

# **ACCESS TO JUSTICE FOR CHILDREN: IRAQ**

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## **I. What is the legal status of the Convention on the Rights of the Child (CRC)?**

### **A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?**

Iraq acceded to the CRC on 15 June 1994.<sup>1</sup> However, Iraq's ratification is subject to a reservation regarding Article 14 para. 1 of the CRC, which reads: "*States Parties shall respect the right of the child to freedom of thought, conscience and religion*".

Iraqi jurisprudence dictates that children inherit their religion, with Muslims, for example, not being given the freedom to choose a religion, despite the Constitution providing for freedom of thought, conscience and religious belief and practice.<sup>2</sup> Consequently, Iraq's perception of its implementation of the CRC, whether as a matter of rights or one of privileges accorded to children, has previously been called into question by the Committee on the Rights of the Child.<sup>3</sup> It must be noted that, since the time of the above criticism, the new Iraqi Constitution does stipulate that: "*Each individual has the freedom of thought, conscience and belief*".<sup>4</sup> Although there are considerable doubts as to whether this is in fact the case in practice.<sup>5</sup>

At the time of its ratification by Iraq, the CRC was self-executing and its provisions could have been invoked before the courts.<sup>6</sup> Whilst the Iraqi Government had developed a legislative framework for recognition of the CRC, its provisions and principles had not yet been fully reflected in the country's legal regime.<sup>7</sup> The Committee on the Rights of the Child has also expressed its concern regarding the need to strengthen law enforcement in all areas covered

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<sup>1</sup> Committee on the Rights of the Child, Reporting status for Iraq, State party's report, 9 December 1996, para. 3, available at:

[http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=IRQ&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=IRQ&Lang=EN)

<sup>2</sup> U.S. Department of State, July-December, 2010 International Religious Freedom Report - Iraq, 13 September 2013, available at: [http://www.state.gov/j/drl/rls/irf/2010\\_5/168265.htm](http://www.state.gov/j/drl/rls/irf/2010_5/168265.htm).

<sup>3</sup> Committee on the Rights of the Child, Summary record of the 482nd meeting - Iraq, 13 April 1999, CRC/C/SR.482, para. 10, available at:

<http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/7afeec7003489bb7802567550045e27a?Opendocument>.

<sup>4</sup> The Constitution of Iraq 2005, Article 42, available at:

[http://www.iraqnationality.gov.iq/attach/iraqi\\_constitution.pdf](http://www.iraqnationality.gov.iq/attach/iraqi_constitution.pdf).

<sup>5</sup> U.S. Department of State (n 2).

<sup>6</sup> Committee on the Rights of the Child, Concluding Observations: Iraq, 26/10/1998, CRC/C/15/Add.94, para. 3, available at:

<http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/CRC.C.15.Add.94.En?OpenDocument>.

<sup>7</sup> Ibid, para. 7.

by the CRC.<sup>8</sup> However, it is unclear what the current status of the Convention is, or whether its self-executing character remains, since the promulgation of the new Constitution of 2005. It also remains unclear whether the CRC has authority of national law in Iraq, as the Constitution of 2005 makes no mention of the status of international treaties and conventions within the domestic legal system.

Iraq has also ratified two of the Optional Protocols to the CRC (on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography) on 24 June 2008,<sup>9</sup> but has not signed or ratified the third Optional Protocol on a communications procedure.

B. Does the CRC take precedence over national law?

As aforementioned in part I.A, it is not possible to ascertain with any certitude the legal status of international treaties and conventions in Iraq. The Constitution merely states that:

“[The Council of Representatives is competent for] *Regulating the ratification process of international treaties and agreements by a law, to be enacted by a two-thirds majority of the members of the Council of Representatives*”,<sup>10</sup> and that:

“[The President is competent to] *ratify international treaties and agreements after the approval by the Council of Representatives*”.<sup>11</sup>

Article 13 of the Constitution of Iraq affirms its supremacy over all other laws in the country, both regional and federal.

Consequently, the status of international instruments that have been ratified by the State of Iraq remains unclear due to a lack of legislative provisions addressing this matter.

C. Has the CRC been incorporated into national law?

Please refer to parts I.A and I.B.

D. Can the CRC be directly enforced in the courts?

As aforementioned in part I.A, prior to the Constitution of 2005, it was possible to rely on the provisions of the CRC before national courts in Iraq. There is, however, uncertainty as to the status of the Convention since the promulgation of the 2005 Constitution, which makes no reference to the status of international treaties and conventions within the domestic legal system. The research has not identified any conclusive information in this regard.

