ... shall be entitled to trial within a reasonable time or to release.”

⁹⁵ *Eustace Henry and Everaldo Douglas v Jamaica* UN Human Rights Committee Communication No (571/1994) 25 July 1996 para 9(3); *Dermitt and Hugo Haroldo Dermitt Barbato v Uruguay* UN Human Rights Committee, (n 77) para 10; *McLawrence v Jamaica* UN Human Rights Committee, (n 54) para 5.11; *Taright et al. v Algeria* UN Human Rights Committee, (n 91) paras 8.2, 8.4; UN Human Rights Committee, Draft General Comment No 35, (n 2) 38 para. 38.

done by the state expeditiously.⁹⁶ What follows is that the circumstances of each case need to be considered separately as has been indicated, “What constitutes ‘reasonable time’ is a matter of assessment for each particular case.”⁹⁷ In light of above considerations, it may be safe to submit that the absence of clear guidance in human rights rules and case law makes it hard to determine the precise time of proceedings to be expeditious and what are acceptable grounds for any delay. However, what is more encouraging is that under human rights law, as Meester et al., state “there is an unconditional entitlement to release in case there is no trial within reasonable period of time.”⁹⁸ As a result, under intentional rules it has been made clear that without undue delay, the outcome of criminal proceedings against a person under investigation should be determined through a trial or he should be released immediately.

⁹⁶ *McKay v the United Kingdom*, (n 50) para 44.

⁹⁷ *Nicole Fillastre v Bolivia* UN Human Rights Committee Communication No (336/1988) 5 November 1991 para 6.5; see also UN Office of High Commissioner for Human rights and UN International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (New York and Geneva, 2003) 191; see also Roza Pati, *Due Process and International Terrorism: An International Legal Analysis* (2009, Martinus Nijhoff Publishers) 47.

⁹⁸ Karel de Meester et al., “Chapter 3, Investigation, Coercive Measures, Arrest, and Surrender” in Goran Sluiter et al. (eds.), *International Criminal Procedure Principles and Rules* (1st ed., 2013, Oxford) 343.

4.2. Iraqi rules and practice

According to reputable international reports, it is clear that the rights of accused persons were massively violated during the Saddam Hussein era.⁹⁹ Since 2003, to move away from the past violence, the reform of the post-Saddam Iraqi criminal justice system has seen some significant changes for prohibiting the unlawful deprivation of liberty in law and practice. As was described in chapter two, many programs have been implemented to train State agents. Further, the International Convention for the Protection of All Persons from Enforced Disappearance was ratified on 23 November 2010.¹⁰⁰ The numerous pieces of legislation under which the administrative officials had been given the power of arrest and detention were abolished. Furthermore, the constitutional court that is called the Iraqi Federal Supreme Court (*AlMahkamah AlAthadia AlUlya*) was established, one of whose functions is to prevent the violation of the liberties of the new democratic order. One encouraging improvement is that many unconstitutional provisions have been ruled as invalid by this court.¹⁰¹ The most important improvement is that, as elaborated further under the new Constitution, there are special provisions by which these rights for anyone who is arrested or detained are further articulated.

This section is devoted to highlighting the Iraqi reformed criminal justice system and how it protects the right to liberty during arrest and detention in order to know whether the system is actually compliant with Iraq's international obligations.

⁹⁹ See the Reports of the Special Rapporteur on the situation of human rights in Iraq dating to between 1991 and 15 March 2002, established in UN Commission on Human Rights Resolution 1991/74 of 6 March 1991, e.g., United Nations Commission on Human Rights (CHR), 'Report on the situation of human rights in Iraq, submitted by the Special Rapporteur, Mr. Max van der Stoep' (15 February 1995) E/CN.4/1995/56, para 37; see also UN Human Rights Committee, 'Concluding Observations/Comments: Iraq' (Sixty-first session, 19/11/1997) UN Doc CCPR/C/79/Add.84, para. 8.

¹⁰⁰ The Convention was adopted on 20 December 2006, entered into force on 23 December 2010.

¹⁰¹ See for example, Federal Supreme Court (*AlMahkamah AlAthadia AlUlya*), Case number 15 /2011 on 22 February 2011 published in the High Judicial Council, *The Judicial Bulletin* (No. 17, the fourth year 2011 March and April) 16. {المحكمة الاتحادية العليا} In this case, some provisions on deprivations of liberty ruled as invalid by the Court.

4.2.1. Rights in relation to an arrest

An arrest is a deprivation of liberty and confines a person's freedom of movement for a period of time.¹⁰² On one hand, it may be viewed as a prejudicial action, that is, in a way, an assault on personal freedom and human rights. On the other hand, the right to liberty is not an absolute one and the arrest may be required during criminal proceedings to protect society and fight crimes. Therefore, for a deprivation of liberty to be really legitimate, there are extensive duties on the state and a person facing the criminal justice system should benefit from many safeguards. For the purpose of examining these safeguards in the new Iraqi criminal justice system, the following issues, which are of particular importance, have to be considered:

4.2.1.1. Lawful grounds for arrest

The prohibition of unlawful deprivation of liberty in post-Saddam Iraq is constitutionally enshrined. The Iraqi Permanent Constitution 2005 provides that:

“Every individual has the right to enjoy life, security and liberty. Deprivation or restriction of these rights is prohibited except in accordance with the law and based on a decision issued by a competent judicial authority.”¹⁰³

“A. Unlawful detention shall be prohibited. B. Imprisonment or detention shall be prohibited in places not designed for these purposes, pursuant to prison laws covering health and social care, and subject to the authorities of the State.”¹⁰⁴

“No person may be kept in custody or investigated except according to a judicial decision”¹⁰⁵

Taking this principle into practical effect, the ICCP articulates and circumscribes the circumstances and procedures of the deprivation of freedom. There are two legal

¹⁰² *Miguel Gonzalez del Rio v Peru* UN Human Rights Committee Communication No (263/1987) 28 October 1992 para 5.1.

¹⁰³ The Iraqi Permanent Constitution 2005, Article 15. The official translation in English is available online at the homepage of the Iraqi government at <<http://www.cabinet.iq/default.aspx>> accessed 20 November 2013.

{الكل فرد الحق في الحياة والأمن والحرية، ولا يجوز الحرمان من هذه الحقوق أو تقييدها إلا وفقاً للقانون، وبناءً على قرار صادر من جهة قضائية مختصة}

¹⁰⁴ *Ibid*, Article 19(12).

{أ- يحظر الحجز. ب - لا يجوز الحبس أو التوقيف في غير الأماكن المخصصة لذلك وفقاً لقوانين السجون المشمولة بالرعاية الصحية والاجتماعية والخاضعة لسلطات الدولة}

¹⁰⁵ *Ibid*, Article 37. {لا يجوز توقيف احد أو التحقيق معه الا بموجب قرار قضائي}

grounds allowing for arrest. First, an arrest must be pursuant to a warrant issued by the judicial authority according to the circumstances prescribed in the law. Second, the law provides for the specific situations where the arrest can be carried out without a warrant from the judicial authority.

4.2.1.1.1. Arrest with a warrant from judicial authority

The ICCP states “Arrest or apprehension of a person is permitted only in accordance with a warrant issued by a judge or court or in other cases as stipulated by the law.”¹⁰⁶ For the purpose of this provision, the first type of arrest can only be carried out on the basis of a warrant issued by the judge. The warrant of arrest is an order, which empowers the law enforcement officials to whom it has been directed, to deprive the named person of his liberty. Otherwise, if the warrant is defective, the arrest would be unlawful.¹⁰⁷ The warrant should identify the person against whom the authority is ordered to arrest. In addition, it contains other relevant information.¹⁰⁸ The ICCP states that,

“The arrest warrant should contain the full name of the accused, with his identity card details and physical description if these are known, as well as his place of residence, his profession, and the type of offence to which the warrant relates, the legal provision which applies and the date of the warrant. It should be signed and stamped by the court. In addition to the details given, the warrant should contain an instruction to members of the police force to arrest the accused, by force if he will not come voluntarily.”¹⁰⁹

Furthermore, the ICCP identifies the situations whereby investigating judges can issue a warrant of arrest. According to Article 99, investigating judges are authorized to order a warrant of arrest in the offence punishable by imprisonment for a period exceeding one year.¹¹⁰ In these sorts of crimes, ordering the warrant of arrest by a judge is optional except for an offence punishable by death or life imprisonment. In

¹⁰⁶ ICCP Article 92.

{ لا يجوز القبض على اي شخص او توقيفه الا بمقتضى امر صادر من قاضي او محكمة او في الاحوال التي يجيز فيها القانون ذلك }

¹⁰⁷ Richard Clayton & Hugh Tomlinson, *The Law of Human Rights* (74) 585; Helen Fenwick, *Civil Liberties and Human Rights* (n 20) 1143.

¹⁰⁸ ICCP, Article 93.

¹⁰⁹ ICCP, Article 93.

{يشتمل الامر بالقبض على اسم المتهم ولقبه وهويته ووصافه ان كانت معروفة ومحل اقامته ومهنته ونوع الجريمة المسندة اليه ومادة القانون المنطبقة عليها وتاريخ الامر وتوقيع من اصدره وختم المحكمة ويجب اضافة الى البيانات المتقدمة ان يشتمل امر القبض على تكليف اعضاء الضبط القضائي وافراد الشرطة بالقبض على المتهم وارغامه على الحضور في الحال اذا رفض ذلك طوعا }

¹¹⁰ ICCP, Article 99.

offences punishable by death or life imprisonment ordering the warrant of arrest against an accused person is mandatory.

The investigating judges before ordering an arrest warrant against a person must take into account whether there is a fear of escape, interference with the course of the investigation or a wanted person has no certain place of residence.¹¹¹ The investigating judge, also, is entitled to issue an arrest warrant against a person who has previously failed to appear for questioning by summons without lawful excuse.¹¹² Further, in accordance with the provisions of the ICCP, a judge is entitled to order the arrest of any person who has committed a crime in his presence.¹¹³ Apparently, empowering to order the arrest in this exceptional situation is necessary to maintain available evidence in the case and this may be necessary for the effectiveness of subsequent investigations.

The above mentioned rules have given logical discretion to the judicial authority regarding the issuance of an arrest warrant whereby the freedom of individuals can be protected against the risk of violation. It seems clear that the arrest warrant may only be issued by a court or investigating judge and only be ordered in significant crimes.¹¹⁴ Therefore, it can be submitted that the explicit provisions in the new Constitution and law in accordance with which the decision to deprive liberty should be based on the approval of the judicial authority, is significant progress to improve justice in post-Saddam Iraq, moving further foreword establishing the UN's definition of the rule of law.¹¹⁵

¹¹¹ ICCP Article (97) states, "If the person does not attend after being summoned, without a legal excuse, or if there is a fear that he will abscond or influence the investigation, or if he does not have a specific place of residence, the judge may issue a warrant for his arrest."

¹¹² ICCP, Article (97).

{إذا لم يحضر الشخص بعد تبليغه بورقة التكليف بالحضور دون عذر مشروع أو إذا خيف هربه أو تأثيره على سير التحقيق أو لم يكن له محل سكني معين جاز للقاضي أن يصدر أمرا بالقبض عليه}

¹¹³ ICCP Article (98) states that "Any judge may issue an arrest warrant against any person who has committed an offence in his presence."

{لكل قاضي أن يأمر بالقبض على أي شخص ارتكب جريمة في حضوره}

¹¹⁴ Looking at this matter comparatively, national legislations are not consistent about using the warrant of arrest. For example, in the almost Arabic legislations, the resorting to the warrant of arrest is very high. Otherwise, in England and Wales the arrest with warrant is less resorted to, whereas the arrest without warrant is widely used there. See Article 127 of Egyptian Code of Criminal Procedure; see also Egyptian Court of Cassation on 31/12/1987 AD, set of provisions established by the Egyptian Court of Cessation, Q 29, No. 206, 993; regarding English law see Richard Clayton & Hugh Tomlinson, (n 74) 585; Helen Fenwick, (n 20) 1143.

¹¹⁵ Regarding the UN's definition of the rule of law, see Chapter Two.

However, the Iraqi community has been subjected to tough security challenges, which have adversely impacted on judicial practice with regard to ordering mass arrests of individuals in relation to offences under Article 47(2) of the ICCP.¹¹⁶ Over the last decade, an arrest warrant has become a simple measure in judicial practice.¹¹⁷ It is quite common that the arrest warrant can be determined merely on the basis of the report against a person even from a so-called “secret informant”.¹¹⁸ The problem here is relevant with a lack of verification of information provided by secret informants in the Iraqi criminal justice system. The investigating authority still deems the “secret informant” as a basis for establishing harsh criminal procedures such as issuing the warrant of arrest. This view does not only belong to the present author but also reputable reports from many resources have confirmed this defect.¹¹⁹ Over the last ten years, the frequent failure of the judiciary to verify information on the use of “secret informants” has been recognised by international and national human rights reports.¹²⁰

Reports from Human Rights Watch have pointed to the risks surrounding the use of “secret informants” who may intervene in a notable role in the arrest decisions.¹²¹ Human Rights reports deemed that the “secret informant” has a massive adverse effect on the integrity of the proceedings and violates individual human rights.¹²² There is evidence that a lack of verification means false information provided by

¹¹⁶ ICCP, Article 47(2) states “If the complaint is about offences against the internal or external security of the state, crimes of economic sabotage and other crimes punishable by death, life imprisonment or temporary imprisonment and the informant asks to remain anonymous, and not to be a witness, the judge has to register this with the notification in a special record prepared for this purpose, and conduct the investigation according to the rules, considering the information included in the notification without mentioning the informant’s identity in the investigative paper.”

{للمخبر في الجرائم الماسة بأمن الدولة الداخلي أو الخارجي وجرائم التخريب الاقتصادي والجرائم الأخرى المعاقب عليها بالإعدام أو السجن المؤبد أو الموقت ان يطلب عدم الكشف عن هويته وعدم اعتباره شاهداً، وللقاضي ان يثبت ذلك مع خلاصة الاخبار في سجل خاص يعد لهذا الغرض ويقوم بأجراء التحقيق وفق الاصول مستفيداً من المعلومات التي تضمنها الاخبار دون بيان هوية المخبر في الاوراق التحقيقية}

¹¹⁷ The Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Rights Report (Baghdad, 2010) 77.

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الانسان العراقية}

¹¹⁸ ICCP, Article 47(2); see Joseph Logan, *The Quality of Justice: Failings of Iraq's Central Criminal Court* (2008, Human Right Watch, US) 30.

¹¹⁹ Amnesty International, *Iraq: A Decade of Abuses* (Index: MDE 14/001/2013, March 2013) 46; the Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Right Report (Baghdad, 2008) 87.

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز وزارة حقوق الانسان العراقية}

¹²⁰ Ibid.

¹²¹ Joseph Logan, (n 118) 30; see also UNAMI, Human Rights Reports, Reports of the Iraqi Ministry of Human Rights, and other international NGOs such as Amnesty International dating between 2004 and 2013.

¹²² Ibid.

secret informants has adversely impacted the new Iraqi justice system.¹²³ It has been repeatedly reported, “The use of informants became widespread leading to accusations that many people had been detained solely on the basis of false information provided by secret informants.”¹²⁴

Therefore, for the purpose of protecting innocent people, investigating judges in actual practice should adequately review available information and take the circumstances of a case into account before ordering a warrant of arrest. The secret informant that can be used as a base for arrest and detention must be limited. Any reports or complaints that can be used as a basis for issuing an arrest warrant against persons needs to be duly verified in a timely manner before any action could take place against liberties of individuals.

Iraqi law provides fundamental rights for a person under investigation, in line with what is enshrined in the international human rights instruments. However, those standards are not maintained by giving wide discretion or excessive warrant of arrest under Article 47(2) of the ICCP. There is evidence that such power of arrest has been abused in practice. Some orders of arrest, as the human rights reports mentioned did not comply with a procedure prescribed under Article 93 of the ICCP regarding that the arrest warrant should fully identify the accused person, which resulted in massive arbitrary deprivation of liberty against innocent people. One of the Annual Reports of the Iraqi Ministry of Human Rights recognised that some of these arrests, as the report observed, were as a result of a lack of identifying wanted persons under the issued warrants.¹²⁵ According to the Ministry of Human Rights, in 2010-2011 there were 14231 cases of arrest which included persons who were either innocent or released without charge and without any further action. The obvious shortcoming behind conducting these wrong arrests belongs to the lack of verification of information provided by secret informants.¹²⁶

¹²³ Amnesty International, *Iraq: A Decade of Abuses* (n 119) 46.

¹²⁴ Amnesty International, *New Order Same Abuses: Unlawful Detentions and Torture in Iraq* (September 2010) Index: MDE 14/006/2010, 19.

¹²⁵ The Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Rights Report (Baghdad, 2011) 62.

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الإنسان العراقية}

¹²⁶ The Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Rights Report (Baghdad, 2010) 76, 77.

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الإنسان العراقية}

Therefore, it must be emphasised that people as mentioned under the above provisions of the ICCP and international law must not be arrested simply for questioning without a reliable information and evidence that establish reasonable suspicion against a person arrested. As such, the defective lines have affected the right to liberty in post-Saddam Iraq and must be sufficiently dealt with in implementation. It has been argued that under international rules for the purpose of legitimate grounds of deprivation of liberty, national authorities must satisfy sufficient evidence about a person who commits the crime for which he can be deprived of his liberty. It is suggested that the system needs to meet the principle known in international human rights law in order to provide sufficient protection to the innocent and that the deprivation of liberty must be “lawful” and carried out “in accordance with a procedure prescribed by law.”

4.2.1.1.2. Arrest without a warrant

The provisions of Iraqi law provide relevant officials and even a private citizen, in specific circumstances, with the power to arrest persons for a necessary reason such as protecting society from crimes.¹²⁷ What is notable in these provisions is the amount of discretion given to the members of official authority with regard to using their power of arrest. Two observations may be recognised. On one hand, the power of arrest without warrant is only empowered in limited cases under certain conditions. In this regard, the ICCP provides that:

- “(a) any person may arrest any other person accused of a felony or misdemeanour without an order from the authorities concerned, in any of the following cases:
- i. If the offence was committed in front of witnesses.
 - ii. If the person to be arrested has escaped after being arrested legally.
 - iii. If he has been sentenced in his absence of a penalty restricting his freedom.
- (b) Any person may, without an order from the authorities concerned, arrest any other found in a public place who is in a clear state of intoxication or confusion and is a juvenile or has lost his reason.”¹²⁸

In the same vein, any policeman or civilian support staff may arrest

¹²⁷ ICCP Articles 102,103, 41.

¹²⁸ ICCP, Article 102.

{أ- لكل شخص ولو بغير امر من السلطات المختصة ان يقبض على اي متهم بجناية او جنحة في احدى الحالات الآتية :-
1 - اذا كانت الجريمة مشهودة 2 - اذا كان قد فر بعض القبض عليه قانونا3 - اذا كان قد حكم عليه غيابيا بعقوبة مقيدة للحرية ب - لكل شخص ولو بغير امر من السلطات المختصة ان يقبض على كل من وجد في محل عام في حالة سكر بين واختلال واحد شغبا او كان فاقدا صوابه }

“Any person thought, based on reasonable grounds, to have deliberately committed a felony or misdemeanour and who has no particular place of residence; ... any person carrying arms, whether openly or concealed, violating the provisions of law.”¹²⁹

An analysis of these provisions may illustrate that the power of arrest without warrant is prescribed not only in cases of *flagrante delicto* (caught committing an offence) but also, there are particular situations exclusively cited by the Code allowing any person even other than the police member to arrest a person, even without the warrant issued by the competent authorities for a felony and misdemeanour offences in limited circumstances. These conditions are when the committed offence is a *flagrante delicto* type; the accused person has escaped after being arrested according to the law; and the accused has been sentenced with imprisonment in absentia. In addition, anyone, even without an order issued by the competent judicial authority is able to arrest a person who is found in the public place in a clear state of intoxication or confusion and who has lost his awareness in order to bring him to the nearest police station. Lastly, the Code includes that even without an order from the competent judicial authority; any member of police or civilian support staff is empowered to arrest persons who are found in some certain situations carrying weapons.

It may be argued whether some of these provisions breach the right of liberty when they go beyond a *flagrante delicto* to grant a wide power of arrest to law enforcement officials and citizens. In this respect, it is apparent from reviewing these provisions that these certain situations under which deprivation of liberty can arise are considered logical justification for making arrests. The requirement of arresting persons under these provisions is to protect public interest and individuals. For example, there is a public interest to arrest someone who has lost his reason in the street in order to protect the public including the arrested person, and their property against an unconscious risk.

With regard to arresting a person who has no particular place of residence, the image is relatively clear. The provisions make clear that the individual must not be simply arrested unless there are reasonable grounds, to have deliberately committed a

¹²⁹ ICCP, Article 103.

{ على كل فرد من افراد الشرطة او عضو من اعضاء الضبط القضائي ان يقبض على اي من الاشخاص الاتي بيانهم :-
كل شخص ظن لأسباب معقولة انه ارتكب جنابة او جنحة عمدية ولم يكن له محل اقامة معين. كل من كان حاملا سلاحا ظاهرا او مخبأ
خلافًا لأحكام القانون }

criminal offence. In this situation it seems that first of all, a person must be asked to provide his address. Giving particular place of residence means that the person can be summoned to the investigating authority without being arrested, otherwise, the arrest will be unlawful. A failure to provide their address is a lawful reason for the arrest.

What may be drawn from the above provisions is that, Iraqi law is among those legislations in which a police officer or any person is empowered with a limited discretion to conduct an arrest without a warrant against individuals, and that the entitled power of the arrest must be based on reasonable grounds.¹³⁰ These provisions show that Iraqi law makes a distinction between both the conducting of the arrest according to the judicial warrant and the arrest occurring according to the general power of policemen and civilian support staff. It attempts to restrict the latter category by rendering such arrest to be not permitted without an approval from a judge except in the above mentioned situations.

These rules may be deemed a good indication in the right direction for securing an individual's right to liberty. This is in compliance with international human rights standards which require an exercise of any compulsory measure in the restriction of an individual's liberty to be based on lawful grounds; reasonable, predictable and appropriate.¹³¹ It may be rightly considered that these rules might not be only enacted for protecting an individual's rights and liberties but also necessary to protect the persons who exercise the arrest power against any allegation of violence to the right of liberty of arrested persons.

On the other hand, Article 41 and the second part of Article 103 of the ICCP contains some problematic provisions, which provide that

¹³⁰ For example, French and German laws specify the power of arrest without warrant only in limited cases under certain conditions. French Criminal Procedure Code, Article 73 provides that "In the event of a flagrant felony or of a flagrant misdemeanour punished by a penalty of imprisonment, any person is entitled to arrest the perpetrator and to bring him before the nearest judicial police officer." The German Constitution, Article 104(1) provides that "deprivations of liberty may be imposed only on the basis of a specific enabling statute that also must include procedural rules." Similarly see German Code of Criminal Procedure 1987, Article 114.

¹³¹ Article 9(3) of the ICCPR.

“Investigating officers are authorized within their areas ... to apprehend those who committed the offences and to deliver them to the appropriate authorities”¹³²

“Any policeman or civilian support staff may arrest any person in the event of whom impedes a member of the court or public official from carrying out his duty.”¹³³

These provisions go beyond *flagrante delicto* to empower police officers and members of support staff to apprehend persons without an order from the competent judicial authority.

In the view of the present author, in spite of the fact that many countries around the world give such power to the police such as in England and Wales, the Iraqi situation is unusual.¹³⁴ Giving broad power of arrest to unqualified and unlimited agencies of law enforcement officials has adversely impacted the right to liberty that is enshrined in the new Iraqi Permanent Constitution. It is important to mention that the new Constitution makes clear that a judge is the only authorized authority to deprive the right to liberty of individuals.¹³⁵ In addition, the provisions of the ICCP, as explained above, have shown the extent to which the officials have the power to deal with the right to liberty of individuals without an order from the judges.

¹³² ICCP, Article 41.

{اعضاء الضبط القضائي مكلفون في جهات اختصاصهم بالتحري عن الجرائم ... وضبط مرتكبيها وتسليمهم الى السلطات المختصة}

¹³³ ICCP, Article 103.

{كل من تعرض لاحد اعضاء الضبط القضائي او اي مكلف بخدمة عامة في اداء واجبه}

¹³⁴ In England and Wales, the police have a different role that police have in Iraq. They have much more autonomy in action under strict regulations. The powers of arrest without a warrant are mostly enacted under PACE that has been amended by Section 110 of the Serious Organised Crime and Police Act 2005 (SOCPA). Police officers have general powers of arrest in relation to any offence. They have the power for arresting any person solely with two broad requirements that need to be satisfied. These are that the suspect has committed, is committing, or is about to commit an offence. Or a police officer has reasonable grounds to suspect that the suspect has committed, is committing or is about to commit an offence. In accordance with these current changes on the power of arrest, it is apparent that the difference between arrestable and non-arrestable offences has been abolished, because all offences have become arrestable. This means that someone who has committed a trivial offence could be arrested if the officer deemed it necessary. Moreover, it could be going further to submit that, unsurprisingly, if an officer may be able to arrest on a ‘hunch’ which likely turns out to be justified. Therefore, such amendments have broadened the ambit of police power and oppositely decreased safeguards for arrestees. Thus, the constable’s discretion is wide and the exercise of such discretion may be negatively effecting practice due to the arrest, which could be used disproportionately against the individual’s rights. See Gary Slapper & David Kelly, *The English Legal System* (10th ed., 2009, Routledge-Cavendish) 431; see also Helen Fenwick, (n 20) 1144; Richard Clayton & Hugh Tomlinson, (n 74) 586; Catherine Elliott and Frances Quinn, *English Legal System* (10th ed., 2009, Pearson Longman) 377.

¹³⁵ The Iraqi Permanent Constitution 2005, Articles 15, 37.

However, the power of arrest that arises under the provisions of the Article 41 and the second part of Article 103 of the ICCP, which empower deprivation of liberty outside the scope of *flagrante delicto* offences is not in line with the value of the right to liberty under the Constitution. This is due to the fact that according to these provisions, law enforcement officials have given broad power to conduct an arrest and that adversely affect the rights of individuals in actual practice.

It is important to support this argument by mentioning that Egyptian law includes similar provisions under the Egyptian Code of Criminal Procedure, Article 35, which were countered by most Egyptian Scholars.¹³⁶ As a result, the Egyptian Court of Cassation pursuant to its duty to review unconstitutional legal texts, decided in favour of the same argument. The Court deemed this sort of measure, even temporary arrest, outside the scope of *flagrante delicto* is contrary to the Article 41 of the Egyptian Constitution and hence these provisions are unconstitutional.¹³⁷ The Court states that these provisions authorizing law enforcement officials to apprehend those against whom there are reasonable grounds, to have deliberately committed a felony or misdemeanour or those who impede a member of the court or public official from carrying out his duty, these provisions are unconstitutional.¹³⁸

Over the last ten years, reliable reports from national and international resources still reveal serious concerns about violence in conjunction with deprivation of liberty in Iraq.¹³⁹ The apprehension of a person's freedom for many hours or days, to only say to him at the end "you are free to go" is quite common. This widespread phenomenon has badly affected human rights protection and all aspects of personal and societal life even in financial aspects when paralyzing a person from doing his job due to the wrong discretion from the side of members of the official authority. According to

¹³⁶ Ahmad Lutfi Alsaid, *Procedural Legitimacy and Human Rights* (2004, Law School, University of Mansoura) 114.

{أحمد لطفي السيد، الشرعية الاجرائية وحقوق الانسان (كلية الحقوق جامعة المنصورة 2004) ص 114}

¹³⁷ The Egyptian Court of Cassation (*Mahkamat Al-Niked*), Case number 3294/63 on 15 February 1995; Ahmad Lutfi Alsaid, *Procedural Legitimacy and Human Rights*, *ibid*, 114.

{أحمد لطفي السيد، الشرعية الاجرائية وحقوق الانسان (كلية الحقوق جامعة المنصورة 2004) ص 114}

¹³⁸ The Egyptian Court of Cassation (*Mahkamat Al-Niked*), Case number 3294/63 on 15 February 1995.

¹³⁹ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), *Human Rights Reports* (Baghdad, 2005-2013); see also *The Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Rights Reports* (Baghdad, 2007-2012).

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الانسان العراقية}

these reports, it is usual that members of the law enforcement agencies, without the minimum legal knowledge, resort to arresting persons with no need for earlier approval to be issued by the competent judicial authority and this prejudices the Iraqis' human rights protection and personal liberty.

As a result, the system is still struggling with protection of the right to liberty. Clearly, one has to strike a balance between the interests of society as represented by the police powers on the one hand, and the rights and liberties of the individual on the other. As will be seen in chapter seven of this research, many holistic suggestions will be proposed to resolve the problems of the post-Saddam Iraqi criminal justice system. One of the important aspects of the reform suggests that police must not abuse their power and improvement in this respect needs to be made in law and practice.

4.2.1.2. Right of the arrested person to be informed of the reasons for the arrest

According to this right, the arrested person must be notified of the reasons for his arrest so that he can defend himself against an alleged offence.¹⁴⁰ As elaborated earlier, the arrest of a person without informing him about the alleged offence for which he has been arrested is flawed under international standards. It can however be fixed within a reasonable time following the moment of an arrest. This guarantee is important because it affords the first opportunity for a person arrested to challenge the allegation against him.¹⁴¹

a. Arrest with a warrant

Under Iraqi law, the norm is for arrest to be authorized through the issuing of a warrant of arrest. Article 93 of the ICCP requires that a warrant of arrest from the investigating judge must include the name of the accused, surname, identity and description, place of residence, occupation and alleged offence attributed to him and the legal provision applicable on such offence. Furthermore, Article 94(b) of the ICCP

¹⁴⁰ The ICCPR, Article 9(2); see also Universal Declaration of Human Rights, Article (9/2).

¹⁴¹ *Drescher Caldas v Uruguay* UN Human Rights Committee, (n 30) para 13.2; *Campbell v Jamaica* UN Human Rights Committee, (n 32) para 6.3; see also UN Human Rights Committee, Draft General Comment No 35, (n 2) para. 26.

provides that “the wanted person must be informed of the warrant which has been issued for his arrest and be brought before the authority which issued the warrant.” In examining these provisions it is safe to conclude that officials who conduct the arrest must at the very least notify the person about the warrant and what it says.¹⁴²

However, one of the limitations with these provisions is that it explains neither when nor how an arrested person is notified with reasons of an arrest. There is no obligation laid down on the official who conducts the arrest to provide a copy of the warrant to the arrested person. There is evidence that this lack of provisions has adversely impacted practice. In 2011, Iraqi Ministry of Human Rights reported that a lack of identifying wanted persons under the issued warrants resulted in many cases of arbitrary deprivation of liberty against innocent people.¹⁴³ Providing a copy of the warrant to the arrested person is useful to fully identify the wanted person. Identifying the wanted person is a significant means to avoid any misconduct that could arise from unsatisfactory information prescribed by the order of arrest.

According to numerous reliable reports, these legal provisions under Articles 93 and 94 of the ICCP are routinely overlooked in practice.¹⁴⁴ These reports repeatedly raise concern about the failure to inform the wanted person about reasons of arrest in practice.¹⁴⁵

As a result, the suggestion is that the ICCP must include clear text in which at the outset of proceedings, an arrestee should be orally notified by the arresting officer about reasons of arrest and also provided with the copy of the warrant.

¹⁴² ICCP, Article 94(b).

¹⁴³ The Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Rights Report (Baghdad, 2011) 62.

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الإنسان العراقية}

¹⁴⁴ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, January 2012) 11; *ibid* 2011, 23; see also The Annual Reports of the Iraqi Ministry of Human Rights, and international NGOs such as Human Rights Watch, Amnesty International dating to between 2004 and 2012.

¹⁴⁵ *Ibid*.

b. Arrest without a warrant

In a case of arrest without a warrant, there is no warrant about which to inform the person. It is noteworthy that there are no provisions under the ICCP about an important procedural safeguard that is reasons of an arrest must be made clear to the person arrested by the arresting officer. Therefore, the suggestions are that the member of law enforcement officials whilst conducting an arrest without order from judges must inform the person arrested about reasons for the arrest.¹⁴⁶ An explicit text in the Code should be also enacted including that the arresting officer should orally put the reasons of arrest before a person arrested at the outset of proceedings.¹⁴⁷ The omission of such duty must be not allowed even if the reason of arrest is clear.¹⁴⁸

In Iraqi law, however, under Article 123 of the ICCP, the earlier failings can be corrected when arrested persons either under arrest with or without warrant, are informed about reasons for their arrest during interrogation. According to the international standards, earlier failing can be corrected by giving enough information about the reason of arrest when an accused person is questioned about the alleged offence at a later time following the initial arrest.¹⁴⁹ It is important to mention that when arrested persons are taken to the police station, their arrest must be brought to knowledge of investigating judges within 24 hours amenable to be renewed for additional day.¹⁵⁰ The case of arrest then needs to be approved by the judges. In case the arrest was unlawful the investigating judge orders to release the person arrested immediately. However, over the last years, the failure to meet the provisions of law in practice has contravened the human rights of persons during an arrest and investigation.¹⁵¹

¹⁴⁶ As mentioned under the ICCP, an arrest without a warrant can be made in certain situations by law enforcement officials and citizens in limited circumstances. Thus it is safe to allude here that it is not practicable to suggest such important safeguard during a private person's arrest.

¹⁴⁷ Comparatively, see M CCP, 170(2).

¹⁴⁸ UN Human Rights Committee, Draft General Comment No 35, (n 2) para. 26.

¹⁴⁹ See *Fox, Campbell and Hartley v the United Kingdom*, (n 17) paras 40, 41; UN Human Rights Committee, Draft General Comment No 35, (n 2) 31.

¹⁵⁰ The Iraqi Permanent Constitution 2005, Article 19(13).

¹⁵¹ Amnesty International, *New Order Same Abuses: Unlawful Detentions and Torture in Iraq* (n 124).

4.2.1.3. Detention following arrest

Having been deprived of his liberty it is essential that an arrested person must not be held under restriction for longer than is necessary.¹⁵² Therefore, laws in most countries in order to protect personal liberty against the abuse of official authorities fixed a short period of time during which the arrested person must be brought before the “judge or other officer authorised by law.”¹⁵³ This period between the first moments of an arrest and bringing persons before a judicial authority was not clear under Iraqi law. This could be attributed to the policy of the legislature at that time to provide more power to the official authority at the expense of due process. It was problematic that Iraqi law does not specify this period and as a result an arrested person when transferred from a long distance may have spent many days under arrest before being brought to a police station or a judiciary authority.

Comparatively, most legislations around the world agree that where a suspect has been arrested, he must be brought to a designated place of detention and to be before a judge without delay, and prescribed shorter than forty-eight hours for this purpose. Under German Code of Criminal Procedure, Article 115 states that “the court shall examine the accused concerning the subject of the accusation without delay following the arrest and not later than on the following day.” Then, an investigating authority must question the suspect who is arrested and taken into custody during this period.¹⁵⁴

In reviewing the developments of Iraqi law it can be deduced that the ICCP does not fix the length of the period in which an arrested person must be promptly brought before a judicial authority. In 2005, the redress was made by the Iraqi Permanent Constitution in this regard. Therefore, in order to assess the factual situation of Iraqi

¹⁵² The right to be brought promptly before a judge, ICCPR, 9(3).

¹⁵³ See UN Human Rights Committee, Draft General Comment No 35, (n 2) para. 34.

¹⁵⁴ German Code of Criminal Procedure, Article 115; Under French Code of Criminal Procedure, Article 63 states that “The person so placed in custody may not be held for more than twenty-four hours. However, the detention may be extended for a further period of up to twenty-four hours on the written authorisation of the district prosecutor”; In English law the general rule is that a suspect has the right to be not held in police detention without charge for more than a limited time of 24 hours whether the alleged offence is indictable or not. Under PACE Act 1984, the suspect can be held in the first instance for up to 24 hours from the relevant time if the offence is not an indictable one. Then the suspect may be detained without charge from 24 hours to 96 hours from the relevant time if the detention is still necessary and an alleged offence is an indictable one such as murder, rape, and complex fraud, which is investigated by police sufficiently. Thereafter, the decision of remand against a person who has been charged will convert to be taken by a competent court at later stage of proceedings.

law, the provisions of the ICCP and the Constitution must be analysed to determine whether or not current provisions comply with minimum requirements of the human rights standards.

Article 123 of the ICCP stipulates that

“The investigative judge or [judicial) investigator must question the accused within twenty-four hours of his attendance, after proving his identity and informing him of the offence of which he is accused. His statements on this should be recorded, with a statement of evidence in his favour. The accused should be questioned again if necessary to establish the truth.”¹⁵⁵

This Article sets out provisions upon which the person arrested shall be brought before the judicial authority for investigation and to confirm the arrest or release the arrested person if the arrest was unlawful. The provisions of Article, however, do not explain what the upper limit of time during which a person arrested must be brought before the judicial authority. The shortcomings in these provisions stem from the fact that when Article 123 of the ICCP stated “the suspect within twenty-four hours of his attendance” does not make clear what the “attendance” is. It is ambiguous whether the time of attendance runs to start from the initiation of an arrest when the wanted person was apprehended by the arresting officer, or from attendance at a police station where he is caught, or from attendance in police custody where he was sought or from the attendance of the arrested person into custody of the Investigation Court.

In practice, the situation was that the police having controlled a person arrested they take him into police custody. From the initiation of a deprivation of liberty until bringing the arrested person under the control of judicial authority, the fact is that police need time during the collecting evidence stage and for bringing this person to the police custody where they were sought. For this reason the person under arrest may spend excessive periods of time in attendance before the judicial authority. In particular, where the arrest is conducted in the area far away from the place where the arrested person was sought. This means that detention after arrest likely takes several days before involving judicial authority.

¹⁵⁵ ICCP, Article 123.

{ على حاكم التحقيق او المحقق ان يستجوب المتهم خلال اربع وعشرين ساعة من حضوره بعد التثبيت من شخصيته واحاطته علما بالجريمة المنسوبة اليه. ويدون اقواله بشأنها مع بيان ما لديه من ادلة لنفيها عنه وله ان يعيد استجواب المتهم فيما يراه لازما لاستجلاء الحقيقة }

Afterward, a police officer, without upper limited time, can bring the case of arrest before the investigating judge who orders to bring the arrested person within the period of twenty-four hours. As a result, in practice, the period of 24 hours indicated in the provisions of Article 123 of the ICCP namely starts to run, without addressing previous periods under arrest, from the moment of reading the case file by the investigating judge until personal attendance of the arrested person before the Investigating Court.

This understanding of the legal provision under Article 123 was a shortcoming in the Iraqi legal system which in contrast with international human right standards resulted in massive violation of the right to liberty when persons under arrest could spend long period of time in custody before the judicial authority were involved. Here, it must be also born in mind that the relevant case-law of the HRC shows that the time is contextualised, i.e. there is no hard and fast rule and it is determined on a case-by-case verdicts.¹⁵⁶ However, it is clear that the authorities have to act as expeditiously as possible.¹⁵⁷ It should also be made clear that even if the initiation of an arrest lawfully takes place the subsequent deprivation of liberty following the initial arrest can be unlawful unless it is reasonable.¹⁵⁸

During the recent reform, other provisions have been enacted to correct the indicated shortcoming in the Iraqi criminal justice system. The new Constitution in Article 19(13) states that

“The preliminary investigative documents shall be submitted to the competent judge in a period not to exceed twenty-four hours from the time of the arrest of the accused, which may be extended only once and for the same period.”¹⁵⁹

These new provisions, addressed the period that could be spent by an arrested person in custody before being brought before the judicial authority. According to the new

¹⁵⁶ See section one of this chapter, *McLawrence v Jamaica* UN Human right Committee Communication, (n 54) para 5.6; *Kovaleva and Kozyar v Belarus* UN Human right Committee Communication No (2120/2011) 29 October 2012 para 11.3; see also UN Human Rights Committee, Draft General Comment No 35, (n 2) para. 34.

¹⁵⁷ *McLawrence v Jamaica* UN Human right Committee, (n 54) para 5.6; UN Human Rights Committee, ‘Concluding Observation: Gabon’ (n 61) para.13.

¹⁵⁸ *Spakmo v Norway* UN Human right Committee Communication No (631/1995) 11 November 1999 para 6.3; UN Human Rights Committee, Draft General Comment No 35, (n 2) paras. 12, 13.

¹⁵⁹ The Iraqi Permanent Constitution 2005, Article 19(13).

{تعرض اوراق التحقيق الابتدائي على القاضي المختص خلال مدة لا تتجاوز اربعا وعشرين ساعة من حين القبض على المتهم ولا يجوز تمديدها الا مرة واحدة وللمدة ذاتها}

provisions, the detention after arrest or the period between the first moments of an arrest and bringing the wanted person before a judicial authority becomes clear under Iraqi law. Article 19(13) of the Constitution sets forty-eight hours of the initiation of a deprivation of liberty as the upper limit, during which the case of an arrest must be submitted to the investigating judge. Then, according to the provision of Article 123 of the ICCP the investigating judge can order to bring the arrested person to the Investigation Court (office of investigating judge) for judicial interrogation within twenty-four hours, which start from the engagement of investigation judge by reading the case file.

This time limit of detention following arrest is deemed a step in the right direction. Towards bringing the right to liberty in line with the international human rights norm and inspires the authorities to act as expeditiously as possible. But, this constitutional provision does not fully solve the problem. The fact is that the detention time following an arrest is still long, namely (72 hours), particularly in cases where an arrest takes place at weekends or holidays due to the initial hearing by investigating judge can only be made during the official working hours. Therefore, the ICCP should be revised to include that reviewing of legality of arrest by judicial authority could take place every day even during weekends and holidays. The author of this research proposes that the arrested person has to be brought before the judge to conduct the initial hearing within 48 hours of the time of his arrest.

Another defective line is that, the new reform does not clarify in detail the due proceedings that must be followed throughout the period of arrest until arriving at the police station.¹⁶⁰ In this regard, the suggestion is that further legal reform requires to

¹⁶⁰ English law clearly elaborates the proceedings that must be followed throughout the period of arrest detention and its extensions. As the Police and Criminal Evidence Act 1984 refers that the period of detention is usually calculated from the "relevant time". Such time starts on arrival at the first police station to which the suspect is taken after being arrested. If the suspect has been voluntarily at a police station before arrest and is then arrested it is from this time that the 24 hours is considered. Where the arrest takes place outside England and Wales the relevant time starts 24 hours after the suspect's arrival into England and Wales, or on earlier arrival at the police station in the area where the arrest was sought. If the arrest takes place in England and Wales but in another police area where the arrest is sought, if the suspect is questioned about the offence, the time starts from the first arrival at a police station. If the suspect is not questioned about the alleged offence for which the arrest was made, then the relevant time starts from when the suspect first arrives at a police station where the arrest was sought, or if the suspect is not taken to such police station in the same situation mentioned above, the time starts directly after arrest occurred. The reason behind such rule may be to avoid any lateness of suspect inside detention. In addition, to put pressure on police to achieve their task at limited time

be made by which the efficient procedures have to be elaborated so that the period between the moment of arrest until bringing the suspect in the police station is to be adjusted.

Furthermore, it is evident that there are cases in which provisions of the ICCP and the Constitution have been subjected to violation in practice, namely arrested persons spending long periods of time without being brought before the judges.¹⁶¹

4.2.2. Rights in relation to detention

“Detention”¹⁶² can be understood as the period of time in which the suspect is held in police custody between arrest and judgment following trial and no matter how justified, places the individual in a very vulnerable position. Since the suspect retains the “presumption of innocence”, the restriction of his freedom must only be resorted under the right conditions. This sub-section is devoted to highlighting the Iraqi reformed criminal justice system and how it regulates detention.

4.2.2.1. Detention is only to be ordered by the competent authority

As long as an accused person is innocent until proven guilty by a fair hearing, the order of detention should be issued from the competent authority in precise legal

especially when the suspect is released on bail and thereafter directly rearrested for another offence (the Police and Criminal Evidence Act 1984 s. 41). For more details see David Feldman, “Regulating Treatment of Suspects in Police Stations: Judicial Interpretation of Detention Provisions in the Police And Criminal Evidence Act 1984” (1990) *Criminal Law Review* 461; Richard Stone, *Civil Liberties & Human Right* (4th ed., Oxford University Press) 95; Michael Zander, *Cases and Materials on the English Legal System* (10th ed., 2007, Cambridge University Press) 209; Michael Zander, *the Police and Criminal Evidence Act 1984* (5th ed., 2005, Sweet & Maxwell) 167.