E. Are there examples of domestic courts using or applying the CRC or other

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<sup>8</sup> Ibid, para. 8.

<sup>9</sup> Further information regarding Iraq’s ratification of these two Optional Protocols is available at: [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=IRQ&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=IRQ&Lang=EN)

<sup>10</sup> The Constitution of Iraq 2005 (n 4), Article 61(4).

<sup>11</sup> Ibid, Article 73(2).

## relevant international instruments?

The research has not identified any recorded cases of domestic courts using or applying the CRC. The lack of court reporting in Iraq means that there is limited publicly accessible information regarding any attempts to enforce the various protections for children set out in the Convention in accordance with Iraqi law.

## II. **What is the legal status of the child?**

### A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

The Constitution affirms that litigation is a right that is protected and guaranteed for all.<sup>12</sup> It goes on to confirm that every person shall: “*have the right to be treated with justice in judicial and administrative proceedings*”.<sup>13</sup> Therefore, children and their representative can bring cases to challenge children’s rights violations.

Article 106 of the Civil Code provides that an individual is considered a minor until they attain 18 years of age,<sup>14</sup> and the Personal Status Act states that the role of the guardian ends once a child has attained 18 years of age.<sup>15</sup>

In civil cases, the party must have a ‘real’ [legal] interest in the matter, although a lawsuit in anticipation of potential harm is also possible.<sup>16</sup> In such instances, however, the claimant incurs the court fees.<sup>17</sup> The Civil Procedure Act states that it is a requirement for all parties to proceedings to possess the necessary capacity to exercise their rights relating to the lawsuit at hand, it is not permissible for their legal representative to make use of these rights in their place.<sup>18</sup> The Civil Procedure Act makes no further mention of children as claimants and, consequently, it appears that a representative, who has full legal capacity, must act on behalf of the child.

Criminal proceedings are initiated upon either the oral or written notification of a complaint to the judge of investigations, a detective, any official at a police station, or any member of the judicial police, by the injured party or their legal representative, or any person(s) made aware of the crime.<sup>19</sup> If the victim of a

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<sup>12</sup> The Constitution of Iraq 2005 (n 4), Article 19(3).

<sup>13</sup> Ibid, Article 19(6).

<sup>14</sup> Law No. 40 of 1951, the Civil Code, Article 106, available at (Arabic): <http://www.dhrd.info/pdfs/lawo-2.pdf>.

<sup>15</sup> Law No. 188 of 1959, the Personal Status Act, Article 82(2), available at (Arabic): <http://www.refworld.org/cgi-bin/txis/vtx/rwmain/opensocpdf.pdf?reldoc=y&docid=5322d5ae4>.

<sup>16</sup> Law No. 83 of 1969, the Civil Procedure Act, Article 6, available at (Arabic): <http://www.iraq-ig-law.org/ar/content/%D9%82%D8%A7%D9%86%D9%88%D9%86-%D8%A7%D9%84%D9%85%D8%B1%D8%A7%D9%81%D8%B9%D8%A7%D8%AA-%D8%A7%D9%84%D9%85%D8%AF%D9%86%D9%8A%D8%A9-%D8%B1%D9%82%D9%85-83-%D9%84%D8%B3%D9%86%D8%A9-1969-%D8%A7%D9%84%D9%85%D8%B9%D8%AF%D9%84>.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid, Article 3.

<sup>19</sup> Law No. 23 of 1971, the Criminal Procedure Act, Article 1(1), available at (Arabic): <http://www.radiodijla.com/forums/showthread.php?46109-%DE%C7%E4%E6%E4-%C7%D5%E6%E1-%C7%E1%E3%CD%C7%DF%E3%C7%CA-%C7%E1%CC%D2%C7%C6%ED%C9%D1%DE%E3-%2823%29-%E1%D3%E4%C9-1971>.

crime does not have full legal capacity (applicable to children under 18 years of age) to make a corresponding civil claim [for damages], their legal representative must act on their behalf; if the victim does not have a legal representative, it is for the judge of investigations or the court to appoint one on their behalf.<sup>20</sup> Article 3 of the Criminal Procedure Act lists a series of crimes for which it is only permissible for the victim or their legal representative to notify the authorities, these include, amongst others; adultery and polygamy where contrary to the Personal Status Act; libel, slander, threats, abuse, divulging secrets regarding a public servant in exercising their duties or due their exercise; throwing rocks or other objects at modes of transport, hangars, groves or buildings.<sup>21</sup>

B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a representative?