¹⁶⁰ Court of Cassation (*Mahkamat Al-Tamyeez AlAthadia*), Case number 505, General Commission on 24/5/2010 {محكمة التمييز الاتحادية}; see also about past defective - Court of Cassation (*Mahkamat Al-Tamyeez*), Case number 641/Cassation/ 78 on 30/5/1978. {محكمة التمييز}; Court of Cassation (*Mahkamat Al-Tamyeez*), Case number 3838/Criminal/89 on 8/7/1989. {محكمة التمييز}

¹⁶¹ See, the Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, dating to between 2005 and 2013); the Annual Reports of the Iraqi Ministry of Human Rights {التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الإنسان العراقية}; and international NGOs such as Human Rights Watch, Amnesty International dating to between 2004 and 2013.

¹⁶² The word of “detention” is synonymous with word “*al-tukaiff*” in Arabic. Comparatively, most criminal procedure legislation does not define the concept of detention. However, previous studies presented such a definition to fill this gap in legislations. It has been suggested that “detention means that remand in custody during pre-trial investigation stage until the trial.” Ahmed Fathi Sorour, *Mediator in the Code of Criminal Procedure* (1986, Cairo, Dar Al Nahda Al-Arabiya) 637. {احمد فتحي سرور, الوسيط في قانون الاجراءات الجنائية (القاهرة, دار النهضة العربية, 1986) 637}

terms in order to protect innocent individuals against unlawful deprivation of liberty. There has been a major reform of the Iraqi justice system in this area. Only judges now order the pre-trial detention. Article 37(b) of the Iraq Permanent Constitution 2005 confirms that “No person may be kept in custody or investigated except according to a judicial decision.”¹⁶³ This is also affirmed in Article 15: “Every individual has the right to enjoy life, security and liberty. Deprivation or restriction of these rights is prohibited except in accordance with the law and based on a decision issued by a competent judicial authority.”¹⁶⁴

It follows that after arrest, no authority other than the judges can order the detention of a suspect under any circumstance. In addition, neither the “judicial investigators” nor the “police officers” whom the law may empower to conduct the investigation, have any authority to order detention without authorization from the judge. Consequently, it can be submitted that, from the viewpoint of due process rights, the new constitutional reform gives a person under investigation an important safeguard. The only judges who would be engaged at this stage would be investigating judge. Nonetheless, lack of respect for this development can be noted under both the existing legal framework regulating the pre-trial detention and in practice. This failure has negatively affected the right to be free from arbitrary detention.

Persons could be detained under some provisions of Iraq law but these provisions do not accord with Article 37(c) and 15 of the Iraqi Permanent Constitution. Inconsistency with the Constitution arises due to the Executive branch still has the power of detention under many pieces of legislation. For example, the Customs Act No. 23 of 1984 provides Customs Officials with the power to detain persons instead of a competent judge.¹⁶⁵ The jurisprudence of the Federal Supreme Court has

¹⁶³ The Iraqi Permanent Constitution 2005, Article 37.

{ لا يجوز توقيف احد أو التحقيق معه الا بموجب قرار قضائي }

¹⁶⁴ The Iraqi Permanent Constitution 2005, Article 15.

{ لكل فرد الحق في الحياة والأمن والحريّة، ولا يجوز الحرمان من هذه الحقوق أو تقييدها إلا وفقاً للقانون، وبناءً على قرار صادر من جهة قضائية مختصة }

¹⁶⁵ Article (237) (a) of the Customs Act No. 23 of 1984, provides that the detention is prohibited, except in the following cases: an offense of smuggling ... a decision of detention can be issued by the Director-General. An unofficial translation in English is provided by the present author; similarly Decree of the Revolutionary Command Council No. 169 of 1997 which is still in force, published in the Official Gazette, issue 3696 of 17 November 1997.

{ لا يجوز التوقيف الا في الحالات الاتية : جرم التهريب ... يصدر قرار التوقيف من المدير العام او من يخوله بذلك ويقدم الموقوف الى المحكمة الجمركية خلال ثلاثة ايام من تاريخ توقيفه }

recognised such problems and determined some provisions that give the Customs Officials power of detention under the Customs Act No. 23 of 1984 to be unconstitutional.¹⁶⁶ Despite this, the offending provisions continue to remain in force, highlighting another problem of non-compliance with constitutional court decisions. Another example is that under the ICCP, the investigators rather than the judges have been given the power of detention in some circumstances.¹⁶⁷ So this is unconstitutional, clearly inconsistent with Article 15 and 37 of the Permanent Constitution. As a matter of law, detentions carried out in accordance with unconstitutional provisions are unlawful, thus those provisions are inconsistent.

Furthermore, practice is also problematic. Reputable reports from national and international human rights organizations continue to report repeated violations in this regard. UN human rights teams operating in Iraq have, during visits to places of detention, observed many instances in which the detainees seemed to be held in detention without any judicial orders. In 2010, a United Nations report stated that “in practice, it is difficult to ascertain whether warrants and detention orders are issued as required by the relevant laws, since accused persons are not usually furnished with copies.”¹⁶⁸

The suggestion is that the Federal Supreme Court needs to review unconstitutional laws. It has to repeal the unconstitutional laws and introduce new laws. The system must provide remedies for those who are unlawfully detained persons. Finally, no less importantly, sanctions for holding persons unlawfully in detention must take place. These proposals are necessary for the system to be consistent with the binding obligation under international human rights standards.

¹⁶⁶ Federal Supreme Court (*AlMahkamah AlAthadiah AlUlya*), Case number 15 /2011 on 22 February 2011 published in the High Judicial Council, *The Judicial Bulletin* (No. 17, the fourth year 2011 March and April) 16.

{المحكمة الاتحادية العليا}

¹⁶⁷ ICCP, Article 112.

¹⁶⁸ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, 2010) 23; the Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, 2012) 12, 13; see also Amnesty International, *New Order Same Abuses: Unlawful Detentions and Torture in Iraq* (n 124) 18, 29.

4.2.2.2. Detention must be exceptional

As observed in the first section of this chapter, international rules require that resorting to detention must only take place in exceptional circumstances.¹⁶⁹ In Iraq, detention is only possible for specific serious offences.¹⁷⁰ In this context, the offences have been divided by the ICCP into three categories.

In case the alleged offence is punishable by imprisonment for a term exceeding three years or life¹⁷¹, here the rule is that the investigating judge may detain the accused person, unless releasing from detention will not lead to his escape and will not prejudice the investigation.

In case the alleged offence is punishable by a fine or imprisonment for a term not exceeding three years the basic rule is that releasing the accused person on bail or without bail is mandatory unless this leads to an escape or harm to the investigation, i.e. Iraqi law imposes upon investigating judge to release the accused person on bail or without bail. In this case, as a result, releasing the accused person, like the international law, is the default position or general rule and the detention is exceptional.

Lastly, in case the alleged offence either is punishable by death or lies in a limited category of offences, the investigating judge has no choice to determine the release either with or without bail at all pre-trial processes, i.e. the detention is mandatory.¹⁷²

¹⁶⁹ The ICCPR, Article 9 (3); the HRC states that “pre-trial detention ... be an exception and as short as possible.” Human Rights Committee, General Comment No. 8, (n 15).

¹⁷⁰ For minor offences, detention is permissible if the suspect has no place of residence; ICCP, Article 110 (b) states, “If the person arrested is accused of an infraction, he may not be held in detention unless he has no particular place of residence.”

{إذا كان المقبوض عليه متهما بمخالفة فلا يجوز توقيفه إلا إذا لم يكن له محل إقامة معين}

¹⁷¹ The imprisonment for life is defined in Article 87 of Penal Code No. 111 of 1969 to mean “20 years in prison rather than life which means life”

¹⁷² ICCP, Article (109) states that:

“a. If the person arrested is accused of an offence punishable by a period of detention exceeding 3 years or by imprisonment for a term of years or life imprisonment, the judge may order that he be held for a period of no more 15 days on each occasion or order his release on a pledge with or without bail from a guarantor, and that he attend then requested if the judge rules that release of the accused will not lead to his escape and will not prejudice the investigation.

b. If the person arrested is accused of an offence punishable by death the period stipulated in subparagraph A may be extended for as long as necessary for the investigation to proceed until the investigative judge or criminal court issues a decision on the case on completion of the preliminary or judicial investigation or the trial.”

These offences include, for example, murder and knowingly handling stolen goods or handling a vehicle derived from a felony. In these alleged crimes, the accused person must be detained without being released on bail until the investigation of his case is complete.¹⁷³ It is apparent from these provisions that investigating judges have been given excessive power of detention where they can keep an accused person in detention on the mere fact that he is under suspicion of committing a serious crime. Denying bail in these non-bailable offences on this basis along with a lack of legal provisions with regard to elaborate alternatives to detention is a notable cause for concern, which adversely impacts the right to liberty under which the detention should be an exceptional measure.

Furthermore, practice is also problematic. Excessively resorting to detention during the pre-trial investigation stage has been recognised by domestic and international reputable organizations. In 2010, as noted by the Ministry of Human Rights, 75% of persons (14231) who were under detention were released without charge or any further action.¹⁷⁴ It can be deduced that investigating judges deem detention as an easy action which they can frequently order during the pre-trial investigation. While under international standards detention must be the last resort.

Many causes underlie excessive resorting to detention including that notion that the system still adopts old traditional methods of criminal investigation, hence systemic failure to establish modern development measures to deal with serious crimes provide

{ ١ - إذا كان الشخص المقبوض عليه متهما بجريمة معاقب عليها بالحبس مدة تزيد على ثلاث سنوات أو بالسجن المؤقت أو المؤبد فللقاضي أن يأمر بتوقيفه مدة لا تزيد على خمسة عشر يوماً ف بكل مرة أو يقرر إطلاق سراحه بتعهد مقرون بكفالة شخص ضامن أو بدونها بأن يحضر متى طلب منه ذلك إذا وجد القاضي أن إطلاق سراح المتهم لا يؤدي إلى هروبه ولا يضر بسير التحقيق. ب - يجب توقيف المقبوض عليه إذا كان متهما بجريمة معاقب عليها بالإعدام وتمديد توقيفه كلما اقتضت ذلك ضرورة التحقيق مع مراعاة المدة المنصوص عليها في الفقرة ١ حتى يصدر قرار فاصل بشأنه من حاكم التحقيق أو المحكمة الجزائية بعد انتهاء التحقيق الابتدائي أو القضائي أو المحاكمة }

¹⁷³ ICCP, Article 109 (b), *ibid*; the decrees of the Revolutionary Command Council No. 157 of 1996 published in the Official Gazette, issue 3651 on 6 January 1997; No. 137 of 1996 published in the Official Gazette, issue 3647 on 9 December 1996. Despite the reform of the Iraqi criminal justice system after 2003, some of abusive decrees of the Saddam-era appear to have been overlooked. While other abusive decrees such as decree 38 of 1993 that deems some crimes non-bailable offences have been repealed according to the law 45 of 2007. If the new Iraqi criminal justice system wants to move forward, there must be a clean break with the practices of the past, these laws in violation of obligations under international rules must be repealed, and Article 109 of the ICCP must be redrafted.

¹⁷⁴ The Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Rights Report (Baghdad, 2010) 77.

{ التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الإنسان العراقية }

a notable reason to keep persons under detention.¹⁷⁵ Investigating judges widely use detention for the purpose of protecting persons under investigation from the reprisal of individuals or victims of crimes. Cultural norms and traditions pose a real challenge on the legal system measures because investigating judges are usually under indirect pressure to use harsh measures in dealing with accused persons under investigation in serious crimes, particularly with regard to investigations against terrorism and other national security crimes.

UNAMI continues to find after many years of inspection that there is a notable preference to hold people in detention.¹⁷⁶ As a result, the author's research proposes further reform in which the criminal justice system must adopt appropriate non-custodial measures as an alternative to keep persons accused under detention.

4.2.2.3. Period of detention

As has been repeatedly emphasized, detention places a person in position of great vulnerability to abuse. Accordingly, even if there are genuine suspicions, it should not be automatic for a person to be deprived of liberty or simply for no purpose of conducting an investigation. This brings us to urge that if detention is necessary it has to be an exceptional measure and hence its period has to be restricted to the minimum level.¹⁷⁷

Under Iraqi law, the order of detention takes place, after a judicial investigating review, only under necessary reasons. The ICCP in Article 109 (c) states that:

¹⁷⁵ The Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Rights Report (Baghdad, 2010) 87;

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الإنسان العراقية}

The Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Rights Report (Baghdad, 2011) 67.

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الإنسان العراقية}

¹⁷⁶ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, January 2011) 23; see also, The Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Rights Report (Baghdad, 2010) 87;

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الإنسان العراقية}

The Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Rights Report (Baghdad, 2011) 66.

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الإنسان العراقية}

¹⁷⁷ The detention can be necessary only when it meets the international standards. See section one of this chapter.

“The total period of detention should not exceed one quarter of the maximum permissible sentence for the offence with which the arrested person is charged and should not, in any case, exceed 6 months. If it is necessary to increase the period of detention to more than 6 months, the judge must submit the case to the criminal court to seek permission for an appropriate extension, which must not itself exceed one quarter of maximum permissible sentence, or he should order his release, with or without bail.”¹⁷⁸

Analysis of this Article deduces that as a general rule, Iraqi law provides upper limits for the period of detention. In addition, this Article prescribes the procedures followed in order to extend the detention. Most importantly, a judicial periodic review must take place every 15 days.

However, almost all international and national human rights organisations are still continuing to report their deep concern with regard to on-going aggressive practice of prolonged periods of pre-trial detention in the post-Saddam justice system.¹⁷⁹ It is common that “suspects are frequently arrested and detained without warrants and that detainees are often held for prolonged periods without charge or trial.”¹⁸⁰ The UN experts throughout the eighteen public reports over the last ten years substantiated that a considerable number of detainees may spend long periods of detention without being brought before an investigating judge.¹⁸¹ For instance, in May 2012 UNAMI reported that “pretrial detention periods frequently exceed what is reasonable.”¹⁸²

¹⁷⁸ ICCP, 109(c).

{ ج - لا يجوز ان يزيد مجموع مدد التوقيف على ربع الحد الاقصى للعقوبة ولا يزيد بأية حال على ستة اشهر واذا اقتضى الحال تمديد التوقيف اكثر من ستة اشهر فعلى القاضي عرض الامر على محكمة الجراء الكبرى لتأذن له بتمديد التوقيف مدة مناسبة على ان لا تتجاوز ربع الحد الاقصى للعقوبة او تقر اطلاق سراحه بكفالة او بدونها مع مراعاة الفقرة ب }

¹⁷⁹ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Reports (Baghdad 2005 to 2014); Amnesty International, *Iraq: A Decade of Abuses* (Index: MDE 14/001/2013, March 2013) 31.

¹⁸⁰ The United Kingdom Foreign & Commonwealth Office, *Human Rights and Democracy: The 2011 Foreign & Commonwealth Office Report* (April 2012, the Stationery Office Limited, UK) 262, available at < <http://fcohrdreport.readandcomment.com/wp-content/uploads/2011/02/Cm-8339.pdf> > accessed 14 September 2012.

¹⁸¹ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report, June 2013; May 2012; 1 January - 31 December 2011; 1 January - 31 December 2010; 1 July - 31 December 2009; 1 January - 30 June 2009; 1 July - 31 December 2008; 1 January - 30 June 2008; 1 July - 31 December 2007; 1 April - 30 June 2007; 1 January - 31 March 2007; 1 November - 31 December 2006; 1 September - 31 October 2006; 1 July - 31 August 2006; 1 May - 30 June 2006; 1 March - 30 April 2006; 1 January - 28 February 2006; 1 November - 31 December 2005; 1 September - 31 October 2005; 1 July - 31 August 2005.

¹⁸² The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, May 2012) 11.

Recently, in 2013 UNAMI noted that prolonged periods in pre-trial detention are common across Iraq.¹⁸³

Furthermore, the Minister for the Ministry of Human Rights, during a television interview, confirmed these reports and further admitted that there are detainees who have spent five years under pre-trial detention without their case having been terminated yet.¹⁸⁴

It is important to be noted that UNAMI and the Iraqi Ministry of Human Rights regularly reported figures and statistics, which provided by Iraqi government illustrate the total number of detainees but their reports do not include statistics about the length of detention. Although there is a lack of statistics about the length of detention, it is evident that excessive pre-trial detention is common in Iraq. It appears that many factors underlie length of detention.

In the view of the present author, a key contributing factor is the lack of accountability to those who are responsible for the excessive custody time limits. The legal responsibility may be split between different agencies and thus it seems not clear who is responsible for holding accused persons in the excessive pre-trial detention. However, it is obvious that investigating judges are not doing their job in this regard properly, particularly under the provision of the ICCP the investigation is carried out directly under their control.¹⁸⁵ In consequence, reform is urgent to address this problem by enacting provisions, which remove such lack of clarity and by which those who are responsible for excessive pre-trial detention must be held accountable.

In addition, the Iraqi legal system does not make clear the consequences of excessive pre-trial detention. Thus, reform is urgent to address this issue by prescribing strict proceedings that should be followed after prolonging the period of detention; particularly the system must properly identify those excessively detained and provide remedies.

¹⁸³ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, June 2013) 9.

¹⁸⁴ T.V Interview with the Minister of the Ministry of Human Rights Mohammed Al-Sudanee, the interview was broadcasted on the screen of the "Al-Baghdadis ", a satellite T.V station in Iraq on 21/06/2012.

¹⁸⁵ See Chapter Three; Article 51 of the ICCP.

Let us turn to consider legal framework. As mentioned above, the ICCP provides the general rule about the upper limits of the detention period. However, the legal framework opens the way to the excessive use of pre-trial detention. In offences punishable by death or placed in a limited category, as mentioned above, the pre-trial release with or without bail is not possible until the investigating judge or court ends the case.¹⁸⁶

Iraqi law provides that before the accused person is referred to the competent court at the end of pre-trial investigation stage, the investigating judge can prolong the length of detention many times. The detention must be reviewed every fifteen days. At the end, the total extended period must not exceed a quarter of the maximum penalty for the alleged offence and that in any event, the length of detention should not exceed six months.

The cause for concern is that the ICCP after placing the upper limits on the period of detention in Article 109(c), the second part of these legal provisions left the upper limits to open the way for a long time of the detention that can be decided under the discretion of the judge. It is problematic that an extension of detention for more than six months is possible. In this instance, the investigating judge only needs permission from the Felony Court to authorize a further extension for an appropriate new period of the detention.¹⁸⁷ This period is not mentioned in the ICCP. The Code only mentions that it should not exceed a quarter of the maximum penalty listed in the Penal Code for the alleged offence. Hence, Iraqi law does not set out the clear maximum period for pre-trial detention and gives wide discretion to the judge in this regard. In some countries such as in the Philippines, the legal provisions provide for a maximum of 11 months between arrest and promulgation of the decision of the court.¹⁸⁸ Thus, like the

¹⁸⁶ ICCP, Article 109(b); Decrees of the Revolutionary Command Council 157 of 1996 and 137 of 1996 (n 173).

¹⁸⁷ Article ICCP, Article 109(c).

¹⁸⁸ Ed Cape, *Improving Pretrial Justice: The Roles of Lawyers and Paralegals* (2012, Open Society Foundations) 33. See also Section 121 of the Criminal Procedure Code of the Federal Republic of Germany 1987; similarly see Berlin Court of Appeal, no. 5 Ws 344/93, decision of 5 October 1993, *Strafverteidiger* (StV) 1994, p. 319; see also judgment of ECtHR in the case of *Mooren v Germany* (n 74) para 47; Vivienne O'Connor & Colette Rausch (eds.) *Model Code for Post-Conflict Criminal Justice, Model Code of Criminal Procedure Vol. II* (2008, United States, Institute of Peace Press) 307; see also the Romanian Constitution 1991, Article 23(5) which during the criminal investigation stage, specifies the maximum period of detention in 180 days.

case in these countries it is necessary for the Iraqi justice system to provide a limited period of pre-trial detention not to be exceeded.

Similarly, inadequate review of orders and periods of detention is another factor which may contribute in causing excessive pre-trial detention; particularly such reviews are, under the Iraqi legal system, usually conducted by judges without personal attendance of the accused before the court.

When the detention takes place the period of detention will be amenable to being extended. In the meantime, it is important to note that it is possible for the investigating judge to review the legality of detention in each time the extension of detention takes place; namely every fifteen days. In addition, it is possible to review the legality of detention and applying with a release via an application that can be submitted by the accused person, or his lawyer on his behalf. Therefore, it may be possible to say that this is consistent with international rules. However, it is problematic that the review of the legality of detention can be carried out without the personal attendance of detainees. Iraqi law does not provide any legal basis on which detainees must appear before the competent authority while doing such a review, nor that their lawyer can represent them, and such reviews are only carried out on paper. This may be exacerbated by the systematic denial of other rights; for example the failure to inform detainees about their rights, denial of access to legal assistance and communication with others severely impacted on the right of review of an order of detention.

It seems also that there is a problem about the independence and impartiality of the authority that conducts the review of the legality of detention. The judicial authority, according to the Iraqi legal system, supervises the deprivation of liberty and so the investigating judge, who is the leader of the investigation, is entitled both functions; to determine the detention in the first place and also to periodically review the legality of detention at later time during the pre-trial detention stage.

Therefore, it is usual practice that, when the investigating judge decides the detention or the extension of a detention period in the first place, he is going to refuse any

application regarding a review of such detention later.¹⁸⁹ Such extension to the detention time automatically occurs on the case file during periodic reviews every fifteen days. What makes the problem worse is that even when the detainee or his legal representative appeals the decision, this is likely to take a long time and may be more than the period of detention itself. In addition, the appeal procedures will be done only on paper without the presence of the detainee or the representative on his behalf.

As a result, urgent improvement needs to be made. The suggestion for this purpose is that, the new reform needs to set up the maximum period of detention. The main argument in favour of the limited time of detention is that it would hopefully inspire the investigation authority to carry out their task properly and also protects a person under investigation against unlawful detention. It is right to submit that the short time of detention may enforce the investigation authority to achieve its task and complete the investigation at a reasonable time. At the same time, it is necessary that the implementation must be adjusted to be consistent with the provisions of law.

4.3. Evaluation under international human rights law

It has been previously shown that Iraqi law does regulate the procedure for deprivation of liberty. This of course is one of the most important requirements of international rules that impose obligation on a State to elaborate the substantive and procedural rules upon which a person could be deprived of his liberty. However, it seems that in the Iraqi justice system, the right of liberty is less valued than under international rules. We have seen this from the proceeding scrutiny of verity aspects in law and practice.

It is problematic in the Iraqi legal system that arrest with a lack of reviewing available information could be conducted against the liberty of individuals. As outlined above, in actual practice high number of persons were unnecessarily arrested and detained. Over the last decade, there were a significant proportion of detainees who were never

¹⁸⁹ See the discussion about this issue in Chapter Three.

charged or released without further action as a result of a lack of evidence.¹⁹⁰ This violates the right to liberty of persons and the principle of presumption of innocence recognised under international human rights law. It is important to note that arbitrary deprivation of liberty arises not just from a flawed legal regime but also from implementation. Hence, arrest and detention must not be simply for questioning without a reliable information and evidence that establish reasonable suspicion against a person arrested. In the same vein, “arrest first, investigative late” is usual practice and thus reduction of the use of pre-trial detention before investigation is very important.

A flawed legal regime is a notable part of the problem as well. The amount of discretion given to the members of official authority to use the power of arrest plays an important role against liberty of persons. Some of the provisions of Iraqi law, as have been previously discussed, authorising police with the power to arrest without a warrant and outside the scope of *flagrante delicto*, particularly the provisions of the Article 41 and the second part of Article 103 of the ICCP. Empowering deprivation of liberty under these provisions outside the scope of *flagrante delicto* offences is not in line with the value of the right to liberty under the international human rights law. In the view of the present author, these provisions inconsistent with international standard because lead to arbitrary arrest and detention.¹⁹¹ As a result, the suggestion is that the police power should be reduced to minimum and Iraqi legislature should rigorously limit the wide power of arrest without order by judges. The judicial authority must also provide effective control on law enforcement officials to protect individuals against their excessive powers in practice.

Furthermore it can be suggested that, the dictatorship having been removed, the right to liberty is enshrined in the Iraqi Permanent Constitution 2005. The Federal Supreme Court (*Almahkama Al-Itahadiya Al-Olya*) has been convened, and one of its tasks is to

¹⁹⁰ The Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Rights Report (Baghdad, 2010) 76, 77.

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الإنسان العراقية}

¹⁹¹ HRC recognised that “When private individuals or entities are authorized by a State party to exercise powers of arrest or detention, the State party remains responsible for adherence to article 9. It must rigorously limit those powers and must provide strict and effective control to ensure that those powers are not misused, and do not lead to arbitrary or unlawful arrest or detention.” UN Human Rights Committee, Draft General Comment No 35, (n 2) para. 10.

consider the constitutionality of laws.¹⁹² Therefore, individuals, civil-society and human rights organisations could challenge these defective rules. It may be well to follow proceedings against any legal rules that are in contradiction with the Constitution in order to obtain a decision in which the Federal Supreme Court can declare the unconstitutionality of such rules. Even though it has not been active enough due to the fact that it relies on cases being brought before it the present research draws attention to the possibility of improving little by little.

The aforesaid brings us to an important note that the protection of the right to liberty should be secured to move further and further away from the time of the Ba'ath regime. It goes without saying that, in the former era, the brutal violence to liberty was a systemic phenomenon in law and in practice. The difference at the present time is that even though the arbitrary deprivation of liberty widely happens, addressing these defective issues is possible and the constitutional review is one of the attempts to do so. Consequently, it can be suggested that even though this approach is not part of the Iraqi culture, the constitutional review needs to be activated in order to challenge any unconstitutional rules that may violate the right to liberty of Iraqis. In order to enable people to do this of course efficient guidance and support in how to do it must be provided.

As elaborated above there are no provisions under the ICCP that impose a duty upon the arresting officer to notify reasons of an arrest for a person under arrest. Failure to inform the reasons for arrest would violate international rules under Article 9(2) of the ICCPR. Bearing in mind that this flaw can be fixed when arrested persons either under arrest with or without warrant, under provisions of the Article 123 of the ICCP, must be informed about the reasons for their arrest during judicial interrogation after police investigations. The shortcoming, however, is that the notifying, when it takes place might be too late after a noticeable period has elapsed. It is better for Iraqi law to make clear that notifying the arrested person the reason for arrest must be provided upon arrest.

¹⁹² See Article 93 of the Iraqi Permanent Constitution 2005.

It is problematic that persons arrested could spend a long time in police custody before they are brought before the judicial authority. In post-Saddam reform, an attempt to correct the indicated shortcomings in the Iraqi criminal justice system is made by the new Iraqi Permanent Constitution. According to Article 19(13) of the Constitution police have duties to bring the case of an arrest before the investigating judge within forty-eight hours as the upper limit from time of an arrest. Then, according to the provision of Article 123 of the ICCP the investigating judge can order to bring the arrested person to the Investigation Court (office of investigating judge) for interrogation within twenty-four hours, which start from his reading the case file.

The author of this research proposes that further legal reforms are required to be made. Like the case under practice of international bodies and many countries around the world the arrested person has to be brought before the judge to conduct the initial hearing within 48 hours of the time of the arrest even during weekends and holidays.

The right to liberty seems also negatively affected by the fact that the investigating judge, who controls investigations, is entitled both functions to determine the detention in the first place and subsequently to review the legality of detention at the pre-trial investigation stage as well. In addition, when detention takes place the investing judge has a duty to conduct fortnightly review of it. It is likely that, when the investigating judge decides detention in the first place or continued detention period, he is going to refuse any application regarding a review of such detention later. This could affect independence and impartiality of the authority that conducts the review of the legality of detention.

In addition, Iraqi law does not provide any legal basis on which a detainee could physically appear before the competent authority while doing such reviews of detention, nor that his lawyer can represent him, i.e. such review is only done on paper. Furthermore, the systematic denial of other rights severely impacts judicial review of detentions; particularly denial of access to legal assistance or communication with others. Above all, it is obvious that violation of this right is usual practice. Consequently, these shortcomings are inconsistent with the protection of human rights enshrined in international rules under Article 9(4) of the ICCPR and

hence it can be proposed that the post-Saddam system needs further reform to improve the right under consideration by identifying clear procedural safeguards for a proper judicial review of detentions.

The reformed criminal justice system in Iraq includes in law and implementation complex measures that may frustrate the release of the detainee on bail. As discussed above, reliable reports have illustrated the concern regarding vast number of detainees whose rights to release on bail have been extensively overlooked. UNAMI has consistently reported that “a reluctance to utilise bail provisions where appropriate” results in excessive delays for persons in pre-trial detention.¹⁹³

The presumption of innocence is breached in a number of offences, which have been deemed non-bailable offences. On the contrary, the practice of the HRC makes clear that “there should not be any offences for which pre-trial detention is obligatory.”¹⁹⁴ Pre-trial detention should not be ordered solely on the basis of the severity of the potential sentence.¹⁹⁵ The HRC states that “the Committee considers it a matter of concern that the duration of pre-trial detention is determined by reference to the possible length of sentence following conviction rather than the need to bring the detainee before the courts.”¹⁹⁶ “Detention must be based on an individualized determination that it is reasonable and necessary in all the circumstances.”¹⁹⁷ Moreover, according to the HRC other measures could be taken other than detention to prevent the possibility of trying to abscond.¹⁹⁸

As a result, it is recommended that the presumption must always be in favour of release and detention must be the exception.¹⁹⁹ For this purpose, these legal provisions

¹⁹³ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, January 2011) 23 and (Baghdad, June 2013) 7.

¹⁹⁴ UN Human Rights Committee, ‘Concluding Observations: Panama’ (Ninety-second session, 17 April 2008) CCPR/C/PAN/CO/3, para. 12; UN Human Rights Committee, ‘Concluding Observations: Argentina’ (Seventieth session, 15 November 2000) CCPR/CO/70/ARG, para. 10.

¹⁹⁵ UN Human Rights Committee, Draft General Comment No 35, (n 2) para. 39; see also practice of ECtHR in *Letellier v France* App no 12369/86 (ECtHR, 26 June 1991), (1992) 14 EHRR 83 para 43.

¹⁹⁶ UN Human Rights Committee, ‘Concluding Observations: Argentina’ (n 194) para. 10.

¹⁹⁷ UN Human Rights Committee, Draft General Comment No 35, (n 2) para. 39;

¹⁹⁸ *Eligio Cedeño v Bolivarian Republic of Venezuela* UN Human Rights Committee Communication (1940/2010) 29 October 2012 para 7.10.

¹⁹⁹ *Juan Peirano Basso v Uruguay* UN Human Rights Committee, (n 87) para 10.2; *Michael and Brian Hill v Spain* UN Human Rights Committee, (n 41) para 12.3; See also *Castravet v Moldova* (n 93) para 30.

in violation of obligations under Article 9(3) of the ICCPR must be repealed, and that Article 109 of the ICCP must be redrafted. In addition legal provisions with regard to elaborate alternatives to detention are also important. It may well be that the release of persons from detention can be subjected to any other guarantees of appearance. In this respect, interesting alternatives of detention established by various regional and international documents can be adopted in the national justice systems. These alternatives include for example methods “based on new technology, such as electronic monitoring, making use of a GPS system.”²⁰⁰ By the same token, an observation of practice by the international human rights bodies and the rules of international criminal tribunals could also illustrate some interesting alternatives to detention.²⁰¹ These are electronic bracelets ‘tags’ and other conditions such as a suspect being held at a limited area or put under the supervision of official authority.²⁰²

Finally, Iraqi law does not establish the clear maximum length of pre-trial detention. As outlined above, over the last ten years, the Iraqi system has fallen short of these mentioned international rules under which the accused person has to be either released and his case to be closed or referred to trial. Consequently, the suggestion for the Iraqi justice system to be in line with international due process regarding the right to trial within a reasonable time under Article 9(3) of the ICCPR is that Iraqi law should set out maximum length of detention for persons detained pending trial.²⁰³

²⁰⁰ Karel de Meester et al., “Chapter 3, Investigation, Coercive Measures, Arrest, and Surrender” (n 98) 346.

²⁰¹ See the ICC Rules of Procedure and Evidence, Rule 119; see also *ibid.*

²⁰² UN Human Rights Committee, ‘Concluding Observations: Argentina’ (n 92) CCPR/ C/ARG/CO/4 para. 16; UN Human Rights Committee, ‘Concluding Observations, Panama’ (n 194) para. 12; *Smantser v Belarus* UN Human Rights Committee, (n 92) para 10.3; UN Human Rights Committee, Draft General Comment No 35, (n 2) para. 39.

²⁰³ It also may be important that the periods of detention which may be spent during other stages of proceedings such as these which may be spent during the trial stage until the final verdict is decided, are of particular importance to be within a scope of a limited period.

CHAPTER FIVE

THIRD PARTY ACCESS RIGHTS IN THE REFORMED IRAQI CRIMINAL JUSTICE SYSTEM

Introduction

The third party access rights that includes the rights of access to a lawyer and an interpreter, is crucial in criminal proceedings. For the purposes of this chapter, these two guarantees of persons accused during the pre-trial investigation stage are of particular significance. The chapter endeavours to identify and discuss these rights in order to ascertain the extent to which the post-Saddam justice system in Iraq is compliant with international standards.

The question to be addressed is whether post-Saddam reform fully brings the contemporary legal system in line with the international due process in relation to third party access rights or still falls short of international rules. The answer needs analysis and identifying the issues in the law and practice for redressing any weaknesses and fault lines.

A claim that could be asserted here is that in post-Saddam Iraq, the situation regarding the right of access to a third party at the pre-trial stage is still non-compliant with international human right rules. In order to test the correctness of this claim, the chapter is divided in the following three sections. The first one considers the protection of the right as it exists under international law. The second section, considers present Iraqi law and practice, and a third section considers this new Iraqi system in light of international rules.

5.1. International rules

5.1.1. Right of access to a lawyer

A person under investigation is usually in a vulnerable position at the outset of the proceedings.¹ The risk of mistreatment in custody at this stage is usually more likely and thus the right to prompt legal assistance is of crucial importance. At this stage a suspect may not know the accusation against him and be under grave danger of making irreparable confession resulting from great emotional pressure. For these reasons, denying legal assistance at this stage might mean a notable violation of the rights of persons under criminal investigation, especially the protection against self-incrimination. It is certainly correct to presume that a suspect who is provided with the legal assistance promptly at the outset of the proceedings, immediately before any interrogation taking place, would be less likely to be a victim of invalid confession or improper interrogation.²

The presence of a lawyer during questioning not only provides a suspect with much-needed advice, but also helps to minimize the risk of oppressive interrogation. Otherwise, preventing a person under investigation from access to a lawyer in this stage of proceedings may result in an unreliable confession, a wrong conviction and a miscarriage of justice. Thus, the safeguards for persons under investigation can only be properly secured after he has received legal assistance. What follows is that denying the present right at the initial stage of the police interrogation can lead to breach other rights of the accused person.³ A further issue is that denying such a right at this stage of the proceedings would be contrary to international rules, as upheld by relevant international bodies such as the HRC and ECtHR.

The right to legal assistance has been recognized under provisions of a fair trial in accordance with Article 14 paragraph (3) of the ICCPR which states that:

¹ *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008), (2009) 49 EHRR 19 para 54; Layla Skinnis, "I'm a Detainee; Get Me Out of Here" (2009) 49 *British Journal of Criminology* 412.

² Columbia Law Review Association, "The Right to Non-Legal Counsel during Police Interrogation Source" (1970) 70, *Columbia Law Review* 758 <<http://www.jstor.org/stable/1121313>> accessed 18/06/2012.

³ Ed Cape, *Improving Pretrial Justice: The Roles of Lawyers and Paralegals* (2012, Open Society Foundations) 14.

“In the determination of any criminal charge against him, everyone shall be entitled (b) [...] to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; [...] (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.”⁴

The guarantees that underlie this Article require the following to be discussed:

5.1.1.1. Right to legal assistance from the outset of the proceedings

From the Article indicated above, the right of access to a lawyer is protected by international rules, and it is considered a fundamental right. However, the wording of Article 14(3) of the ICCPR does not guarantee this right from the beginning of proceedings at the pre-trial stage but explicitly guarantees this right for a person under criminal charge. Hence the question, first of all, is whether the suspect’s right of defending himself through legal assistance is available only at trial or at all stages of criminal proceedings. In this regard, it can be assumed that like other rights of a suspect having been given under international rules in the context of fair trial, the right to the counsel has not been exactly mentioned in the pre-trial investigation stage from the outset of criminal proceedings. Yet, it is certainly incorrect to claim that the right to legal assistance may solely be relevant to the accused at trial stage.⁵

It can be argued that the right to a lawyer under the provision of a fair hearing applies from the outset of criminal proceedings being taken place by the police. The argument can be evidenced from the jurisprudence of the HRC. The HRC makes it clear that the

⁴ Similarly see, ECHR, Article 6(3) which states that “everyone charged with a criminal offence has the following minimum rights: ... (c) To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require...”.

⁵ In *G v UK* (1983) 35 DR 75, the UK government adopted this view. According to Starmer (former UK *Director of Public Prosecutions*): the UK government argued that Article 6(3) (c) should only apply when it is clear that a trial would take place. However, that position is no longer sustainable, *G v UK* held that the right to legal assistance is relevant to the accused person at the outset of proceedings in police custody; Keir Starmer, *European Human Rights Law* (1999, Legal Action Group) 245.

accused person should be granted prompt access to a lawyer because this right can be applied at all stage of criminal proceedings.⁶

The HRC held that the right of access to counsel under Article 14, paragraph 3 (b), was breached after the request for this right had been ignored by police throughout five days from the time of arrest.⁷ In another decision, it found that “the denial of access to a lawyer of choice until the trial stage constitutes a violation ... of the Covenant.”⁸ What is more, in the view of the HRC, a state party must ensure that a suspect has access to a lawyer from the start of his detention.⁹ This makes clear that the right to legal assistance is applicable to a suspect at the pre-trial stage once he is arrested and taken to a police station for questioning.

The jurisprudence of the ECtHR is also illustrative of the right. There is no express right of access to a lawyer at pre-trial stage enshrined in the ECHR. However, in the case of *Salduz v Turkey* the Grand Chamber of European Court of the Human Rights unanimously held that:

“The safeguards of art. 6 apply not merely to the criminal trial but also to the pre-trial procedures that have a bearing on the trial. In particular, early access to a lawyer is part of the procedural safeguards stemming from the privilege against self-incrimination. The investigation stage is important for the preparation of criminal proceedings, and ... an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex ... In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer.”¹⁰

⁶ *Eustace Henry and Everal Douglas v Jamaica* UN Human Rights Committee Communication No (571/1994) 25 July 1996; *Panovits v Cyprus* App no 4268/04 (ECtHR, 11 December 2008) paras 6.3, 9.2; *Borisenko v Hungary* UN Human Rights Committee Communication No (852/1999) 14 October 2002 para 7.5 which states that “the Committee has made it clear that it is incumbent upon the State party to ensure that legal representation provided by the State guarantees effective representation ... legal assistance should be available at all stages of criminal proceedings.”

⁷ *Paul Anthony Kelly v Jamaica* UN Human Rights Committee Communication No (537/1993) 15 February 1993 para 9.2; *Gridin v Russian Federation* UN Human Rights Committee Communication No (770/1997) 20 July 2000 para 8.5, in both of these two cases the HRC deemed that the right of access to a lawyer was violated when the police had failed to provide a lawyer for five days from the time of arrest.

⁸ *Sandzhar Ismailov v Uzbekistan* UN Human Rights Committee Communication No (1769/2008) 25 March 2011 para 7.4.

⁹ UN Human Rights Committee, ‘Concluding Observation: Gabon’ (10/11/2000) CCPR/CO/70/GAB, para.13.

¹⁰ *Salduz v Turkey* (n 1) paras 50-63. For comment on this case see Andrew J. Ashworth “Right to Fair Trial” (2010) *Criminal Law Review* 421; similarly see *Plonka v Poland* App no 20310/02 (ECtHR, 31 March 2009) para 35; *Shabelnik v Ukraine* App no 16404/03 (ECtHR, 19 February 2009) paras 52, 53.

The duty of providing a lawyer to a suspect at the police station after arrest is very important and can only be subject to restriction for good cause. Thus, the Grand Chamber of the ECtHR rightly stated that:

“The legal principle to be derived from the judgment is therefore that, normally and apart from exceptional limitations, an accused person in custody is entitled, right from the beginning of police custody or the pre-trial detention, to be visited by defence counsel to discuss everything concerning his defence and his legitimate needs.”¹¹

Similarly, Ashworth points out that

“A suspect should be granted access to legal advice from the moment he is taken into police custody or the pre-trial detention. It would be regrettable if the impression were to be left by the judgment that no issue could arise under Art. 6 as long as a suspect was given access to a lawyer at the point when his interrogation began or that Art. 6 was engaged only where the denial of access affects the fairness of the interrogation of the suspect.”¹²

It seems to be that the reason behind recognizing this safeguard for a suspect at the outset of deprivation of liberty in a police station, is concern to protect fundamental rights. Access to a lawyer prepares the defence and also deters abuse. Safferling asserts that

“The whole inquiry is intended to determine the legal and factual basis for trial by obtaining evidence and preparing court procedure. The foundations for potential conviction are being laid here. It is a crucial stage for the suspect ... Therefore, already at this stage the suspect must be assisted by legal counsel.”¹³

In light of the above, the legal assistance of the accused person has been rightly deemed one of the most significant rights during the pre-trial stage and police investigatory process. Beyond this, it is not surprising that treaties do not lay down limits within which a person must have access to a lawyer; these are a matter for domestic laws. Nevertheless, as noted, there is a clear demand from the HRC and the ECtHR that access to a lawyer must be “prompt” and automatically follows the deprivation of liberty. The UN Basic Principles on the Role of Lawyers is relevant as best practice.¹⁴ It provides that persons deprived of liberty must have legal assistance

¹¹ *Salduz v Turkey* (n 1).

¹² Andrew J. Ashworth “Right to Fair Trial” (n 10) 421.

¹³ Christoph Safferling, *Towards an International Criminal Procedure* (2001, Oxford University Press) 106.

¹⁴ Principle 1 provides that “All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.” The UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba, 27 August to 7 September

of their own choice upon arrest.¹⁵ According to principle 7 a State must ensure “prompt access to a lawyer and in any case not later than forty-eight hours from the time of arrest or detention.”¹⁶ Also, in 2003, the UN Special Rapporteur on Torture suggested a 24 hour limit to be given access to a lawyer.¹⁷

In *Chikunova v Uzbekistan*, the HRC found that the delay in providing the suspect with a lawyer within two days after his arrest was a violation of the concerned right.¹⁸ The HRC in the case of *Kasimov v Uzbekistan*, deemed Article 14(3)(d) to be violated when legal representation had not been provided to the accused for ten days from arrest.¹⁹ Similarly, the HRC in the case of *Kandarov v Tajikistan*, upheld that the right was violated when legal representation was not provided to the accused for thirteen days after the time of arrest.²⁰ In light of such jurisprudence, the conclusion is that the assistance of a lawyer should be provided promptly at the outset of proceedings and any reason for delay should be avoided.

In light of the above considerations, the present author is of the view that, the international rules and their application by international bodies make it clear that there is a right to prompt legal assistance, and that right is triggered from the moment a person is deprived of liberty.

1990); see also UN General Assembly Res 43/173 ‘The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment’ (9 December 1988) principle 17 states that “A detained person shall be entitled to have the assistance of a legal counsel.”

¹⁵ Ibid, principle 5.

¹⁶ Ibid, principle 7.

¹⁷ UN Commission on Human Rights, Report of the Special Rapporteur on the question of torture, Theo van Boven, submitted pursuant to Commission resolution 2002/38 Addendum E/CN.4/2003/68/Add.1, February 27, 2003, para. 26(g), at <http://ap.ohchr.org/documents/alldocs.aspx?doc_id=3360> accessed 19 January 2014.

¹⁸ *Chikunova v Uzbekistan* UN Human Rights Committee Communication No (1043/2002) 16 March 2007 para 7.4; see also UN Human Rights Committee, ‘Concluding Observation: Gabon’ (10/11/2000) (n 9) para.13.

¹⁹ *Kasimov v Uzbekistan* UN Human Rights Committee Communication No (1378/2005) 30 July 2009 para 9.6.

²⁰ *Iskandarov v Tajikistan* UN Human Rights Committee Communication No (1499/2006) 30 March 2011 para 6.1; see also *Borisenko v Hungary* UN Human Rights Committee, (n 6) para 7.5.

5.1.1.2. Right of notification to access legal assistance

As demonstrated above, the right of access to a lawyer has to be provided at all stages of criminal procedures. For this to be effective, the accused needs to be notified about availability of this guarantee at an early stage of proceedings. In this respect, the Open Society Justice Initiative asserts that the *travaux préparatoires* of the ICCPR demonstrate that “the right to be informed of the right to legal assistance is ‘self-evident’. The person should be informed promptly about this right upon arrest.”²¹ The UN Basic Principles on the Role of Lawyers provides that the responsibility of a State in criminal justice matters is not only to provide an accused with this safeguard but also to notify him about the right of access to a lawyer promptly at the outset of the proceedings.²²

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, also, provides that “he shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.”²³ The HRC, therefore, upheld the view that it was a violation of Article 14(3) (d), when the suspect had not informed of his right to legal representation and this right should be available throughout the stages of proceedings “also to any preliminary hearing relating to the case.”²⁴ Similarly, in the case of *Andrei Khoroshenko v Russian Federation*, the Committee also found a violation of the Covenant in the event of the accused not being informed of his right to have a lawyer at the initial stage of the process of arrest.²⁵

What is more, it is important that the accused person must be informed of the right to be freely assisted by a legal representative at the initial phase of the proceedings

²¹ Open Society Justice Initiative, *Case Digests: International Standards on Criminal Defence Rights* (April 2013) 11, at < <http://www.opensocietyfoundations.org>> accessed 21 January 2014.

²² The UN Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, (n 14) principles 5, 8.

²³ See UN General Assembly Res 43/173 ‘The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment’ (n 14) Principle 17.

²⁴ *Barno Saidova v Tajikistan* UN Human Rights Committee Communication No (964/2001) 8 July 2004 para 6.8; *Clarence Marshall v Jamaica* UN Human Rights Committee Communication No (730/1996) 3 November 1998 para 6.2.

²⁵ *Andrei Khoroshenko v Russian Federation* UN Human Rights Committee Communication No (1304/2004) 29 March 2011 para 9.8; see also *Pagdayawon Rolando v the Philippines* UN Human Rights Committee Communication No (1110/2002) 3 November 2004 para 5.6; *Valichon Aliboev v Tajikistan* UN Human Rights Committee Communication No (985/2001) 18 October 2005 para 6.4.

where he cannot afford to pay for a lawyer and whenever the interest of justice so requires.²⁶ In *Johnson v Jamaica*, the HRC affirmed that this right is not only relevant to the trial but also to any preliminary investigation stage and that “the investigation magistrate was required to inform the author [suspect] of his right to have legal representation and to ensure legal representation for the author [suspect], if he so wished.”²⁷

In view of the above, violation of Article 14(3) of the ICCPR may occur where a person has not been informed at the initial stage of the proceedings i.e. when he is deprived of his liberty about his right to have a lawyer, even if he is indigent (unable to pay for those costs).

5.1.1.3. Meaningful access

5.1.1.3.1. Meaningful access: Role of right to a lawyer in protecting the right to silence and to be free from self-incrimination²⁸

It is widely accepted that the presence and assistance of a lawyer plays a vital role in protecting other rights. Most importantly, the right provides a strong guarantee of the presumption of innocence, which manifests itself through the right to silence. These findings are derived from the jurisprudence of international instruments’ bodies. It seems that the jurisprudence of the ECtHR is illustrative and it is more helpful to interpret the international rules by determining the direct effect of the right to legal assistance on the right to remain silent. For instance, in *Murray v the United Kingdom*, the Strasbourg Court observed that even though domestic law may give the silence of the suspect during questioning incriminating inferences in certain

²⁶ UN Human Rights Committee, General Comment No. 32, (CCPR/C/GC/32, 23 August 2007) “Right to Equality before Courts and Tribunals and to A Fair Trial (Article 14)” adopted on 27 July 2007, para. 38.

²⁷ *Johnson v Jamaica* UN Human Rights Committee Communication No (592/1994) 25 November 1998 para 10.2; *Levy v Jamaica* UN Human Rights Committee Communication No (719/1996) November 1998 para 7.7; *Krasnova v Kyrgyzstan* UN Human Rights Committee Communication No (1402/2005) 29 March 2011 para 8.6; see also Till Gut et al., “Chapter 9: Defence Issues” in Goran Sluiter et al. (eds.), *International Criminal Procedure Principles and Rules* (1st ed., 2013, Oxford) 1210.

²⁸ Highlighting the role of lawyer in this regard is necessary for paving the way to consider some relevant details in the next chapter.

circumstances, drawing adverse inferences from silence are prohibited unless the right of access to a lawyer has been guaranteed at the beginning of the proceedings.²⁹

The same reasoning was followed in the Court's judgment in the case of the *Averill v the United Kingdom*.³⁰ In this case, access to a solicitor had been denied during the first 24 hours of police interrogation, and then access was later allowed. During subsequent interviews, the police did not allow the solicitor to be present. At trial, adverse inference was drawn from the suspect's silence. The court found that the right to a fair trial was violated on the basis that the adverse inference was drawn from the silence of the suspect. The drawing of adverse inferences from an accused's silence is only possible when providing the right of access to a lawyer at the initial stages of police interrogation.³¹

Similar findings can be found in the decisions of the HRC, with regard to the role of a lawyer in protecting the right to be free from self-incrimination. In the case of *Mukhammadruzi Iskandarov v Tajikistan*, for example, the HRC considered that the obtained confession in the absence of a lawyer is not admissible.³²

One can therefore conclude that, the interpretation of international rules by international bodies and case law reveals that, no adverse inference may be drawn unless legal advice is offered or made available from the initial stage of interrogation. The right to access legal assistance from the initial stage of proceedings is a critical tool for protecting other rights including presumption of innocence.

²⁹ *Murray v the United Kingdom* App no 18731/91 (ECtHR, 8 February 1996), (1996) 22 EHRR 29 para 59. Para 66 states that "...under the Order [Criminal Evidence (Northern Ireland) Order 1988], at the beginning of police interrogation, an accused is confronted with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him. Under such conditions, the concept of fairness enshrined in Article 6 requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation. To deny access to a lawyer for the first 48 hours of police interrogation, in a situation where the rights of the defence may well be irretrievably prejudiced, is - whatever the justification for such denial - incompatible with the rights of the accused under Article 6."

³⁰ *Averill v the United Kingdom* App no 36408/97 (ECtHR, 6 June 2000), (2001) 31 EHRR 36 para 60.

³¹ *Ibid*, para 59.

³² *Iskandarov v Tajikistan* UN Human Rights Committee, (n 20) para 6.6.

5.1.1.3.2. Meaningful access: Right to have effective legal assistance

As discussed earlier, international bodies and case law have consistently held that the right of access to legal assistance must be guaranteed from the pre-trial stage of criminal proceedings. At the same time, an accused person from the outset of the investigation has right of free access to legal assistance where he cannot afford to pay for a lawyer and whenever the interest of justice so require.³³ Obviously, if this right is to be at all effective due account should be given to the quality of the legal assistance.³⁴ Having an incompetent lawyer can be ever worse than having no lawyer. The wording of the ICCPR does not consider explicitly the raised issue but effectiveness of assistance is supported by relevant case law. One could say that the right under consideration does not only need to be enshrined in domestic legislations, but also has to be practical and effective as well, so the right is not solely theoretical one.

According to the jurisprudence of the international human rights bodies, where there is an entitlement to free access to a lawyer, the State has to provide the suspects with effective legal assistance. This argument has been substantiated by the jurisprudence of the HRC.³⁵ The jurisprudence of the ECtHR is consistent.³⁶ The HRC upholds that “the State had to take the steps to ensure that a lawyer, once assigned, provides effective representation in the interest of justice.”³⁷

In view of the foresaid, the State has to be held responsible for providing effective legal assistance for an accused person when the person cannot afford it or when it is in

³³ UN Human Rights Committee, General Comment No. 32, “Right to Equality before Courts and Tribunals and to A Fair Trial (Article 14)” (n 26) para. 38; see also *Johnson v Jamaica* UN Human Rights Committee, (n 27) para 10.2; *Levy v Jamaica* UN Human Rights Committee, (n 27) para 7.7; *Krasnova v Kyrgyzstan* UN Human Rights Committee, (n 27) para 8.6.

³⁴ See for example *Barno Saidova v Tajikistan* UN Human Rights Committee, (n 24) para 6.8; *Paul Anthony Kelly v Jamaica* UN Human Rights Committee, (n 7) para 9.3; see also UN Human Rights Committee, General Comment No. 32, “Right to Equality before Courts and Tribunals and to A Fair Trial (Article 14)” (n 26) para. 38.

³⁵ *Lawrence Chan v Guyana* UN Human Rights Committee Communication No (913/2000) 31 October 2005 para 6.2; *Makhmadim Karimov and Amon Nursatov v Tajikistan* UN Human Rights Committee Communication No (1108 & 1121/2002) 27 March 2007 para 7.5; *Alive v Ukraine* UN Human Rights Committee Communication (781/1979) 7 August 2003 para 7.2; *Butovenko v Ukraine* UN Human Rights Committee Communication No (1412/2005) 19 July 2011 para 7.8.

³⁶ *Daud v Portugal* App no 22600/93 (ECtHR, 21 April 1998) paras 36, 42; *Kamasinski v Austria* App no 9783/82 (ECtHR, 19 December 1989), (1991) 13 EHRR 36 para 65.

³⁷ *Barno Saidova v Tajikistan* Human Rights Committee, (n 24) para 6.8.

the interest of justice. Nevertheless, the State party cannot be held responsible for every shortcoming of the legal aid lawyer. In the case of *Imbrioscia v Switzerland*, the ECtHR held that “Art.6 applied to the pre-trial proceedings [...] but a state could not be held responsible for all the inadequacies of an accused’s counsel.”³⁸ The court added that,

“the State could not be held responsible for every shortcoming of the legal aid lawyer [...] the competent national authorities are required to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way [...] both before and during the trial at first instance.”³⁹

This right to effective legal representation only applies when the lawyer is supplied by the State. When a suspect seeks a private lawyer, the State is not responsible for that lawyer’s failures.⁴⁰ The HRC therefore observed in *HC v Jamaica* that “the author’s lawyer was privately retained and that his alleged failure to properly represent the author cannot be attributed to the State party.”⁴¹

In light of the practice of the HRC, the state is not responsible for fault when legal representation is privately retained. In addition, the conduct of a defence lawyer may be deemed inadequate only if a domestic court finds it incompatible with the interests of justice. For instance in the case of *Fazal Hussain v Mauritius*, the Committee held that “a State party cannot be held responsible for the conduct of a defence lawyer, unless it was or should have been manifest to the judge that the lawyer’s behaviour was incompatible with the interests of justice.”⁴²

One of the important components of the adequacy of the given legal assistance is that the opportunity to contact a lawyer should be given with enough time and facilities.⁴³

³⁸ *Imbrioscia v Switzerland* App no 13972/88 (ECtHR, 24 November 1993), (1994) 17 EHRR 441 para 41; *Kamasinski v Austria*, (n 36) para 65.

³⁹ *Imbrioscia v Switzerland* *ibid*; see also *Kamasinski v Austria* *ibid*.

⁴⁰ UN Human Rights Committee, General Comment No. 32, “Right to Equality before Courts and Tribunals and to A Fair Trial (Article 14)” (n 26) para. 38.

⁴¹ *HC v Jamaica* UN Human Rights Committee Communication No (383/1989) 28 July 1992 para 6.3.

⁴² *Fazal Hussain v Mauritius* UN Human Rights Committee Communication No (980/2001) 18 March 2003 para 6.3; see also the Committee’s decisions in the cases of *Campbell v Jamaica* UN Human Rights Committee Communication No (248/1987) 30 March 1992 para 7.3; *Francis Peter Perera v Australia* UN Human Rights Committee Communication No (536/1993) 28 March 1995 para 3.2.

⁴³ ICCPR 14(3) states that “(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”; UN Human Rights Committee, General

The lack of time and facilities to meet with a lawyer means restriction on the right to defence and could prejudice the overall fairness of proceedings.⁴⁴ In the case of *Andrei Khoroshenko v Russian Federation*, the HRC held that the State party should give the accused person “adequate time and facilities ... have the opportunity to always freely and privately meet with his lawyer during the pre-trial proceedings.”⁴⁵

Similarly, the HRC decided in *Pierre v Cameroon* that the conduct of authorities had breached the rights of the accused person under Article 14(3) of the ICCPR because his efforts to communicate with his lawyers faced considerable obstacles where the authorities prevented them from travelling to assist their client.⁴⁶ In the view of the Committee in *Kasimov v Uzbekistan*, significant obstacles to private communication between the accused person and his lawyer at the early stage of arrest constituted a violation to the right to be assisted by a lawyer under the ICCPR.⁴⁷

Another relevant issue that may affect receiving effective legal representation is about confidentiality of lawyer-client communication in person or meeting. The effectiveness of legal assistance and its usefulness may be adversely influenced where breach of this confidentiality takes place. In the case of *Chikunova v Uzbekistan*, the HRC provided clear statement that in the case of the meeting between the suspect and lawyer is subjected to the presence of the investigator, this leads to a violation the right of access to a lawyer and adversely affects fair trial.⁴⁸

To sum up, meaningful access to legal assistance is essential for safeguarding other rights including the presumption of innocence, and depends on a variety of factors, including the adequacy of a presented lawyer. In addition, a person under preliminary

Comment No. 32, “Right to Equality before Courts and Tribunals and to A Fair Trial (Article 14)” (n 26) para. 32.

⁴⁴ Annemarieke Beijer, “False Confession During Police Interrogation And Measures To Prevent Them” (2010)18 *European Journal of Crime, Criminal Law and Criminal Justice* 336.

⁴⁵ *Andrei Khoroshenko v Russian Federation* UN Human Rights Committee, (n 25); see also, *Marlem Carranza Alegre v Peru* UN Human Rights Committee Communication No (1126/2002) 28 October 2005 para 7.5.

⁴⁶ *Pierre v Cameroon* UN Human Rights Committee Communication No (1397/ 2005) 22 July 2009 para 7.8.

⁴⁷ *Kasimov v Uzbekistan* UN Human Rights Committee, (n 19) para 9.6.

⁴⁸ *Chikunova v Uzbekistan* UN Human Rights Committee, (n 18) para 7.4; see also *Sirageva v Uzbekistan* UN Human Rights Committee Communication No (907/2000) 18 November 2005 para 6.3.

investigation has the right to communicate with his defence lawyer in private and in conditions that fully respect confidentiality.

5.1.2. Right of access to an interpreter

The ICCPR's Article 14(3) states that

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality... (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court”.⁴⁹

Accordingly, where an accused person cannot understand or use the language in court, the State is obliged to provide him with the interpreter to assist him understand and communicate during criminal proceedings. It has been stated that this safeguard exists to provide the accused person with the full ability to defend himself despite any linguistic disadvantage.⁵⁰ The protection of the right under international rules requires considering following issues:

5.1.2.1. Scope of the interpretation service

One major argument with the texts of the international rules is that textually, the relevant provisions seem to apply to criminal proceedings in “court”. It can be argued that despite the ICCPR's use of the word “court”, this right also applies to the pre-trial stage of criminal proceedings.⁵¹ In other words, this right arises from the moment in which the suspect cannot understand or speak the language used in criminal proceedings at the preliminary phases of the investigation. The reasoning is that it would otherwise destroy the objective of the right.⁵² The body of Principles states that

⁴⁹ Similarly ECHR, Article 6(3) stipulated that: “Everyone charged with a criminal offence has the following minimum rights... (e) To have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

⁵⁰ Arthur Henry Robertson & J. G. Merrills, *Human Rights in Europe* (4th ed., 2001, Manchester University Press) 131.

⁵¹ See Article 14(3) (f) of the ICCPR; see also Chapter One, particularly the page that is relevant to the notion of the criminal charge under international law.

⁵² Stefan Trechsel & Sarah J. Summers, *Human Rights in Criminal Proceedings* (2006, Oxford University Press) 32 & 337.

“A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled ... to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.”⁵³

More importantly, case law on many occasions has deemed many fair trial rights are also applicable at the pre-trial stage. The HRC, for example, regarding the applicability of the right to an interpreter clearly upheld that “this right arises at all stages of the oral proceedings. It applies to aliens as well as to nationals”⁵⁴ In *Sobhraj v Nepal*, the HRC considered the provisions of 14, paragraph 3 (f) of the ICCPR were violated as a result of a lack of access to an interpreter from the time of arrest.⁵⁵

Hence, the ICCPR explicitly confirms the right to interpretation for a suspect who cannot speak or understand the language of proceedings. The right to an interpreter is no less important than other rights, and absolutely applies at the pre-trial investigation stages, which occupies a direct impact on the outcome of the proceedings at the trial stage. The approach of ECtHR is illustrative in this regard. The Court in *Cusciani v the United Kingdom*, considered that “the lack of an interpreter at the trial was of much less significance than it was at the earlier stage”⁵⁶ As a result, during police questioning, the suspect has to be provided with the service of an interpreter at the outset of proceedings following arrest.⁵⁷

The interpretation should cover all the exchanged communication between the suspect who is under investigation and the public authority. Likewise, it should cover all communications that may occur between the suspect and the State provided lawyer. Conversely, where the suspect chooses his lawyer, he needs to bear the cost of an interpreter, if one is needed.⁵⁸ Under the practice of the ECtHR, the suspect, even if he has a lawyer who understands the language of the police, should be assisted to

⁵³ UN General Assembly Res 43/173 ‘The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment’ (n 14) principle 14.

⁵⁴ UN Human Rights Committee, General Comment No. 32, “Right to Equality before Courts and Tribunals and to A Fair Trial (Article 14)” (n 26) para. 40.

⁵⁵ *Sobhraj v Nepal* UN Human Rights Committee Communication No (1870/2009) 11 August 2010 para 7.2.

⁵⁶ *Cusciani v the United Kingdom* App no 32771/96 (ECtHR, 24 September 2002), (2003) 36 EHRR 2 para 27.

⁵⁷ *Kamasinski v Austria*, (n 36) para 74; see also David Harris et al., *The Law of the European Convention on Human Rights* (2nd ed., 2010, Oxford University Press) 327.

⁵⁸ Richard Clayton & Hugh Tomlinson, *The Law of Human Rights* (2nd ed., 2009, Oxford) 890.

understand the language in which the proceedings are conducted. In addition, a suspect not only has the right to interpretation of oral proceedings but also a translation of relevant documentations.⁵⁹ This does not, however, require that the suspect must be given a translation of all documents but no less than the necessary communication or enough that needs to be done to enable him to understand what is going on with regard to the case.⁶⁰

5.1.2.2. Free interpretation

There is some serious ambiguity in the ICCPR regarding the term “free assistance of an interpreter.” The text suggests the costs are to be borne by the state where the person cannot speak or understand the language of proceedings. The question to be asked in this respect is whether this extends to the suspect who has the means to pay and is it regardless of the proceedings’ outcome. The ICCPR does not deal plainly with these details. The practice of ECtHR makes clear that under Article 6(3) (e) of the ECHR,⁶¹ the State has to pay the cost of an interpreter regardless of whether the accused person can afford it or not.⁶²

In *Luedicke, Belkacem and Koc v Germany*, the ECtHR has held that the present right “entails for anyone who cannot speak or understand the language used in a court, the right to receive the free assistance of an interpreter, without subsequently having claimed back from him payment of costs thereby incurred.”⁶³ The finding of that case was further affirmed by the ECtHR in the case of *Ozturk v Germany*. In this case the court decided that the State party is under an obligation to compensate the applicant for paying the cost of an interpreter fees.⁶⁴ In this case, it deemed that the State forcing the accused person to pay the costs of interpreter service violated the right of

⁵⁹ *Luedicke, Belkacem and Koc v Germany* App no 6210/73; 6877/75; 7132/75 (ECtHR, 28 November 1978), (1979-80) 2 EHRR 149 para 48.

⁶⁰ *Kamasinski v Austria*, (n 36) para 74; see also Pieter Van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (3rd ed., 1998, Kluwer Law International) 478.

⁶¹ It should be taken into consideration that 6 (3)(e) of the ECHR corresponds to the meaning of Article 14(3) of the ICCPR.

⁶² ECHR, Article 6 (3) (n 49)

⁶³ *Luedicke, Belkacem and Koc v Germany*, (n 59) para 46.

⁶⁴ *Ozturk v Germany* App no 8544/79 (ECtHR, 21 February 1984), (1984) 6 EHRR 409 para 58; see Alastair Mowbray, *Cases and Materials on the European Convention on Human Rights* (2nd ed., 2007, Oxford University Press) 369; See also *Luedicke, Belkacem and Koc v Germany*, (n 59) para 40.

accused to have a fair trial and that the person was entitled to be compensated for the interpretation costs.

5.1.2.3. *Competent interpretation assistance*

It appears obvious that an interpreter has to be competent, if the right is to be actualized. The competence of interpretation comprises many elements such as expertise or knowledge, and also the ability to work in an impartial manner. The HRC has affirmed that even if it is not expressly stated, Article 14 of the ICCPR requires that the interpreter is linguistically proficient.⁶⁵ A similar approach is taken by the ECtHR. In the case of *Cuscani v the United Kingdom*, the Court makes clear that interpretation service must be adequate and rely on the tested language skills of the interpreter.⁶⁶

Consequently, the appointment of an interpreter is not enough to satisfy the need for interpreter services unless it is effective and does not breach fairness of proceedings.

5.2. Iraqi rules and practice

5.2.1. Right of access to a lawyer

Iraq is one of the state parties to the ICCPR. This means that it is obliged to ensure its criminal justice system is consistent with an international fair trial regime as set out in the convention. Accordingly, a person who is facing criminal proceedings has the right, *inter alia*, to a lawyer to defend himself, as has already been elaborated. As is well known, in the era of Saddam's Iraq, subject to a major human rights violation, a person under investigation was not afforded access to legal assistance.

⁶⁵ *Geral John Griffin v Spain* UN Human Rights Committee Communication No (493/1992) 5 April 1995 para 9.5; *Abduali Ismatovich Kurbanov v Tajikistan* UN Human Rights Committee Communication No (1096/2002) 6 November 2003 para 6.6; *Valichon Aliboev v Tajikistan* UN Human Rights Committee, (n 25) para 5.3; *Michael and Brian Hill v Spain* UN Human Rights Committee Communication No (526/1993) 2 April 1997, para 14.4.

⁶⁶ *Cuscani v the United Kingdom* (n 56) para 27.

Throughout this era, no mention was made in the context of the ICCP regarding this right, whether before the police interrogator or the investigating judge. International reports recognized such a default trend of Iraqi law and its non-compliance with Iraq's obligations under international law. For example, in the last periodic report of Iraq under the ICCPR (1997) the HRC criticized Iraqi legislature for failing to protect basic human rights and justice: the Committee also recommended that the law be amended.⁶⁷

As has been discussed, the post 2003 reforms addressed problematic criminal procedure. Among other things, the right of access to a lawyer throughout proceedings (including the pre-trial stage) has been guaranteed in order to ensure the law is human rights compliant. The reform was first made by establishing the right to a lawyer. This amendment to the ICCP was done by Memorandum 3 of the Coalition Provisional Authority.⁶⁸ New provisions of Article 123 of the ICCP now state that

“... (b) Before questioning the accused the investigative judge must inform the accused that: [...] he or she has the right to be represented by an attorney, and if he or she is not able to afford representation, the court will provide an attorney at no expense to the accused”⁶⁹

⁶⁷ UN Human Rights Committee, ‘Concluding Observations/Comments: Iraq’ (Sixty-first session, 19/11/1997) UN Doc CCPR/C/79/Add.84. See also United Nations Commission on Human Rights (CHR), ‘Report on the Situation of Human Rights in Iraq, submitted by the Special Rapporteur, Mr. Max van der Stoel’ (4 September 1995) E/CN.4/1996; United Nations Commission on Human Rights (CHR), ‘Report on the Situation of Human Rights in Iraq, submitted by the Special Rapporteur, Mr. Max van der Stoel’ (10 March 1998) E/CN.4/1998/67; United Nations Commission on Human Rights (CHR), ‘Report on the Situation of human rights in Iraq, submitted by the Special Rapporteur, Mr. Max van der Stoel, in accordance with Commission resolution 1998/65’ (26 February 1999) E/CN.4/1999/37; United Nations Commission on Human Rights (CHR), ‘Report of the Special Rapporteur on the situation of human rights in Iraq, Mr. Andreas Mavrommatis’ (16 January 2001) E/CN.4/2001/42; United Nations Commission on Human Rights (CHR), ‘Report of the Special Rapporteur on the situation of human rights in Iraq, Andreas Mavrommatis’ (15 March 2002) E/CN.4/2002/44; United Nations Commission on Human Rights (CHR), ‘Situation of Human Rights in Iraq’ (18 April 2000) E/CN.4/RES/2000/17; United Nations Commission on Human Rights (CHR), ‘Situation of human rights in Iraq’ (18 April 2001) E/CN.4/RES/2001/14; see also Law Library of Congress <<http://www.loc.gov/law/help/guide/nations/iraq.php>> accessed 10 September 2011.

⁶⁸ The Coalition Provisional Authority Memorandum No 3 Criminal Procedures [Iraq] 18 - June -2003, published in the Official Gazette, issue 3978 August 2003. The original text is in the English language, and the official translation in Arabic is available in the Official Gazette, issue 3978 of 17 August 2003.

⁶⁹ Article 123 of the ICCP in the official English translation that is available online at the homepage of *the Global Justice Project: Iraq* (GJPI) <<http://gjpi.org/central-activities/judicial-independence/>> accessed 28 January 2014.

{قانون اصول المحاكمات الجزائية رقم (23) لسنة 1971 المادة 123: ب- قبل اجراء التحقيق مع المتهم يجب على قاضي التحقيق اعلام المتهم ما يلي: ان له الحق في ان يتم تمثيله من قبل محامي، وان لم تكن له القدرة على توكيل محامي تقوم المحكمة بتعيين محامي منتدب له، دون تحميل المتهم اتعابه}

In addition, CPA's Memorandum 3, which was enacted in the time of the interim administration post-2003 but remains in force, requires that the accused person must be informed about the ability to have a lawyer. Section five of the Memorandum provides that "at the time an Iraqi law enforcement officer arrests any person, the officer shall inform that person of his or her right [...] to consult an attorney."⁷⁰ It should be noted here that section five is unlike other sections of the CPA's Memorandum 3 has not amended the ICCP.

Moreover, the Iraqi Permanent Constitution reinforces the significance of this safeguard, and states that the right to defend is sacred and should be guaranteed at all stages of the criminal proceedings.⁷¹ It, also, states that "the court shall appoint a lawyer at the expense of the state for an accused of a felony or misdemeanour who does not have a defence lawyer."⁷²

With these amendments, some say that the justice system in post-Saddam Iraqi is fully compliant with the right to legal assistance under international rules and modern procedural safeguards around the world.⁷³ Is this really so? What follows is an attempt to explore this matter.

5.2.1.1. Right of access to a lawyer from the outset of the proceedings

Despite the importance of legal assistance for ensuring justice, national legislations have varied in approaching this right at the preliminary investigation stage.⁷⁴ Many states around the world such as France and the UK guarantee this right throughout the

⁷⁰ CPA's Memorandum 3, signed 18 June 2003, published in the Official Gazette, issue 3978 of 17 August 2003. The original text is in the English language, and the official translation in Arabic is available in the Official Gazette, issue 3978 of 17 August 2003, as follows:

{ عندما يقول احد رجال الضبط القضائي العراقيين باعتقال احد الاشخاص يقوم بأعلامه بحقه التزام الصمت والحصول على محام }

⁷¹ The Iraqi Permanent Constitution 2005, Article 19(4) provides that "The right to a defence shall be sacred and guaranteed in all phases of investigation and the trial." The official translation in English is available online at the homepage of the Iraqi government at <<http://www.cabinet.iq/default.aspx>> accessed 20 November 2013.

{ حق الدفاع مقدس ومكفول في جميع مراحل التحقيق والمحاكمة }

⁷² Article 19(11) of the Iraqi Permanent Constitution. The official translation in English is available online at the homepage of the Iraqi government at <<http://www.cabinet.iq/default.aspx>> accessed 20 November 2013.

{ تنتدب المحكمة محامياً للدفاع عن المتهم بجناية أو جنحة لمن ليس له محام يدافع عنه وعلى نفقة الدولة }

⁷³ Michael M. Farhang, "Reconstructing Justice: The Coalition Provisional Authority Took Giant Steps to Guarantee Iraq a Functioning Criminal Justice System" (2004) *Los Angeles Lawyer* 46.

⁷⁴ See previous pages in 5.1.1.

pre-trial criminal proceedings, whereas in others there are no satisfactory legal provisions put in place.⁷⁵ Against this backdrop, it would be appropriate to assess the protection of the right, in the post-Saddam legal system, with reference to France and the UK.⁷⁶

The right to have a lawyer from the beginning of the police custody is expressly laid out in the French Criminal Procedure Code which provides that:

“At the beginning of police detention, and again after twenty hours have elapsed, the person may request to talk to an advocate. Where he is not in a position to choose one, or if the advocate chosen cannot be reached, he may request an advocate to be appointed to him officially by the president of the bar. The president of the bar is informed of such a request forthwith and by any means available.”⁷⁷

In French law, considerable reform in police custody has been introduced in order to be fully compliant with the context of the ECtHR’s jurisprudence, particularly in light of cases such as *Salduz v Turkey* and *Brusco v France*.⁷⁸ In the case of *Brusco v France*, it has been held that “any persons detained in police custody had the right to benefit from the effective assistance of a lawyer from the very start, and throughout, the custody phase.”⁷⁹ Correspondingly, the right to a lawyer for a suspect is given at beginning of police custody.⁸⁰

English law in turn provides that the suspect in detention, whether at a police station or elsewhere, has the statutory right to consult a solicitor in private and free of charge at any time.⁸¹ The Code of Practice states that information must be given about the

⁷⁵ Ed Cape, *Improving Pretrial Justice: The Roles of Lawyers and Paralegals* (n 3) 76.

⁷⁶ A glance to these ascertains systems would be enlightening, to build idealistic system that could fully protect human rights in criminal proceedings.

⁷⁷ The French Code of Criminal Procedure, Article 63(4).

⁷⁸ *Salduz v Turkey* (n 1); Dimitrios Giannouloupolos, “Custodial Legal Assistance and Notification of the Right to Silence in France: Legal Cosmopolitanism and Local Resistance” (2013) 24 *Criminal Law Forum* 292.

⁷⁹ *Brusco v France* App no 1446/07 (ECtHR, 14 October 2010) para 45; see also Aude Dorange & Stewart Field, “Reforming Defence Rights in French Police Custody: A Coming Together in Europe? Legislative Comment” (2012) *International Journal of Evidence & Proof* 158.

⁸⁰ Article 63-4-2 of the French Code of Criminal Procedure, created by the Law of 14 April 2011. Indicated by Dimitrios Giannouloupolos, “Custodial Legal Assistance and Notification of the Right to Silence in France: Legal Cosmopolitanism and Local Resistance” (n 78).

⁸¹ PACE s.58(1) states that “A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time.” PACE s.59 (as amended)

suspect's right to independent legal advice, and the fact that such advice is available free of charge when he is taken to a police station under arrest or having attended voluntarily.⁸² He must be informed that he can access this advice immediately before the beginning or re-commencement of any interview at the police station or other authorised place of detention,⁸³ before a review of detention is conducted,⁸⁴ after he has been charged or informed that he may be prosecuted, if the police wish to bring to his attention any statement or the content of an interview, or where they wish to re-interview,⁸⁵ before being asked to provide an intimate sample,⁸⁶ and before an identification parade, or group or video identification occurs.⁸⁷

In Iraq, there is a different approach taken regarding the securing of this right at the initial stage of investigation. The question then arises as to how the new change protects the right to a lawyer. It is possible to claim that despite the changes, the protection of the right remains contended. The new provisions of the ICCP and the Iraqi Permanent Constitution that are relevant to the right to a lawyer suffer from some flaws. The new provisions of Article 123 of the ICCP which provide this right during the pre-trial stage are reliant on whether the interrogation is conducted by the police interrogator or investigating judge. This is to say that the reform overlooked police custody interrogation, and Article 123 only guarantees access to a lawyer at later stages of investigation during judicial process when the accused person is to be brought before the investigating judge. Besides, the protection of this right under the provisions of the Constitution suffers from some flaws. Unlike the right to a lawyer in the trial stage, which is explicitly entrenched in Article 19(11), the Constitution does not explicitly determine that the right to have a lawyer must be guaranteed from the beginning of the police custody and at all stages of criminal proceedings.⁸⁸ The Constitution determines the necessity of the right in the general context under the

by legal Aid Act 1988) provides that this consultation will be provided freely, enabling duty solicitor schemes to be established.

⁸² PACE, Code of Practice C paras 3.1 and 3.5.

⁸³ PACE, Code of Practice C para 11.2.

⁸⁴ PACE, Code of Practice C para 15.3.

⁸⁵ PACE, Code of Practice C paras 16.4 and 16.5.

⁸⁶ PACE, Code of Practice D para 5.2.

⁸⁷ PACE, Code of Practice D para 2.15.

⁸⁸ Iraqi Permanent Constitution, Article 19(11) provides that "the court shall appoint a lawyer at the expense of the state for an accused of a felony or misdemeanour who does not have a defence lawyer." See (n 72)

term of the right to defence (of which the right of legal assistance is one of the most important of its pillars at all stages of criminal proceedings).

What follows is that even though Article 19(4) of the Iraqi Permanent Constitution 2005 appears to secure such right throughout proceedings starting from the pre-trial stage, the ICCP takes the position that this right does not apply at the initial stage of the police investigation.⁸⁹ Therefore, in view of the present author, this approach of the ICCP represents an antithetical position not only to the obligatory application under international due process, but also a notable contradiction with the text of the Iraqi Permanent Constitution. This is because the Constitution explicitly determines the necessity of the right to a defence. It is important that the new amendment must be interpreted in light of the right to defence in the new Constitution. Hence the right to a lawyer must extend to encompass all stages of criminal proceedings even during police investigation.

However, the current approach of the reformed system and law enforcement officials are of the opposite view. This seems due to the fact that the wording of the Article 19(4) of the Constitution does not explicitly say that the person under investigation has a right to a lawyer in police station. In addition, the wording of Article 123 of the ICCP only provides the right to a lawyer before the investigating judge. Besides, 19(11) of the Constitution, without addressing the right to a lawyer before police, explicitly says that a person who is accused of a felony or misdemeanour and who does not have a defence lawyer before the court that court shall appoint a lawyer for him at the expense of the state.⁹⁰

The fact is that providing a lawyer in the early stages of police investigation is critical for pre-trial justice. Nonetheless, the right to a lawyer is often omitted in practice. Law enforcement officials despite the changes remain refuting that the right to a lawyer in criminal proceedings arises front of police interrogations.⁹¹ They assert that the right to a lawyer is not given to a person under initial police interrogation because

⁸⁹ The Annual Report of the Iraqi Ministry of Human Rights, The Conditions of Prisons and Detention Centres, Human Rights Report (Baghdad, 2011) 61.

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الانسان العراقية}

⁹⁰ Article 19(11) of the Iraqi Permanent Constitution (n 72).

⁹¹ The Annual Report of the Iraqi Ministry of Human Rights, (n 89) 61.

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الانسان العراقية}

these changes only referred to the right to a lawyer before the investigating judge and trial. What follows is, the post-Saddam amendments, even though deemed progressive, leave a remarkable gap with binding international due process. The reformed Iraqi system, unlike these binding obligations under international standards, does regrettably not provide the right of access to a lawyer from the outset of proceedings at the initial stage of the police custody. As a result, the present right has been violated in the post-Saddam criminal justice system both in law and in practice.

The International Community has serious concerns regarding such defects in the new Iraqi criminal justice system. For instance, international experts, during observation of the human rights situation in the Iraq criminal justice system, reported their concern regarding “prolonged periods of detention without charge or access to legal counsel.”⁹² By the same token, UNAMI indicated that “some detainees had been held for long periods of time ... without access to family members, lawyers ... only after all investigations are completed and that the participation of attorneys, when present, is largely nominal.”⁹³ In May 2012, it was reported that, “UNAMI monitoring from a variety of sources substantiated claims that detainees suffer from lack of regular or meaningful access to legal counsel.”⁹⁴

What compounds the situation is that law enforcement officers are afforded broad powers during pre-trial criminal investigation stage.⁹⁵ Thus, until the judge is involved with proceedings and such time to be emanated, a person without lawyer could be exhausted in police custody and submit irreparable confessions. In general, nothing in the law forbids them to interrogate the suspect and this is usually what happens in practice. Once made, a confession during the police custody stage becomes the basis for conviction at the outcome of proceedings,⁹⁶ as nothing in the

⁹² Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, 1 July – 31 December 2008) 25.

⁹³ Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, 1 January 2011) 25; see also U.S. Department of State, ‘Human Rights Report: Iraq 2010’ (8 April 2011)14 available at <<http://www.state.gov/j/drl/rls/hrrpt/2010/nea/154462.htm>> accessed 2 October 2012.

⁹⁴ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, May 2012)11.

⁹⁵ See Chapter Three, particularly pages that are relevant to the power of police.

⁹⁶ “The evidence is sufficient and compelling to convict the accused [including] based on his confession during the investigation period, which is relied upon because it was given closer to the date of the incident than his later statement” Resafa Criminal Court, Baghdad, justifying the use of a

law prevents from using such admission at trial, even if extracted by police without the presence of a lawyer. This is completely contrary to international human rights standards. It seems that the reason for this lies in part in weaknesses in the legal regime, as discussed earlier. Therefore the lack of enshrining the right in legal framework combines with wide ranging police power to exploit improper confessions from un-witnessed interrogations pre-trial.

Although, as the Ministry of Human Rights has observed, such a duty flows directly from the Constitution, law enforcement officials are reluctant to uphold it. One may argue that unless these provisions are adequately regulated in the ICCP, being the competent law regulating all criminal proceedings, law enforcement officials will continue to understand the legal right of access to a lawyer in a limited way.⁹⁷ They clearly deem the law only to require providing of a lawyer before investigating judges, but not during police investigations.⁹⁸

In view of the aforesaid, Iraqi legislature needs to fill the indicated gap by enacting new provisions in the ICCP that expressly provide for automatic legal access, to enable persons under investigation to have a lawyer at the beginning of the proceedings and at the police station. This is most important in order to bring Iraqi law forward with the modern developments of procedural safeguards and international standard of human rights, particularly the ICCPR which is binding on Iraq.⁹⁹ For instance, if reforms are to work, the legislature must impose a system of accountability in which deterrent sanctions may be imposed on every person who in authority would prevent or obstruct the person accused from having legal assistance. The law must also deem any confession obtained in the absence of a lawyer inadmissible.

“confession” allegedly obtained under torture in a verdict that imposed the death penalty, May 2010 to which referred by Amnesty International, *Iraq: A Decade of Abuses* (Index: MDE 14/001/2013, March 2013) 28.

⁹⁷ The Annual Report of the Iraqi Ministry of Human Rights, The Conditions of Prisons and Detention Centres, Human Right Report (Baghdad, 2011) 61 and 73; The Annual Report of the Iraqi Ministry of Human Rights, The Conditions of Prisons and Detention Centres, Human Right Report (Baghdad, 2012) 72. {التقرير السنوي لأوضاع السجون ومراكز الاحتجاز- وزارة حقوق الانسان العراقية}

⁹⁸ Ibid.

⁹⁹ See the practice of the HRC under the Article 14(3) (d) of the ICCPR.

The present author will conclude this thesis with some reform proposals. At this stage, it is important to underscore that this is not about piece-meal reform, but holistic and cross-cutting changes.

5.2.1.2. Right of notification to access legal assistance

As has been examined, the right to access legal assistance is of no use if the person needing it does not know his entitlements. Many national systems entrench this right in law, others do so, through practice.¹⁰⁰ French law, for example, requires that this right should be brought to the knowledge of an accused at the beginning of police custody.¹⁰¹ In England and Wales, if a suspect is arrested by the police or comes voluntarily and is then arrested, he must be informed of the right of access to free legal advice both orally and in writing.¹⁰² The custody officer must record every step of this request in the custody record. Once the request is made, a solicitor must be contacted as soon as practical.¹⁰³ Indeed, such right is still not complete unless a person under investigation comprehensively understands that the access to advice is available to him in confidence and free of charge at the first moment of detention before any questioning.

In Iraq, the key issue of concern is that the reform of the post-Saddam system does not specify in the appropriate place, that is, in the ICCP, a text in which the police at police custody are obliged to inform a person under investigation about his right of access to legal assistance before questioning. Rather, according to the ICCP the mandatory notification does not arise until a later time, when the person under investigation is brought for judicial interrogation.¹⁰⁴

However, the CPA's Memorandum 3 stated that an arrested person must be informed about the ability to have a lawyer.¹⁰⁵ This was a step towards bridging the gap between the system and due process regarding the right of access to a lawyer.

¹⁰⁰ See comparative criminal procedure regarding this right in deferent legal systems such as French law and English law.

¹⁰¹ The French Code of Criminal Procedure 63-1.

¹⁰² Cod C paras 3.1, 3.2 and 6.1).

¹⁰³ See PACE s.58 and Cod C, Note 6B.

¹⁰⁴ ICCP, Article 123.

¹⁰⁵ CPA's Memorandum 3(5) (n 70).

Nonetheless, many limitations make implementation difficult. These provisions have not been formulated in a more accessible way. The new provisions independently stand in the Memorandum 3 without being incorporated into the ICCP. Thus, due to the fact that the rights of persons under criminal proceedings are primarily found in the ICCP providing some unobserved pieces of provisions in other different places may pose difficulties to trace or follow these provisions by law enforcement officials. While, the legal provisions that include rights of individuals must be established in a clear form which can be accessible by everybody in a society.¹⁰⁶

Furthermore, regarding these provisions in the CPA's Memorandum 3, the introduction of official English language translation of the ICCP mentioned that,

“CPA Memorandum 3, which amends a number of provisions of the Criminal Procedure Code, exists in two versions – the version signed on 18 June 2003 and published in the Official Gazette, issue 3978 of 17 August 2003 and a revised version, signed on 27 June 2004, which was never published in the Official Gazette. There is also a different numbering scheme between the two versions and Iraqi Arabic texts and commentaries do not follow the revised version.”¹⁰⁷

The implication of these particular circumstances, according to the introduction, is that some anomalies remain regarding the provisions given under CPA's Memorandum 3 and this minimizes the effect of these provisions in practice.

It should be mentioned that the new procedural safeguards established by Memorandum 3 are incorporated into the ICCP by amending the relevant provisions in it. Conversely, caution of an accused person regarding the right of access to a lawyer has not been placed in the Code yet. What follows is if that reform is to be actualized and taken seriously it must be incorporated in the Code in order to the law enforcement officers observe their duty and normal individuals understand their rights during an arrest. Years have elapsed since that reform was cited in the Memorandum and it is still not to be found in the provisions of the ICCP. As a result, it must be admitted that, inappropriate place of new provisions adversely impacts the duty to inform a person under arrest about his right to lawyer in practice. In particular, the

¹⁰⁶ Professor Bingham has written: one of the ingredients of the rule of law is that the law must be adequately accessible and clear “to know what our rights or obligation are.” Tom Bingham, *The Rule of Law* (2011, Penguin Books) 37, 38.

¹⁰⁷ This introduction is not written in the original Arabic text of the ICCP. It is only written in the official English language translation that is available online at the homepage of *the Global Justice Project: Iraq* (GJPI) <<http://gjpi.org/central-activities/judicial-independence/>> accessed 28 January 2014.

post 2003 procedural safeguards established by this Memorandum are seen by officials as not meriting protection.¹⁰⁸ The reason is that they have been imposed from the outside and do not respond to the local requirements regarding crime control.