As outlined in part II.A above, it is to be deduced that individuals under 18 years old would only be able to bring cases (including cases to challenge violations of children's rights) in conjunction with an appropriate representative. Appropriate representatives are:

- a) parents;
- b) legal guardians;
- c) other adult representatives; or
- d) court-appointed custodians.<sup>22</sup>

Under the Juvenile Welfare Act, if the court finds that the best interests of the child are not being represented by their parent/legal guardian, the child court has the capacity to 'limit' their guardianship.<sup>23</sup> In doing so, it is to appoint a probation officer or 'social/community researcher' to monitor the situation, their relationship, and to report on it to the court; should it be deemed unsatisfactory, the child court may terminate the parent/legal guardian's relationship with the child in their best interests.<sup>24</sup> In such instances, the child court may replace the negligent/unsuitable parent/guardian, review/nullify any decision taken by them and appoint a new legal guardian to represent the best interests of the child and the community.<sup>25</sup> A guardian may be liable to a fine whenever negligence of their duty of care results in a child's homelessness or deterioration in behaviour;<sup>26</sup> the fine may rise should the juvenile in question commit a misdemeanour or crime as a result;<sup>27</sup> whenever delinquency is facilitated by a guardian, they may be liable to imprisonment.<sup>28</sup> The Juvenile Courts are to accept a juvenile's guardian or relative to act as their legal representative, or any official from a social institution, without the requirement of a written transfer of agency, all the

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<sup>20</sup> Ibid, Article 11.

<sup>21</sup> Ibid, Article 3.

<sup>22</sup> Law No. 76 of 1983, the Juvenile Welfare Act, Article 3(5), available at (Arabic): <http://www.iraq-lg-law.org/ar/node/876>.

<sup>23</sup> Ibid, Article 35.

<sup>24</sup> Ibid, Article 36.

<sup>25</sup> Ibid, Article 37.

<sup>26</sup> Ibid, Article 29(1).

<sup>27</sup> Ibid, Article 29(2).

<sup>28</sup> Ibid, Article 30.

while taking into account the provisions of Article 144 of the Criminal Procedure Act.<sup>29</sup>

C. In the case of infants and young children, how would cases typically be brought?

Please see parts II.A and II.B above.

D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

Legal aid regarding criminal matters is available to individuals who are being prosecuted for an alleged crime as a constitutionally protected right.<sup>30</sup> The Criminal Procedure Act states that if there is a conflict of interests between the victim of a crime and their legal representative, or should they not have a legal representative, then the judge of investigations is to appoint one to them on their behalf.<sup>31</sup> It appears, however, that there are no provisions that allow legal aid to child victims of crime.

For civil matters, legal aid is available to the ‘poor’ who cannot afford the financial cost of litigation or appeals.<sup>32</sup> It may be granted to organisations with ‘charitable or righteous aims’.<sup>33</sup> However, the granting of legal aid is conditional upon the party’s financial status and the likelihood of success in proceedings.<sup>34</sup> Applications for legal aid are to be made to the competent court at which the case or appeal is under consideration, outlining the facts of the case and the evidence in support of it and a certificate or an official document from the Municipality of Baghdad confirming the party’s lack of financial means.<sup>35</sup>

E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g., would a child's parents or guardian have to agree to a case being brought)?

Please refer to the previous sections of part II, as they contain all of the limitations that were identified by the research.

**III. How can children’s rights violations be challenged before national courts?**

A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

The Federal Supreme Court has jurisdiction regarding the overseeing of constitutionality of laws and regulations currently in place; interpreting the Constitution’s provisions; as well as settling disputes between federal judicial

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<sup>29</sup> Ibid, Article 60.

<sup>30</sup> The Constitution of Iraq 2005 (n 4), Article 19(11).

<sup>31</sup> The Criminal Procedure Act (n 19), Article 5.

<sup>32</sup> The Civil Procedure Act (n 16), Article 293(1).

<sup>33</sup> Ibid, Article 293(2).

<sup>34</sup> Ibid, Article 293(3).