In view of the present author, Section 5 of Memorandum 3 which provides that “at the time an Iraqi law enforcement officer arrests any person, the officer shall inform that person of his or her right ... to consult an attorney” is inadequate.¹⁰⁹ It is short and it does not make clear whether this right is available free of charge or in what stage of proceedings such right is available. It is ambiguous when it does not clarify whether providing a lawyer comes before the police and judicial interrogator or both. Furthermore, the key issue of concern is that it does not require the police interrogator to inform an accused person at the outset of the police interrogation, his right of access to a lawyer. Thus, notification of this right needs to be adequately prescribed in the ICCP, addressing issues such as timing and legal aid.

In England and Wales, as an example of best practice, a detainee, who has had a solicitor, should be allowed to specify that solicitor to give advice at police station.¹¹⁰ If the detainee does not have a solicitor, he must be told of the availability of a duty solicitor scheme and to be shown a list of the duty solicitors. If the duty solicitor who is available is unacceptable to the suspect, he can request two further selections of solicitors from the list. Further attempts may be permitted to be made by the custody officer relying on his discretion. In this regard, it seems to be more appropriate, if the suspect can be entitled to select as his legal advisor, somebody in whom he has confidence because the legal assistance of a suspect’s choice is deemed an essential right not only in the interest of the suspect, but also in the whole fairness of the criminal justice system.

After a solicitor has been chosen, the custody officer must act without delay to secure the advice by making contact with him. At once a solicitor, who arrives at a police station to see the suspect, must first be informed of the nature of the accusation and general evidence against him and should be able to access any interviews with his

¹⁰⁸ This issue will be further dealt with in the next Chapter.

¹⁰⁹ CPA’s Memorandum 3(5), (n 70).

¹¹⁰ PACE, s. 58(2) (4).

client. It should be noted that, the suspect must be informed of the solicitor's arrival, even if he is being interviewed at this time.¹¹¹ At the end in case he declines using this right, the reasons behind such refusal must be examined by the custody officer.¹¹² In Iraq, such clear proceedings as already mentioned are not available under the new reform and hence it can be suggested that the Iraqi post conflict justice is still in its infancy regarding supplement right to legal advice and needs more steps to be compatible with genuine need of pre-trial justice.

Therefore, the suggestion for the ICCP to be in line with modern procedural safeguards and international human rights standards is that the accused person, from the start of any criminal proceedings i.e. arrest, must be informed about the right to have a lawyer and that there is an entitlement to legal assistance free of charge. This author believes that best practice should also require that the person be given a written copy of the warning and form to sign.¹¹³ What should follow is that the accused person when invoking his right to have a lawyer should see them directly without delay, prior any questioning, a lawyer must be available, and that the lawyer in this case must act urgently to read and understand the file of the case and be given enough time before attendance at the interrogation.¹¹⁴

This paper has already discussed the problem of law and practice in Iraq in relation to provision of legal access before the matter reaches the investigating judge.¹¹⁵ Let us turn to consider the procedures under Article 123 of the ICCP by which accused persons can be notified about their right of access to a lawyer in the front of the investigating judge to know whether it is adequately stipulated and given in practice or not. In this regard, there are no clear procedures that can be followed for sufficiently informing the accused person of his right to legal assistance. It must be admitted that through the new changes under Article 123 of the ICCP with regard to the present right, on the one hand, much attention has been given to the inquiry by the investigating judge but there has been clear negligence for the inquiry of the police. On the other hand, even with regard to giving the right to an accused person in the

¹¹¹ Richard Stone, *Civil Liberties & Human Rights* (4th ed., Oxford University Press) 115.

¹¹² See PACE, Code of Practice C 3.1.

¹¹³ See PACE, Code of Practice C 3.2

¹¹⁴ The Canadian Charter s. 10(b); the ICCPR Article 9 and 14(3); the ECHR Article (6).

¹¹⁵ See pervious pages.

front of the investigating judge, this Article during this stage of judicial questioning has not elaborated any specific details except the short ambiguous sentence that includes this right.

The lack of legal framework under Memorandum 3 and Article 123 of the ICCP along with abuse of due process in practice, over the last ten years, means that the post-Saddam reform has failed to provide this right for an accused person in the pre-trial investigation stage. According to interviews with defence lawyers by Human Rights Watch, the right to a lawyer before being brought before the investigating judges is significantly diminished in practice.¹¹⁶ In 2013, Amnesty International reported that in some cases, violations of detainees' human rights have taken place under the observation of investigating judges.¹¹⁷

In light of the aforesaid, the Iraqi legal system in law and practice is unlike other professional systems. It does not elaborate efficient procedures that can be followed in order to ensure effective right to a lawyer for persons facing pre-trial criminal proceedings. Hence, as outlined above it is of particular importance to provide clear procedures regarding this right.

5.2.1.3. Guaranteeing high-quality legal assistance

Access to legal advice is considered a significant right for a person under investigation but that is not complete in itself, because if the lawyer's advice is subsequently criticised by the court, then the question arises whether the adviser's performance could affect the outcome of the case against the accused person at trial or not. In this regard, the adequacy of legal assistance has a vital role in determining the destiny of persons under criminal proceedings. Previous studies indicate that the fairness of proceedings and trial may be breached in cases where the advice given at

¹¹⁶ See Joseph Logan, *The Quality of Justice: Failings of Iraq's Central Criminal Court* (2008, Human Right Watch, US) 36.

¹¹⁷ Amnesty International, *Iraq: A Decade of Abuses* (Index: MDE 14/001/2013, March 2013) 37, available at <<http://www.amnesty.ch/de/laender/naher-osten-nordafrika/irak/dok/201>> accessed 17 February 2014.

the pre-trial stage was inadequate.¹¹⁸ These deficiencies of the lawyer's assistance should be considered manifest or so blatant as to be obvious, which is the requirement of international human right law as well. For that reason, an active vetting mechanism as Gut et al proposed can be useful "in assessing the objective qualification of counsel."¹¹⁹

Some criticisms have reported that "legal advisers are largely passive and non-interventionist in police interrogations. The self-perceived role of many is to act purely as a witness to the proceedings."¹²⁰ Another criticism reported that "advice... little impact on police practice."¹²¹ Thus, a lawyer has to undergo extensive training to be admitted and to keep their skills sharp and up to date through continuous education. Professional bodies regulate competence. The importance of practical experience within the training programmes also needs to be emphasised. As Hodgson has pointed out, "In order to advise the client effectively, the lawyer herself must first have a clear understanding of the issues involved and the consequences of adopting various courses of action."¹²²

In post-Saddam Iraq, the quality of legal advice remains a major issue.¹²³ It is rightly stated that "while, on paper, an accused enjoys a robust right to counsel, the reality is that right has been significantly diminished by an overloaded system, a culture of submissive defence lawyers, and inadequate judicial oversight."¹²⁴ In this regard UNAMI has also consistently criticised the role of appointed legal counsels in

¹¹⁸ Till Gut et al., "Chapter 9. Defence Issues" in Goran Sluiter et al. (eds.), *International Criminal Procedure Principles and Rules* (n 27) 1270.

¹¹⁹ Ibid

¹²⁰ David Dixon et al., "Safeguarding the Rights of Suspects in Police Custody" (1990) *Policing and Society* 124.

¹²¹ Jacqueline Hodgson & Lee Bridges, "Improving Custodial Legal Advice" (1995) *Criminal Law Review* 105-106; Layla Skinns, "The Right to Legal Advice in the Police Station: Past, Present and Future" (2011) *Criminal Law Review* 33; Michael Zander, *the Police and Criminal Evidence Act 1984* (5th ed., 2005, Sweet & Maxwell) 232.

¹²² Jacqueline Hodgson, "Defending Suspects at the Police Station: the Practitioner's Guide to Advice Representation" (1994) *Criminal Law Review* 392; At this point since April 2001, only solicitors who have a contract with the Legal Services Commission (LSC) can undertake legal aid work.

¹²³ Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), *Human Rights Reports: between 2005 up 2013*; *The Annual Report of the Iraqi Ministry of Human Rights, The Conditions of Prisons and Detention Centres, Human Rights Reports between 2007 up 2012.*

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الانسان العراقية}

¹²⁴ Christopher J. Costantint, "Criminal Investigation under the Iraqi Code of Criminal Procedure" (2010-2011) 41 *Cumberland Law Review* 558.

criminal justice system because in many instances their role were passive and unhelpful.¹²⁵

It can be said that, the legal assistance that is available in the reformed Iraqi criminal justice system may be less valuable than that provided in many legal systems and jurisdictions around the world. For example, regarding France as Dorange and Field suggest, the most important aspect of the right to immediate access to a lawyer is that the duty lawyers must be experienced specialists and therefore, the right to legal assistance “must be accompanied by reorganisation of the provision of duty legal advice to favour specialisation and continuity of representation.”¹²⁶ In England and Wales, for instance, the suspect has the right not only to legal advice but also the advice must be adequate.¹²⁷

In the UK, there have been a number of cases where the evidence obtained from police interrogations has been excluded under section 78 of the PACE on the grounds that incompetent or inadequate legal advice to the accused at the police station had compromised fairness.¹²⁸ In the UK, at trial, the jury could draw adverse inference from the refusal to answer questions during former police interviews.¹²⁹ However, inferences must not be drawn if the accused had followed the poor and wrong advice from his solicitor to remain silent.¹³⁰ A notable result of this trend is that a court cannot draw adverse inference from a suspect’s silence during questioning by police unless having requested the provision of proper legal advice has been made for the suspect during investigation.

In contrast, in the reformed Iraqi justice system there is no way that inadequate advice can be overcome. Iraqi law provides no remedy to a person who suffers detriment

¹²⁵ Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, June 2013)14.

¹²⁶ Aude Dorange & Stewart Field, “Reforming Defence Rights in French Police Custody: A Coming Together In Europe?” (n 79) 170.

¹²⁷ Layla Skinnis, “The Right to Legal Advice in the Police Station: Past, Present and Future” (n 121) 34.

¹²⁸ Paris, Abdullahi and Miller (1993) 97 Cr. App.R. 99; Glaves [1993] Crim.L.R.685; Mankda and Mustak Manchester Crown Court, No T97/0718, judgment dated 11, 1997; Fisher and Lovell, Leeds Crown Court, No. 2000/1040, judgment dated December 18, 2000. Indicated by Ed Cape, “Incompetent Police Station Advice and the Exclusion of Evidence” (2002) *Criminal Law Review* 471.

¹²⁹ The Criminal Justice and Public Order Act 1994, s. 34, 36 and 37.

¹³⁰ Ed Cape, “Incompetent Police Station Advice and the Exclusion of Evidence” (n 128) 481; Cath Crosby, “Privilege, Waiver, and Recent Fabrication” (2010) *Journal of Criminal Law* 500.

because of inadequate advice. There is a real and very serious problem with professional standards in Iraq. Consequently, it is problematic that slight attention is paid to the lack of legal counsel during the investigation stage. Such claim can be simply sustained by the fact that a person can be registered in the Iraq Bar Association to be a 'lawyer' by merely graduating from schools of law. Lawyers who have no quality training can handle the criminal cases for people under pre-trial criminal investigation. Conversely, lawyers need advanced training to be eligible to represent a client before courts during trial stage.¹³¹ This underscores a systemic failure to recognise the fundamental importance of the pre-trial stage in ensuring a fair and reliable criminal justice system.

This is a critical situation in the eyes of due process rights and in the view of the international standards. The ECtHR has held "the competent national authorities are required to intervene if a failure by legal aid counsel to provide effective representation ... both before and during the trial at first instance."¹³² In the same case, the court held that "[...] the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective."¹³³ Therefore, the fairness of criminal proceedings is not solely affected by denial of legal advice to the accused persons but also by the quality of such representation.

Several reports issued by institutions and international organizations have indicated that detainees in Iraq are exposed to serious danger inside places of detention and police stations. Human Rights Watch monitored many investigation processes, and found that in Iraq a person under criminal proceedings has "ineffectual legal counsel" and hence recommended to the international donor community to "support the Iraqi Bar Association and other legal organizations that provide free legal representation for defendants in the criminal justice system."¹³⁴

¹³¹ See Articles 19, 20, and 21 of Advocacy Law No 173 of 1965, published in the Official Gazette, issue 1213 of 22 December 1956.

{قانون المحاماة العراقي رقم 173 لسنة 1965}

¹³² *Kamasinski v Austria*, (n 36) para 63-71.

¹³³ *Kamasinski v Austria*, (n 36) para 53.

¹³⁴ Joseph Logan, (n 116) 5 and 36; The similar observation reported by the Annual Report of the Iraqi Ministry of Human Rights, The Conditions of Prisons and Detention Centres, Human Rights Reports (Baghdad, 2009) 80; also see *ibid* (2010) 76.

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الانسان العراقية}

While Iraqi law now requires access to a lawyer during questioning by the investigating judge, reports suggest this is not followed in reality.¹³⁵ The lawyer has no vital role, and is unable to prevent an accused person from incriminating himself for two reasons. Firstly, the accused person undergoes major investigation during police custody, a time when there is no right of access to a lawyer. By the time that person gets to the investigating judge, he may have already incriminated himself and there is little that a lawyer can do.¹³⁶

Secondly, observers of the Iraqi system note that legal assistance is given a limited role during the judicial interrogation stage. In 2012, the Iraq Ministry of Human Rights criticised that in many cases the lack of legal counsel during the judicial investigation stage is still a critical problem in the Iraqi criminal justice system.¹³⁷ In 2013, UNAMI observed that the role of lawyers in many cases were passive and unhelpful.¹³⁸ It embodies solely observing the proceedings without intervention whether directing or answering or objecting to the questions or talking with client or speaking on his behalf.¹³⁹ The fact is that the investigator has power over the lawyer by virtue of Article 57 of the ICCP. These provisions suggest that the investigation authority can prevent a lawyer from attending the investigation “if the matter had in hand so required”.¹⁴⁰ It can be observed that the existing limits have not been clearly circumscribed. It has been not made clear that always the prevented lawyer must be allowed as soon as the justifications of prohibition cease to exist during reasonable

¹³⁵ The Annual Report of the Iraqi Ministry of Human Rights, The Conditions of Prisons and Detention Centres, Human Rights Reports (Baghdad, 2012) 68, 73; see also *ibid.*

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الإنسان العراقية}

¹³⁶ This issue will be comprehensively elaborated in next chapter.

¹³⁷ The Annual Report of the Iraqi Ministry of Human Rights, The Conditions of Prisons and Detention Centres, Human Rights Report (Baghdad, 2012) 68, 73.

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الإنسان العراقية}

¹³⁸ Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, June 2013) 14.

¹³⁹ Christopher J. Costantint, (n 124) 558.

¹⁴⁰ ICCP Article 57 states, “An accused person, a plaintiff, a civil plaintiff, a person responsible in civil law for the actions of the accused and their representatives may attend the investigation while it is in progress. The judge or the [judicial] investigator may prohibit their attending if the matter in hand so requires, for reasons that he shall enter in the record, with the proviso that they shall be granted access to the investigation as soon as the need to prohibit their attendance ceases and that they shall not have the right to speak unless permitted to do so and that if permission is withheld a note to that effect shall be entered in the record of the investigation.” The official translation in English is available online at the homepage of *the Global Justice Project: Iraq* (GJPI) <<http://gjpi.org/central-activities/judicial-independence/>> accessed 28 January 2014.

{ للمتهم وللمشتكي والمدعي بالحق المدني والمسؤول مدنيا عن فعل المتهم ووكلائهم ان يحضروا اجراءات التحقيق. وللقاضي او المحقق ان يمنع أيا منهم من الحضور اذا اقتضى الامر ذلك لأسباب يدونها في المحضر على ان يبيح لهم الاطلاع على التحقيق بمجرد زوال هذه الضرورة ولا يجوز لهم الكلام الا اذا اذن لهم، واذا لم يأذن وجب تدوين ذلك في المحضر }

time. Hence the right to legal assistance, which is enshrined in abiding international rules, is extremely undermined. This is contrary to the right given to legal assistance and therefore, the legislature must provide the legal advisers with adequate privileges by which their task can be achieved in consistent with international due process and recent development of procedural safeguards.

Accordingly, it is critical that for the right to access legal assistance to be meaningful it must be notified at an early stage of proceedings in police custody and provided as requested. The right creates obligations upon the public authority to protect members of the community against the abuse of investigators and protection a person facing criminal justice system from self-incrimination. In summation, mere access to a lawyer is not enough unless the legal assistance is professionally adequate. This is a critical lesson for Iraq in taking its criminal justice system forward.

5.2.1.4. Confidentiality of the client-legal adviser communications

As noted previously, the jurisprudence of the international bodies has highlighted that communications between an adviser and his client must be in private. The State is obliged to enable such contact either via direct or indirect means, *inter alia*, such as telephone, email, letters and other such means. It can extend to the assistance of an interpreter. The authorities have to enable a lawyer and his client effective communication in accordance with the circumstances. The authorities must not deny communication unless there are valid reasons for a short time “in order to protect the interests of justice”.¹⁴¹ The HRC has emphasised that

“The right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.”¹⁴²

¹⁴¹ Alexander Doyle Birtles, ‘The Standards Developed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment’ (DPhil thesis, the University of Nottingham, October 2000) 86.

¹⁴² UN Human Rights Committee, General Comment No. 32, “Right to Equality before Courts and Tribunals and to A Fair Trial (Article 14)” (n 54) para. 34; see also, *Khomidova v Tajikistan* UN Human Rights Committee Communication No (1117/2002) 29 July 2004 para 6.4; *Sirageva v Uzbekistan* UN Human Rights Committee, (n 48) para 6.3; *Gridin v Russian Federation* UN Human Rights Committee, (n 7) para 8.5.

Privacy of conversation does not mean providing the meeting away from the view of official authority, but means that they must not be able to hear these discussions.¹⁴³ Obviously, for there to be confidentiality, there must also be no surveillance devices enabling the authorities to “listen in”. Both the lawyer and the accused person should not be subsequently asked to disclose their previous conducted communications between them.¹⁴⁴ This is known as legal professional privilege.

The foregoing is recognised as part of the international due process.¹⁴⁵ Regrettably, the post-Saddam reformed Iraqi system operates differently. There are no rules, governing the nature of access or the conditions of confidentiality. Recent reports claimed that in practice the right concerned is breached in different ways. For instance, the lawyer-client meeting could be refused or controlled, with or without reason. Frequently there is no independent room which can be found for this purpose.¹⁴⁶ Consequently, the communication between the suspect and his lawyer cannot be conducted privately without any interception or eavesdropping from a third person. This situation could be avoided through the adoption of a legalization framework enabling the detainee to have confidential contact with a lawyer. The law should also specify the duty to facilitate lawyer-client access and describe specific circumstances where this could be curtailed.

¹⁴³ Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 - Rule 93 states that “For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official”

¹⁴⁴ *Antonius Cornelis Van Hulst v The Netherlands* UN Human Rights Committee Communication No (903/2000) 1 November 2004 para 7, 6; see also Vivienne O’Connor & Colette Rausch (eds.), *Model Code of Criminal Procedure Vol. II* (2008, United States, Institute of Peace Press) 129.

¹⁴⁵ “Finnish law would appear to be quite developed in this regard. It provides that a person suspected of an offence and apprehended, arrested or remanded for trial... [has, in principle,] the right to be in contact with his counsel through visits, by letter or by telephone” Alexander Doyle Birtles, (n 141) 82; Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, (n 143); see also the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, (n 14) principle 18; UN Basic Principles on the Role of Lawyers, (n 14) principles 8 & 22.

¹⁴⁶ The Annual Report of the Iraqi Ministry of Human Rights, The Conditions of Prisons and Detention Centres, Human Rights Report (2009, Baghdad) 80; *ibid* (2010) 76 {التقرير السنوي لأوضاع السجون ومراكز الاحتجاز- وزارة حقوق الانسان العراقية } Joseph Logan, *The Quality of Justice: Failings of Iraq’s Central Criminal Court* (n 116) 35.

5.2.2. Right of access to an interpreter

In a globalized world, there will always be instances where foreigners come into contact with the law and issues of language arise. Iraq is a multicultural and multilingual nation. In addition, tourism is one of the tributaries of Iraq's economy due to the daily presence of a huge number of tourists there. There are shrines of Imams of Shiite and Sunni Muslims, various monuments and archaeological sites, and other beautiful tourist sites. As a result, the situation infrequently arises where communication is a problem when a person suspected of involvement in criminal activity interpretation becomes critical and for communication. For example, in the case of French journalist Nader Tendon who was arrested in Baghdad on 23 January 2012 the French authorities called on Iraqi authorities either to charge him formally or to be immediately released. According to the official spokesman of the Iraqi government, the lack of interpreter service in this case was behind the prolonged detention for several days.¹⁴⁷

As previously discussed, according to international standards (e.g. Article 14(3) of the ICCPR), there is a right of persons, who are facing criminal justice system and cannot understand or speak the language of the proceedings, to be provided with the service of an interpreter. Under practice of international bodies, a person under investigation has the right not only to interpretation of oral proceedings but also translation of documents that are relevant to the proceedings. He has to receive in his own language a written statement in which information about the reasons for his arrest, the time and place where he will be before an investigating judge, efficiently disclosed. In addition, through an understandable language authorities must make clear to him what rights he has and how these rights are exercised, the reasons behind the arrest or detention, and clarify any charge against him.

In Iraq, the Judicial Organization Law stipulates that the court may hear the statements of parties, witnesses or experts who are ignorant of the language of the

¹⁴⁷ T.V Interview with the official spokesman of the Iraqi government, the interview was broadcasted on the screen of the "Al-Faiha", a satellite T.V station in Iraq on 22/01/2013; Amnesty International, *Iraq: Independent Journalist Detained in Baghdad: Nadir Dendoune*, 8 February 2013, UA: 32/13 Index: MDE 14/002/2013, available at <<http://www.refworld.org/docid/511a04803a.html>> accessed 9 May 2013.

court through an interpreter.¹⁴⁸ Likewise, the ICCP stipulates that if the witness does not understand the language of investigation or is deaf or mute, an interpreter shall be appointed to translate his words or signs, having sworn that the translation is going to be done with honesty and integrity.¹⁴⁹

The analyses of aforementioned texts reveal that at best, one can say these provisions have only set general circumstances of when an interpreter is to be provided. These circumstances whereby the court is entitled to use the service of an interpreter are that if a witness does not understand the language in which the investigation is being conducted. If an expert does not understand the language in which a trial is being conducted; and if accused persons or/and victims do not speak the language of the Court in order to that Court can understand saying of litigations.¹⁵⁰

It could be argued that these provisions are not clearly about rights of a person facing criminal justice system, but they are for the communications of the courts and authorities i.e. interpreters are that to help the authorities do their job. What follows is that it is problematic that Iraq law does not set out clear provisions by which a duty could be imposed on authorities to provide access to an interpreter at the initial stage of the proceedings for a person facing criminal investigations and cannot speak or understand the language of proceedings. Admittedly, this approach does not meet Iraqi obligation under Article 14(3) (f), as interpreted by the HRC.

¹⁴⁸ Article 4 provides that “Firstly-The Arabic language shall be the language of the Courts unless the law provides otherwise. Secondly- The Court shall hear the saying of litigations, witness or experts who ignore the language of the Court through a translator after his administering an oath.” The Judicial Organization Law No.160 of 1979, published in the Official Gazette, issue 2746 of 17 December 1979. The official English translation is available online at the homepage of *the Global Justice Project: Iraq* (GJPI) <<http://gjpi.org/central-activities/judicial-independence/>> accessed 18 January 2014.

{اولا – تكون اللغة العربية لغة المحاكم الا اذا نص القانون على خلاف ذلك. ثانيا – تسمع المحكمة اقوال الخصوم او الشهود او الخبراء الذين يجهلون لغة المحكمة، بواسطة مترجم بعد حلفه اليمين}

¹⁴⁹ Article 61 of the ICCP states that :

“B. Any person who is unable to speak may give his evidence in writing or in conventional sign language if he is unable to write.

C. If a witness does not understand the language in which the investigation is being conducted, or is deaf or dumb, a person may be appointed to translate what the witness says, or interpret the witness's sign language, after taking an oath that he will translate or interpret truthfully and faithfully.” The official translation in English is available online at the homepage of *the Global Justice Project: Iraq* (GJPI) <<http://gjpi.org/central-activities/judicial-independence/>> accessed 28 January 2014.

{ب – لمن لا قدرة له على الكلام ان يدلي بشهادته كتابة او بالإشارة المعهودة ان كان لا يستطيع الكتابة. ج - اذا كان الشاهد لا يفهم اللغة التي يجرى بها التحقيق او كان اصم او ابكم جاز تعيين من يترجم اقواله او اشاراته بعد تحليفه اليمين بان يترجم بصدق وامانة}

¹⁵⁰ See ICCP Article 61; the Judicial Organization Law Article 4.

The existing problem is that the texts of Iraqi law do not secure proper access to the service of the interpreter or translator for the person facing the criminal justice system. The lack of provisions with regard to providing the right of access to an interpreter leads to that respecting this right for a person under investigation relies on the discretion of authorities of investigation while protection this right should directly stem from legal rules. The fact is still that there are many defective areas which need to be considered in the words of these legal texts. The problem in these provisions is that they do not establish clear duty on authorities to provide access to an interpreter for a person under investigation who does not speak or understand Arabic. They do not explicitly clarify the suitable details or place the clear obligation to provide this right during the outset of the proceedings.

It is important to note that Iraq is a civil law country where the laws must cover every situation, and there is no scope for judges to fill gaps. Consequently, lack of clarity of some existing rules is one of the serious weaknesses in the post-Saddam justice system. With regard to the present right, these inadequate rules result in the public authority naming exclusive discretion to decide whether the service of an interpreter is to be afforded to the person accused or not. Such a wide power of discretion, which is much higher than human rights protection, may adversely affect the present right.

Although the right to interpretation for a person entitled is necessary and should take place in practice it must be given a legal basis. It is rightly stated that “The creation of an express legal guarantee of a right is, it believes, ‘an absolute necessity’. Merely respecting the right in practice, in the absence of a guarantee in law, would appear, therefore, to be insufficient.”¹⁵¹ Consequently, the proposal lays upon the legislature the duty to enact logical texts, which encompass all necessary aspects of this right. The reform appears very necessary for the two following aspects:

¹⁵¹ Alexander Doyle Birtles, (n 141) 87.

5.2.2.1. Scope of the right to interpretation

As discussed earlier, under Iraqi law there is a lack of provisions regarding the right of access to an interpreter. It does not clarify whether the right is only confined to the trial stage or extends to the pre-trial investigation stage. Likewise, it is not clear whether this right extends throughout the pre-trial phase or solely arises for the accused person before the investigating judge.

Some comparative analysis will be very helpful for illuminating best practice that could guide Iraq. In England and Wales, for example, the suspect who cannot speak English is not interrogated unless there is a qualified interpreter present. Code of Practice states: “Chief officers are responsible for making sure appropriate arrangements are in place for provision of suitably qualified interpreters for people who are deaf or do not understand English.”¹⁵² It also sets out the instances that require providing an interpreter.¹⁵³ It emphasises that a suspect where is entitled must be provided with an interpreter as soon as practicable.¹⁵⁴

English law guarantees that foreign persons who do not speak or understand English and those who suffer a physical disability have the right to communicate through an interpreter. Importantly, English law obliges the State to provide the service of an interpreter from the initial investigation stage all the way to the end of the proceedings and also specifies the circumstance in which a duty arises. The interpreter is not only for dealing with police and Magistrate questioning but also for client–lawyer communications.¹⁵⁵ What follows is that any failure to satisfy this safeguard would breach the provisions of law and undermines any evidence against the defendant from the period of detention.¹⁵⁶

In Iraq, the current structure of texts in relation to this right does not clarify details with regard to providing the service of an interpreter at the pre-trial stage. Therefore, in line with the aforesaid, the texts must clearly elaborate such right and stipulate that

¹⁵² PACE, COP Code C Section 13(1).

¹⁵³ Ibid, Section 13(1).

¹⁵⁴ Ibid, Section 13(10).

¹⁵⁵ Ibid, Section 13(9).

¹⁵⁶ Ibid, Section 3(12).

during police questioning the entitled person should be provided with the service of an interpreter following arrest.¹⁵⁷ Also, an interpreter should be appointed as soon as it becomes apparent that the accused person cannot speak or understand the used language. What is more is that Iraqi law must clarify the ambit of assistance to interpretation during the pre-trial investigation. In this context, it could be said that, the interpretation should include translation and cover all communications occurring between the person who is under investigation and the public authority.

Moreover, interpretation should cover all communications that occur between the accused person and his lawyer who is chosen from the legal aid scheme. If the lawyer is privately retained, the accused person must bear the cost of an interpreter if one is needed.¹⁵⁸ It should be noted that even though the accused person has a lawyer who understands the language of the proceedings, that person must personally be enabled to understand the language in which the proceedings are conducted so as to enable him to defend himself properly. This does not mean that accused persons must be given a translation of all documents or proceedings but no less than the necessary communication that could enable them to understand what is going on regarding the case against them.¹⁵⁹

5.2.2.2. *Competent interpretation assistance*

The quality of the interpretation must be fit for purpose. There are examples of how national jurisdictions ensure this. In the Czech Republic, to be a person who is considered competent to work as interpreter, that person must have a Master's degree in language(s) at issue; must pass foreign language proficiency examination; and must have at least five years of experience as an interpreter.¹⁶⁰

¹⁵⁷ See some details about providing this right according due process standards in Harris et al., (n 57) 327.

¹⁵⁸ Richard Clayton & Hugh Tomlinson, *The Law of Human Rights* (n 58) 890.

¹⁵⁹ Pieter Van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (n 60) 478; see also *Kamasinski v Austria*, (n 36) para 74.

¹⁶⁰ Órla Ryan BL, edited by Grace Mulvey and Amanda Oi, *Report on the Implementation of the Right to Interpretation and Translation Services in Criminal Proceedings* (The JUSTICIA European Rights Network, Irish Council for Civil Liberties Limited 2012,) 33 at <https://www.hrmi.lt/uploaded/Documents/Report_Right_to_Interpretation_Justicia.pdf> accessed 20 January 2014.

In England and Wales, the officer in charge of the police station is responsible for providing the suspect who does not understand the English language or who is deaf, a suitably qualified interpreter. Such a person must be registered with the National Register of Public Service Interpreters (NRPSI) which requires language proficiency evidenced by the requisite level of formal qualification. The interpreter shall take an oath to ensure true and impartial interpretation.¹⁶¹ In addition, according to the PACE, it is mandatory that all communications with a suspect during interviews are recorded, and this clearly facilitates a high quality of interpretation.¹⁶² Tape-recording provides a faithful copy of what exactly happened during interrogation.¹⁶³

Consequently, mistakes or errors that arise due to the interpreter could be identified by examining the conduct of the process of interpretation and its surrounding circumstances and then the validity of the interview can be determined. Hence, tape recording could protect a person under investigation. At the same time, the proceedings can be protected, given that “Some defendants seek to discredit the interview interpreter as a way of denying the validity of the interview, and claims of not having understood the interpreter are common.”¹⁶⁴

From the discussion above, it is obvious that, in order to avoid a miscarriage of justice, the competence of interpretation must be taken seriously. The suggestion for Iraqi legislature is that whether he requests it or not, the eligible person under criminal proceedings is not just entitled to an interpreter, but to a competent one. The law needs to regulate who can be an interpreter during pre-trial, trial and appeal, in relation to qualifications. Many further aspects should also be covered in this regard such as regulating oath and required impartiality.

¹⁶¹ Ibid, 34.

¹⁶² The procedure of tape recording is not applicable for the detainees who are arrested under the provisions of both the Preventing of Terrorism Act (1989) and who are arrested according the Official Secrets Act 1911.

¹⁶³ Sonia Claire Russell, ‘Guilty as Charged’ (DPhil thesis, University of Aston in Birmingham, January 2001) 8; see also *Nallaratnam Singarasa v Sri Lanka* UN Human Rights Committee (1033/2001) para 7.2; *Michael and Brian Hill v Spain* UN Human Rights Committee, (n 65) para 14.2.

¹⁶⁴ Sonia Claire Russell, *Guilty as Charged*, ibid 72.

5.3. Evaluation under international human rights law

5.3.1. Right of access to a lawyer

One would reasonably expect reforms to the criminal justice system in Iraq to have adequately covered the right to legal assistance. Nonetheless, the reality is that over the last ten years, it has been, as was in the past, inconsistent with the due process required by international law. The above examination leads the author to the clear conclusion that the reformed criminal justice system has not fully protected the right in both the law and implementation. These failings lead to a violation of international standards and urgently need to be redressed. Regrettably, the system has failed to provide the right of a person accused to a lawyer from the start of proceedings, i.e. the start of police custody. In addition, there is a chronic failure to ensure that an accused person be notified of the right without delay at the initial stage of proceedings and at the initial stage of questioning during the police custody phase.

Furthermore, the post-Saddam legal system provides the right to a lawyer for an accused person before investigating judge. However, there are problems in law and practice. In addition, there is a lack of guarantee to high-quality advice during pre-trial stage. The norm is to interrogate without a lawyer being prevented. According to the practice of the HRC, if a suspect demands legal advice then makes an admission during an interview without getting it, the court may exclude this confession.¹⁶⁵ However, Iraqi law does not include any provisions by which one can clearly identify what the appropriate implications can take place if the present right is breached. In particular the confession, which may be attributed to an accused person without the attendance of a lawyer, must be not accepted.

In consequence, post-Saddam legislature has not exercised statutory powers in a way by which the new system can attain a level of modern procedural rights or to be in line with the mandatory minimum standard of international law as interpreted by the

¹⁶⁵ *Iskandarov v Tajikistan* UN Human Rights Committee, (n 20) para 6.6; *Kasimov v Uzbekistan* UN Human Rights Committee, (n 19) para 9.6; *Patricio v Equatorial Guinea* UN Human Rights Committee Communication No (1152&1190/2003) 31 October 2005 para 6.3; *Oral Hendricks v Guyana* UN Human Rights Committee Communication No (838/1998) 28 October 2002 para 6.2.

HRC. Thus, efficient measures and further provisions are urgently required to bring the right in the line with international due process.

The proposal for the new Iraqi justice system is to reform the indicated defects in law and practice. The explicit texts, which pay great attention to all provisions indicated by the international standards, must be enacted in the ICCP. For further reform, there is logic in making legislation as comprehensive as possible. Taking lessons from around the world is illustrative in this respect. For example, the English legal system seeks to ensure that those who entering custody are informed that free legal assistance is available to them.¹⁶⁶

In England and Wales, a number of previous studies carried out via different periods and places illustrate that the rate of making requests to legal advice is on the increase.¹⁶⁷ Recent studies during (2009) (2011) have shown that the proportion requesting advice during the police custody stage has reached about 60 per cent of suspects, 80 per cent of which were provided to consult with a solicitor.¹⁶⁸ In contrast with previous studies which indicated much less than this rate.¹⁶⁹ That is to say that it seems right that utmost reasons behind such a rise in the rate of suspects making the requests for legal advice belong to the Codes of Practice. The review of the provisions of the PACE, demonstrates that it is comprehensive. In light of this, there is much that the Iraqi system can learn from considering the experiences of other countries' legislations enshrining and safeguarding this right.

¹⁶⁶ See PACE, COP (C).

¹⁶⁷ See Keith Bottomley et al., "The Detention of Suspects in Police Custody" (1991) 31(4) *British Journal of Criminology* 347, 352; Tom Bucke and David Brown, *In Police Custody: Police Powers and Suspects' Rights under the Revised PACE Codes of Practice* (1997 London: Home Office) 19; Coretta Phillips and David Brown, *Entry into the Criminal Justice System* (1st ed., 1998, London: Home Office) 59; Layla Skinns, "I'm a Detainee; Get Me Out of Here" (n 1) 407; Pascoe Pleasance et al., "The Justice Lottery? Police Station Advice 25 Years on from PACE" (2011) *Criminal Law Review* 6.

¹⁶⁸ Layla Skinns, "The Right to Legal Advice in the Police Station: Past, Present and Future" (n 121) 23; see also Pascoe Pleasance et al., "The Justice Lottery? Police Station Advice 25 Years on from PACE" (n 167).

¹⁶⁹ Tom Bucke and David Brown, *In Police Custody: Police Powers and Suspects' Rights under the Revised PACE Codes of Practice* (n 167).

5.3.2. Right of access to an interpreter

The Iraqi criminal justice system is inconsistent with international rules which entitle an accused person who cannot understand or speak the language of proceedings, an opportunity to receive the service of an interpreter to protect the interests of justice. It must be admitted that, there is a lack of the legal texts in this regard because generally there is no explicit statutory rule to secure accessing of an interpreter for a person who cannot speak or understand the language of proceedings.

It is apparent that the lack of clear, enforceable provisions, adversely affects the rights of a person under criminal investigation. As a result, tackling this problem, first of all, requires that the current Iraqi criminal justice system in order to be in line with international due process must give the protection to this right in law.

From the above highlighted problems in Iraqi law the duty is laid down upon the legislature to provide clear competent legal provisions in which all details concerning providing and protecting this right can be elaborated consistently with international standards. This may well give this right a legal basis, as well as to place a limit against all improper discretion in daily practice when the required details are to be efficiently mentioned. Bearing in mind that in a post conflict society like Iraq, which has not known the rule of law or experienced good practice in criminal justice, there is logic in making legislation as comprehensive as possible. Of course the authorities will fail to meet the exceptionally high (unattainable) demands, but there must be something to work towards. Admittedly, it means that the law will keep being broken because the system is just not up to these unrealistic demands at this point in time.

CHAPTER SIX

THE RIGHT TO BE FREE FROM SELF-INCRIMINATION IN THE REFORMED IRAQI CRIMINAL JUSTICE SYSTEM

Introduction

Aspects of the post-Saddam overhaul of the criminal justice system have sought to promote, protect and improve the rights of accused persons against all forms of self-incrimination. Despite the changes, however, the protection of the right remains precarious. This chapter endeavours to assess and discuss the contemporary Iraqi criminal justice system in relation to the protection of the right against self-incrimination. It will explore whether this aspect of the justice system in post-Saddam Iraq is fully compliant with international standards.

The chapter discusses the elements of the right against self-incrimination - the right to silence, the right to be free from all forms of improper pressure and ill-treatment, and the right to make a voluntary confession. Essentially, these components, which are connected and overlap with each other, safeguard the rights of persons under criminal proceedings.¹ The chapter is divided into three sections. Section One examines the international standard. Section Two is devoted to highlighting the provisions of Iraqi law and practice. Section Three considers this new Iraqi system in the light of international rules to clarify any lack of compliance with international human rights law.

¹ Robin C A White & Clare Ovey, *The European Convention on Human Rights* (5th ed., Oxford University Press) 393; Nicolas A.J. Croquet, "The Right of Silence and Not to Self-Incriminate under the European Convention on Human Rights: To What Extent Are They Qualified?" (2008) *Cambridge Student Law Review* 215; Vivienne O'Connor & Colette Rausch (eds.), *Model Code for Post-Conflict Criminal Justice, Model Code of Criminal Procedure Vol. II* (2008, United States, Institute of Peace Press) 108, 109.

6.1. International rules

6.1.1. The right to silence

This section assesses whether the right to silence of an accused person is enshrined in international rules from the outset of criminal proceedings or only during the trial stage. It also examines whether silence adversely impacts the position of the person accused during criminal proceedings.

6.1.1.1. The right to silence during the pre-trial investigation stage

The right to silence during the pre-trial stage is not enshrined under the provisions of the ICCPR. Nevertheless, according to the practice of the HRC, a suspect must enjoy the right during the pre-trial investigation phase. This can be deduced from examining the relevant case-law, which reveals that the suspect's right to silence and right not to incriminate himself are enshrined in the right to a "fair hearing."² The HRC states that "The presumption of innocence imposes the burden of proving a charge on the prosecution."³ The HRC deems the right to remain silent useless if the refusal to make a statement or answer questionings during investigation could be held against persons accused and contributes to their conviction.⁴ Interestingly, it has been recognized that "an accused person can stay mute without reacting to the allegation."⁵

A similar view is held by the jurisprudence of the ECtHR. There is no express

² The ICCPR, Article 14(3) states that, "in the determination of any criminal charges against him, everyone shall be entitled to the following minimum guarantees, in full equality... (g) not to be compelled to testify against himself or to confess guilt"; similarly the ECHR, Article 6(1) states that "In the determination... of any criminal charge against him, everyone is entitled to a fair and public hearing... by a...tribunal..."

³ *J.O. v France* UN Human Rights Committee Communication No (1620/2007) 23 March 2011 para 9.6; *Gridin v Russian Federation* UN Human Rights Committee Communication No (770/1997) 20 July 2000 para 8.3.

⁴ Human Rights Committee, 'Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland' (27 July 1995) CCPR/C/79/Add 55, para. 4; see also Eileen Skinnider & Frances Gordon, *The Right to Silence – International Norms and Domestic Realities*, Paper presented to the International Centre for Criminal Law Reform and Criminal Justice Policy (2001) 4, at

<http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/Paper1_0.PDF> accessed 2 February 2014.

⁵ Karel de Meester et al., "Chapter 3. Investigation, Coercive Measures, Arrest, and Surrender" in Goran Sluiter et al (eds.), *International Criminal Procedure Principles and Rules* (1st ed., 2013, Oxford) 226.

entitlement to remain silent under the ECHR, but it is regarded as a part of the essentials of a fair trial and due criminal justice system. The Court clarified that the right to silence lies “at the heart of the notion of a fair procedure.”⁶ In the same vein, the prevailing view among scholars is that the right to remain silent forms part of the right to a fair trial.⁷ Hence, even though the right is not explicitly guaranteed in the wording of the ICCPR and the ECHR, this has not deterred international human rights bodies from concluding that this right is applicable during both the pre-trial investigation and trial stages.⁸

It is very important, if the right to silence is to be effective, that a suspect should be notified about this right in sufficient terms.⁹ The caution must be in a proper form, which can make clear to a suspect that he has the choice of speaking or keeping silent. In fact, the form of the warning is not mentioned under binding human rights law. However, guidance can be derived from international documents and case law, even though these are not binding on Iraq. For example, rules governing the conduct of interrogation under international criminal procedure in the ICTY RPE, ICTR RPE and the ICC Statute have emphasized that a suspect must be cautioned about the right to remain silent clearly and in a language that he understands.¹⁰ The case-law of international criminal trials has gone further in upholding that the statement of a suspect must not be introduced before the court if he had not been properly warned about his right to remain silent, the rationale being that the use of such statements would be unfair to the accused.¹¹ It would follow that a person under investigation

⁶ *Murray v the United Kingdom* App no 18731/91 (EHRR, 8 February 1996), (1996) 22 EHRR 29 para 45; see also *Saunders v the United Kingdom* App no 19187/91 (ECHR, 17 December 1996) (1997) 23 EHRR 313 paras 68-75; *Funke v France* App no 10828/84 (ECtHR, 25 February 1993), (1993) 16 EHRR 297 para 44.

⁷ See Karel de Meester et al., (n 5) 245.

⁸ Mark Berger, “Self-incrimination and the European Court of Human Rights: Procedural Issues in the Enforcement of the Right to Silence” (2007) (5) *European Human Rights Law Review* 516; see also Ben Emmerson & Andrew Ashworth, *Human Rights and Criminal Justice* (1st ed., 2010, London Sweet & Maxwell) 446.

⁹ Soft law provides certain guideline that “Any person shall, at the moment of arrest ... be provided by the authority responsible for his arrest respectively with information on and an explanation of his rights and how to avail himself of such rights.” UN General Assembly Res 43/173 ‘The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment’ (9 December 1988) principle 31.

¹⁰ Rule 42 (A) (iii) ICTY RPE, Rule 42 (A) ICTR RPE, SCSL RPE (42) (iii) and Article 55 (2)(b) of the ICC Statute; see also Karel de Meester et al., (n 5) 225.

¹¹ *Prosecutor v Sefer Halilovic*, ICTY, Case No. IT-01-48-AR73.2, AC, 19 August 2005, para. 15; *Prosecutor v Blagojevic and Jokic*, ICTY, Case No. IT-02-60-T, T, TC I Section A, 18 September 2003, para.19; see also Karel de Meester et al., (n 5) 225.

needs to be properly told about the right to remain silent before submitting statements. Otherwise, out of regard for the fairness of proceedings the statements should be inadmissible at trial on the grounds that they undermine the voluntariness of interrogation.

6.1.1.2. Drawing an adverse inference from the silence of the accused

International standards place an obligation upon the authorities to respect the right to silence during criminal proceedings. The obligation upon the authorities to respect the right to silence stems from the principles of freedom against self-incrimination and the presumption of innocence. As Berger states, international human rights bodies have been systematically attempting to “forge a mature right to silence that permits individuals to resist State compulsion to provide self-incriminatory information.”¹² However, one may wonder whether an implication of guilt can be drawn from silence. In this regard, fair trial and due process standards often require an attempt to strike a balance between individual liberty and the exercise of state authority.¹³ Thus, the right to silence of a suspect must be guaranteed, yet its extent and application might vary according to the different circumstances, i.e., it is not an absolute right. In other words, a court at any subsequent trial could draw adverse inferences from a suspect’s silence in particular situations.

Adverse inferences can be drawn only in certain situations, employing a considerable amount of caution and in accordance with the circumstances of each case. In addition, due attention has to be given by the authorities to providing suspects with all the required procedural safeguards. Unless these safeguards are satisfied, such adverse inference must not take place, in particular with regard to the provision of legal assistance, as mentioned in the previous chapter.

In view of the above, a process that is fair by international standards enables a suspect, in principle, to keep silent when questioned. It is certainly correct that neither

¹² Mark Berger, (n 8) 515.

¹³ Tim Ward & Piers Gardner, “The Privilege against Self-Incrimination: In Search of Legal Certainty” (2003) (4) *European Human Rights Law Review* 389; see also *Murray v United Kingdom*, (n 6) para 47; *Condron v the United Kingdom* App no 35718/97 (ECtHR, 2 May 2000), (2001) 31 EHRR 1 para 55; *Boyle and David Ford v the United Kingdom* App nos. 29949/07 and 33213/07 (ECtHR, 22 June 2010) para 37; *Beckles v the United Kingdom* App no 44652/98 (ECtHR, 8 October 2002) (2003), 36 EHRR 13 paras 57 and 59; Mark Berger, (n 8) 517.

a mere silence nor a refusal to co-operate with an investigation should be, in itself, regarded as an indication of guilt or a basis for criminal liability and conviction.¹⁴ However, in situations, which clearly call for an explanation from the suspect, the silence may be taken into account in order to assess the persuasiveness of the evidence adduced by the prosecution, and a court may be entitled to draw adverse inferences.¹⁵ Inference from silence may be reasonable as long as it is not the only grounds for guilt and that other evidence is available, which requires an explanation from the suspect, who unreasonably remains silent. It must be borne in mind that the inference still provides only a supporting role in particular issues, and adequate safeguards must be given to the suspect in such cases, particularly in warning the suspect regarding possibility of using such silence against him at trial and in providing legal assistance at the outset of proceedings.

The fact is that a range of considerations need to be taken into account if a court is to make any inference from silence. The most important of these considerations are the interests of individuals facing the criminal justice system and the requirements of justice. What follows is that the outcome of each case may differ according to the circumstances.¹⁶ In any case, the most widely accepted view seems to be that the decision as to whether a fair hearing may be violated due to the drawing of adverse inferences from the accused's silence relies on the following factors:¹⁷

1- The nature and degree of the compulsion used for obtaining the evidence, for instance, whether persistence in maintaining silence is deemed an offence in domestic law or not.

¹⁴ *Funke v France*, (n 6); *Saunders v United Kingdom*, (n 6); *Murray v United Kingdom*, (n 6).

¹⁵ *Murray v United Kingdom*, (n 6) para 47. In this case the applicant had remained silent during police questioning and in the national court, then failed to account for his presence at the scene of the alleged crime. The ECtHR in this case allowed the drawing of common sense inferences from silence. In this case, the ECtHR had taken account of the entire circumstances including that the independent evidence of guilt was strong, and that the Northern Ireland legislation incorporated a number of safeguards: in particular, the adverse inferences had been drawn by a judge sitting without a jury, and his decision was recorded in a reasoned judgment which was susceptible to scrutiny on appeal.

¹⁶ The ECtHR stated that "On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidences himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution." *Murray v United Kingdom*, (n 6) para 47.

¹⁷ Richard Clayton & Hugh Tomlinson, *The Law of Human Rights* (2nd ed., 2009, Oxford) 865; Nicolas A.J. Croquet, (n 1) 223; Mark Berger, (n 8) 519.

2- The scope of the community's interest with regard to the offence occurred and the conviction of the offender.

3- The way in which the warning is conveyed to the suspect about the effect of silence on the future of his case, and whether it is adequately put in place or not.

4- It is important to consider whether the suspect is given all due process guarantees and safeguards before drawing any adverse inference from silence. These inferences must not be drawn at a subsequent trial unless there were sufficient safeguards during the investigation stage to secure the right to silence and the non-incrimination of self.

International cases, as one would expect, exhibit examples of domestic courts being found at fault for having drawn adverse inferences from a suspect's silence,¹⁸ and there are also cases where complaints against drawn adverse inferences from silence have been rejected on the basis that the procedures required for a fair hearing have not been breached.¹⁹

To sum up, in the context of criminal proceedings the right to silence is one of the paramount procedural safeguards for a person facing compulsion from the authorities to provide self-incriminatory information.²⁰ Simultaneously, the drawing of adverse inference from silence might be possible in narrow circumstances and when important requirements are satisfied.

6.1.2. Unfairly obtained confession evidence and ill treatment

Article 14 (3) (g) of the ICCPR states that a person may not "be compelled to testify against himself or to confess guilt."²¹ Accordingly, the right not to be compelled to confess guilt is enshrined in international rules as a major component of the right to freedom from self-incrimination. It embodies the right to a fair hearing by protecting

¹⁸ *Condon v the United Kingdom*, (n 13) para 61; *Beckles v the United Kingdom*, (n 13) para 48.

¹⁹ *Adetoro v the United Kingdom* App no. 46834/06 (ECtHR, 20 April 2010) paras 57, 58; see also Rosemary Pattenden, "Adverse Inference from Silence: European Court of Human Rights" (2010) *International Journal of Evidence & Proof* 272; *Shukla v the United Kingdom* App no 2526/07 (ECtHR, 16/06/2009).

²⁰ *Saunders v United Kingdom*, (n 6) para 68; *Funke v France*, (n 6) para 44; see also Karel de Meester et al., (n 5) 226.

²¹ In addition, Article 15 of the UN CAT provides that "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

an accused person from confessing guilt, or from the admissibility at trial of a confession that has been improperly obtained during the course of the investigation. In the discussion which follows, aspects of these rights will be explored.

6.1.2.1. Confessions improperly extracted by ill treatment

One significant problem is that a suspect might be subjected to police coercion and violence in order to extract information or a confession. Such practice represents a serious breach of international human rights standards. Article 7 of the ICCPR provides that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”²² A considerable responsibility is placed on State organizations in responding to the explicit and implicit obligations contained in this Article. One aspect of the obligations imposed by these provisions pertains to confessions. Confessions are habitually extracted in criminal investigations by improper pressure and torture, practices against which these provisions provide important safeguards during the period of pre-trial detention.

The protection of a suspect against maltreatment is deemed an absolute right under international human rights law, and evidence obtained in contravention of article 7 of the ICCPR may be inadmissible. The HRC states that “it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession.”²³

In the light of these provisions in international rules, whenever a confession is made by an accused person during the course of the pre-trial investigation, the question arises as to whether it was properly obtained. By answering this question, it might be possible to determine the admissibility of a confession in the subsequent proceedings at the trial stage.

²² Similarly ECHR, Article (3) states that: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

²³ *Sandzhar Ismailov v Uzbekistan* UN Human Rights Committee Communication No (1769/2008) 25 March 2011 para 7.6; see also the UN Body of Principle for the Protection of All Persons under Any Form of Detention or Imprisonment, (n 9) principle 1: “All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.” Also Principle 6: “No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.”

The question to be asked here is: what kind of action falls within the scope of the prohibition and could thus violate the integrity of the proceedings? Basically, the ICCPR bans all kinds of actions by which a suspect could be subjected to abuse, either physical or mental. The practice of the HRC clarifies that the ill-treatment “relates not only to acts that causes physical pain, but also to acts that cause mental suffering to the victim.”²⁴ Thus, all types of misconduct, such as torture and other forms of cruel, inhuman, and degrading treatment are prohibited.²⁵ However, it should be noted that distinctions have been made between different levels of inflicted harm and misconduct. Such distinctions raise important issues regarding the remedies that could be subsequently provided to the victim. Of particular relevance is the question of what means of misconduct would damage the reliability of proceedings to an extent that would justify the exclusion of evidence obtained by those means.²⁶ In this regard, torture has been recognized as the most serious degree of violation that casts substantial doubt on the reliability of the evidence in criminal proceedings.²⁷

The definition of torture is not contained in the ICCPR. Nonetheless, it can be observed that the act of torture necessarily involves a certain degree of brutality with a high level of pain inflicted, while the other forms of ill treatment may cause less severe pain. It has been described that “Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”²⁸ According to Nowak “Torture most serious violation of the human right to personal integrity and dignity ... it presupposes a situation where the victim is powerless i.e. is

²⁴ UN Human Rights Committee, General Comment No. 20, (Forty-fourth session, 1992) “Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Article 7)” adopted on 10 March 1992, para. 5.

²⁵ UN Human Rights Committee, General Comment No. 20, Ibid, para.4; see also Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd ed., 2005, N.P. Engel Publisher) 161.

²⁶ The distinction is also necessary because the forbidden actions, in order to be under the ambit of Article 7 of the ICCPR, have to reach a certain threshold of torture, and cruel, inhuman, or degrading treatment. Otherwise, the violation even if does not reach “the minimum level of the threshold of Article 7”, it is still not allowed, but perhaps lies within the scope of Article 10 of the ICCPR, which bans inhumane treatment. See Suzanne Egan, “the necessary elements of torture: a consideration of the views of the Human Rights Committee in *Giri v Nepal*” (2012) *Dublin University Law Journal* 302.

²⁷ UN CAT 15; The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, (n 9) principle 27; UN Guidelines on the Role of Prosecutors, 1990, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990, Guideline 16.

²⁸ UN General Assembly Res 30/3452 ‘Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (9 December 1975) Article 1.

under the total control of another person.”²⁹ In any case, torture is comprised of the following main elements:³⁰

1. Mental or/and physical suffering inflicted on the detainee: this element includes a large number of acts and omissions. It is important to mention here that the practice of international bodies regarding where accidents could be torture extends also to such cases of prolonged solitary confinement, that is, detention “incommunicado” and complete isolation of the victim, without communication with close family members and friends for a long period.³¹ Moreover, in some cases adequate conditions of detention and medical care for detainees can be also amount of torture.³²
2. The suffering must have been inflicted intentionally.
3. The suffering must have been inflicted for a purpose: in an overwhelming number of cases torture occurs in order to obtain a confession or information from a suspect. At the same time, torture could take place for reasons other than extracting information, such as: intimidation, the extortion of money or on the basis of discrimination of some kind.³³

²⁹ UN Special Rapporteur on Torture Manfred Nowak, E/CN.4/2006/6, para. 39; similarly see the General Assembly of the United Nations, Resolution 3452 (XXX) (thirteen session on 9 December 1975) Article 1(2); *Ireland v the United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) (1979-80), 2 EHRR 25 para 167; see also Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary*, (n 25) 161.

³⁰ See Article 1 of the UN CAT “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

³¹ UN Committee Against Torture (CAT), *Conclusions and Recommendations of the Committee against Torture: Japan*, 3 August 2007, CAT/C/JPN/CO/1, para. 18; UN Committee against Torture, *Summary account of the results of the proceedings concerning the inquiry on Peru*, UN Doc. A/56/44, 2001,186, at <<http://www.refworld.org/docid/46cee6ac2.html>> accessed 16 April 2014; UN Commission on Human Rights, ‘Human Rights Resolution 2005/39: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (19 April 2005) E/CN.4/RES/2005/39, para. 9; see also *Aboussedra v Libyan Arab Jamahiriya* UN Human Rights Committee Communication No (1751/2008) 25 October 2010 para 7.4; see also *Laureano v Peru* UN Human Rights Committee Communication No (540/1993) 25 March 1996 para 8.5; see also *El-Megreisi v Libyan Arab Jamahiriya* UN Human Rights Committee Communication No (440/1990) 23 March 1994 para 5.4.

³² Center for Human Rights and Humanitarian Law, *Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture’s 2013 Thematic Report* (American University, Washington College of law 2013) 7 & 20, at <http://antitorture.org/wpcontent/uploads/2014/03/PDF_Torture_in_Healthcare_Publication.pdf> accessed 26 May 2014.

³³ Moritz Birk, Julia Kozma, Roland Schmidt and other, *Pre-trial Detention and Torture: Why Pre-trial Detainees Face the Greatest Risk* (2011 Open Society Foundations) 30; Prisoners Abroad, *Torture, Cruel, Inhumane and Degrading Treatment* (January 2008) 2 at

Bearing in mind that torture is not solely intended to compel persons under investigation to confess their guilt. Thus, statements gained from a person under investigation by law enforcement officials through torture or other forms of compulsion must be inadmissible in evidence at trial. The Body of Principles provides that “No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.”³⁴ Examples of such prohibited interrogation methods can be found in a range of case law and practice of international bodies.³⁵ The HRC states that “It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment”³⁶

The HRC, on many occasions has affirmed that the reliability and credibility of a confession depends on how it is obtained. It has stated that that “The wording of article 14(3)(g) of the Covenant must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.”³⁷

The HRC has interpreted the provisions of the ICCPR to mean that obtaining evidence during an investigation by any form of coercion would derail the whole proceedings. Thus, evidence elicited from a suspect by invalid means should be

<<http://www.prisonersabroad.org.uk/uploads/documents/prisoners/Torture.pdf>> accessed 8 March 2013; see also *Denizci and others v Cyprus* App nos 2531625321/94 and 27207195 (ECtHR, 23 May 2001); *Egmez v Cyprus* App no 30873/96 (ECtHR, 21 December 2000).

³⁴ The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, (n 9) principle 21; see also UN Human Rights Committee, Concluding Observations of the HRC: Georgia, UN Doc: CCPR/C/79/Add.75 at para.26 (5 May 1997).

³⁵ *Saunders v United Kingdom*, (n 6) para 71; *Funke v France*, (n 6); *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), (2007) 44 EHRR 667.

³⁶ UN Human Rights Committee, General Comment No. 20, (n 24) para. 12; see also The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, (n 9) principle 27.

³⁷ *Sandzhar Ismailov v Uzbekistan* UN Human Rights Committee, (n 23) para 7.6; *Dmitry Koreba v Belarus* UN Human Rights Committee Communication No (1390/2005) 25 October 2010, para 7.3; *Berry v Jamaica* UN Human Rights Committee Communication No (330/1988) 4 July 1994 para 11.7; *Nallaratnam Singarasa v Sri Lanka* UN Human Rights Committee Communication No (1033/2001) 21 July 2004, para 7.4; *Deolall v Guyana* UN Human Rights Committee Communication No (912/2000) 1 November 2004 para 5.1; *Kurbonov v Tajikistan* UN Human Rights Committee Communication No (1208/2003) 16 March 2006 paras 6.3, 6.4; *Zulfia Idieva v Tajikistan* UN Human Rights Committee Communication No (127/2004) March 2009 para 9.3.

inadmissible.³⁸ The HRC also recognised that fair trial under Article 14(1) of the ICCPR could be violated if a conviction is based either on improper confession extracted from a defendant by investigating authorities, or on testimony against the defendant improperly extracted from other persons.³⁹ This practice of the HRC means that statements obtained as a consequence of torture inflicted on any person should not be used in proceedings to implicating another person in a crime.

The HRC deems exclusion of evidence elicited by coercion to be among the effective safeguards for making control effective.⁴⁰ The jurisprudence of the ECtHR is illustrative of the position of the HRC. In the case of *Levinta v Moldova*, the ECtHR took the position that “the use of such evidence, obtained as a result of a violation of one of the core rights guaranteed by the Convention, always raises serious issues as to the fairness of the proceedings ... regardless of whether the courts also relied on other evidence.”⁴¹ In the case of *Gafgen v Germany*, the verdict of the ECtHR contained the statement that all confessions obtained from the accused as a result of a violation of the convention during the pre-trial investigations must be excluded from the trial.⁴²

The ECtHR in *Gafgen* clarifies that “As to the use during the trial of real evidence recovered as a direct result of ill-treatment ... should never be relied on a proof of the victim’s guilt.”⁴³ Reliance on evidence obtained by improper means, contrary to the rights enshrined within human rights rules, could render the proceedings unfair.

Case law has on many occasions asserted that a confession that has been obtained by police through invalid methods, or contrary to the requirements of humane treatment, should be excluded in order to secure the fairness of the whole proceedings.⁴⁴ A

³⁸ UN Human Rights Committee, General Comment No. 20, (n 24) para. 12; see also The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, (n 9) principle 21.

³⁹ *Bazarov v Uzbekistan* UN Human Rights Committee Communication No (959/2000) 8 August 2006 paras 8.3, 8.4.

⁴⁰ UN Human Rights Committee, General Comment No. 20, (n 24) para. 12.

⁴¹ *Levinta v Moldova* App no 17332/03 (ECtHR, 16 December 2008), (2011) 52 EHRR 40 paras 99, 104; see also *Jalloh v Germany*, (n 35) paras 82, 83.

⁴² *Gafgen v Germany* App no 22978/05 (ECtHR, 1 June 2010), (2011) 52 EHRR 1 paras 178, 180; see also Rosemary Pattenden, “Case Comment” (2009)13 *International Journal of Evidence & Proof* 58-78.

⁴³ *Gafgen v Germany*, *ibid*, para 99; *Jalloh v Germany*, (n 35) paras 105-199; see also Robin C A White and Clare Ovey, (n 1) 228

⁴⁴ *Jalloh v Germany*, (n 35); see also the ECHR, Article (6).

confession extracted in breach of the rights of the convention during the pre-trial stage may not only render the proceedings unfair, but may also entail redress for the alleged violence. The redress could include three actions: bringing the perpetrator to justice, inadmissibility of the evidence, and compensation for the alleged victim.⁴⁵

It follows that the general approach under international standards is that evidence under torture is never admitted at trial and that a statement made by the accused must be given voluntarily.⁴⁶ Moreover, some international institutions have been gone further to prohibit the admission not only of evidence extracted as a result of torture but also that evidence obtained by other forms of ill-treatment even cruel, inhuman and degrading treatment.⁴⁷

However, case law provides guidance on when evidence obtained under compulsion may be used. In *Saunders v United Kingdom*, for example, the ECtHR deemed that information which could have been obtained coercively is not covered by the right not to incriminate oneself if obtained independently of the will of the person under investigation, such as when information or documents are obtained by a search carried out according to a warrant issued by a court.⁴⁸

It should be further added that, according to international standards, there is an additional requirement to be taken into account in order for the confession to be admissible as valid evidence against a person under criminal proceedings. The person accused must be granted all safeguards under internal and international law to deal with the accusation against him. As discussed in an earlier chapter, a State party should ensure that there is proper legal representation during the pre-trial investigation process. The HRC on many occasions has held that the denial of a suspect's right to access to a lawyer during questioning would render the given

⁴⁵ Comments on the European Court of Human Rights decision in *Colibaba v Moldova* (29089/06) "Ill-treatment in detention: state pressure - Arts 3 and 34" (2008) *European Human Rights Law Review* 154-157 (case comment).

⁴⁶ Article 15 of the UN CAT; *Dmitry Koreba v Belarus* UN Human Rights Committee, (n 37) para 7.3.

⁴⁷ See practice of the African Commission on Human and Peoples' Rights in *Egyptian Initiative for Personal Rights v Egypt* (334/06) Unreported March 2011 referred to by Jamil D Mujuzi, "The African Commission on Human and Peoples' Rights and the Admissibility of Evidence Obtained as a Result Of Torture, Cruel, Inhuman And Degrading Treatment" (2013) *International Journal of Evidence & Proof* 284.

⁴⁸ *Saunders v United Kingdom*, (n 6); see also Nicolas A.J. Croquet, (n 1) 214.

confession unreliable.⁴⁹ Under the jurisprudence of the Committee, any exception applied in this regard must be for a good cause whereby restriction on the right of access to legal assistance can be justified. In *Kasimov v Uzbekistan*, the applicant claimed that his incriminating statement during interrogation had been made under duress and that his right of access to a lawyer had been denied. In these circumstances, the HRC found that using such an incriminating statement as evidence against the accused would be in breach of article 14, paragraph 3 (b) of the ICCPR.⁵⁰

Similarly, under the jurisprudence of the ECtHR, a confession would be inadmissible unless a national court made sure that an accused person had been given adequate safeguards during police questioning. In this connection, the court in the case of *Jalloh v Germany* stated that “In order to determine whether the applicant’s right not to incriminate himself has been violated, the Court will have regard to ... the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.”⁵¹ By the same token, in the case of *Salduz v Turkey*, it was held that using an incriminating admission was a violation of the right to a fair hearing, since it was obtained in the absence of access to legal assistance from the time of the first interview, with no exceptional circumstance that might allow such a restriction.⁵²

Having regard to the foregoing, it can be concluded that if a detainee is forced or improperly pressured to confess guilt, or is intentionally or negligently deprived of adequate safeguards given under international human rights legislation, and makes a confession, that confession may not be used. It may also be that, dependent on the facts, the State party could be obliged to provide an adequate remedy.

⁴⁹ *Iskandarov v Tajikistan* UN Human Rights Committee Communication No (1499/2006) 30 March 2011 para 6.6; *Kasimov v Uzbekistan* UN Human Rights Committee Communication No (1378/2005) 30 July 2009 para 9.6; *Patricio v Equatorial Guinea* UN Human Rights Committee Communication No (1152&1190/2003) 31 October 2005 para 6.3; *Oral Hendricks v Guyana* UN Human Rights Committee Communication No (838/1998) 28 October 2002 para 6.2.

⁵⁰ The HRC in this case held that “in preventing the author to access the counsel of his choice for ten days, and by obtaining his confessions during that period, the State party's authorities did violate Mr. Kasimov's rights under article 14, paragraph 3 (b) of the Covenant; see *Iskandarov v Tajikista*, *ibid*, para 9.6.

⁵¹ *Jalloh v Germany* (n 35) para117; see also Ed Bates, “Article 6: Right to a Fair Trial” (2002) *European Law Review* 150.

⁵² *Salduz v Turkey* App no. 36391/02 (ECtHR, 27 November 2008), (2009) 49 EHRR 19 paras 62, 63.

6.1.2.2. Proving alleged torture in order to exclude invalid confessions

In practice, proving incidents of torture is critical so that confessions extracted by torture being excluded from evidence placed before courts. States such as Iraq might apply the rule of inadmissibility of these invalid confessions, but this requires proof that torture had been perpetrated. The issue arises as to what means could be used to prove that confessions had been obtained by invalid means. In this regard, international rules place a fundamental obligation on national authorities, by which a person under criminal proceedings should be protected against any form of ill-treatment.⁵³ It is a significant obligation that protects individuals from prohibited treatment and should be fulfilled through positive action.⁵⁴ In the view of international law, this obligation requires the State parties not only to enact sufficient provisions for prohibiting all forms of abuse against the person accused, but also to act properly to achieve the task of protection in practice.⁵⁵

What follows is that one of the most important measures of protection that the State parties must provide is a proper investigation with regard to any allegation of torture and other forms of ill-treatment. Of course, the remedy for any violation of the right under consideration cannot be provided without satisfactory investigation. The investigation should be operated effectively. According to this vital guarantee and in the view of the HRC, a State party must conduct the investigation concerning allegations of ill treatment promptly and impartially.⁵⁶ Likewise, the state must not be allowed to evade responsibility for maltreatment on the grounds that the maltreatment emanated from the personal behaviour and conduct of those in positions of authority.⁵⁷

It must be admitted that at the heart of the problem is the difficulty of proof in verifying the oppressive acts of officials. Accordingly, the perpetrators may deny the

⁵³ UN Human Rights Committee, General Comment No. 20, (n 24) para. 2.

⁵⁴ Aisling Riedy, *The Prohibition of Torture, Guide to Article 3 of the European Convention on Human Rights* (2003, Council of Europe) available at <<http://www.scribd.com/doc/55078657>> accessed 13 August 2011.

⁵⁵ Aisling Riedy, *ibid.*

⁵⁶ *Otabek Akhadov v Kyrgyzstan* UN Human Rights Committee Communication No (1503/2006) 25 March 2011 para 7.3; *Dmitry Koreba v Belarus* UN Human Rights Committee, (n 37) para 7.2; see also *Ireland v the United Kingdom*, (n 29).

⁵⁷ *Otabek Akhadov v Kyrgyzstan* UN Human Rights Committee, *ibid.*, para 7.3; *Dmitry Koreba v Belarus* UN Human Rights Committee, (n 37) para 7.2; see also *Ireland v the United Kingdom*, (n 29).

infliction of ill-treatment, and complaints of violations may be useless unless supported with substantiated evidence.⁵⁸ The allegation requires to be corroborated, for example, by independent medical documents or photographs, or eyewitness or other available evidence, so that the onus may be on the state to prove that the alleged case is unreliable. In countries such as Iraq, courts look at truth but the difficulties of proof of torture is a notable reason why the exclusion of confessions obtained through torture during investigations does not take place in practice.⁵⁹ By contrast, under the practice of the HRC, once the allegation of ill-treatment is made, the accused person who is allegedly subjected to the violence should be immediately provided with a medical examination.⁶⁰

It can be observed that the practice of the HRC could be interpreted to mean that, if a confession is contested on the basis that it has been extracted by torture, the burden of proof of torture should not be on the accused person and instead the burden should be on the state to disprove the allegation of torture. In other words, according to the jurisprudence of the HRC there should be simplicity of proof of the existence of torture. On many occasions, the Committee has rightly stressed that “where an individual deprived of liberty receives injuries in detention, it is incumbent on the State party to provide a plausible explanation of how these injuries occurred and to produce evidence refuting these allegations.”⁶¹ A similar view has been upheld by the ECtHR. The Court recognised that “where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent upon the state to provide a plausible explanation of how these injuries were caused.”⁶² It was further held that, where an individual is injured by police at the time of arrest,

⁵⁸ *Vadim Stolyar v Russian Federation* UN Human Rights Committee Communication No (996/2001) 31 October 2006 para 8.8; *Dikme v Turkey* App no 20869/92 (ECtHR, 11 July 2000) para 73.

⁵⁹ Amnesty International, *Iraq: A Decade of Abuses* (March 2013) Index: MDE 14/001/2013, 41.

⁶⁰ *Kasimov v Uzbekistan* UN Human Rights Committee, (n 49) para 9.3; *Dmitry Koreba v Belarus* UN Human Rights Committee, (n 37) para 2.3; *Sattorov v Tajikistan* UN Human Rights Committee Communication No (1200/2003) 30 March 2009 para 8.3.

⁶¹ *Zheikov v Russian Federation* UN Human Rights Committee Communication No (889/1999) 17 March 2006, para 7.2; see also, *Siragev v Uzbekistan* UN Human Rights Committee Communication No (907/2000) 1 November 2005 para 6.2; *Bleier v Uruguay* UN Human Rights Committee Communication No (30/1978) 24 March 1980 para 13.3; *Dermitt and Hugo Haroldo Dermitt Barbato v Uruguay* UN Human Rights Committee Communication No (84/1981) 21 October 1982 para 9.6.

⁶² *Selmouni v France* App no 25803/94 (ECtHR, 28 July 1999), (2000) 29 EHRR 403 para 87; see also *Colibaba v Moldova* App no 29089/06 (ECtHR, 23 October 2007), (2009) 49 EHRR 44 para 43.

“the burden rests on the Government to demonstrate with convincing arguments that the use of force was not excessive.”⁶³

In General Comments No. 31 and No. 20 the HRC has stressed that complaints against violation by a person under criminal proceedings raises the obligation on a State party to conduct the investigation “promptly, thoroughly and effectively through independent and impartial bodies.”⁶⁴ In the same way, the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment has stated that: “Where allegations of torture or other forms of ill treatment are raised by a defendant during trial, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture and similar ill-treatment.”⁶⁵

In the light of the above, international standards, either in the context of treaties, “soft law” and case law, have elaborated in absolute terms the effective protection against all kinds of violation, and due consideration is given to the obligation of a State party to provide the person who is under criminal proceedings with adequate protection against ill-treatment at all times. For this purpose, the domestic criminal proceedings must include adequate details of the means by which the redress of the allegations of ill-treatment, particularly the exclusion of invalid confessions, can be advanced adequately to the affected person.

6.2. Iraqi rules and practice

6.2.1. The right to silence

In the Iraqi criminal justice system during the Saddam era, the right of an accused person to remain silent was non-existent in practice. Contrary to international rules,

⁶³ *Rehbock v Slovenia* App no 29462/95 (ECtHR, 28 November 2000) para 72.

⁶⁴ UN Human Rights Committee, General Comment No. 31, (CCPR/C/21/Rev.1/Add.13, 26/05/2004) “The nature of the General Legal Obligation Imposed on States Parties to the Covenant” adopted on 29 March 2004, para.15; UN Human Rights Committee, General Comment No. 20, (n 24) para. 14; *Kasimov v Uzbekistan* UN Human Rights Committee, (n 49) para 9.7; see also Guideline 16 of UN Guidelines on the Role of Prosecutors, (n 27).

⁶⁵ Report of the UN Special Rapporteur on Torture, UN Doc. E/CN.4/2003/68, 17 December 2002, para. 26(k).

the system was heavily reliant on confessions extracted by police interrogators to convict persons on trial.⁶⁶ At the same time, the right was not fully respected in law.⁶⁷ Iraqi law had taken the position that, even though the ICCP strictly prohibited abusing a person under investigation and had provided that “the accused does not have to answer any of the questions he is asked,”⁶⁸ nonetheless there were some provisions by which the protection granted was seriously undermined. A salient problem was that implicit messages were sent to officials to force an accused person to speak against his will: the ICCP stated that “if the confession is corroborated by other evidence which convinces the court that it is true or which has led to uncovering a certain truth, then the court may accept it.”⁶⁹ In addition, there was no reference in the ICCP to notifying a person under investigation about the right to silence, either at the initial investigation before the police or before the investigating judge. Moreover, there were wide rules of immunity from criminal proceedings for officials, such as Article 136 of the ICCP and decrees of the Revolutionary Command Council.⁷⁰

After 2003, as already discussed, reform of the ICCP did address the right to keep silent for a person under investigation during questioning at the pre-trial stage. Article 123 was amended by the Coalition Provisional Authority:⁷¹

⁶⁶ Michael M. Farhang, “Reconstructing Justice: The Coalition Provisional Authority took Giant Steps to Guarantee Iraq a Functioning Criminal Justice System” (2004) *Los Angeles Lawyer* 46; Joseph T. Thai, “Constitution Excluded Confessions: Applying America’s Lessons to a Democratic Iraq” (2005) *Oklahoma Law Review* 39; Daniel L. Rubini, *Justice in Waiting: Developing Rule of Law in Iraq* (National Security Report, July 2009) 46 available at http://www.roa.org/site/DocServer/0907_NSR.pdf?docID=17781 accessed 2 April 2011.

⁶⁷ Ibid.

⁶⁸ ICCP Article 126. The official English translation is available online at the homepage of *the Global Justice Project: Iraq* (GJPI) <<http://gjpi.org/central-activities/judicial-independence/>> accessed 3 January 2014.

{المادة 126: ب – لا يجبر المتهم على الاجابة على الاسئلة التي توجه اليه}

⁶⁹ ICCP Article 218. The official English translation is available online at the homepage of *the Global Justice Project: Iraq* (GJPI) <<http://gjpi.org/central-activities/judicial-independence/>> accessed 3 January 2014.

{المادة 218: اذا انتفت رابطة السببية بينها وبين الاقرار او كان الاقرار قد ابد بأدلة اخرى تقتنع معها المحكمة بصحة مطابقته للواقع او ادى الى اكتشاف حقيقة ما جاز للمحكمة ان تأخذ به}

⁷⁰ Article 136 of the Iraqi Code of Criminal Procedure {قانون أصول المحاكمات الجزائية العراقية}; Decrees of the Revolutionary Command Council No 453, published in the Official Gazette, issue 2991 of 30 April 1984; No 1042, published in the Official Gazette, issue 2727 of 27 August 1979; No 749, published in the Official Gazette, issue 3117 of 29 September 1986. {اشارة الى بعض قرارات مجلس قيادة الثورة المنحل}

⁷¹ The Coalition Provisional Authority Memorandum No (3) Criminal Procedures [Iraq] 18 - June - 2003, published in the Official Gazette, issue 3978 August 2003. The original text is in the English language, and the official translation into Arabic is available in the Official Gazette, issue 3978 of 17 August 2003.

“... (b) Before questioning the accused the investigative judge must inform the accused that: [...] he or she has the right to remain silent and no adverse inference may be drawn from the accused’s decision to exercise that right.”⁷²

In a similar vein, Section Five of the CPA’s Memorandum 3, without amendment of the ICCP, states that an apprehended person has the right to be informed about his right to remain silent.

The Iraqi Permanent Constitution of 2005 also provides that the right to a defence is sacred and guaranteed at all stages of the criminal proceedings.⁷³ Following these amendments, it was hoped that Iraqi law would come fully into line with international standards.⁷⁴ However, the present author believes that it is essential to examine whether the formal changes to Article 123 have made a difference.

6.2.1.1. Notification of the right to silence

The person accused must be adequately informed about the right to remain silent in order to take advantage of it. As already illustrated, a person under investigation should not be forced to speak under any circumstances, and international due process secures the right to silence from the outset of criminal proceedings. Moreover, international due process requires a duty of the person who conducts the arrest to notify the suspect about his right to keep silent. Under international standards, to ensure full respect for the fairness of proceedings, statements obtained from a suspect before notification of the right to silence should be inadmissible at trial as having undermined the voluntary nature of the interrogation.

This right is guaranteed in many legal systems around the world. For example, French law provides that “persons in custody must be informed immediately of their right during the interview, after having indicated their identity, to make declarations, to

⁷² Article 123 of the ICCP. The official English translation is available online at the homepage of *the Global Justice Project: Iraq* (GJPI) <<http://gjpi.org/central-activities/judicial-independence/>> accessed 28 January 2014.

{المادة 123: ب- قبل اجراء التحقيق مع المتهم يجب على قاضي التحقيق اعلام المتهم ما يلي: اولاً- ان له الحق في السكوت، ولا يستنتج من ممارسته هذا الحق اية قرينة ضده}

⁷³ The Iraqi Permanent Constitution 2005 Article 19(4).

⁷⁴ Michael M. Farhang, (n 66).

answer questions put to them or to remain silent.”⁷⁵ Similarly, German law provides a suspect, whether or not under arrest, with the right to be informed about the right to remain silent before any interrogation takes place. Drawing adverse inferences from silence is not allowed at any stage of the criminal proceedings.⁷⁶

In Iraq before 2003, there was no rule in place requiring a caution in respect of informing a person under investigation about his right to remain silent at any stage of the proceedings. In the post-Saddam Iraqi legal system, it seems that at the commencement of arrest, according to CPA’s Memorandum 3, an apprehended person has right to be informed about his right to remain silent.⁷⁷ Section Five of the Memorandum provides that “at the time an Iraqi law enforcement officer arrests any person, the officer shall inform that person of his or her right to remain silent.”⁷⁸ This was a step towards bridging the gap between the system and due process. However, a closer look at the new reform reveals certain limitations that could minimize its effect and render its implementation difficult.

The key issue of concern is that the new reform does not specify in the appropriate place, that is, in the ICCP, a text in which the police are obliged to inform a person under investigation about his right to remain silent before questioning. Rather, according to the ICCP, the mandatory notification does not arise until a later time, when the person under investigation is brought for judicial interrogation.⁷⁹ As has been mentioned previously, most provisions of the CPA’s Memorandum 3 are inserted as amendments to provisions of the ICCP, particularly in Article 123. However, it is problematic that the provisions under consideration in the CPA’s Memorandum 3, regarding notification of the right to silence, have not yet been

⁷⁵ French law according New Art. 63-1 CPP, the Act of 14 April 2011 relating to the police custody phase. “Loi no.2011-392 du 14 avril 2011 relative à la garde-à-vue (JO 15 avril 2011, p. 6610” referred to by Aude Dorange & Stewart Field, “Reforming Defence Rights in French Police Custody: A Coming Together in Europe? Legislative Comment” (2012) *International Journal of Evidence & Proof* 164; referred to also by Dimitrios Giannouloupoulos, “Custodial Legal Assistance and Notification of the Right to Silence in France: Legal Cosmopolitanism and Local Resistance” (2013) 24 *Criminal Law Forum* 323; See also MCCP, Article 172 (3) (a).

⁷⁶ Germany Code of Criminal Procedure, S.136.

⁷⁷ The Coalition Provisional Authority Memorandum No (3) Criminal Procedures [Iraq] (n 71).

⁷⁸ Ibid. Published in the Official Gazette, issue 3978 August 2003. The original text is in the English language, and the official translation into Arabic is available in the Official Gazette, issue 3978 of 17 August 2003.

{المادة 5: عندما يقول احد رجال الضبط القضائي العراقيين باعتقال احد الاشخاص يقوم بأعلامه بحقه التزام الصمت}

⁷⁹ ICCP, Article 123.

inserted in the Code. The implication is that some anomalies remain, and this in turn minimizes the effect of these provisions in practice.⁸⁰ In other words, as long as these provisions stand independently in the Memorandum without being incorporated into the ICCP, they remain inaccessible, whereas legal provisions dealing with the rights of individuals should be established in a clear form, accessible to everybody in a society.⁸¹ In addition, the process of enactment of these provisions by the occupying power and translations from the English to the Arabic language has some negative implications with regard to their intelligibility, clarity and predictability. In contrast, the United Nation's definition of the rule of law requires, as already mentioned, that "the law must be accessible and, so far as possible, intelligible, clear and predictable."⁸² In the view of the foregoing it is apparent that, this changes made in the transitional period post-2003 was temporary and one of interim measures appropriate to that time but it is still in force. Years have elapsed since that reform was cited in the Memorandum and it is still not to be found in the provisions of the Code. If that reform is to be actualized and taken seriously, it must be incorporated in the ICCP.

Another problem with the new reform is that the phrase employed in notifying the right during a process of arrest is inadequate. It is short and it does not make clear whether this right is available without adverse inference at a later stage of proceedings. In the same way, the phrase employed in notifying the right during judicial interrogations in the pre-trial stage is also inadequate. It is short and it does not make clear whether this right is available without adverse inference at a later stage of proceedings. A key issue of concern is that it only refers to the investigating judge's questioning of the accused person while, as has previously been shown, investigations in Iraq actually come before that stage. Thus it appears that the right to silence does not apply to police questioning.

The author's research suggests that it would be appropriate for the Iraqi legislature to intervene. The law needs to protect the right to silence at all stages, and to impose

⁸⁰ See Chapter Five.

⁸¹ Bingham has written: one of the ingredients of the rule of law is that the law must be adequately accessible and clear "to know what our rights or obligation are." Tom Bingham, *The Rule of Law* (2011, Penguin Books) 37, 38.

⁸² For the meaning of the rule of law, see Chapter Two.

obligations of notification throughout. It must stipulate a clear provision, whereby a duty rests upon the police interrogator to caution the suspect by adequate means about his choice to remain silent, and to inform him that such a silence does not adversely affect his position, and that only his answers may be given as evidence. The notification should be given in both oral and written forms at the outset of the proceedings, and again prior to answering any questioning following a break in the proceedings. It is most important for an accused person to be fully informed about the freedom to keep silent, and what the consequences may be of answering any questions. Therefore, a further reform needs to come soon. Alternatively, the legislature may enact clear provisions to be inserted at an appropriate place in the ICCP, by which the questioning of the person accused can only be conducted by the judicial authority.

Another cause for concern is that the analysis of the reform of the text reveals that no obvious consequences follow from breaching the right concerned. In other words, according to the reformed Iraqi law, the proceedings are still valid, even when this right is abused. Consequently, the reform must include a stipulation that statements given by a person under investigation should not be acceptable unless he or she has been fully informed of the right to silence. For this purpose, the caution must be worded in the ICCP in such a way as to inform the accused person in understandable phrases. In addition, this notification should be deemed unsatisfactory unless it is signed by the accused person in the record of the interrogation.

These proposals, in the view of the author of the present research, represent not only protection for the accused person from undue pressure, but are also beneficial to the officials for the purpose of contesting assertions that the statements might have been obtained by invalid means. Furthermore, they are an incentive to proper interrogation, whereby the statements of an accused person are not the sole source of information and evidence. In reality, the conclusion is that even though the current reform seeks to provide the right to silence, it is not workable because the person accused cannot be

expected to take advantage of the right unless he is properly informed about it at the outset of police questioning.⁸³

6.2.1.2. Adverse inference from remaining silent

Under international standards, as a derivative from the presumption of innocence and the right not to be compelled to incriminate oneself, the State is under an obligation to provide the suspect with the right to remain silent during the authorities' questioning from the outset of pre-trial investigations.⁸⁴ The practice of drawing inferences from silence is only allowed in particular circumstances. Procedural safeguards have to be in place at the same time, particularly the right of access to a lawyer. Otherwise, any adverse inference drawn from silence is impermissible. It is rightly stated, "Allowing adverse inference means that the silence of person is taken as an admission of guilt and thus the person's right to the presumption of innocence is violated."⁸⁵

Before examining the post-Saddam reformed justice system, it would be instructive to look at some domestic jurisdictions elsewhere in the world in order to understand how they have dealt with the compromise between two conflicting interests. These are the right of a suspect to keep silent and the authorities' need to obtain information in order to hold the offender and to fight crime.

In some jurisdictions, a person under investigation can remain silent without adverse inferences being invoked from that silence.⁸⁶ In other jurisdictions, such as those of England and Northern Ireland, adverse inferences can be derived from the suspect remaining silent in specific situations,⁸⁷ although it must be borne in mind that, in

⁸³ See MCCP, Article 172(3) (a); Vivienne O'Connor & Colette Rausch (eds.), *Model Code for Post-Conflict Criminal Justice, Model Code of Criminal Procedure*, (n 1) 109; Dimitrios Giannouloupoulos (n 75).

⁸⁴ *Murray v United Kingdom*, (n 6) para 47.

⁸⁵ Vivienne O'Connor & Colette Rausch (eds.), *Model Code for Post-Conflict Criminal Justice, Model Code of Criminal Procedure*, (n 1) 109.

⁸⁶ Germany Code of Criminal Procedure, S.136; The French Code of Criminal Procedure, Art 63-1, modified by the Law of 14 April 2011, referred to by Dimitrios Giannouloupoulos (n 75) 323; see also MCCP, Article 57. see also Vivienne O'Connor & Colette Rausch (eds.), *Model Code for Post-Conflict Criminal Justice, Model Code of Criminal Procedure*, (n 1) 109.

⁸⁷ In English law and Northern Ireland the right to silence is not an absolute right. In Northern Ireland, the right to silence has been being restrained since 1988 by the enactment of the Criminal Evidence Order, which allows the court to draw proper inferences from the accused's silence in some situations. In English law, the situation became somewhat similar when the right to silence was curtailed or

these jurisdictions, this right is an essential element of a suspect's right to refuse to answer police questions. However, a suspect's refusal to answer questions put to him by interrogators may enable him to evade evidence against him, and thus the drawing of adverse inference is sometimes permissible in order to assist the competent authority to achieve their legitimate objectives and bring an offender to justice. This interpretation meets with international standards and has avoided the criticism of the ECtHR on many occasions.⁸⁸ It complies with international standards for several reasons. The most important reason is that, even though a negative inference could be drawn from silence, a conviction would not be mainly or solely based on inferences drawn from the accused's silence.⁸⁹ In addition, this practice of inferences drawn from the silence is only justified in particular circumstances.⁹⁰ Other procedural safeguards also have to be put in place, particularly the right of access to a lawyer, and a person under investigation should receive a warning from the police that an inference could possibly be drawn from his silence.⁹¹

In post-Saddam Iraq, the reform of this right in compliance with international human rights standards ensures that the drawing of adverse inference from silence is prohibited in absolute terms. The new provisions explicitly state that

“... (b) Before questioning the accused the investigative judge must inform the accused that: [...] he or she has the right to remain silent and no adverse inference may be drawn from the accused's decision to exercise that right.”⁹²

However, these provisions are undermined in many aspects during criminal proceedings. Iraqi trial judges, either a single judge in misdemeanour courts or three

undermined by the enactment of the Criminal Justice and Public Order Act 1994. By virtue of new amendments, the suspect is not forced to speak, but the court, whenever it appears proper, can draw adverse inferences from the suspect's failure to answer questions put to him in some circumstances. For detail, see Deborah Cheney et al., *Criminal Justice and the Human Rights Act 1998* (1999, Jordan Publishing Bristol) 61; Susan Easton, *The Case for the Right to Silence* (2nd ed., 1988, Ashgate Publishing Company) 13; Peter N. Mirfield, “Two Side-Effects of Sections 34 to 37 of the Criminal Justice and Public Order Act 1994” (1995) *Criminal Law Review* 611.