<sup>35</sup> Ibid, Article 294(1).

institutions and those of the regions and governorates, amongst other things.<sup>36</sup> Decisions of the Federal Supreme Court are final and binding for all authorities.<sup>37</sup> In addition, there is a constitutional prohibition on the drafting and promulgation of legal provisions according immunity from appeal for administrative decisions and actions;<sup>38</sup> this implies that such decisions and actions may be challenged directly before the Federal Supreme Court.<sup>39</sup>

Civil courts have jurisdiction over all persons, natural and legal, including the government, and are competent to adjudicate in all disputes, save where this is excluded by a special provision in legislation.<sup>40</sup> The Courts of First Instance have jurisdiction in cases of small value, property cases, cases concerning religious rights, certain property rights and any other matters where the jurisdiction of the Courts of First Instance is stipulated in legislation.<sup>41</sup> The Courts of Appeal have jurisdiction in the following cases: review/appeal of decisions of Courts of First Instances, and other matters set forth in legislation; challenges to decisions of the Magistrates Courts of the highest degree, in accordance with the provisions of the Civil Procedure Law and other legislation; and to challenge decisions of the Courts of First Instance set out in paragraph one of Article 216 of this Act (relating to ‘urgent judgements’).<sup>42</sup>

With regard to criminal matters, the Judicial Police are charged with the investigation of crimes and accepting information and complaints received by them in respect thereof; they are to provide assistance to the judges of investigations, investigators, police officers, commissioners, and provide them with information about the crime(s) in question and the perpetrators, handing them over to the competent authorities; they also have to prove/validate all the actions that they have undertaken in this regard through detailed reporting.<sup>43</sup> It is for the victim of the crime in question or any witness to report and initiate the public action by informing the Public Prosecutor’s office.<sup>44</sup> All persons assigned to public service positions, medical professionals and others, who become aware, during the discharge of their responsibilities or due to them, of a crime having been committed, or suspect that a crime may have been committed, have a duty of care and responsibility to immediately inform the parties mentioned in Article 47 of the Criminal Procedure Act of this information.<sup>45</sup> Any official in a police station that receives a report of a crime or misdemeanour having been committed is obliged to immediately inform the detectives and write up a report, which is to be transferred to the judge of investigations and/or the investigator(s).<sup>46</sup> If the judge of investigations finds that the person responsible for a crime or misdemeanour committed cannot be held accountable due to their

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<sup>36</sup> The Constitution of Iraq 2005 (n 4), Article 93.

<sup>37</sup> Ibid, Article 94.

<sup>38</sup> Ibid, Article 100.

<sup>39</sup> Article 93(3) of the Constitution, in support of this and in reference to federal laws and decisions, states the following: “*The law shall guarantee the right of direct appeal to the Court [...] those concerned individuals [...]*”.

<sup>40</sup> The Civil Procedure Act (n 16), Article 29.

<sup>41</sup> Ibid, Article 31.

<sup>42</sup> Ibid, Article 34.

<sup>43</sup> The Criminal Procedure Act (n 19), Article 41.

<sup>44</sup> Ibid, Article 47(1).

<sup>45</sup> Ibid, Article 48.

<sup>46</sup> Ibid, Article 49(1).

age, the judge is to issue a decision rejecting the action and canceling the reported complaint.<sup>47</sup>

B. What powers would courts have to review these violations, and what remedies could they offer?

Although the Constitution does not state what power the Federal Supreme Court has to remedy breaches of human rights, it states that the Court's decisions are final and binding for all authorities.<sup>48</sup>

The Civil Code accounts for measures such as strict performance [of legal obligations],<sup>49</sup> and compensatory measures,<sup>50</sup> amongst other civil measures.

C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

The Criminal Procedure Act states that the name of the victim is to be included in the decision to indict the alleged perpetrator of a crime or misdemeanour.<sup>51</sup> Petitions for initiating civil cases must also include the name of all parties.<sup>52</sup> Research did not identify any provisions permitting for a civil case to be brought on behalf of an unidentified or anonymous child victim. Therefore, it would appear that naming the child is required.

Nonetheless, there are certain provisions protecting the identity of children involved in matters of juvenile justice when they have been accused of a crime or misdemeanour; it is prohibited to make public the name of the juvenile, their address, the name of their school, their photograph or any other information which may lead to their identification.<sup>53</sup> There are no similar provisions in the Civil and Criminal Procedure Acts.

D. Is any form of collective action or group litigation possible, with or without naming individual victims?

The Criminal Procedure Act states that if there are multiple victims of the same crime and the crime is listed under Article 3 of the Act - please see part II.A - it is possible for one of them to present the complaint to the authorities on behalf of all victims.<sup>54</sup> It is also possible to conduct proceedings against multiple defendants that participated in criminal activities together.<sup>55</sup>

The Civil Procedure Act states that group litigation is possible for some types of cases, including where multiple rights are affected and the reason and parties are

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<sup>47</sup> Ibid, Article 130(1).

<sup>48</sup> The Constitution of Iraq 2005 (n 4), Article 94.