⁸⁸ *Murray v the United Kingdom*, (n 6); *Adetoro v the United Kingdom*, (n 19); see also Rosemary Pattenden, “Adverse Inference from Silence: European Court of Human Rights” (n 19); *Shukla v the United Kingdom*, (n 19).

⁸⁹ *Murray v United Kingdom*, (n 6) para 47.

⁹⁰ See for example, Articles 34, 36, 37 of the Criminal Justice and Public Order Act, 1994.

⁹¹ Regarding safeguards identified for drawing inference see Michael Farrell, *The Right to Silence and the Criminal Justice Bill* (2007) 9, 10, at

<http://www.flac.ie/download/pdf/mfarrell_right2silence_paper_24may07.pdf> accessed 11 April 2014.

⁹² ICCP Article 123 (B), (n 72).

judges in felony courts, traditionally have discretion to determine the conviction in the light of the discovered facts. By virtue of so-called “inner belief,” judges are free to evaluate the merits of the evidence in order to sustain a conviction. Thus, silence may be given an evidentiary value in strengthening the prosecution and determining the conviction. Consequently, it can be said that the reformed provisions have not laid down any limitation against inference being drawn against accused persons in case of their remaining silent. It must be admitted that even if adverse inferences from silence are prohibited, they are likely to be exploited to the detriment of the accused person and deemed to be incriminating evidence against him. Silence in combination with other weak evidence may suffice to sustain a conviction whereas, in other cases where the evidence is weak, the defendant’s spoken denial of the accusation rather than his invocation of the right to silence is more likely to achieve an acquittal.

In a situation where a person under investigation has the opportunity to mention a fact but does not do so, the investigating authority will tend to assume the refusal to answer questions means that the person has something to hide regarding the alleged offence. In such a situation, the interrogators could try to exert improper pressure on that person to incriminate himself. In practice, the exertion of the interrogators’ power over the detainee is a systemic problem,⁹³ made worse by the fact that the proceedings of interrogation, contrary to international due process, have not been adequately regulated in Iraqi law.⁹⁴ In other words, the questioning procedure is within the discretion of the interrogator, because there are no relevant provisions for organizing an interrogation or regulating its conduct, such as time limits, rest breaks, and audio or video records to prevent improper tactics. Thereafter, even if a person under investigation does not wish to speak, the questioning may continue for a long time under improper compulsion in the hope of obtaining a confession, and a person under investigation could be interviewed many times over a long period.⁹⁵

⁹³ See Amnesty International, *Iraq: A Decade of Abuses* (n 59) Index: MDE 14/001/2013.

⁹⁴ The UN CAT, Article (11) states that: “Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.”

⁹⁵ As will be substantiated in next pages, there are a large number of detainees who have been subjected to ill treatment at the hand of the authorities to produce statements during interrogations. See the Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Right Reports (2007, 2008, 2009, 2010, 2011, 2012 Baghdad).

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الإنسان العراقية }

The approach of the reformed Iraqi justice system regarding right to silence is unlike those jurisdictions elsewhere in which there is no limitation on the right. It is also unlike those jurisdictions in which the drawing of inferences from silence is allowed. The dissimilarity takes two forms. On the one hand, in those jurisdictions that permit adverse inference to be drawn from a suspect's silence, such an inference is not allowed unless there are safeguards entirely available to the suspect; for example, negative inferences should not be drawn if there has been deviation from due process.⁹⁶ In particular, legal assistance is guaranteed, and any incriminating statements made without a lawyer in attendance would not be admissible. In Iraqi law, however, there is no mention of such a provision.

On the other hand, in contrast to Iraqi law, in those jurisdictions in which no inference is permissible, the provision regarding the right to silence without adverse effects has been respected.⁹⁷ In the reformed post-Saddam justice system, a failure of legal reform is not the end of the story: what makes the failure worse is that the right to remain silent is routinely breached.⁹⁸ Therefore, it is very rare to find cases in which

⁹⁶ In some jurisdictions such as in England and Wales, lengthy questioning of a suspect is not permitted in the conduct of an interrogation. A suspect should be cautioned about his right to silence before being asked any question about an offence of which he is suspected. In addition, there is a duty laid down on the interviewing officer to remind the suspect of his right to silence again after every break in questioning. At the same time, the interviewing officer should record a record of the caution of right to silence. In the same way, the interviewing officer must warn a suspect about this right in ordinary language, and should include the warning that the failure to answer questions may affect the consequence of his trial if the case goes to court. In a similar vein, drawing adverse inferences from silence is not allowed if the right to a lawyer is violated. Most importantly, "inferences cannot in themselves provide sufficient evidence for a conviction: a prima facie case must first be established from other evidence. But inferences may be used to reinforce the prosecution case or undermine that of the evidence." Hence, negative inferences should not be drawn if there has been a due process problem. See Dennis Ian, "Silence in the police station: the marginalisation of section 34" (2002) *Criminal Law Review* 36. Helen Fenwick, *Civil Liberties and Human Rights* (4th ed., 2007, Routledge -Cavendish Publish) 1237; Michael Zander, *Cases and Materials on the English Legal System* (10th ed., 2007, Cambridge University Press) 17; Michael Zander, *The Police and Criminal Evidence Act 1984* (5th ed. 2005, Sweet & Maxwell) 170.

⁹⁷ See, for example, Germany's Code of Criminal Procedure, S.136.

⁹⁸ See reliable reports from different domestic and international resources- the Annual Report of prisons and detention facilities, Iraqi Ministry of Human Rights, Human right report (2007, 2008, 2009, 2010, and 2011, Baghdad)

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الانسان العراقية}

; The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report, 1 January - 31 December 2011; The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report, 1 January - 31 December 2010; The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report, 1 July - 31 December 2009; The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report, 1 January - 30 June 2009; The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report, 1 July - 31 December 2008; 1 January - 30 June 2008; The Human Rights Office of the United Nations Assistance

an accused person has invoked the right to remain silent. As will be elaborated in the forthcoming pages, the accused person's right to silence is, despite the legal requirement, no more than ink on paper. Solving a crime under the post-Saddam justice system, as in the past, is reliant on forcing the person accused to answer questions and to confess guilt.⁹⁹

Reputable reports confirm the lack of respect for the human rights of persons in detention and the reliance on self-incrimination for securing convictions. These reports clearly reveal the reality of the reformed Iraqi system with regard to adverse inferences drawn from the silence of the accused.¹⁰⁰ The issue of concern is that the right to silence is not only inadequately articulated in law by the new provisions, but that even these meagre and unsatisfactory provisions are not respected in practice.

From the above discussion, it is important to state that further reform is necessary to address the shortcomings in law and practice. In order to strength the right to silence it should be noted that securing rights within the law is not sufficient. These rights should be properly prescribed. Attention also needs to be given to accountability and to promoting effective practical measures, such as training courses, monitoring, discipline, supervision, and the videotaping of interrogations.¹⁰¹ The Iraqi legislature should learn from other legal systems, such as those of England and France, that the cautioning of a suspect about his right to silence has to be done at the outset of the proceedings in police custody, before any questioning takes place. The caution must be given in such a way that the suspect can know whether his silence will have adverse results. At the same time, the caution should prevent any contradiction between theory and practice since, although in theory no adverse inference should be derived from silence, in practice this is not the case. Also, in other jurisdictions, such as those of England and Wales, a suspect has the right to be reminded of the right to

Mission for Iraq (UNAMI), Human Rights Report, 1 July – 31 December 2007; 1 April – 30 June 2007; 1 January – 31 March 2007; The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report, 1 November - 31 December 2006; 1 September - 31 October 2006; 1 July – 31 August 2006; 1 May – 30 June 2006; 1 March– 30 April 2006; 1 January– 28 February 2006; The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report, 1 November– 31 December 2005; 1 September – 31 October 2005; 1 July – 31 August 2005.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ The next chapter will explore what needs to be done in terms of further reform.

silence by the interrogator at the beginning of each interrogation and after each break, and it would be preferable if the Iraqi legislature adopted this practice. What is more, as in English law, a record of caution should be recorded by the interviewer to make clear whether the statements have been given voluntarily by the suspect.¹⁰²

To sum up, the conclusion is that the pre-trial right to silence in the Iraqi criminal justice system falls short of international standards and further reform is required.

6.2.2. Unfairly obtained confession evidence and ill treatment

As mentioned above, international law protects the person accused against involuntary confession. In fact, the pre-Saddam Iraqi criminal justice contained a legal framework to respect the right to be free from ill-treatment under the ICCP.¹⁰³ However, as has been noted, a systemic problem with the Iraqi justice system during Saddam's rule was that the confessions were extracted by invalid means at the investigation stage and were then admissible at trial, leading regularly to conviction.¹⁰⁴ One previous study in England and Wales revealed that many refugees

¹⁰² PACE, Code of Practice C, para. 10.7.

¹⁰³ ICCP Article 127 prohibits "the use of any illegal method to influence the accused to extract a confession such as mistreatment, threats, injury, enticement, promises, psychological influence or use of drugs or intoxicants are considered illegal."

{لا يجوز استعمال اية وسيلة غير مشروعة للتأثير على المتهم للحصول على اقراره. ويعتبر من الوسائل غير المشروعة اساءة المعاملة والتهديد بالإيذاء والاغراء والوعد والوعيد والتأثير النفسي واستعمال المخدرات والمسكرات والعقاقير} ; also, IPC Article 333 criminalises "any public official who tortures or orders torture, or threatens torture, of a person accused of a criminal act, including witnesses, with the aim of compelling a confession."

{يعاقب بالسجن او الحبس كل موظف او مكلف بخدمة عامة عذب او امر بتعذيب متهم او شاهد او خبير لحملة على الاعتراف بجريمة او للأدلاء بأقوال او معلومات بشأنها او لكتمان امر من الامور او لإعطاء رأي معين بشأنها. ويكون بحكم التعذيب استعمال القوة او التهديد}

¹⁰⁴ United Nations Commission on Human Rights (CHR), 'Report on the Situation of Human Rights in Iraq, submitted by the Special Rapporteur, Mr. Max van der Stoel' (4 September 1995) E/CN.4/1996; United Nations Commission on Human Rights (CHR), 'Report on the Situation of Human Rights in Iraq, submitted by the Special Rapporteur, Mr. Max van der Stoel' (10 March 1998) E/CN.4/1998/67; United Nations Commission on Human Rights (CHR), 'Report on the Situation of human rights in Iraq, submitted by the Special Rapporteur, Mr. Max van der Stoel, in accordance with Commission resolution 1998/65' (26 February 1999) E/CN.4/1999/37; United Nations Commission on Human Rights (CHR), 'Report of the Special Rapporteur on the situation of human rights in Iraq, Mr. Andreas Mavrommatis' (16 January 2001) E/CN.4/2001/42; United Nations Commission on Human Rights (CHR), 'Report of the Special Rapporteur on the situation of human rights in Iraq, Andreas Mavrommatis' (15 March 2002) E/CN.4/2002/44; United Nations Commission on Human Rights (CHR), 'Situation of Human Rights in Iraq' (18 April 2000) E/CN.4/RES/2000/17; United Nations Commission on Human Rights (CHR), 'Situation of human rights in Iraq' (18 April 2001) E/CN.4/RES/2001/14. See also Amnesty International, *Iraq: Evidence of Torture* (Index: MDE 14/006/1981, 29 April 1981); Amnesty International, *Iraq: Systematic Torture of Political Prisoners* (Index: MDE 14/008/2001, August 2001).

from Iraq who suffer from trauma have been physically tortured during detention at the hands of the Iraqi official authorities.¹⁰⁵

There were no satisfactory legal provisions and in practice accused persons were under the risk of a coerced confession. The ICCP in Article 218 stated that:

“... Whether it be physical or moral, a promise or a threat. Nevertheless, if there is no causal link between the coercion and the confession or if the confession is corroborated by other evidence which convinces the court that it is true or which has led to uncovering a certain truth, then the court may accept it.”¹⁰⁶

Thai states that the law provides “without limitation that statements of the defendant are [to be] heard at trial... these laws lacked enforcement under the Saddam regime, which made torture an essential tool of interrogation.”¹⁰⁷ Thomas also suggested that,

“The criminal practice code in effect at the time sanctioned torture and permitted coerced confessions that were supported by other evidence. As a result, confessions obtained through torture were routinely admitted in court. Another fundamental deficiency was that the criminal code then in effect did not clearly provide for the right of an accused person to remain silent.”¹⁰⁸

Therefore the new Iraq criminal justice system shows a real need for reform in order to move away from any kind of ill-treatment against persons accused during detention. Once the dictatorship was removed, some of those deficiencies were overhauled to improve the situation and to comply with the international human rights obligations to which Iraq had committed itself. Other provisions were incorporated in the ICCP. The aim of these legal provisions is to promote, protect and improve the right of the accused person against all forms of self-incrimination. Article 218 of the

¹⁰⁵ C. Gorst-Unsworth and E. Goldenberg, “Psychological Sequelae of Torture and Organised Violence Suffered by Refugees from Iraq” (1998) 172 *British Journal of Psychiatry* 90-94, available at <<http://www.freedomfromtorture.org/sites/default/files/documents/Gorst-PsychologicalSequelae.pdf>> accessed 8 March 2014.

¹⁰⁶ ICCP, Article 218 (n 69); see also Article 221. “The minutes, reports, and official letters written by officials and employees dealing with an infraction are regarded as proof of the events they contain. The court may rely on these as its reason for its ruling in the infraction. It is not however obliged to investigate their veracity. The parties nevertheless can prove that they are true.”

{ تعتبر المحاضر والتقارير والكتب الرسمية التي يحررها الموظفون والمستخدمون المختصون في المخالفات حجة بالنسبة للوقائع التي اشتملت عليها والمحكمة ان تتخذها سببا للحكم في المخالفة دون ان تكون ملزمة بالتحقيق عن صحتها، ومع ذلك فالخصوم ان يثبتوا عكس ما ورد فيها }

This Article was suspended by CPA Memorandum 3, Section 4(1), signed 18 June 2003, published in the Official Gazette, issue 3978 of 17 August 2003.

¹⁰⁷ Joseph T. Thai, (n 66) 39.

¹⁰⁸ Luther Dan Thomas, “Establishing Justice in Iraq: A Journey into the Cradle of Civilization” (October 2008) *International Journal for Court Administration* 5.

ICCP was re-articulated in the following terms “a confession must not have been extracted by coercion.”¹⁰⁹ According to this revision, a confession obtained by coercive means was prohibited. By the same token, under Article (37) of the Iraqi Permanent Constitution, reliance on invalid types of confession is prohibited. It states that “Any confession made under force, threat, or torture shall not be relied on.”¹¹⁰

Furthermore, “the use of restraints, such as handcuffs, irons and strait jackets” as punishment against a person who is under criminal proceedings is prohibited.¹¹¹ By the same token, the right not to be subject to ill-treatment has become embodied in the constitution: “All forms of psychological and physical torture and inhumane treatment are prohibited”.¹¹² Additionally, “Every person shall have the right to be treated with justice in judicial and administrative proceedings.”¹¹³ A further important step was recently taken when the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 was approved and ratified by the Iraqi government on 7 July 2011.¹¹⁴

However, the system still struggles with the problem of ill-treatment of the accused person. There is strong evidence that the reformed system has not changed much in this regard. Ill-treatment of detainees and torture is still a problem in Iraq.¹¹⁵ Thus, there is an urgent need to improve the criminal justice to eradicate a systemic lack of protection for persons in detention through “a combination of various legislative,

¹⁰⁹ The wording of the Article was amended to the form given in the CPA Memorandum 3, Section 4(k), signed 18 June 2003, published in the Official Gazette, issue 3978 of 17 August 2003.

{يشترط في الاقرار ان لا يكون قد صدر نتيجة الاكراه}

¹¹⁰ The Iraqi Permanent Constitution 2005, Article 37(C) (n 112).

¹¹¹ CPA’s Memorandum 2, signed 8 June 2003, published in the Official Gazette issue 3978 of 17 August 2003. The original text is in the English language, and the official translation into Arabic is available in the Official Gazette, issue 3978 of 17 August 2003.

{لا تستخدم ابدا ادوات تقييد السجناء مثل الاصفاد والسلاسل والقيود الحديدية ومعاطف التكتيف لمعاقبهم}

¹¹² Article 37(C) of the Iraqi Permanent Constitution 2005. The official translation into English is available online at the homepage of the Iraqi government at <<http://www.cabinet.iq/default.aspx>> accessed 20 November 2013.

{يحرم جميع انواع التعذيب النفسي والجسدي والمعاملة غير الانسانية، ولا عبرة باي اعتراف انتزع بالاكراه او التهديد او التعذيب}

¹¹³ Ibid, Article 19(6).

{لكل فرد الحق في ان يعامل معاملة عادلة في الاجراءات القضائية والادارية}

¹¹⁴ United Nation Treaty Collection, available at

<http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en> accessed 20 October 2011.

¹¹⁵ Amnesty International, *Iraq: A Decade of Abuses* (n 59) Index: MDE 14/001/2013; The Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human rights report (2010, Baghdad) 110.

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الانسان العراقية}

administrative, judicial and other measures.”¹¹⁶ In the view of the author, the failure of the Iraqi criminal justice system and its reforms to protect a person under investigation from being compelled to confess guilt during the pre-trial investigation stage is embodied in the following problematic issues:

6.2.2.1. Failure to fulfill the obligations under the rules of the UN Covenant against torture

Although wide reforms need to be carried out to adjust the post-Saddam justice system terms of the obligations embodied in this treaty, it seems that no steps have been taken to implement the rules of the Covenant. For example, there is no statute within the framework of Iraqi law which satisfies the obligations of the Covenant. Needless to say, priority must be given to ratifying the Optional Protocol of the UN Convention against Torture, in accordance with which the Subcommittee for the Prevention of Torture (SPT) can conduct regular inspection inside the country. This is of crucial significance in order to monitor and prevent torture and other cruel, inhuman or degrading treatment or punishment.

Consequently, in order to accelerate the end of systemic abuse of human rights in criminal proceedings, a way must be found to fulfil the obligations under the UN CAT.

6.2.2.2. Continued widespread mistreatment and the lack of prohibition

In post-Saddam Iraq, after the Ba’ath regime was toppled in 2003, the leaders from all political parties pledged that priority would be given to civil liberties and the protection of human rights, and that tough measures would be taken against those who violated these rights in criminal processes.¹¹⁷ However, the research tells a different

¹¹⁶ The Preamble of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199, entered into force on 22 June 2006.

¹¹⁷ The Iraqi coalition government, in co-operation with the United Nations and the World Bank, drafted a Compact under which the government committed itself to prevent any human rights violations; Eric De Brabandere, *Post-Conflict Administration in International Law* (2009, Martinus Nijhoff Publishers) 49; see also United Nations General Assembly A/HRC/WG.6/7/IRQ/1, 18 January 2010, Human Rights Council, Working Group on the Universal Periodic Review, Seventh session,

story. It remains a systemic problem that there is little protection from self-incrimination, because a person under investigation can still be subjected to both physical and mental harm to confess guilt. Amnesty International alleges that torture and other forms of ill-treatment frequently occur, since obtaining a confession is considered to be the main aim throughout the detention period.¹¹⁸ The justification used for such abuse is that government agencies are operating in an environment of rising civil disorder, including terrorism and organized crime.¹¹⁹ This justification is, of course, in contradiction to international rules that protect the right to be free from torture and other forms of ill-treatment in absolute terms.¹²⁰ This right is applied to any conditions and circumstances, even in a time of emergency, as the HRC states that this right “allows of no limitation.”¹²¹ In a similar vein, the jurisprudence of the ECtHR has clearly held that ill-treatment must not be allowed under any pretext, such as the prevention of organized crime or terrorism.¹²²

A report recently released by the UN disclosed multiple failures to protect the right in Iraq and highlights the fact that:

“There is significant evidence of continued widespread mistreatment and abuse, on occasion amounting to torture, of persons in detention centres and prison facilities in Iraq ... From information gathered by UNAMI, it appears that different methods of physical and psychological coercion were used during interrogation in order to obtain confessions and to extract information. In some instances detainees had not been permitted to read or have read to them confessions before they signed ... UNAMI strongly condemns the torture or ill-

Geneva, 8-19 February 2010, report submitted in accordance with paragraph 15 (A) of the annex to Human Rights Council Resolution 5/1, para. 42, and p. 26.

¹¹⁸ Amnesty International, *Iraq: A Decade of Abuses* (n 59); at this point it is obvious that the physical harm to which detainees may be subjected is easier to detect than the mental harm that may be caused, for example, by threats or insults or the isolation of detainees. . See *Iljina and Sarulienė v Lithuania* App no. 32293/05 (ECtHR, 15 June 2011) para 47.

¹¹⁹ Human Rights Watch, *The New Iraq? Torture and ill-treatment of detainees in Iraqi custody* (January 2005 Vol. 17, No. 1(E)); available at <<http://www.hrw.org/node/11864/section/3>> accessed 20 November 2012; also see Institute of Peace in the United States, *Justice and the Rule of Law in Iraq: A Blueprint for Action*, <<http://www.usip.org/publications/establishing-justice-and-rule-law-iraq-blueprint-action>> accessed 20 October 2011.

¹²⁰ This right, as Nowak indicated, is not only non-derogable but also “ensured without any restriction whatsoever.” Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (n 25) 157; see also David Harris et al., *Law of the European Convention on Human Rights* (2nd ed., 2010, Oxford University Press) 69.

¹²¹ UN Human Rights Committee, General Comment No. 20, (n 24) para. 3; UN Human Rights Committee, General Comment No. 29, (CCPR/C/21/Rev.1 /Add. 11) “States of Emergency: (article 4)” adopted on 24 July 2001, para. 7.

¹²² *El-masri v the Former Yugoslav Republic of Macedonia* App no 39630/09 (ECtHR, 13 December 2012) para 195; *Selmouni v France*, (n 62) para 95; *Tomasi v France* App no 12850/87 (ECtHR, 27 August 1992) para 115.

treatment of detainees in Iraq and urges the Government of Iraq to take urgent steps to respect its international and constitutional legal obligations and to bring this situation to an end.”¹²³

The Table below, created by the author, is configured on the basis of publicly available official information that shows deaths as a result of torture during detention and also registered complaints alleging torture in the years 2006 to 2012. Claims regarding continued torture in the post-Saddam criminal system can hereby be substantiated.¹²⁴ It is evident that a disturbing number of detainees have died as a result of torture during interrogations.

Table 1: the review of cases of death as a result of torture and registered cases of torture

Year		2006	2007	2008	2009	2010	2011	2012	Total
1	Death as a result of torture	---	1	---	4	9	3	20	37
2	Registered cases of torture	109	122	307	574	653	467	593	2825

It is clear that, despite the reforms of the post-Saddam criminal justice system, torture and other ill-treatment of detainees remain commonly employed methods of extracting confessions. The outdated provisions that are still enforced in the post-Saddam system permit judges to consider that “the confession is the king of evidence,” and it can still be the main basis for a conviction. According to the ICCP, “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.”¹²⁵ However, even if a confession is the sole evidence in a case, the court can accept it as evidence of defendant’s guilt “if it is satisfied with it.”¹²⁶

In 2013, UNAMI’s experts observing the practice of Iraqi courts reported that in some instances “persons were convicted on capital charges and sentenced to death based solely on a confession— even where it was alleged by the accused that the confession

¹²³ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report: 2011 (Baghdad, May 2012)16, 18.

¹²⁴ See the Annual Reports of the Iraqi Ministry of Human Rights, The Conditions of Prisons and Detention Centres, Human Rights Reports (Baghdad 2007, 2008, 2009, 2010, 2011, and 2012).

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز- وزارة حقوق الانسان العراقية}

¹²⁵ ICCP, Article 213(a).

¹²⁶ ICCP, Article 213(c). {للمحكمة ان تأخذ بالإقرار وحده اذا ما اطمأنت اليه}

had been obtained through duress.”¹²⁷ Then, in its comments on this report provided to UNAMI 23 May 2013, Iraqi government responded that “Article 213(c) of the Iraqi Criminal Procedure Code is problematic in that where allegations of torture are made before the court the court may still proceed with the case and convict a suspect based on a confession.”¹²⁸

In the light of the above, it is suggested that the present provisions must be reformed in line with international due process, to the effect that the court cannot accept a confession unless there is sufficient evidence to prove the case without it.

Furthermore, contrary to international due procedures, there is a lack of legal provisions regarding the inadmissibility of evidence obtained by coercive means during the investigation.¹²⁹ It can be submitted that the scope of protection of the right in the reformed justice system is narrower than that provided under international rules.¹³⁰ Thus, some rules in this regard still need further improvement if they are to meet obligations under international law.

Consequently, in addition to the requirement of reforming practice, legislative intervention is necessary to address these shortcomings. Evidence obtained by torture and other unlawful coercive means must not be used against the accused person at any stage of the criminal proceedings. In this connection, useful guidance can be derived from international practice. For example, the rules governing the conduct of interrogation under international criminal procedure outline several safeguards to be provided to the accused person and they also provide that evidence obtained without

¹²⁷ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, June 2013) 12.

¹²⁸ Ibid.

¹²⁹ UN Guidelines on the Role of Prosecutors state that “When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.” UN Guidelines on the Role of Prosecutors, (n 27) Guideline 16.

¹³⁰ Ibid; see also UN CAT, Article 15 states “each State Party shall ensure that any statement...” (n 21); The Iraqi Permanent Constitution 2005, Article 37(C) states that “Any confession made under force, threat, or torture shall not be relied on.” (n 112).

respect for these minimum rights can be excluded at trial.¹³¹ Similar protection may exist under the national laws of different countries.¹³² The obligation of the Iraqi criminal justice system is to combat all torture and other forms of ill-treatment. Most importantly, the legal requirement in the light of the obligations under the provisions of the ICCPR and UN CAT is that a new statutory law should be adopted as a part of the national legislation by which the provisions for the elimination of all forms of torture and other forms of ill-treatment against the person accused can be regulated.

6.2.2.3. Failure to criminalize and penalize some forms of torture

The IPC prohibits torture and ill-treatment, criminalizes the offence of torture, and sets out the punishment.¹³³ However, it must be admitted that, although torture is forbidden under the provisions of this Code, it is dealt with in a narrow ambit. A considerable number of acts that constitute torture and ill-treatment have been overlooked. For example, the practice of international bodies has deemed that an extreme regime of solitary confinement facilitates torture and other ill-treatment and,

¹³¹ These are: “(1) the right to be assisted by counsel, (2) the right to the free assistance of an interpreter, and (3) the right to remain silent and to be cautioned” Rule 42 (A) ICTY RPE, ICTR RPE, and SCSL RPE; Article 18 (3) ICTY Statute and Article 17(3) ICTR Statute; for the detail see Karel de Meester et al., (n 5) 220; M. Cherif Bassiouni, *Introduction to International Criminal Law* (2nd ed., 2013, Martinus Nijhoff Publishers) 810.

¹³² Under French law, for example, there must be a rest between questioning, the period of questioning must not be lengthy, and the right to a lawyer, a medical examination and other rights must be allowed to accused persons in accordance with the ECHR (see John Bell, Sophie Boyron, and Simon Whittaker, *Principles of French Law* (2nd ed., 2008, Oxford University Press) 135. Similarly, in the UK’s PACE in s.39 (1) and COP (Code of Practice) the custody officer is responsible for all matters of the suspect’s welfare throughout the detention. PACE, *inter alia*, makes clear that the custody officer is responsible for protecting the physical and mental safety of the detainee, who must be free from “torture, inhuman or degrading treatment and use or threat of violence.” According to s.134 of the Criminal Justice Act 1988 (c.33) para. (1) “A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.”

¹³³ IPC, 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 is punishable by imprisonment or by penal servitude. Torture shall include the use of force or menaces”;

{يعاقب بالسجن او الحبس كل موظف او مكلف بخدمة عامة عذب او امر بتعذيب متهم او شاهد او خبير لحمله على الاعتراف بجريمة او للإدلاء بأقوال او معلومات بشأنها او لكتمان امر من الامور او لإعطاء رأي معين بشأنها. ويكون بحكم التعذيب استعمال القوة او التهديد}

See also Court of Cassation (*Mahkamat Al-Tamyeez*), Case number 14 / General Commission / 1980 published in the Ministry of Justice, “Judicial Judgments” (1980) *Journal of Judicial Judgments* 67.

in a recent approach, can even amount to torture.¹³⁴ It has been stated that “prolonged incommunicado detention or detention in secret places may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment.”¹³⁵

Although over the last ten years detainees in Iraq may have spent long periods in solitary pre-trial detention, this does not amount to torture in the eyes of the Iraq legal system. In 2013, Amnesty International acknowledged that courts have accepted confessions presented during pre-trial as evidence of a defendant’s guilt, even if that detention continued for many month or even years.¹³⁶ The most common purpose of excessive length of detention is to extract confessions and information. It is self-evident that excessive periods of detention along with the granted of an unfettered discretion to the authorities in their treatment of a detainee during interrogation could result in involuntary confessions. Thus, it is right to propose that such conditions amount to torture and that confessions obtained by such means should not be accepted as evidence of a defendant’s guilt.

Article 333 of the IPC, which criminalizes the act of torture, is narrower in scope than the standard adopted under international human rights law.¹³⁷ Article 333 has been

¹³⁴ UN Commission on Human Rights, ‘Human Rights Resolution 2005/39: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (n 31) para. 9; the practice of the Committee Against Torture also states that the solitary confinement regime, which included “sensorial deprivation and the almost total prohibition of communication cause[d] persistent and unjustified suffering which amount[ed] to torture ... the Committee recommended that the State party not only amend its legislation, but also to consider systematically reviewing all cases of prolonged solitary confinement, through a specialized psychological and psychiatric evaluation, with a view to releasing those where the detention can be considered in violation on the Convention.” UN Committee Against Torture (CAT), *Conclusions and Recommendations of the Committee against Torture: Japan*, (n 31) para 18; UN Committee against Torture, *Summary account of the results of the proceedings concerning the inquiry on Peru*, (n 31); see also the Association for the Prevention of Torture (APT), *Torture in international law* (2008, SRO-Kundig, Geneva) 42, 43.

¹³⁵ *Ibid.*

¹³⁶ Amnesty International reported that “throughout the past 10 years, these have been marked by flagrant violations of human rights and the rule of law, with the authorities subjecting suspects to: arrest without warrant and prolonged detention without charge or trial, often incommunicado and in secret, unacknowledged places of detention, and without effective remedy; trials that have been grossly unfair and conducted before courts that based their guilty verdicts on contested confessions, even in capital cases; torture and other ill-treatment committed with impunity; and the death penalty and execution... [Detainees] are entirely under the control of their interrogators and held in conditions that are widely known to facilitate, even invite, torture and other ill-treatment.” Amnesty International, *Iraq: A Decade of Abuses* (n 59) Index: MDE 14/001/2013, 28 & 32; see also Chapter Four regarding detail on excessive period of detention.

¹³⁷ See the definition of torture in Article 1 of the UN Convention against Torture; see also the practice of international bodies (n 134).

criticized on the grounds that it does not include torture used for purposes other than extracting information during criminal proceedings, whereas a wider protection is required in the binding international rules.¹³⁸ In addition, the provisions do not criminalize all kinds of ill-treatment, and no suitable punishments are prescribed for the perpetrators.¹³⁹ This is, of course, contrary to binding obligations of Iraq under Article 4 of the UN CAT.¹⁴⁰ Human rights reports recognize this problem. For example, the Iraqi Ministry of Human Rights in 2008 called for the system to be reformed in this regard; however, until the present time this has not taken place.¹⁴¹

In addition to inadequate prohibition, the state's obligation under international law to investigate and prosecute these violations is regularly disregarded in practice, and where steps have been taken the violations have been dealt with leniently.¹⁴² The fact remains that, over the last ten years, the system has tolerated violence during detention. There have been impunity of perpetrators from punishment and a lack of accountability.¹⁴³ Thus it can be said that ill-treatment is a widespread phenomenon which has been routine over the last ten years in the post-Saddam justice system.

¹³⁸ Iraqi law does not deem the act as torture unless it is committed for the purpose of extracting information from an accused person by official authority. In contrast, the purpose of torture under binding obligations of the UN Convention against Torture encompasses a wide scope, and even for reasons other than extracting information. Prisoners Abroad, *Torture, Cruel, Inhumane and Degrading Treatment*, (n 33) 2; Redress, *Reparation for Torture in Iraq in the Context of Transitional Justice, Discussion Paper* (February 2004) 25 at <http://www.mideastinfo.com/documents/Iraq_reparations_en.pdf> accessed 22 October 2011; see also the comment on the approach of international rules by Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary*, (n 25) 161.

¹³⁹ IPC Article 332 states "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 is punishable by a period of detention [imprisonment] not exceeding 1 year plus a fine not exceeding 100 dinars, or by one of those penalties but without prejudice to any greater penalty stipulated by law." In this regard it can be seen how the punishment under Article 332 is mild compared to the punishment under Article 333.

{يعاقب بالحبس مدة لا تزيد على سنة وبغرامة لا تزيد على مائة دينار او باحدى هاتين العقوبتين: كل موظف او مكلف بخدمة عامة استعمل القسوة مع احد من الناس اعتمادا على وظيفته فاخل باعتباره او شرفه او احدث الما ببدنه وذلك دون الاخلال بأية عقوبة اشد ينص عليها القانون}

¹⁴⁰ UN CAT, Article 4 states that "ensure that all acts of torture are offences under its criminal law" the HRC went further by places positive obligation on the States parties to protect any person against public and private torture; see Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary*, (n 25) 161, 182.

¹⁴¹ Amnesty International, *Iraq: A Decade of Abuses* (n 59); The Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Rights Report (Baghdad, 2008) 76.

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الانسان العراقية}

¹⁴² IPC, Article 332 (n 139).

¹⁴³ See the General Amnesty Law no 19 of 2008, published in the Official Gazette, issue 3978 of 17 March 2008; see also Article 136 (b) of the ICCP stated that "The transfer of the accused for trial in an offence committed during performance of an official duty, or as a consequence of performance of this

For the above-mentioned reasons, the author concludes that Iraq's reformed criminal justice system has failed to comply with its obligations under the UN ICCPR and UN CAT. The provisions of human rights law prohibit all kinds of ill-treatment under their scope in absolute terms, and any allegation of violation has to be adequately investigated. Further reform is necessary to meet international standards in both law and practice, and all acts of ill-treatment should be criminalized with adequate and deterrent punishments.

6.2.2.4. *The disconnection between law and practice*

It has been already shown that Iraqi law contains some of most important safeguards against self-incrimination. Iraqi law stipulates that using any illegal means to put influence on a person under investigation to obtain a confession is prohibited,¹⁴⁴ and a person under investigation must not be forced to answer any questions against his will.¹⁴⁵ In addition, Iraqi law provides that any employee or member of the public authority would be punished by imprisonment if he tortures or orders torture of a person so as to extract a confession.¹⁴⁶ Under Iraqi law, a confession obtained under duress is deemed invalid. The ICCP states that “the use of any illegal method to influence the accused and extract an admission is not permitted. Mistreatment, threats, injury, enticement, promises, psychological influence or use of drugs or intoxicants are considered illegal methods.”¹⁴⁷

On the basis of these provisions, the reformed criminal justice system seems to provide necessary safeguards against forced confession. However, it must be admitted that there is a disconnection between law and practice. Over the last years, it has been a systemic problem that the provisions of law regarding the prohibition against

duty is possible only with permission of the minister responsible, in accordance with the stipulations of other codes.” The official translation into English is available online at the homepage of *the Global Justice Project: Iraq* (GJPI) <<http://gipi.org/central-activities/judicial-independence/>> accessed 28 January 2014.

{قانون أصول المحاكمات الجزائية العراقي. المادة 136 (ب): لا تجوز احالة المتهم على المحاكمة في جريمة ارتكبت اثناء تأدية وظيفته الرسمية او بسببها الا بأذن من الوزير التابع له او وكيل الوزارة الذي يخوله}

¹⁴⁴ ICCP, Article 127 (n 103).

¹⁴⁵ ICCP, Article 126 (b) (n 68).

¹⁴⁶ IPC, Article 333 (n 103).

¹⁴⁷ ICCP, Article 127 (n 103); Bearing in mind that binding international rules do not explicitly prohibit using deception during criminal interrogation, while Iraqi law does so. See Karel de Meester et al., (n 5) 250.

compelling a person under investigation to confess guilt have been overlooked in practice. These rules to protect accused persons against being forced to confess guilt against their will during the course of investigation appear to be ineffective. According to reliable reports over the last ten years, violations against detainees for the purpose of extracting confessions have continued to take place.¹⁴⁸ The basic problem is that the practice is still far removed from these stated provisions of human rights. One observer notes that “the Iraqi experience to date amply illustrates the potential gulf between laws on paper and actual practice.”¹⁴⁹

The practice reveals that the system is still widely reliant on confessions for the convictions. UNAMI’s reports sustain such a claim by observing that

“Criminal trials falling short of international standards ... trials were often brief, and consisted of the judge merely certifying confessions which often were obtained before the accused was brought to court and often under duress ... and the reliance of the courts on confessions obtained under duress and with unreliable forensic evidence.”¹⁵⁰

In 2013, Amnesty International also reported that

“[it] has examined numerous verdicts by Iraqi criminal courts where a withdrawn confession constituted a/or the crucial piece of evidence for a conviction”¹⁵¹

These allegations can also be corroborated from the jurisprudence of the Court of Cassation (*Mahkamat Al-Tamyeez AlAthadia*) which, as in the past, takes the view that a conviction can be based on the basis of a confession of the accused, as long as it includes sufficient details.¹⁵² The court also upheld the view that, even if the

¹⁴⁸ Amnesty International, *New Order Same Abuses: Unlawful Detentions and Torture in Iraq* (September 2010) Index: MDE 14/006/2010; Amnesty International, *Iraq: A Decade of Abuses* (n 59); The Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Rights Report (Baghdad, 2008) 72.

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الإنسان العراقية}

¹⁴⁹ Joseph T. Thai, (n 66) 45.

¹⁵⁰ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, January 2012) 12, 13.

¹⁵¹ Amnesty International, *Iraq: A Decade of Abuses* (n 59) 42.

¹⁵² See for example, Court of Cassation (*Mahkamat Al-Tamyeez AlAthadia*), Case number 505, General Commission on 24/5/2010 {محكمة التمييز الاتحادية}; Court of Cassation (*Mahkamat Al-Tamyeez*), Case number 641/Cassation/ 78 on 30/5/1978. {محكمة التمييز}

confession is involuntary it could still be relied upon. Retraction by the accused person makes no difference if it results in obtaining evidence that confirms it.¹⁵³

The growing concern amongst experts is that the judicial authority still has no faith in the new procedures and, in practice, violates international standards. In 2013, international experts remarked that “courts frequently rely solely on confessions to found convictions – often without any corroborating evidence. These factors contribute to an environment where violations, including abuse, torture and corruption can, and do, take place.”¹⁵⁴ It has been further added that

“UNAMI continues to have serious reservations about the integrity of the criminal justice system in Iraq, including with regard to abuses of due process, convictions based on forced confessions, a weak judiciary, corruption, and trial proceedings that fall short of international standards. No legal system can be guaranteed to be free of error, and in Iraq few convictions for serious offenses can be considered safe.”¹⁵⁵

Analysis of the problem reveals that two completely different approaches have been adopted by the new Iraqi criminal justice system. In the first approach, as stated in the reforms, the confession is inadmissible and the court cannot rely on it if it was obtained by invalid means or was given involuntarily by an accused person.¹⁵⁶ In the second approach, the judgment of the courts and the Court of Cassation imply that, even if the admission has been obtained by invalid means and then retracted, it can be relied on as long as it is “elaborate and detailed.”¹⁵⁷ While, Article 15 of the UN CAT to which Iraq is a State party provides that: “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

¹⁵³ Ibid; see also many cases in this regard referred to by Amnesty International, *Iraq: A Decade of Abuses* (n 59) Index: MDE 14/001/2013, 41.

¹⁵⁴ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, June 2013) 12.

¹⁵⁵ Ibid, 17; similarly, The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, May 2012) 13 states that “trials were often brief, and consisted of the judge merely certifying confessions which often were obtained before the accused was brought to court and often under duress.”

¹⁵⁶ See for example Article 37 (C) of the Iraqi Permanent Constitution 2005, (n 112).

¹⁵⁷ See (n 152); see also Central Criminal Court, (*Almahkama Aljnia Almrkzya aliraqia*) Baghdad, Second Branch, Case number 1479 of 2012, Branch 2 ruled on 3 December 2012. Referred to by Amnesty International, *Iraq: A Decade of Abuses* (n 59) 37.

Accordingly, the conclusion is that the basic principles of the right of an accused person to be free from involuntary confession are overlooked as a result of reliance on confessions improperly obtained in practice.¹⁵⁸ There is therefore a disconnection between international standards and practice. Under international standards, a confession should not be accepted at any stage of criminal proceedings unless it is voluntarily given by a person under investigation. In the same vein, since a person under investigation should be dealt with according to the principle of presumed innocence, his confessions should not be granted any evidential weight or deemed valid unless these confessions are sufficiently combined with due rights during interrogation. It has already been stated that these guarantees, covering the entire criminal proceedings, have not yet been given their rightful place in the Iraqi system.

6.3. Evaluation under international human rights law

As indicated earlier, international standards with regard to the pre-trial stage require the right to silence to be notified to a suspect before any questioning takes place, and also require the suspect to be reminded of the right at the outset of every new interrogation and after each break in the questioning. However, the new provisions are not compliant with these requirements, due to their failure to provide such guarantees for an accused person during police questioning at the pre-trial investigation stage.

Moreover, these provisions are not respected in practice, and this due particularly to procedural contradictions that exist in relation to investigations. On the one hand, the police in Iraq are authorized to conduct questioning. Almost all confessions take place during this stage of proceedings and, as stated earlier, the courts rely on these confessions, which are widely obtained “under duress.”¹⁵⁹ The accused person has no right to a lawyer during police investigations in order to protect him from improper interrogation techniques and as a result, no sufficient legal protection of the right to silence exists at this crucial stage of the proceedings. This means that an accused person subjected to improper pressure can be made to speak against his will during police questioning.

¹⁵⁸ *Jalloh v Germany*, (n 35).

¹⁵⁹ Amnesty International, *Iraq: A Decade of Abuses* (n 59) 40; The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Reports (Baghdad, 2011, 2012, 2013).

These legal loopholes may give law enforcement officials further power over the person accused. By the same token, there is no relevant guide to the organisation of the interrogation or to the regulation of its conduct in terms of its timing and intervals of rest, or the use of audio or video records to prevent improper tactics. Such deficiencies send a covert message to law enforcement officials to manipulate the proceedings in order to strengthen the allegation. By international standards of human rights, such practices clearly undermine the presumption of innocence and adversely affect the fairness of the proceedings, and they can in themselves involve human rights violations, for example torture. International human rights observers continue to highlight major problems in this area. What is more, the silence of accused persons could result in them being subjected to cruel official practices, and it may also play a role in sustaining deficient evidence against a defendant during a trial.

This right to be free from ill-treatment is of particular importance in protecting a person under investigation from a confession of guilt and it is given protection under international due process. However, an examination of the new Iraqi criminal justice system indicates that the system has failed to meet these abiding obligations fully in terms of both legislation and implementation. The reasons for this failure will be further elaborated during the next chapter.

As shown above, Iraq has failed to fully implement its commitments under the UN CAT. As yet, no law for preventing any kind of torture or ill-treatment has been adopted. In addition, there is no competent mechanism for the effective investigation of allegations of ill-treatment. International standards provide guidance about the conditions of detention and describe the kinds of treatment which are violations of human rights and could result in involuntary confessions. These invalid means, which are recognised under international rules and the practice of international bodies, have not yet been considered in the new Iraqi justice system and they need to be adequately criminalized. Responsibility for any kind of ill-treatment and torture, other than serious bodily damage or death, has not yet been established in Iraqi law,¹⁶⁰ whereas under the provisions of many treaties, improper methods such as solitary confinement of a detainee for long periods of time, amount to torture and are totally prohibited during the course of an investigation.

¹⁶⁰ This issue will be further dealt with in the next chapter.

For those who suffer violations, the means of redress are lacking in both the legislative framework and in practice, particularly in relation to bringing the perpetrators to justice. As will be shown in the next chapter, serious violations have been inflicted by the justice system through the provision of impunity and amnesties that have been granted even to officials who have committed torture. As a result, and contrary to international rules, the mistreatment of the person accused is still a widespread phenomenon during the pre-trial investigation stage.

A case that goes to trial based on evidence obtained by invalid methods determinately affects the possibility of a fair trial. Thus, this chapter has repeatedly asserted that if a suspect makes a confession during an investigation, it cannot be relied upon unless the person who confesses has been given full due process rights, particularly that of access to a lawyer. Even so, the preceding discussion has shown that a major shortcoming in the reformed post-Saddam justice system is that it is widely reliant on confessions to secure convictions at trial, even if it is extracted without sufficient procedural safeguards and that this trend has adversely affected the new reform. It is problematic that statements obtained during the investigation by invalid means have been widely used during criminal proceedings to secure a conviction.

In the light of these considerations, it is suggested that a confession may be used in evidence at trial only when two requirements have been achieved: first, the statement should be obtained from a person under investigation through valid means and, secondly, this person must be guaranteed full due process rights. Any confession that is obtained otherwise should be completely excluded. Ultimately, it must be emphasised that in the case where a suspect is sent to trial, the conviction must not be on the basis of his statements, particularly when the accused has spent a long period of pre-trial detention under unsatisfactory conditions.

CHAPTER SEVEN

DISPELLING THE MYTH OF A SUCCESSFUL REFORM OF CRIMINAL PROCEDURE IN IRAQ AND PROPOSALS FOR FURTHER IMPROVEMENT

Introduction

The failure of the Iraqi criminal justice system to carry out reforms to protect the human rights of persons at the pre-trial investigation stage has been shown in the previous analysis. It is now ten years since the totalitarian regime was removed, but the new justice system has not yet managed to eradicate abuses of the three identified rights. The criminal justice system still struggles with multiple problems that limit the rights of a person subject to criminal proceedings. The weaknesses having been previously identified, this chapter endeavours to analyse why reform of the criminal justice system has not worked sufficiently, why abuses of human rights in criminal proceedings still exist, and what further steps have to be taken to achieve wider conformity with international human rights law. Accordingly, this chapter consists of two sections. The first section considers the many reasons for the failure to eliminate violations of the rights of an accused person, and each of these reasons will be examined in turn. The second section contains concrete proposals for further work to be carried out in order to enable the Iraqi criminal justice system to meet the objective standards of human rights protection under modern standards of justice and binding international standards.

7.1. Shattering the myth of the successful reform of criminal procedure in Iraq

Iraqi law and practice have failed to achieve full compatibility with international human rights rules. The disparity between Iraqi law and international standards has been demonstrated by substantial evidence and studies conducted by national and international bodies and NGOs. The failure relates to the three identified rights and to other procedural safeguards that are not included within the scope of the present

research. There are many reasons for the failure to eliminate the violation of the rights of the accused person and it is necessary to examine each of them in turn.

7.1.1 Failure to meet due process standards in both theory and practice

The criminal justice system was administered with cruelty throughout the era of the totalitarian regime. After the regime fell, the belief was that the repression would end. Regrettably, despite the efforts made to provide Iraq with a new justice system with full regard for human rights, the fact is that major problems have continued until the present time. The criminal justice system has not succeeded either in protecting the community against crime or in respecting the rights of a person under criminal proceedings. The current failings of the criminal justice system should not be underestimated.

Firstly, there is a gap between the law and due process rights because of legislative failure to provide all the minimum procedural guarantees under binding international law.¹ The legislative framework requires much more reform in order to be in line with the standards of due process and to offer the protection of basic international human rights.

There is a significant gap between the legislative framework and daily practice, and the extreme threat to the freedom and liberty of Iraqis is due to both the weakness of the legislative provisions and mistreatment of individuals by law enforcement officials during daily working practice. The new criminal justice system therefore needs to redress the failure in both theory and practice on issues related to criminal proceedings.

7.1.2. Continuing weaknesses in the investigation system

It has been previously indicated that neither the rules of criminal procedure nor their reform have eradicated the existing flaws within the Iraqi investigative system. It seems problematic that the investigative function is entrusted to several parties rather

¹ The absent guarantees have been described in three previous chapters of the thesis.

than solely to the investigating judge during the preliminary investigation phase. This adversely affects due rights standards, particularly because, in the Iraqi legal system, the investigation is a judicial function and needs to be conducted by an agency that behaves in a way that is consistent with the requirements of impartiality, independence and competence.

However, it is problematic that nothing in the law prohibits the division of labour among several parties that may not have these features. In the view of the author, entrusting the task of investigation to parties other than the judicial investigating authority has generated problems in the investigative system.² The main cause for concern is that the role of the judicial investigating authority is curtailed as a result of the practice of allowing law enforcement officials to conduct investigations at the outset of proceedings, before the accused person is brought before the judicial authority. As mentioned earlier, criminal investigations are supposed to be brought under the control of an investigating judge at the earliest opportunity.³ The Iraqi justice system has been involved in a long-term struggle regarding the protection of human rights during the police investigation stage due to the lack of supervision and control of judicial authority on police investigations in actual practice. As a result, it is quite usual for incriminating evidence to be obtained coercively by the police.⁴ It is commonplace for a law enforcement official to force the accused person to confess guilt.

As demonstrated in Chapter Six, an interrogator in Iraq will often employ various coercive methods, using force or brutality to extract a confession. We have seen how these methods play a role in securing a conviction against the accused at a later stage during the trial.⁵ In 2013 the UNAMI was still reporting “reliance by the courts on

² Chapter Three of this thesis.

³ Chapter Three of this thesis.

⁴ The Reports of Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI); Reports of International NGOs such as Human Rights Watch and Amnesty International; the Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Rights Report - dated between 2004 and 2013.

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز وزارة حقوق الإنسان العراقية}

⁵ See the Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report, Bagdad June 2013; May 2012; 1 January - 31 December 2011; 1 January - 31 December 2010; 1 July - 31 December 2009; 1 January - 30 June 2009; 1 July - 31 December 2008; 1 January - 30 June 2008; 1 July - 31 December 2007; 1 April - 30 June 2007; 1 January - 31 March 2007; 1 November - 31 December 2006; 1 September - 31 October 2006; 1 July - 31 August 2006; 1

confessions also contributes to a culture where torture and abuse of detainees are seen by some officials as legitimate means to secure convictions.”⁶ The report added that “courts frequently rely solely on confessions to find convictions- often without any corroborating evidence. These factors contribute to an environment where violations, including abuse, torture and corruption can, and do, take place.”⁷ Similarly, “there is significant evidence that mistreatment, abuse and torture of persons in detention are widespread in Iraq.”⁸ This creates serious problems for Iraq’s obligations under international human rights law, particularly the binding obligations of the ICCPR and the UN CAT.

The fact is that police power is a key element in the management of the proceedings. The task of the police in the current system extends beyond the detection of crimes and the gathering of evidence to include investigation and questioning. The most critical issue here, as has been amply demonstrated, is the lack of checks and balances with regard to police activity. From information collected by the UNAMI, it appears that “a magistrate is not generally present during the taking of statements by accused persons, and that different methods of physical and psychological methods of coercion are brought to bear on accused persons by interrogators to obtain confessions and to extract information.”⁹ The weakness in the investigative system is that it grants the police wide powers but it fails to ensure that, as a matter of law, they operate in accordance with due process.¹⁰

7.1.3. Failure to modernize procedural safeguards to meet minimum international standards of due process binding on Iraq.

The current law of criminal procedure is still the one that was current during the totalitarian regime. Due to the absence of a holistic vision of reform in the period following the fall of the regime, the procedural amendments made did not amount to a new alternative code by which the level of protection of human rights could reach

May – 30 June 2006; 1 March– 30 April 2006; 1 January– 28 February 2006; 1 November– 31 December 2005; 1 September – 31 October 2005; 1 July – 31 August 2005.

⁶ Ibid (Bagdad, June 2013) 7.

⁷ Ibid 12.

⁸ Ibid (Bagdad, January 2011) 18.

⁹ Ibid (Bagdad, January 2011) 18; see also Chapters Three and Four.

¹⁰ Chapters Three, Four, Five and Six.

minimum international standards. As a result, there has been a failure to attain full compliance with the broad UN definition of the rule of law, and Iraq has failed to meet its international obligations, particularly the commitments made to uphold the standards of the ICCPR and the UN CAT; whereas the broad UN definition of the rule of law requires legislation in which the rules should provide full compliance with international human rights standards.¹¹

With regard to the UN CAT, Iraqi has so far failed to implement its rules. There is neither a specific law addressing torture and other forms of cruel, inhuman or degrading treatment or punishment, nor have appropriate rules been inserted into the ICCP. This generates a notable gap between Iraqi law and Iraq's obligations. Similarly, the fundamental guarantees cited in the new Constitution of 2005 (the Iraqi Permanent Constitution), have not yet been reflected in the ICCP.

It is worth mentioning that one way to challenge this situation would be a resort to the Federal Supreme Court (*Almahkama Al-Itahadiya Al-Olya*) and thereby to invoke constitutional human rights. But this court has played a passive role and relies on the cases brought before it, and obtaining redress by this means would require an exceptional effort to be made by the plaintiff. The contribution of the Federal Supreme Court to reform has been meagre because few cases involving the defence of the rights of due process have been brought before it.

Another issue of concern is that Iraqis lack opportunities to complain at the international level. Engagement with international mechanisms that allow a complainant to petition the Human Rights and Torture Committees has not yet taken place in Iraq. No one can say how long it will take to engage with these international mechanisms, but undoubtedly it will not be in the near future. It has been rightly stated that "The ability of individuals to complain about the violation of their rights in an international arena brings real meaning to the rights contained in the human rights treaties."¹² Consequently, although engagement with these international mechanisms

¹¹ Chapter Two.

¹² UN human rights, Office of the Higher Commissioner of Human Rights, *International Treaty Bodies-Complaints Procedures* at <<http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx>> access 17 May 2014.

is optional, not obligatory, they could enhance a culture of lawfulness and respect for human rights if adopted by Iraq.

7.1.4. A lack of independence of the actors in the justice system

It is problematic that participants in the criminal justice system are continually subject to political influence, and this negatively impacts on the respect for the rule of law throughout the criminal proceedings.¹³ The system suffers from corruption and poor training of criminal justice personnel. Reputable international reports have indicated a deficiency in this area, stating that “there have been some encouraging signs of growing independence in the Iraqi judiciary ... however they still lack capacity in some areas, including a shortage of trained judges, and vulnerability to political influence.”¹⁴

Clearly, due process rights are likely to be violated if members of the justice system and law enforcement officials have been corrupted or threatened or intimidated. In 2012, for example the Geneva International Centre for Justice sent an appeal to the Special Rapporteur on the Independence of Judges and Lawyers and to the Office of the High Commissioner urging them “to take the necessary measures to protect lawyers working in Iraq and pressure the authorities to release those who have been detained for defending suspects before Iraqi courts.”¹⁵

It must be said that neglecting to address the aggravating circumstances and the unsuitable environment of judges, lawyers and other members of the justice system in Iraq is contrary to the requirement of the UN Conventions and serves to undermine the rule of law in Iraq.

¹³ The United Kingdom: Foreign and Commonwealth Office, *Annual Report on Human Rights 2008 - Iraq* (26 March 2009) available at: <<http://www.unhcr.org/refworld/docid/49ce361a2d.html>> accessed 5 August 2012.

¹⁴ Ibid.

¹⁵ Geneva International Centre for Justice, *Iraq - Continuous interference of the executive in the judiciary* (2012) at <http://www.gicj.org/index.php?option=com_content&task=view&id=116&Itemid=52> accessed 18 May 2014.

7.1.5. The continuing culture of abuse

Many amendments to Iraqi law, including those affording more protection to human rights in criminal procedures, have been proposed by foreign experts and passed by the Iraq Parliament. Of course, these amendments are steps in the right direction for the development of the Iraqi criminal justice system. However, they remain to be fully implemented, and in some cases they are not implemented at all.

It is problematic that members of the public authority and justice officials do not, as yet, have faith in these rights being given to an accused person. Crime-fighting is, in the official mind set, justification for the abuse of procedural rights during the process of arrest and detention. In addition, there are situations where officials do not even know about the law or the requirements of human rights. Another problem is that these rights are little known in the community, whose members often have no sympathy for the person accused.

In Iraq there is a lack of public education about human rights, and so that persons under investigation may not know that they have a right to remain silent, or a lawyer free of charge. Therefore, even when revisions have been made to the due process procedures, there remains a problem of institutional culture. These rights are likely to be disregarded in practice unless that aspect is addressed. The situation has been exacerbated by the lack of experience and education of criminal justice personnel and law enforcement officials. Their level of awareness has not raised sufficiently to ensure the applicability of the reforms in practical terms.

As a result of these shortcomings, the reforms have not been effective. The evidence presented in this research shows that, at present, the idea of respect for the human rights of a person accused of serious offences is not accepted by actors in the criminal justice system. Personnel within the system believe that these reforms are inappropriate to the Iraqi situation, and are an obstacle in a system that is mostly reliant on confessions as the main source of information leading to criminal convictions. During the past ten years, the reforms have proved to be incapable of preventing torture, arbitrary arrest or detention and other abuse. Fieldwork carried out by reliable international institutions supports this assertion, as has been seen in an

earlier chapter. A comment by a senior police officer during one of the interviews explicitly illustrates such a view. He stated that “the ratification of the Convention against Torture would not be helpful. How are we going to get confessions? We have to force the criminals to confess and how are we going to do that now?”¹⁶

It is difficult to predict how long it may take to achieve a culture of human rights rather than a culture of abuse, particularly as the government has been slow to move in this direction.¹⁷ An overview of the process of reform in the justice system suggests that the protection of human rights and the implementation of international commitments have been side-lined in the fight against crime and the protection of public order.

7.1.6. Lack of accountability, and a culture of impunity for officials who violate human rights

One of the main reasons for the breach of the rights of persons facing the criminal justice system is impunity, meaning the absence of punishment for perpetrators. In a system without adequate monitoring or checks and balances, the gathering of evidence against an official who is involved in the violation of human rights in criminal proceedings is very difficult, and the culpability of individuals is impossible to establish unless the violation results in death or the loss of a limb. Therefore, although there are plenty of allegations of violation causing bodily harm, investigations and prosecution are rare. Over the last years, there has been accountability in only a few cases.¹⁸ In these cases, victims had lost limbs or died under torture during investigations.

The case of Kata in 2008 is illustrative. The Iraqi Minister of Justice received an urgent letter from Amnesty International calling for an impartial investigation to be conducted in order to establish the reasons for this person’s death in custody. After more than a year, Amnesty International was informed that the death of this person was due to torture by officials during interrogation. However, the officials against

¹⁶ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, 1 July – 31 December 2008) 25.

¹⁷ While, under the rule of law, public protection and solving crimes are important, respecting human rights during criminal proceedings is equally so.

¹⁸ Amnesty International, *Iraq: A Decade of Abuses* (Index: MDE 14/001/2013, March 2013) 62.

whom the investigation was conducted had been released under the amnesty law.¹⁹ While, the obligation under international standards is that states should not enact amnesties leading to absolve for those who commit torture and they should be brought to justice. Torture should be not eligible for amnesty because it is a gross violation of human rights.²⁰

The situation is exacerbated by the fact that punishments, in the rare cases of prosecution leading to conviction, are likely to be lenient, or to be mitigated to an amount incommensurate with the severity of the violations committed.²¹ This dangerous phenomenon has attracted the concern of the international community. In its annual report on the human rights situation in Iraq in 2011, the UNAMI reported that

“In the rare instances where investigations were carried out by the responsible authorities, penalties applied to perpetrators were often limited to disciplinary or administrative measures.”²²

Similarly, there was strong criticism that

“This laxity in the prosecution is contrary to the international obligations undertaken by Iraq ... many of the sanctions imposed (salary reductions, transfer and dismissal) are not serious enough given the severity of abuse of human rights.”²³

Official impunity for perpetrators is a serious barrier to ensuring respect for human rights in the criminal justice system. The use of an official amnesty for offenders has frustrated justice, hindered the deterrence of these offences and increased the crime rate. The system provides immunity from prosecution and criminal liability unless

¹⁹ Amnesty International, *New Order Same Abuses: Unlawful Detentions and Torture in Iraq* (Index: MDE 14/006/2010, September 2010) 19.

²⁰ Transitional Justice Institute, *The Belfast Guidelines on Amnesty and Accountability* (2013, Transitional Justice Institute, University of Ulster) at <http://www.transitionaljustice.ulster.ac.uk/documents/TheBelfastGuidelinesonAmnestyandAccountability.pdf> >accessed 21 May 2014; World Conference on Human Rights, Vienna Declaration and Programme of Action (1993), Part II, section B.5.

²¹ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, 1 July– 31 December 2008) 24; see also the Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, January 2011) footnote 57 on p18.

²² The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, January 2011) 19.

²³ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report (Baghdad, 1 July– 31 December 2008) 24-26.

there is authorization by the executive Minister.²⁴ According to the Iraqi Code of Criminal Procedure of the Internal Security Forces, which is the code applicable to the police, a law enforcement officer cannot be arrested, detained, interrogated or brought to trial by a non-military authority without approval from the Commander of the executive authority or the executive Minister. It has been stated that

“It is not allowed to notify the policeman, summon or arrest him, unless pursuant to the approval of the minister or the person he appoints if the action was committed during the performance of his duty.”²⁵ By the same token: “1. The Minister, by virtue of a decision containing the reasons, may not approve of referring the policeman to the civil criminal courts if the crime is shown to be resulting from or caused by fulfilling his official duty. 2. The decision taken according to clause (1) of this Article shall prohibit taking legal reviews against the policeman for that crime.”²⁶

These national provisions are a considerable violation of the binding provisions of international law that impose duties on the state to investigate any violation against human rights in criminal proceedings and to provide remedies. Sometimes it is an express duty to bring the suspect to justice. Affording immunity from prosecution through legislation of the kind discussed above is a clear dereliction of obligation. Similarly, it is a clear violation of the independence of the judicial authority that bringing procedures against an official requires the permission of the executive authority. Such legal protection for officials is an important reason for widespread violations of human rights, and the impact of any legislative reform is thereby frustrated.

²⁴ The Iraqi Code of Criminal Procedure of the Internal Security Forces 17 of 2008, published in the Official Gazette, issue 4068 in 17 March 2008. {قانون أصول المحاكمات الجزائية لقوى الأمن الداخلي}; also, the Decree of the Revolutionary Command Council No 1042 of 1979, published in the Official Gazette issue 2727 of 27 August 1979, which is still in force, provides officials with immunity against prosecution. {قرار مجلس قيادة الثورة المنحل}

²⁵ Article 111 of the Iraqi Code of Criminal Procedure of the Internal Security Forces, *ibid*, in an unofficial translation into English is available at <<http://www.docstoc.com/docs/148845712/Internal-Security-Forces-Criminal-Procedure-Law-No>> accessed 11 April 2013.

{قانون أصول المحاكمات الجزائية لقوى الأمن الداخلي, المادة 111: لا يجوز تبليغ رجل الشرطة أو تكليفه بالحضور أو إلقاء القبض عليه إلا بناء على موافقة الوزير أو من يخوله إذا كان الفعل قد ارتكب أثناء أداء واجبه}

²⁶ *Ibid*, Article 113.

{قانون أصول المحاكمات الجزائية لقوى الأمن الداخلي, المادة 113: أولاً – للوزير بقرار مسبب عدم الموافقة على إحالة رجل الشرطة على محاكم الجزاء المدنية إذا ظهر أن الجريمة ناشئة عن قيامه بواجباته الرسمية أو بسببها, وبناءً على توصية مجلس تحقيقي يشكل لهذا الغرض. ثانياً – يكون القرار المتخذ وفقاً للبند (أولاً) من هذه المادة مانعاً من اتخاذ التعقيبات القانونية بحق رجل الشرطة عن تلك الجريمة}

In addition, Article 136 of the ICCP has provided during the past ten years that “the transfer of the accused for trial in an offence committed during the performance of an official duty, or as a consequence of the performance of this duty is possible only with permission of the minister in charge, in accordance with the stipulations of other codes.”²⁷

Through these defective provisions of impunity, the independence of the judicial authority has been undermined: according to Article 136 of the ICCP a judge have not been able to bring the offender to justice in a courtroom without obtaining permission from the executive authority. Despite all the concerns that have been expressed, attempts to repeal the defective provisions in Article 136 of the ICCP have failed. At the time of writing, another attempt is being made to repeal this Article, and it is to be hoped that it will be repealed permanently.²⁸

In the light of the aforementioned, it can be seen that contradictions in the provisions of the legislative framework are a substantial obstacle to achieving human rights in the criminal justice system.²⁹ On the one hand, the law prevents ill-treatment against the person accused in absolute terms. On the other hand, a perpetrator who breaches the suspect’s rights is immune from prosecution unless it is authorized by the executive minister. In a review of Iraq’s record of human rights, published in the Universal Periodic Review in 2010, this impunity was described as a critical cause for

²⁷ Article 136 (b) of the ICCP. The official translation into English is available online at the homepage of *the Global Justice Project: Iraq* (GJPI) <<http://gjpi.org/central-activities/judicial-independence/>> accessed 28 January 2014.

{قانون أصول المحاكمات الجزائية العراقي، المادة 136 (ب): لا تجوز احالة المتهم على المحاكمة في جريمة ارتكبت اثناء تأدية وظيفته الرسمية او بسببها الا باذن من الوزير التابع له او وكيل الوزارة الذي يخوله}

²⁸ Since 2003, several unsuccessful attempts at amending and repealing Article 136(b) have been made. For example, the CPA in Memorandum 3, section 4(d) on 18 June 2003, suspended the Article. Then the Iraqi Interim Government reinstated it by Order 14 of 2005, published in the Official Gazette, issue 3995 of 3 March 2005. Once again the Article was suspended by the new elected government (led by Prime Minister Jaffari) and later reinstated. Subsequently, this Article was repealed on 18 September 2007. However, the new law was not published in the Official Gazette and therefore was not effective and in force in accordance with Article 129 of the Constitution. Finally, after many years of effort, provisions for the repeal of this Article appeared on the website of Council of Representative and later its repeal was contained in the Official Gazette, Issue 4193 of 13 June 2011. Will the repeal be maintained or will there be another amendment in future in response to political demands? Commentary of the Iraqi Minister of justice, Al-Shimmery, broadcasted by Al-Baghdadi TV in October 2012; see also the website of the Iraqi Council of Representative at <<http://www.parliament.iq/>> accessed 13/11/2012.

²⁹ See earlier discussion in Chapter Six regarding prohibition of ill-treatment in Iraqi law.

concern for the Human Rights Council, and the latter's recommendations were forwarded to Iraq's leaders in an attempt to address this problem.³⁰

In view of the above, it is clear that the reformed criminal justice system has failed to establish effective measures to protect an accused person from abuse by public officials, or to constitute effective measures to detect and punish such crimes. The system is failing to protect accused persons against human rights violations. Therefore, dealing seriously with the issues raised in this study is a fundamental obligation if Iraq is to be restored to its place in the international community.

7.1.7. A lack of capacity and resources

Lack of resources has been a consistent feature to emerge from the present study. The administration of justice has been impacted by capacity issues, such as the number of investigating judges, interrogators, skilled police and sufficient gender representation.³¹ The administration of justice also suffers from a lack of both financial capacity and fundamental infrastructure. These deficiencies have frustrated the attempts of the High Commission for Human Rights to carry out its functions.³² In addition, the problem negatively affects the legal aid scheme and contributes to the undermining of the right to legal assistance for indigent persons involved in criminal proceedings. Furthermore, the lack of custody facilities and of access to medical resources at the primary investigation stage contributes to the lack of accountability and facilitates the abusive practices.

Additionally, many criminal justice personnel have had long experience of working within a culture of repression and abuse, but little experience of a culture of human rights. The system and its personnel struggle with a low level of knowledge and awareness of the international law of human rights. Likewise, the education and

³⁰ Human Rights Council, Report of the Working Group on the Universal Periodic Review Regarding Iraq, submitted to the UN General Assembly, Fourteenth Session, A/HRC/14/14 on 15 March 2010, para 17.

³¹ According to the Iraqi Global Justice Project, the number of judges in 2009 was 881: "301 of those being investigative judges and 326 are prosecutors. 62 of the 1207 are women-12 judges and 50 prosecutors." Clearly such numbers are not proportionate, given that the population of Iraq is about 30 million. See Global Justice Project: Iraq (GJPI) مشروع العدالة الشامل -العراق, available at <<http://gjpi.org/central-activities/judicial-independence/>> accessed 23 September 2013.

³² See Chapter Two.

training of criminal justice officials is of a low standard. This is one of the reasons why officials are failing to fulfil their duty in terms of international human rights obligations.

The fact is that recent reforms of the system have failed to maximize the skills and expertise of those responsible for handling and assessing forensic evidence.³³ There is a lack of capacity in the collection and analysis of administrative data. There is significant need to establish research centres, legal medical institutes and forensic laboratories and to develop scientific methods for dealing with criminal investigations and analysing relevant evidence, without resort to the old methods of investigation. Maximizing the skills of personnel is of great importance in dealing with crimes without violation of the rights of persons under criminal investigation. Of course, responding to such needs requires effective resources to be available, and a lack of adequate funding in this regard is one of the factors that contribute to the failure to attain a minimum level of investigative skills and techniques.

7.1.8. Corruption

One of the reasons for the failure of the reformed criminal justice system to meet its binding obligations under international law is the corruption of government officials, legal authorities and the courts. Reliable reports have repeatedly alleged that “corruption had slowed Iraq’s reconstruction after the 2003 invasion.”³⁴ In 2010, Amnesty International reported that it “is aware of a number of cases in which security officials have asked detainees’ families to give them money - in US dollars - in return for either releasing their detained relatives or providing information about their whereabouts in detention.”³⁵ It is apt to refer to the reports of Transparency International in this regard, especially its 2013 ranking of Iraq as the seventh country among the list of the most corrupt countries in the world.³⁶

³³ United Nations Development Programme, *Governance in Iraq: Selected Topics* (2009) 22 at <http://www.google.co.uk/?gws_rd=cr#fp=85177d2ca4155b73&q=governance+in+iraq> accessed 13 August 2013.

³⁴ UK Border Agency, *Country of Origin Information Service, Iraq* (issued on 16 September 2009) 122 at <http://www.homeoffice.gov.uk/rds/country_reports.html> accessed 22 December 2012.

³⁵ Amnesty International, *New Order Same Abuses: Unlawful Detentions and Torture in Iraq* (n 19) 16.

³⁶ Transparency International, available at <<http://transparency.org/cpi2012/results>> accessed 27 January 2014.

Regardless of the reasons for this problematic phenomenon, or of the ways it can be reduced or dramatically eliminated, the processes of detention and treatment of persons in the criminal system have been adversely affected by this major factor. As a result, The Working Group considers that, “among other factors, corruption is detrimental to the rule of law and on the effective fulfilment of human rights.”³⁷

7.1.9. Social attitudes

Effective authority to implement a comprehensive reform is an important factor in improving human rights in the criminal justice system and in strengthening the rule of law. However, it seems that Iraqi politicians are insufficiently determined to accelerate reform. It is evident that until the present time the political groups have been more interested in strengthening their own power than in promoting a culture of lawfulness and human rights. Iraq continues to face very serious challenges on the road to becoming a “normal” country in any sense, and the adverse effects of this situation are felt in all aspects of life. A culture of impunity and abuse continues to exist, as has been shown, and moreover, some individuals are awarded positions in the justice sector on the basis of their political loyalties rather than their personal qualities. The political parties concerned provide protection against all forms of accountability, even in cases where justice and human rights are abused during criminal proceedings.

It should be mentioned here that for the purpose of developing the justice system, the engagement of international experience and skills is of importance. Knowledge, experience and skills need to be shared and exchanged at both the domestic and the international level. It has, however, been found that, although in the period immediately after the fall of the previous regime this issue was taken seriously, recently there has been a decline in enthusiasm for such programmes. For example, during Iraq’s attendance at the periodic review in 2010 to discuss the situation of human rights, the state delegation pledged to arrange a large conference in Baghdad, where experts from around the world could engage in dialogue. The conference has

³⁷ UN Human Rights Council, ‘Report of the Working Group on Arbitrary Detention’ (A/HRC/10/21, 16 February 2009) para. 47.

not yet taken place, partly because of the security situation, but also, presumably, because of a lack of willingness on the part of the government.

Respect for the rights of citizens is essential. However, a number of reputable human rights reports reveal that the government is insufficiently active in protecting the rights of due process.³⁸ Scant attention has been paid to creating a balance between law enforcement and human rights.³⁹ There is inadequate political support for the establishment of efficient legal associations, human rights groups and a strong civil society. The experience of other post-conflict states has shown that the promotion of the rule of law and the instigation of reform are difficult to bring about in the absence of political will.⁴⁰ In the view of the United Nations, a system of government that responds to community needs, including, *inter alia*, a strong civil society, professional associations, human rights groups and community organizations, is able significantly to strengthen the rule of law.⁴¹

Mainstream culture within a society may also in some aspects negatively affect efforts to reform the justice system. For example, the experience of post-conflict states such as Kosovo, Timor, Sierra Leone and South Africa has shown that increasing the number of female police officers could provide a greater level of protection against gender-based violence during the process of arrest and detention.⁴² However, gender inequality is rooted in Iraq culture, and this is the underlying reason for the relatively small number of women serving in the Iraqi police force. There needs to be official encouragement of the recruitment of women to work as police officers in order for the entire population to benefit from equal treatment in relation to policing.

³⁸ Geneva International Centre for Justice, *Iraq - Continuous interference of the executive in the judiciary* (n 15).

³⁹ *Ibid.*

⁴⁰ Kristi Samuels, *Rule of Law Reform in Post-Conflict Countries* (Social Development Papers, October 2006) 7& 9 at <http://siteresources.worldbank.org/INTCPR/Resources/WP37_web.pdf accessed 19 May 2014>

⁴¹ UN Secretary-General, *United Nations Approach to Rule of Law Assistance: Guidance Note* (April, 2008) 7.

⁴² The highest percentage of female police in the world is in South Africa (28.6 per cent). See United Nations Office on Drugs and Crime, *Criminal Justice Reform in Post-Conflict States - A Guide for Practitioners* (2011, Printed in Austria) 75 available at

<http://www.unodc.org/documents/justice-and-prison-reform/11-83015_Ebook.pdf> accessed 19 May 2014.

Furthermore, one of the main reasons behind the failure of the new reform is that these developments have not been accepted by those employed in the justice system, who have routinely ignored these new safeguards in practice, as previous chapters have known. The central problem is linked to the wider issue of social attitudes. Many members of the public feel little sympathy towards a person involved in criminal proceedings and there is a widespread belief that the suppression of crime requires a tough legal system. There is evidence that the general public supports tough measures against a person accused, leading sometimes to a lack of respect for the legal rights of accused persons on the part of those administering the justice system, particularly when serious crimes have occurred.⁴³ Thus, level of awareness and education regarding human rights and the rule of law needs to be significantly raised.

7.1.10. Lack of internal and international oversight

National and international observation of the human rights situation has remained problematic. Organizations such as the International Committee of the Red Cross, Human Rights Watch, Amnesty International and United Nations Assistance Mission for Iraq are still struggle to gain access to criminal justice institutions, such as places of detention and police stations. Likewise, the engagement of the press, media, civil society, academics, researchers, social organisations and local non-governmental organisations in observing the working of the system remains at quite a low level. Improving the involvement of these local and international institutions in the observation of detention centres, pre-trial facilities and other institutions of justice is necessary for the protection of human rights. It is often said that one of the most effective instruments in the struggle against human rights violations in Iraq is the regular monitoring visits imposed by international human rights institutions. However, the government of Iraq, on various occasions, has not allowed international observers the opportunity to evaluate the administration of justice in Iraq. Furthermore, as mentioned in Chapter Two, Iraq's continuing failure to respond to the

⁴³ The Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Rights Report (Bagdad, 2011) 67 & The Annual Reports of the Iraqi Ministry of Human Rights (Bagdad, 2012) 69.

{التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الانسان العراقية}

HRC's request to submit reports in recent years has been the cause of the country's behind Iraq's zero engagement with HRC since the last report in 1998.

The UNAMI has reported that “the access to prisons, detention centres and other facilities where persons are deprived of their liberty was problematic in certain areas of Iraq ... because access was restricted or prevented by the Government of Iraq.”⁴⁴ The obstacles put in the way of these organizations to observe the institutions of the justice system have severely impaired the performance of their tasks.

Until now, the High Commission for Human Rights has faced obstacles to the fulfilment of its task. In this regard, Navi Pillay has called for further efforts to empower the Iraqi High Commission for Human Rights by reducing interference from political blocs and reducing challenges to the fulfilment of its duties in practice.⁴⁵ In the same way, the Ministry of Human Rights, which is a branch of the executive body, merely observes the human rights situation, and has no further authority to remedy any violations of these rights. Similarly, the Iraqi Parliament's Human Rights Committee struggles against different obstacles which hinder the committee from carrying out its tasks. On many occasions, the Committee has been prevented from carrying out its supervisory role and could not access places of detention due to obstruction by the executive authority.⁴⁶ For example, at the end of 2012 the Committee was prevented from accessing a place of detention after it received information about female detainees held there who had been subjected to violations during criminal proceedings. Due to the concerns expressed by human rights organizations and widespread public interest in these allegations, they were investigated by a committee of independent legal experts and in fact verified.⁴⁷ These brutal violations sparked angry reactions in the streets of Iraq and there were mass

⁴⁴ The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report, (Baghdad, January 2011) 14; see also The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report, (Baghdad, May 2012) 13.

⁴⁵ See chapter two.

⁴⁶ See chapter two.

⁴⁷ Amnesty International, *Iraq: A Decade of Abuses*, (n 18) 22; Hammurabi Human Rights Organization, *Report of visit to a women's prison in Baghdad*, (10 October 2012) at <http://www.hhro.org/hhro/reports_en.php?lang=en&art_id=592> accessed 9 March 2014; The Centre for Research on Globalization, “Interrogations” in *Iraq: Torture and Rape of Detained Women* <<http://www.globalresearch.ca/cia-interrogations-in-iraq-torture-and-rape-of-detained-women/531622>>; Dr. Osama Mahdi, *Abusing Female Detainees*, at <<http://www.elaph.com/Web/news/2012/12/779680.html>> accessed 2 January 2013.

demands for action against the alleged perpetrators. Scandals of this kind indicate public dissatisfaction with the system and demonstrate that much more needs to be done to combat these violations of human rights.

In the light of the above, the forthcoming pages will be devoted to proposals for the creation of a criminal justice system that functions well both in law and in practice.

7.2. Proposals

The previous pages lead to the conclusion that the rights of the accused person at the pre-trial stage of proceedings continue to be a serious cause for concern in Iraq. The flaws in both law and practice and the various reasons for them have been identified. The task of formulating proposals for a criminal justice system that functions well in law and in practice (with particular focus on the pre-trial stage) is complex and multi-dimensional. “Legislative reform” is not enough, and the author makes a range of holistic suggestions that can be realistically implemented in Iraq. Although the focus of this work is on the pre-trial stage, the wider structural and social challenges have not been ignored.

7.2.1. Addressing the shortcomings in national law and practice

A comprehensive legal reform strategy is essential. It is necessary, *inter alia*, to address the failings of national law and practice, and to establish an appropriate legal framework within a legitimate legal culture. Iraq, emerging from nearly forty years of repression of human rights, has to find a way to change its institutional and social culture. At the theoretical level, it is essential to reform the criminal justice system and to overhaul the formal legal framework. The ICCP must comply with modern procedures and ensure the protection of human rights in accordance with binding legal obligations and the new Constitution (the Iraqi Permanent Constitution). Similarly, the implementation of the law has to be improved. Therefore it is essential to campaign against wrongful daily practice and at the same time to campaign for reform of the law in order to eliminate all the legal ‘loopholes’ that allow continued abuses, and to secure the rights of accused persons in theory and in reality, thus bridging the gap between law and practice.

Procedural laws in Iraq have undergone various reforms in attempts to bring the system into line with universally accepted standards. The examination in previous chapters of relevant new provisions and the three identified rights suggest that an approach based on borrowing, transplanting, or creating new legal provisions has played a positive role in improving the system only when these innovations are consistent with international safeguards and are holistic in character.

However, an analysis of these amendments has revealed that they have been piecemeal and have caused significant problems in terms of human rights. There have been genuine attempts to modernize and improve the system, but the conclusion must be that the reform efforts have failed to protect and ensure full protection of human rights in the three areas studied.

An analysis of the work of international human rights bodies shows that pre-trial rights need to be adopted universally in every kind of national legal system. These procedural safeguards need to be adopted fully, no matter whether the basis of the system is adversarial or inquisitorial.

To give an example: in some countries with an inquisitorial system, there is no established right to a lawyer during the police inquiry at the outset of proceedings. The French legal system, however, which is an example of the inquisitorial approach, has been changed to respond to international human rights standards. The French system has therefore amended the law to adopt an adversarial character with regard to the pre-trial process, which better satisfies a suspect's right to a lawyer and the right to remain silent. Consequently, the system now secures for suspects a full right to be free from self-incrimination and the right to legal assistance from the outset of the proceedings. This is a deviation from the normal practice in an inquisitorial system, but French law has adopted an approach borrowed from the adversarial systems in order to be in conformity with modern legal safeguards. This illustrates how reforms need to consider essential features of the legal framework. At the same time, for the purpose of providing more protection for human rights in criminal proceedings, one cannot be too rigid about the common-civil law divide.

In the view of the author, some changes made in the post-2003 reforms were temporary and interim measures appropriate to the transitional period. The proposal, in this regard, is that Iraqis need to begin a holistic reform in the light of a comprehensive legal reform strategy.

7.2.2. Addressing weaknesses in the investigative system

The ICCP requires that proceedings at the pre-trial investigation stage should be conducted by investigating judges and judicial investigators.⁴⁸ However, because of the legislative weaknesses already discussed, the role of the investigating judge at the outset of proceedings has been usurped by the police and as previously discussed that human rights of a person under police investigations have been violated. In order to bind the state to an international standard with regard to the rule of law and human rights, significant changes should be made. Our version of a new system contains the following suggestions:

1. Police involvement in the investigation process needs to be minimized. It is not necessary for a police officer to carry out questioning at a preliminary stage of proceedings. Questioning conducted by the police should have no evidentiary value nor should it be deemed a source of evidence or acceptable. In other words, the proposal requires transferring these important into the hands of the judicial authority and altering the role of the police to be compliant with its position as the executive power. The same applies to police power to arrest people, apart from cases of *flagrante delicto*.
2. Institutions that have no formal link with the judicial authority should not be involved in the investigative process.
3. There must be an efficient system of checks and balances. It is problematic that even if the judicial authority has control and supervision over the police during the preliminary criminal proceedings, that arrangement has not worked satisfactorily in practice. Thus, criminal proceedings conducted by the police should be subject to an actual and effective supervision by the judicial authority and the system should ensure effective principles of accountability.

⁴⁸ See Chapter Three.

The judicial authority should have the capacity to direct disciplinary or criminal proceedings to deter abuse.

4. The conduct of criminal proceedings must be entrusted only to those authorized by law, and to those possessing the right professional skills and full personal competence.
5. Full rights to due process for a person in police custody must be assured particularly free legal assistance for accused persons who have insufficient means to pay for a lawyer. Of course, this proposed remedy may involve the cost of legal and personal training programmes in the interests of achieving complete safeguards for the accused person guaranteed under international human rights law.
6. The limitations of police powers under the supervision of judicial authority during the investigation should be clear defined. Accordingly, guidelines should be created to define police powers in detail. In this light of this guideline, the power of law enforcement officials should be comprehensively elaborated. Any form of misconduct on the part of the police during proceedings should be clearly identified in the interests of curbing human rights violations.
7. Discretionary activities carried out by law enforcement officials should be limited or subjected to accountability and scrutiny so that compliance can be secured between daily work practice and the wording of law.
8. The new reform must expand judicial authority so as to cover all centres of detention and courts of investigation within the compass of the judicial investigation authority. A sufficient number of judicial investigators, who must be highly qualified specialists in human rights law and in the process of investigation, should be provided for these offices.

7.2.3. Safeguards in criminal proceedings

The proposed holistic reform should adopt further procedural safeguards that are unavailable to the accused person under current Iraqi law:

1. Safeguards relevant to right to liberty: the widespread resort to detention requires the creation of alternative measures that could be employed include electronic

tagging, restricting a suspect's movements to a particular area or placing him under the supervision of an official authority. Bail should be the preferred alternative to detention, unless real risks are involved, as mentioned in the international standards.⁴⁹ In addition, measures have to be put in place to ensure that investigations take place within a fixed time frame. In this regard, it should be considered that speed is essential if the full requirements of justice are to be met.

2. Safeguards relevant to the right to a lawyer: it is important for the deterrence of systemic abuse that a qualified lawyer should be provided to a person under investigation from the outset of police custody. It is necessary to establish a sufficient legal aid scheme. In addition, a person should not be qualified as a lawyer without passing the minimum trainings requirements. A confession should not be admissible as evidence unless a lawyer was present during questioning.⁵⁰

3. Safeguards relevant to the right to be free from self-incrimination: under all conditions, a confession extracted from a person accused against his will must be inadmissible at all criminal proceedings. Many aspects of international law are concerned with upholding this right by seeking to protect the accused person against the abuse of law enforcement officials. These safeguards should be inserted within the legal framework of the state. The right to examination by a doctor is particularly important.⁵¹ Access to independent medical examination is a basic protection against

⁴⁹ *Kwok Yin Fong v Australia* UN Human Rights Committee Communication No (1442/2005) 23 October 2009 paras 9, 3; *Juan Peirano Basso v Uruguay* UN Human Rights Committee Communication No (1887/2009) 19 October 2010 para 10.2; *Michael and Brian Hill v Spain* UN Human Rights Committee Communication No (526/1993) 2 April 1997 para 12.3; *Levința v Moldova* (no 2) App no 50717/09 (ECtHR, 17 January 2012) para 40.

⁵⁰ Case law of the HRC and the ECtHR, for example *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008), (2009) 49 EHRR 19 paras 40, 62, 63; see also *Iskandarov v Tajikistan* UN Human Rights Committee Communication No (1499/2006) 30 March 2011 para 6.6; *Kasimov v Uzbekistan* UN Human Rights Committee Communication No (1378/2005) 30 July 2009 para 9.6; *Patricio v Equatorial Guinea* UN Human Rights Committee Communication No (1152 & 1190/2003) 31 October 2005 para 6.3; *Oral Hendricks v Guyana* UN Human Rights Committee Communication No (838/1998) 28 October 2002 para 6.2; see also Rule 42(A) ICTY, ICTR, and SCSL RPE; Rule 63 (A) ICTY, ICTR, and SCSL RPE; Article 55 (2)(c) ICC Statute & Article 67 (1) (d). For details see Karel de Meester et al., "Chapter 3. Investigation, Coercive Measures, Arrest, and Surrender" in Goran Sluiter et al. (eds.), *International Criminal Procedure Principles and Rules* 253; *The UN Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba, 27 August to 7 September 1990) principles 7, 8; see also PACE COP, Code C para. (C-6 with Annexes B and C); see also the French Code of Criminal Procedure Article 63-4.

⁵¹ UN Human Rights Committee, General Comment No. 20 (Forty-fourth session, 1992) Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Article

systemic reliance on confession and the practice of obtaining convictions by means of abusing a person under investigation. In Iraq, confessions extracted through torture and coercion cannot be excluded from evidence unless there is corroborative evidence that these invalid means have been employed. A medical report submitted to an independent authority, such as a judge, is perhaps the clearest proof in this respect. Regular access to a doctor is seen as the best way to ensure the safety of a person accused against all mental or physical risk.⁵² Consequently the right of access to a routine medical examination is an essential measure for the purpose of preventing the authorities from resorting to illegal methods to extract involuntary confessions.

Important advances in methodology could be made through the adoption of scientific methods, such as the use of a forensic DNA database (on digital computers) and DNA evidence in the process of investigation. It should be stressed here that over-reliance on these methods must be avoided: it is the totality of facts that should be central to criminal proceedings. In addition, it is important that expert witnesses are available whenever necessary.⁵³ In this context, it is worth noting Lowenstein's finding that in England and Wales, 15-25 % of suspects who pleaded guilty to crimes, despite being innocent, were later exonerated by DNA testing.⁵⁴ Similar protection has been given in the USA, where Kassin et al. reported that in recent years there have been a high number of individuals who have been convicted and later exonerated on the basis of DNA evidence.⁵⁵

It is important that persons under investigation should have a right to be informed prior to interrogation that any statement they make may be used in evidence at trial.⁵⁶

7)" adopted on 10 March 1992, para. 11; see also UN General Assembly Res 43/173 'The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment' (9 December 1988) principle 24; UN General Assembly Res 34/169 'Code of Conduct for Law Enforcement Officials' (17 December 1979) para. 6; see also French Code of Criminal Procedure Article 63-3.

⁵² Jurisdictions around the world respond to this duty. English law, for example, is unlike Iraqi law in that it has clear provisions for allowing a suspect access to a doctor. PACE and its COP make it clear that medical examination of a suspect must be available as soon as requested; COP, Code C para. (9.4).

⁵³ Clive Walker, "Forensic Evidence and Terrorist Cases" (1995) *Cambridge Law Journal* 69; Paul Michel, "Pre-hearing expert conference" (2011) *Civil Justice Quarterly* 93-109; Eric Colvin, "Convicting the Innocent" (2009) *Criminal Law Forum* 178.

⁵⁴ L. F. Lowenstein, "Confession in Criminal Cases" (2006) Vol.170 *Justice of the Peace* 624.

⁵⁵ Saul M. Kassin et al., "Police-Induced Confessions: Risk Factors and Recommendations" (2010) 34:3-38 *Law Hum Behav* 2.

⁵⁶ 42(A)(iii) ICTY, ICTR, and SCSL RPE, Rule 63 (B) ICTY, ICTR, and SCSL RPE; Article 15 (b) STL Statute, Rule 65 (A) (iv) and 85(B) STL RPE, for the detail see Karel de Meester et al, (n 50) 254

Furthermore, they should have a right to have the interrogation recorded using an audio or video system.⁵⁷

4. Safeguards relevant to the system as a whole: there are many other provisions of due process under various jurisdictions in the world that are not available in Iraqi law and which could be adopted as part of routine practice in order to provide more protection against abuse. One example of this would be the practice of informing suspects of their rights and presenting them with a review of the legal safeguards and a copy of the written caution.⁵⁸ There should also be a right is to be free from detention ‘incommunicado’ during proceedings.⁵⁹

Furthermore, statements extracted under duress, and all evidence subsequently derived from those statements, even when they do not amount to a confession, must be excluded. In view of the above, it is concluded that, since the reformed justice system is currently inadequate with regard to these safeguards, there exists a duty to provide them for the people who are under criminal proceedings and to undertake the legislative measures that will be necessary to implement the above recommendations.

It is further recommended that an independent court of human rights should be established. Its special functions would be to deal comprehensively with human rights violations; to address the issue of abuse; to determine the responsibility for the abuse and to provide accountability; to compensate those who have been exposed to violations; and to ensure that prosecution in such cases is in future made easier.

⁵⁶ Rule 43 and 63 (B) ICTY, ICTR, and SCSL RPE, Rule 112 ICC RPE, Rule 25 ECCC IR; Rule 66 and 85 (B) STL, ICTR, for the detail, see Karel de Meester et al., (n 50) 254; UN Human Rights Committee, General Comment 20, (n 51) para. 11; UN General Assembly Res 43/173, (n 51) principle 23; the UN CAT, Article 11.

⁵⁷ Rule 43 and 63 (B) ICTY, ICTR, and SCSL RPE, Rule 112 ICC RPE, Rule 25 ECCC IR; Rule 66 and 85 (B) STL, ICTR, for the detail, see Karel de Meester et al. (n 50) 254; UN Human Rights Committee, General Comment 20, (n 51) para.11; UN General Assembly Res 43/173, (n 51) principle 23; the UN CAT, Article 11.

⁵⁸ See for example, Article 63-1 of the French Code of Criminal Procedure; English law COP, Code C para (C-10); Rule 42 (A) ICTY RPE, ICTR RPE, and SCSL RPE; Article 18 (3) ICTY Statute and Article 17(3) ICTR Statute; for details see Karel de Meester et al., (n 50) 253.

⁵⁹ UN Human Rights Committee, General Comment No 21, (Forty-fourth Session, 1992) “Replaces General Comment 9 Concerning Humane Treatment of Persons Deprived of Liberty (Article 10)” adopted on 10 April 1992, para.12; UN General Assembly Res 43/173, (n 51) principle 19; Case law of the ECtHR, see for example *Salduz v Turkey*, (n 50) para 39; see also the French Code of Criminal Procedure, Article 63-2; PACE COP, Code C para (C-5 with Annex B).

7.2.4. Prioritizing accountability and impunity

It is absolutely vital in terms of law and public policy that allegations of violations of human rights during criminal proceedings should be responded to as soon as possible. There must be independent and impartial investigation and punishment where appropriate, along with remedies for victims. Domestic processes need to be developed and supported, and this should be done through engagement with international mechanisms, for example by allowing petitions to the Human Rights and Torture Committees, and by acceding to the Optional Protocol to the Convention Against Torture. The system should also include adequate mechanisms for the fair compensation of victims. It is important here to recall that for the provision of effective redress for victims, the author's research leads him to recommend the formulation of a specialized court of human rights to deal comprehensively with these cases. This would be an important step in combating the widespread practice of violations against the suspect at the hand of government officials. Courts must have the power to order remedies, for example, damages and medical care.

It has been already referred to the problems caused by amnesty laws and other laws that prohibit legal action being taken against police officers. Government and political leaders from all parties in Iraq have granted amnesties even to people who have committed violations of human rights many times.⁶⁰ This, in the view of the present author, is a serious violation of the duty of the State to bring offenders to justice and to deter others. The HRC takes a similar view, viz.,

“Some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.”⁶¹

⁶⁰ The General Amnesty Law no 19 of 2008, published in the Official Gazette, issue 3978 of 17 March 2008. {قانون العفو العام}.

⁶¹ UN Human Right Committee, General Comment 20, (n 51) para. 15; see also Transitional Justice Institute, *The Belfast Guidelines on Amnesty and Accountability* (n 20).

Furthermore, existing provisions entrenching impunity must be identified and immediately repealed.⁶² Regrettably, in spite of the fact that some of these problematic provisions have been identified not only by Iraqis, but also by the international community, amendment and repeal measures may be controversial and take a long period of time.

In Iraq, a large number of perpetrators involved in abuses of human rights are exonerated from punishment under Article 136 (B). Over a ten year period there were urgent requests for its abolition, and several attempts at abolition failed.⁶³ Recently, however, on June 13 2011, this article was repealed. There had been widespread criticism of this article on the grounds that it was hampering prosecutions.⁶⁴ It has been observed that “in many important cases, ministers did not give [...] the permission to take their employees to court, [and] the prime minister's office did not give [...] permission to take ministers to court.”⁶⁵ The challenge here is to change the mind-set of political leaders. The central problem is the political culture, and this in turn is linked to the wider issue of social attitudes.

It should be borne in mind that provisions explicitly aimed at preventing those guilty of mistreatment of detainees from being granted immunity from prosecution may be meaningless unless an effective, impartial, honest process of investigation is conducted at an early stage. Iraqi law needs to have explicit provisions on such important issues. It should be mentioned here that the applicable international rules under the UN CAT, to which Iraq is a State party, imposes the duty “to ensure that all torturous acts are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.”⁶⁶ In addition, it has been stated that such offences should be

⁶² See for example, Iraqi Code of Criminal Procedure of the Internal Security Forces 17 of 2008, (n 25) Article 111 and 113 {قانون أصول المحاكمات الجزائية لقوى الأمن الداخلي}; also the decision of the Revolutionary Command Council, No 1042 of 1979, (n 24). {قرار مجلس قيادة الثورة}.

⁶³ An interesting commentary entitled “The many lives of Article 136(b) Criminal Procedure Code, Law 23 of 1971” explains the failure to deal seriously with the repeal of this Article. It can be found on the Global Justice Project’s website at <<http://gjpi.org/2010/06/01/global-justice-project-iraq/>> accessed 19/11/2012.

⁶⁴ Ibid.

⁶⁵ Christopher J. Costantini, “Criminal Investigation under the Iraqi Code of Criminal Procedure” (2010-2011) 41 *Cumberland Law Review* 565.

⁶⁶ The UN CAT, Article 4(1).

“punishable by appropriate penalties which take into account their grave nature.”⁶⁷ To enable this to be done, the provisions of the UN CAT must be reflected in the reformed Iraqi criminal justice system, in law and practice. A new statutory law, forming a part of a national legislations by which provisions for eliminating all forms of ill-treatment against the person accused can be regulated, has yet to be adopted.

The system must increase and coordinate its efforts in a variety of ways: by raising the general awareness both of the rights of accused persons and of international standards; by the training of officials, by enhancing the human rights in criminal proceedings, particularly in allowing access to defence counsel, who must be of adequate competence; by establishing a strong mechanism of domestic oversight and engaging the international community in the process of monitoring. It goes without saying that the provision of accountability depends on violations being reported. Therefore, the defenders of international and national human rights have to be given appropriate opportunities to perform the task of defending victims of violation. In this respect, Iraq needs to extend a standing invitation to all Special Rapporteurs on torture to visit Iraq in order to examine and report on the situation of the treatment of suspects, taking into account the binding obligations under international law, in particular the ICCPR and the UN CAT, to which Iraq is a State party. It is also important that petitions to the CAT should be allowed,⁶⁸ and engagement with the Subcommittee on Prevention of Torture (SPT) likewise should take place.⁶⁹

⁶⁷ The UN CAT, Article 4(2).

⁶⁸ Article 22 of UN CAT states that “A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party to the Convention which has not made such a declaration.”

⁶⁹ See Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199, entered into force on 22 June 2006;

7.2.5. Improving the performance of the High Commission for Human Rights

The creation of the High Commission for Human Rights in 2008 is considered to be one of the most important steps in Iraq's journey towards the rule of law. At the time of writing, this essential institution has started to work.⁷⁰ Thus, in the view of the present author, the accelerating pace with which it is fulfilling its duties in accordance with the Paris Principles on the Independence of the National Human Rights Institutions⁷¹ is one of the most important steps in the right direction for enhancing human rights protection in Iraq.

Now that the Commission is finally working, every effort must be made to support its independence and to prevent it from being manipulated for political motives. The current study warns that the political pressure may harshly impact on its independence and that it would become meaningless. If it comes to represent the parties in the Iraqi parliament it will become a political body rather than a body of independent experts and this will seriously damage its integrity. There had been a notable delay in appointing its members due to disputes between the politicians inside the parliament with regard to their choices, and there is a culture of submitting to those who are in power. Continuing efforts to support the independence of the Commission will be essential for the promotion of human rights in general and particularly for the protection of the rights of the persons who are subject to criminal proceedings.

7.2.6. Funding the overhaul of the system

There is a genuine problem of lack of resources in the justice sector and this affects the capacity of the system to protect and ensure human rights. Iraq is not a poor country.⁷² The Ministry of Justice and the relevant institutions must prepare a budget that allows for a comprehensive reform package that makes provision for the strengthening of the infrastructure, human capacity and the demands of a modern

⁷⁰ Law of the High Commission of Human Rights No. 53 of 2008, published in the Official Gazette, issue 4103 of 30 December 2008. {قانون المفوضية العليا لحقوق الانسان}; See Chapter Two.

⁷¹ UN General Assembly Res 48/134 'Principles Relating to the Status of National Institutions (The Paris Principles)' (20 December 1993).

⁷² Iraq relies on oil exports for nearly all of its government revenue. According to the Iraqi Ministry of Oil, Iraq exported 75.3 million barrels in April 2014, bringing in revenues of \$7.582 million. See the homepage of the Iraqi Ministry of Oil, at <<http://www.oil.gov.iq>> accessed 21 May 2014.

criminal justice system. For example, the national budget must address, *inter alia*, institutional weaknesses, infrastructural needs, a lack of availability of employees, and poorly trained staff. Similarly, satisfactory financial support must be provided to enable modern techniques of investigation, education on human rights, and implementation of other necessary projects, such as free legal representation for those who have insufficient means to pay for a lawyer. It is important to make provision for adequate devices and development materials for justice agencies, along with an adequate data base and statistics relevant to the administration of the justice sector. Efficient records must be kept, and these should include genuine information relevant to persons arrested and their case histories, with details of their treatment during the periods of investigation and detention, bailment, the invocation of the right to silence, access to a lawyer, the number of detainees, and records of referrals to trial or releases without charge.

It should be emphasised here that the absence of reliable data through inadequate record-keeping, added to the general inaccessibility to the public, impacts on research and external scrutiny. The present author's work, it is submitted, could have been enormously enriched if such materials and facilities had been available. It is not simply a question of academic research. Reliable record keeping is essential for the efficient and effective management of the entire justice system. In the UK, for example, there are expensive electronic systems for management and records, a database for trial evidence, together with staff trained to use the equipment.

The national budget must also make provision for establishing development programmes to address the issues of forensic capability. Forensic laboratories and detention facilities require funding and the issue of overcrowding needs to be addressed. The provision of health services and medical care in detention is an urgent issue and has a notable impact on the improvement of justice. It is not surprising that a person accused may give an involuntary confession for the purpose of escaping the conditions of detention. Therefore, it must be emphasised that improving the facilities at detention centres is of particular significance to improving human rights and protecting the new system against miscarriages of justice. Significantly, due to recent developments in the area human rights, inadequate health care is deemed to be a kind of torture or ill-treatment, and the State is deemed to be responsible for the death of

any person during detention.⁷³ In the case of Iraq, it is regrettably clear that by these standards the state authority is in violation of the right to life and that it is responsible for the loss of a large number of Iraqi lives during detention. Recent official statistics from the government have revealed that there are a large number of detainees who have lost their lives for medical reasons (although the true cause of death in some of these cases may well be torture).

The Table below has been compiled by the author based on data from the Iraqi Ministry of Human Rights covering the recent past. It provides an overview of causes of death in cases registered during the years 2007- 2012.⁷⁴

Table 2: The review of causes of death during detention 2007-2012

	Cause of Death	Year 2007	Year 2008	Year 2009	Year 2010	Year 2011	Year 2012	Total
1	Accident	8	9		45	---		62
2	Illness	25	29	43	32	17	85	231
3	Unspecified causes	14	13	8	3	8	9	55
4	Suicide	1	1	3	---	2	2	9
5	Suspected Torture	1	---	4	9	3	20	37
6	Fatal shooting	1	---	---	---	1	---	2
7	Riot	---	---	---	2	12	---	14
8	Electrical fault	---	---	---	2	---	---	2
9	Killing caused by another	2	---	---	1	---	1	4
10	Other reasons	16	---	---	6	9	---	31
Total		68	52	58	100	52	117	447

The data contained in this Table may help to substantiate previous claims regarding the government's responsibility for the loss in detention of a large number of Iraqi lives.

It is also suggested that an effective institution of research does not exist at the present time and that one should be established at the earliest opportunity so that these specialist statistics and data can be analysed and published. The relevant programmes,

⁷³ See for example, *Tarariyeva v Russia* App on 4353/03 (ECtHR, 14 December 2006), (2009) 48 EHRR 26 para 103.

⁷⁴ See the Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Rights Reports (2007, 2008, 2009, 2010, 2011, Baghdad).

{ التقرير السنوي لأوضاع السجون ومراكز الاحتجاز - وزارة حقوق الانسان العراقية }

academic experts, and researchers must be able to easily access this information and other data, such as judicial case histories and custody records, for the purpose of scientific research and also as a means of contributing to the resolution of particular problems with respect to safeguarding human rights in criminal proceedings.

7.2.7. Combating corruption

It has been indicated earlier in this chapter that corruption is a major problem. In 2010 Amnesty International warned, “Corruption has been a significant factor affecting the pattern and process of detentions, with some people apparently being detained by Iraqi security forces not because they were suspected of committing offences or to pose a threat to security but essentially to extort money from them and their families.”⁷⁵

In light of the aforesaid, combating corruption may be seen as undoubtedly the most significant factor in protecting human rights and the integrity of the criminal justice system. The issue of concern is that despite the high rate of corruption there are few convictions. The recommendation regarding this issue is of “zero tolerance against corruption” as the sole way to combat this chronic phenomenon. Efforts to investigate the offences and to prosecute the offenders must be intensified. The perpetrators must not be granted any form of amnesty or impunity for their crimes against human rights. Above all, Iraq is a party to the UN Convention against Corruption and it is imperative that the set of measures included in this Convention should be put in place for the purpose of combating corruption.⁷⁶

7.2.8. Enforcing international rules domestically

In Chapter Two, the author observed that the Iraqi legal system is not clear as to whether international agreements are a source of legal obligation or whether they can take priority over domestic law.⁷⁷ International conventions have not been

⁷⁵ Amnesty International, *New Order Same Abuses: Unlawful Detentions and Torture in Iraq* (n 19) 16.

⁷⁶ United Nations Convention Against Corruption (adopted 31 October 2003, entered into force 14 December 2005). Iraq ratified the Convention on 17 March 2008.

⁷⁷ See Chapter Two.

incorporated into Iraqi law. This has negatively affected the ability to use international human rights law at the domestic level. Iraq has recently become a State party to most of the international treaties on human rights, such as the UN CAT and the ICPED. Nevertheless, steps have not yet been taken to implement their provisions within the national legal system. This needs to be addressed, for example by enacting new laws that correspond to the provisions of these conventions.

In the view of the author, the ideal solution for Iraq would be for the Iraqi Parliament to pass a law stating that conventions that are binding on Iraq are applicable before the domestic courts. Indeed, the ability to raise binding obligations directly before Iraqi courts can have, the author believes, a catalysing effect on human rights protection in practical terms. It would be still better if these principles were incorporated in the Iraqi Permanent Constitution. The effects of the transformation of international human rights law into a reality for the people of Iraq cannot be underestimated. For this purpose, it is imperative that Iraqi judges are provided with adequate knowledge to ensure effective interpretation of the rules in the light of international standards. It is also imperative that the judges have to study the case law of international jurisprudence, in particular the practice of the HRC and the ECtHR. Law enforcement officials must have a basic level of education regarding international standards, and these need to be adequately contained in the curriculum and courses of the relevant educational institutions, such as police colleges.

The author also recall suggestions that those international human rights treaties not previously ratified by Iraq need to be reviewed again. Priority has to be given to the declaration under Article 22 of the UN CAT on the individual's petitions to the Committee against Torture and to the ratification of the Optional Protocols of the UN CAT.⁷⁸ Similarly, priority has to be given to the ratification of the Optional Protocols of the UN ICCPR.⁷⁹ These would allow for redress in cases of violations of human

⁷⁸ The optional protocol of the UN CAT concerns regular visits undertaken by the Subcommittee for the Prevention of Torture (SPT) in order to inspect torture and other cruel, inhuman or degrading treatment or punishments that may have taken place in the States parties.

⁷⁹ The First Optional Protocol to the International Covenant on Civil and Political Rights. Adopted by the General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976. It provides for an individual whose rights have been violated to submit a written complaint to the HRC for consideration. The Second Optional Protocol to the International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 44/128 of 15 December 1989 and entered into force on 11 July 1991. It bans capital punishment.

rights. In accordance with this international mechanism the victim whose human rights are abused at the hands of a representative of a public authority, having exhausted national remedies, can resort to the HRC to redress the damage inflicted. Therefore, urgent steps must be taken by the government of Iraq towards accession to the First Optional Protocol of the UN ICCPR, so that Iraqi victims can present their cases before the Committee.

7.2.9. Improving social attitudes and the political will to reform

The government and all the leaders of the political parties of Iraq have promised Iraqis and International Community on many occasions to commit themselves to respecting human rights and to work towards a sustainable peace and the rule of law.⁸⁰ However, these promises have not matched their actions, and until the present time, reputable international reports have described Iraq as a “highly repressive” country.⁸¹ The struggle for power among parties is a significant factor exacerbating the situation in Iraq. It creates or entrenches fault lines in public life in general and human rights in particular. Given this situation, political will is of particular importance for improving the justice system and for further reform in the area of human rights.

Speaking as an Iraqi, I can say that there needs to be a major change in the mind-set of Iraqi people, and this applies to the public, as well as professionals working with criminal justice system and politicians. We all need to give thought to our past experience and to the task of making our future more secure. We need to appreciate the significance of human rights and the part they play in improving the quality of life. Education is critical: the level of awareness and education regarding human rights and rule of law needs to be raised. Human rights development should be

⁸⁰ United Nations, *The International Compact with Iraq: Mid-Year Progress Report* (20 July 2007, United Nations in New York); UN General Assembly, National Report submitted in accordance with paragraph 15 (A) of the annex to Human Rights Council Resolution 5/1, Iraq, Human Rights Council, Working Group on the Universal Periodic Review, Seventh Session, Geneva, 8–9 February 2010, A/HRC/WG.6/7/IRQ/1, 26.

⁸¹ The Reports of Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI); Reports of Human Rights Watch, for example, Human Rights Watch, Iraq: Mass Arrests, Incommunicado Detentions (15 May 2012) at <<http://www.brusselstribunal.org/Repression.htm>> accessed 21 May 2014; Reports of Amnesty International such as Amnesty International, *Iraq: A Decade of Abuses*, (n 18); Amnesty International, *New Order Same Abuses: Unlawful Detentions and Torture in Iraq* (n 19).

sustained through serious efforts on the part of the national government to facilitate the process. A holistic reform requires, *inter alia*, the commitment of the national government, law enforcement officials, judges, lawyers, court administration staff, justice institutions, civil society and the public.

7.210. Improving public confidence in the criminal justice system

Proposing methods by which Iraqis can believe that the new criminal justice system is moving away from past practice is of particular importance for improving criminal procedural safeguards. It is worthwhile to propose a measure that exists in other countries of the world:⁸² direct inspection of the administration of justice by the public might be a create step towards healing and consolidating public credibility in the system. In this regard, the appropriate legal framework needs to be enacted in order to organize all the details by which the institution of the justice can be subject to inspection by an Observer Group. This group can be empowered by law to carry out unannounced visits to institutions of justice at any time. The aim of these visits is to discover whether the procedural rights in criminal proceedings are being applied properly, and that a person under criminal proceedings is treated in line with the principles of human rights.

To conclude this analysis, the author accepts that the Iraqi criminal justice system has been much improved by the post-Saddam reforms. However, modifications to the system have not achieved full conformity with the binding obligations of international human rights law. This assessment of a decade of violations of human rights of persons accused reveals that the legal framework remains inadequate and the system still has insufficient capacity to meet international human rights standards. Recent legislative changes regarding the three identified rights demonstrate an incomplete

⁸² See for example the system of Independent Custody Visitors (ICVs) in England and Wales that has been established by the Police Reform Act 2002, as amended by section 117 of the Coroners and Justice Act 2009 and paragraph 299 of Schedule 16 to the Police Reform and Social Responsibility Act 2011 “whereby volunteers attend police stations to check on the treatment of detainees and the conditions in which they are held and that their rights and entitlements are being observed. It offers protections and confidentiality to detainees and the police and reassurance to the community at large.” See Home Office, *Draft Code of Practice on Independent Custody Visiting* (presented to Parliament pursuant to Section 51(8) of the Police Reform Act 2002, December 2012 para.2, available at <[http://www.homeoffice.gov.uk/publications/about-us/consultations/icvconsultation/ i_cv-draft-code ?view=Binary](http://www.homeoffice.gov.uk/publications/about-us/consultations/icvconsultation/i_cv-draft-code?view=Binary)> accessed 5 January 2013.

and inadequate reform process. In the view of the present author, even though these reforms are seen as a positive development it is essential to rethink the process in holistic terms, and this chapter has provided many specific policy recommendations. These, the author firmly believes, are of the utmost importance in the struggle to attain the rule of law in Iraq, with an attendant culture of respect for human rights and compliance with international obligations.

CHAPTER EIGHT

CONCLUSION

Introduction

The thesis was undertaken to test the correctness of the proposition that the reformed Iraqi criminal justice system accords with international standards in the area of human rights, and particularly the objective standards of the ICCPR, which is binding on Iraq as a State Party. This conclusion incorporates the final judgment of the thesis, which is that the new reforms have failed to achieve full compliance with Iraq's obligations under international law. It contains the following sections: the main findings of the thesis; a summary of the research findings chapter by chapter; implications for further research; and a holistic summary of the key points considered.

8.1. Main findings of the research

Ten years has passed since the Saddam regime was removed. The end of the regime was one of the most striking developments in the history of modern Iraq. A justification for the removal of the regime was that the country would be subsequently transformed into a model for democracy and the protection of human rights in the Middle East.¹ It follows that the reform of the criminal justice system was one of the most important aspects of this project. The objective of these reforms was to consolidate what was acceptable and to repair what was defective in order to promote the protection of human rights. In summation, this research has sought to examine whether the Iraqi criminal justice system, after ten years of reforms, has become compliant with the objective standards of international law.

All issues raised by the reform of the Iraqi criminal justice system deserve analysis. However, a number of themes were excluded because a given topic of study needs to be covered in depth, and some issues could not be comprehensively addressed due to

¹ See Chapter One.

limitations of time and of the scope of the research.² Issues unexplored in this work deserve further in-depth study in future.

The present work focused on three rights of an accused person in the pre-trial stage of criminal proceedings: the right to liberty, third party access rights, and the right to be free from self-incrimination. The work from the outset showed that an improvement in the human rights of persons accused in criminal procedures is an important milestone in Iraq's journey towards the rule of law in post-Saddam Iraq. However, the foregoing analysis of these three rights has raised concerns that, despite the efforts towards reform of the criminal justice system, there has been a failure to fully protect these three identified rights. The rights of a person under investigation in the pre-trial stage continue to be violated in Iraq, and a disparity between the practice of the system and obligations under international human rights standards has been established in this research by the inclusion of substantial evidence. The research has identified a wide range of reasons for the failure of the post-2003 reforms to bring those procedural rights into full conformity with international standards, and measures have been proposed to redress the defective areas.

It is hoped that this research will assist in the creation of guidelines for determining whether the justice system in post-Saddam Iraq is fully compliant with the international standards or whether it still falls short of the standards of international due process. Little research has been conducted to explore the successes and failures of the reforms, and the result has been a serious deficit in our understanding that needs to be filled. Despite the fact that little research has been conducted in this area, the efforts to reform the legal system in post-Saddam Iraq have attracted the curiosity of legal experts around the world. This study is offered as a contribution to that much-needed research.

8.2. Summary of the research findings by chapters

Chapter One was an introductory chapter which mapped the route for the entire work. In summation, this chapter showed that the Iraqi criminal justice system during the

² See Chapter One for more detail.

Saddam era failed to protect the rights of a person under criminal proceedings as there were no satisfactory legal provisions, and, in practice, accused persons were defenceless.³ This fact was established at the outset of this thesis and then substantiated through a historical review of the trajectory of the disrespect for human rights in the criminal justice system under the Ba'ath party regime.

After the fall of the Saddam regime, the Iraqi criminal justice system was overhauled with the goal of establishing the rule of law as well as complying with international human rights obligations. Of particular relevance, there were other provisions incorporated in the ICCP. The aim of these legal provisions is to promote, protect and improve human rights in the post-Saddam criminal justice system. However, the main argument of this thesis, which was presented in this chapter, was that the reformed criminal justice system has failed to fully protect the rights in the three identified areas and that there are deficiencies that need to be addressed in order to fully meet obligations under international human rights law in order to ensure the rule of law.

Each subsequent chapter provided a part of the findings related to the key theme of the research. Answering research questions at each stage of the research process formed the key findings. The findings presented throughout the chapters of this thesis have shattered the myth of successful criminal procedure reform and have revealed a vital disparity between the Iraqi system and international human rights standards that must be filled.

Chapter Two demonstrated that in the new era of post-Saddam Iraq, much progress has been made on a number of defective areas fronts of the past era. The ending of the totalitarian regime encouraged the establishment of a democratic state. Once this need for reform was established, the research then reviewed the reform efforts to bridge the gap between the system and the rule of law. The rule of law is of particular importance for the solution to many of Iraq's problems. It requires the establishment of a new criminal justice system in line with obligations under international law and transition from a totalitarian regime to a democracy. That is why after Saddam's regime was removed in 2003, the main focus for Iraqis and the international

³ See Chapter One.

community was restoration of the rule of law. Many significant programmes of work have been carried out to reform the legislative framework, the judicial framework, the police force and other justice personnel and institutions of the criminal justice system, all with the aim of seeking justice in the law and practice.

The chapter described this series of reforms, which were made under the assumption that they would foster a new era of human rights protection and with the belief that the reformed system would be far removed from the past era under the Ba'ath regime. A critical element of the new era is respect for human rights within a reformed criminal justice system under the democratic rule of law. Important initiatives have been put in place regarding Iraqi criminal law. There is a new Constitution, where respecting of human rights is a basic requirement, and the vision is one of democracy.

Thus, it is no surprise that the Constitution sets out the basic rights of persons who are under criminal proceedings. Steps have been carried out to provide an independent judicial system. Steps have been taken to overhaul the police and other justice personal and institutions of the criminal justice system. Iraq became a party to a number of international human rights treaties, such as the UN CAT and the ICPED. Several other bodies have been established with competence in human rights matters, such as the Ministry of Human Rights, the Parliamentary Human Rights Commission and the Higher Commission for Human Rights.

The chapter showed that, despite having taken significant steps, many challenges regarding the rule of law remain in Iraq. The analysis of the steps that have been taken to entrench the rule of law and human rights, with a focus on the Iraqi criminal justice system, has demonstrated that the reform of justice in post-Saddam Iraq has not fully come to fruition. Two observations were presented. On the one hand, for the purpose of improving justice, the reform established several mechanisms for human rights protection; but on the other hand, they do not seem to be adequate protective mechanisms.

Chapter Three examined the investigative system and pre-trial investigation process. It made clear that a full evaluation of the post-Saddam criminal justice reform must involve an investigation of the process as whole as well as into the details of the three

selected rights. Many problems related to the system were viewed in the light of international human rights law and the standards of due process. The outcomes of the chapter critiqued the myth of the competency of the Iraqi investigative system, and the arguments cast light on problems regarding the investigative system in the preliminary investigation stage and the agencies involved, such as the police, the public prosecution and the investigating judge.

It appeared that the investigative system was a cornerstone of human rights abuse in the criminal justice system. One cause was the diffusion of power to many parties other than the investigating judge, particularly to law enforcement officers, to conduct criminal proceedings at the initial criminal investigation stage before the judicial proceedings. The chapter showed that the ICCP empowers police officers, including those who have no investigator qualifications, to conduct investigations in some instances without the need to obtain permission from the judicial investigator or the investigating judge or to even notify them of the matter. Law enforcement officers – having been given broad power – have not fully respected Iraq’s obligations under international human rights law in their daily practice. It has been substantiated that police personnel in Iraq still use coercive means to obtain incriminating statements, and their investigations, which play a crucial role in the overall proceedings, are marked by a failure to maintain even minimal standards. Despite the lack of procedural due process, this research notes that statements given at this stage of proceedings have been accepted by courts in numerous cases.

In addition, the police handling criminal investigations are inadequately supervised by judicial authority. In spite of the fact that criminal proceedings under Iraqi law should be conducted under the supervision and control of judicial authority, many challenges exist in actual practice. In reality, despite these provisions, judicial authorities cannot even impose disciplinary action when police do not follow required duty or disobey instructions and orders given during the investigation of crimes. Consequently, supervision may not be adequately applicable since a disciplinary case against a police officer is outside the jurisdiction of judicial authority.

Moreover, the role of the public prosecutors in criminal proceedings needs to be undergone corrective measures. This research demonstrated that the public

prosecutors although become enjoy the same privileges as professional judges the power of investigation given under the ICCP in some instances is not practical. This chapter showed that they should be disqualified from carrying out an investigation owing to a conflict of interests between the powers of accusation and those of investigation.

Structurally, the system needs to be realigned, particularly by condensing the broad powers of police and recentralising investigation power in the judicial authority (the investigating judge and judicial investigator).

This in-depth study of the Iraqi criminal justice system as a whole provided an entry point into the next three chapters, which focused on the three identified rights. These three chapters revealed many problems related to the protection of a person under pre-trial investigation when viewed in terms of international human rights law. The wealth of evidence revealed during the research process suggests that the reformed criminal justice system, which is considered by many a cornerstone of the rule of law and public confidence in post-Saddam Iraq, has been overwhelmed by the day-to-day relating of Iraq.

Chapter Four analysed the right to liberty by addressing the question about the extent to which the reform of law and practice during arrest and detention were in line with binding standards. The chapter identified various shortcomings in the legal framework and practice during the process of arrest and detention. Despite the formal entitlement to persons under arrest or detention to the right to be protected from deprivation of liberty, these new provisions did not fully resolve the problem. It was evident that in actual practice a great number of persons were unnecessarily arrested and detained. Carrying out arrests based on unreliable information has been a notable abuse of the liberty of individuals over the last several years.

Furthermore, a flawed legal regime has been a significant factor in underscoring the loophole between the system and international standards. For example, the research revealed that some of the provisions of Iraqi law give police the power to arrest without a warrant and outside the scope of *flagrante delicto*. The research has shown

that such legal provisions must be rigorously limited because they could open the gate to the abuse of the right of individuals to liberty.

Under the ICCP, there are no provisions that impose the duty upon the arresting officer to notify the arrestee of the reasons for the arrest. International human rights law makes clear that anyone who is under arrest shall be informed of the reasons for the arrest and that failure to inform the arrestee violates international rules under Article 9(2) of the ICCPR. This chapter also makes clear that new changes have not fully resolved the problem that arrested persons could spend a long time in police custody before they are brought before the judicial authority. The research found that so far there are defective provisions, which remain in force have been overlooked in post-2003 reforms. These provisions supported the idea that modifications to the post-Saddam criminal justice system against arbitrary arrest and detention have not achieved full conformity with the binding obligations of international human rights law. In accordance with these provisions, executive authority rather than the judges have been given the power of detention in some circumstances. So this is unconstitutional, clearly inconsistent with Article 15 and 37 of the Permanent Constitution. As a matter of law, detentions carried out in accordance with unconstitutional provisions are unlawful, thus those provisions are inconsistent with international standards.

The chapter has revealed that when the investigating judge initially decides detention in the first place or to continue the detention period, he may likely later refuse any application regarding a review of such detention.⁴ Unlike the requirements of the ICCPR under Article 9(4), Iraqi law does not provide any legal basis on which a detainee can physically appear before the competent authority during such a review, nor on which his lawyer can represent him – that is, such a review is conducted only on paper. This flaw clearly impedes the system from ensuring the right to liberty under international human rights law.

This chapter has also shown the complex measures in law and implementation that may impede the release of the detainee on bail. The human rights situation regarding detention has worsened due to the fact that Iraqi law has not taken into account the

⁴ See the discussion about this issue in Chapters Three and Four.

clear maximum length of pre-trial detention, and no adequate provisions have been set out in this regard. Consequently, the evidence which has emerged from this chapter suggests that the protection of the right to liberty under the criminal justice system in post-Saddam Iraq have not been in line with the obligations of Iraq under international law. Compliance with international standards requires a holistic reform in the law and in practice.

Chapter Five addressed the question of whether Iraqi law and working practice protect the right of access to free legal assistance and an interpreter during the pre-trial stage. It analysed the situation and the associated deficiencies. The research showed that the law now entitles an accused person to a lawyer during the pre-trial investigation stage. However, notable shortcomings include the absence of satisfactory provisions in the law and in practice.

The effective right of access to a lawyer is not guaranteed from the first moment of arrest during pre-trial criminal proceedings. Iraqi law only guarantees access to a lawyer at the later stages of the investigation – during judicial process when the accused person is brought before the Investigating Court. There is no explicit provision to ensure the right of access to a lawyer for persons facing police investigations, whereas under international standards, the right of access to a lawyer should be guaranteed by sufficient due process from the outset of the criminal proceedings. The right of access to a qualified lawyer should be guaranteed free of charge for indigent persons under criminal investigations from the outset of proceedings.

In addition, under the interim administration post-2003, the duty of the arresting officer to inform the arrested person about his right to a lawyer at the time of arrest is not adequately stipulated. Notable shortcomings also include the absence of the duty to inform a person under police questioning about the right of access to a lawyer. The reforms made during the time of the interim administration post-2003, which were meant to be transitional but remain in force, have proven unsatisfactory regarding this right. The research has shown the weaknesses of those changes due to the fact that they were made in a piecemeal, non-holistic fashion. The research also led to

evidence that, in practice, the majority of persons facing criminal proceedings were not given their right to a lawyer throughout the pre-trial stage.

Furthermore, the research pointed out some defective areas regarding confidential communication between lawyers and their clients. In addition, the research revealed some flaws and challenges in the system with regard to provide effective and practical representation. While, according to international standards a person under criminal proceedings should be guaranteed the right of access to a qualified legal assistance.

This chapter also pointed out a critical problem with regard to the presence of an interpreter during the primary investigation stage. It is problematic that in the Iraqi criminal justice system, there are no legal provisions which give a person under investigation the right of access to an interpreter. In consequence, the post-Saddam legislature has not exercised its statutory powers in such a way that the new system can attain the mandatory minimum level of international standards. International standards entitle an accused person who cannot understand or speak the language of the proceedings the opportunity to receive the service of an interpreter to protect the interests of justice; however, the legal texts in Iraqi law generally have no explicit statutory rule in this regard and are therefore deficient. At the same time, as has been shown in this chapter, in a post-conflict society like Iraq, which has not known the rule of law or experienced good practice in criminal justice, there is an absence of logical legal provisions, leading to the abuse of individuals' human rights in practice – particularly considering that Iraq is a civil law country where the laws must cover every situation, and there is no scope for judges to fill the gaps.

Chapter Six considered the question whether post-Saddam reforms carried out in relation to the right of the accused person against self-incrimination do indeed bring that right to fully comply with international law. The answer to that question was that the protection of the present right still continues to fall short of international standards in many aspects. The chapter examined in-depth the provisions of Iraqi law and what has been done through the reforms with regard to this right. Most importantly, it discussed the possible situation in which, contrary to the due process rights norm, the denial of the right against self-incrimination may happen at the pre-trial investigation for the purpose of obtaining confessions to be used against an accused person to

secure a conviction at trial. The chapter verified that these aspects are in non-compliance with binding obligations under international rules.

The chapter also examined the notable elements of the rights to protection against involuntary confession, to the presumption of innocence and to protection from ill treatment. It is argued that here the reforms have not entirely failed. However, an assessment of the reforms in light of international due process demonstrated that there have been situations where the progress achieved through the reforms has been called into question. It was asserted that the accused person enjoys greater protection under international standards, therefore emphasising the importance of the need to promptly follow the procession of modern developments in criminal proceedings. The subsequent conclusion, then, was that the right of the accused person against self-incrimination remains unfulfilled because the reformed Iraqi criminal justice system continues to rely heavily on confessions to secure convictions at trial.

Chapter Seven asked the question: Why has the story of a successful Iraqi criminal justice system reform process turned out to be a myth?

The discussion throughout this chapter focused on the fact that since 2003 the system has undergone significant measures of reform. Despite these measures, there are many factors underlying why the post-Saddam system is still in non-compliance with obligations under international standards. This chapter identified in detail these factors. Some of these factors are related to the legal culture and the law itself, while other factors involve daily working practice and social attitudes towards human rights. It should be conceded therefore that, in order to tackle the problematic deficiencies and move forward, much greater reform is still required both in law and practice. As explained in this chapter, the reforms to the law in the three relevant areas have not been enough to protect these three identified rights; a holistic reform of the system is particularly important to bring about the necessary change. Consequently, a series of reforms were proposed to be carried out in the near future in order to achieve full compliance with international human rights standards. The key reforms suggested in this chapter include the areas of law reform and the training of criminal justice personnel, accountability and impunity, improving the investigative system and procedural safeguards, improving the performance of the High Commission for

Human Rights, funding and resources, combating corruption, improving social attitudes and enforcing international rules domestically.

To wrap up, some scholars have noted the Iraqi people's pride in their judicial system.⁵ It has been demonstrated throughout this thesis, however, that such pride is misplaced and that much more needs to be done to address deficiencies and to develop modern procedural safeguards for the international standards. The hope is that the main shortcomings shown through this project will generate momentum for reform in the near future in order to overcome transgressions against human rights for the good of the person who is under criminal proceedings. This thesis will be a "best practice" guide for the Iraqi criminal justice system in the area of pre-trial rights. It is the author's plan to use this work to assist the Iraqi legislature and other criminal justice personnel (those in the legal profession, police, judicial officials and scholars) and to assist those institutions which need to explore a targeting strategy to implement the proposals and to win the long-term struggle for human rights in the administration of justice.

8.3. Further suggested research

In a nutshell, this work has argued that the reformed criminal justice system has failed to fully protect the three identified rights. It suggests that a complete overhaul of the Iraqi criminal justice system is needed and that the areas identified in this work are just the tip of the iceberg. More work is clearly needed. To this end, it is hoped that this discussion will create an encouraging stimulus for further research. Further research projects are required in the area of criminal justice system reform. Priority should be given to researching, for example, procedural safeguards to human rights, judicial capacity and the role of judges in building the post-Saddam Iraqi, police power, programmes to build a successful reformed prison system, corruption, the lack

⁵ Professor Brooks indicates that "the Iraqis are extremely proud of their legal system. At our first meeting with Iraqi judicial officials, ... their top priority was to reinforce the idea that Iraq had a good legal structure" Scott Carlson et al., "Establishing the Rule of Law" (2004) 33 *Georgia Journal of International and Comparative Law* 119, 130; see also Travis Hall, "Address: Post-War Criminal Justice in Iraq" *Georgia Journal of International and Comparative Law* 161.

of oversight in the system, impunity and accountability as obligations under international law, gaps in the Iraqi Permanent Constitution, etc. Such research projects could be embarked upon in all these different areas in light of holistic post-conflict measures for respecting human rights and the rule of law.

Such further research can also benefit from the current study, particularly with regard to the limitations this research faced. It should be clear that, owing to the controversial and ongoing nature of this topic, reliable empirical evidence is difficult to obtain. The level of violation of human rights and corruption in the criminal justice system and the confused political landscape being as it is mean that such information is firmly in the grips of the incumbent authorities. As a result, most of the information relied on came from international and national human rights organisations. Even so, the author has been able to draw conclusions from these materials. That does not detract from fact that being said, there must be more openness and transparency to enable further research to be carried out.

The ability to examine the criminal justice system as it works on a day-to-day basis would lead to a more holistic and informed understanding of all aspects of the system. As previously recommended in Chapter Seven, information must be collected through reliable means, recorded and analysed. This also requires equipment and trained staff to cover the system. This kind of research would enable accurate monitoring and interventions as necessary. It would assist with bridging the gap between the national system and Iraq's international obligations.

8.4. Conclusion

This study has revealed major structural and system problems. Changes have been made in a piecemeal, non-holistic way. Changes made in the time of the interim administration post-2003 were meant to be transitional but remain in force. The reform project has stalled. The preceding chapters of this thesis have detailed the problems in the Iraqi criminal justice system. The system cannot operate in accordance with binding international standards unless the human rights of individuals are respected.

Iraq needs to promote these rights through a major overhaul of the system – in particular, through strengthening the pre-trial procedural safeguards for persons facing criminal proceedings. The author’s proposals and recommendations are of particular significance in regards to moving its criminal justice system forward and achieving a genuine commitment to the rule of law. The rule of law in the Iraqi criminal justice system is today a pipe dream, it need not be, and this research is an important step for the future.

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