<sup>49</sup> The Civil Code (n 14), Article 246 et seq.

<sup>50</sup> Ibid, Article 255 et seq.

<sup>51</sup> The Criminal Procedure Act (n 19), Article 131.

<sup>52</sup> See part IV.A of this report.

<sup>53</sup> The Juvenile Welfare Act (n 22), Article 63(1).

<sup>54</sup> The Criminal Procedure Act (n 19), Article 4.

<sup>55</sup> Ibid, Article 133.

the same.<sup>56</sup> Civil suits will also be consolidated into one if there are several plaintiffs and their claim was tied to a particular relationship or association or if there are multiple defendants in relation to the same claim.<sup>57</sup>

E. Are non-governmental organisations permitted to file challenges to potential children's rights violations or to intervene in cases that have already been filed?

There are no legislative provisions expressly outlining the role, if any, of non-governmental organisations in filing challenges to potential children's rights violations. Consequently, it remains unclear whether any such practice exists in Iraq and the research has not identified any notable instances.

IV. **Practical considerations.**

A. Venue. In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

The Civil Procedure Act stipulates that the court before which a claim may be brought is context-dependent. Cases regarding matters of religion or transfer of rights must typically be brought in the competent court with jurisdiction for the place of the defendant's domicile;<sup>58</sup> or, if the defendant is a legal person, their place of administration.<sup>59</sup> If there are a number of defendants, proceedings are to take place in the court located nearest the domicile of one of them.<sup>60</sup> The claimant's petition must include the following information regarding the lawsuit: the name of the court before which the case is brought; the date on which the claim has been made; the names of all parties involved and their place of residence; a statement of the location chosen by the claimant for the purposes of notification [of the claim]; a detailed statements of the nature of the claim; the facts of the case and all supporting evidence; and a signed authorisation for representation by a responsible of a competent authority, if applicable.<sup>61</sup>

Criminal proceedings are initiated and conducted in accordance with the procedure outlined in part II.A. Criminal Courts have jurisdiction over misdemeanours, the Grand Criminal Courts have jurisdiction over crimes, and the Court of Cassation has jurisdiction over misdemeanours, crimes and other matters where stipulated by law.<sup>62</sup> The requirements regarding territorial jurisdiction or the locality of tribunals are outlined in Article 53 to 55 of the Act; this includes the location where the crime took place, or where the victim was found, for example. Criminal proceedings are public as a general rule; however, judges have the competence to make part of or the whole trial secret in certain circumstances.<sup>63</sup> Although not expressly stated, it is probable that one such reason/circumstance would be in relation to the protection of a child implicated in such proceedings. Criminal trials in which a child is the defendant are

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<sup>56</sup> The Civil Procedure Act (n 16), Article 44.

<sup>57</sup> Ibid.

<sup>58</sup> The Civil Procedure Act (n 16), Article 37(1).

<sup>59</sup> Ibid, Article 38.

<sup>60</sup> Ibid, Article 37(2).

<sup>61</sup> Ibid, Article 46.

<sup>62</sup> The Criminal Procedure Act (n 19), Article 138.

<sup>63</sup> Ibid, Article 152.



conducted in closed sessions, which may only be attended by members and staff of the court, opposing parties, witnesses, health and social professionals from concerned institutions [in the interests of the child], representatives of associations dealing with juvenile affairs, and the juvenile's relations/family.<sup>64</sup>

Iraq has a parallel system of religious courts, the Sharia Courts, and Article 2(1) of the Constitution states that “*no law may be enacted that contradicts the established provisions of Islam*”. The Civil Procedure Act outlines the matters over which these courts have jurisdiction; they generally deal with matters of personal status and family matters, including marriage; matters relating to the marital home; guardianship matters; verifying the majority of persons; matters of inheritance; and lost individuals.<sup>65</sup> The majority of these decisions will affect the life of any children involved.

- B. Legal aid / Court costs. Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

In criminal matters, defendants have the right to legal representation during proceedings; if this is beyond their means, it is for the court to secure a lawyer for them without them having to incur the financial cost.<sup>66</sup>

With regards to civil matters, the parties are means tested in order to ascertain whether they are entitled to legal aid from the state, as aforementioned in part II.D. Otherwise, claimants are to cover the court fees and attorney fees, except for penal tribunals, appellate courts or before the Court of Cassation.<sup>67</sup>

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practising lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

Several political and charitable organisations work on improving access to legal representation in Iraq. For example, in 2010, USAID launched the ‘Iraq Access to Justice Programme’ which aims to help vulnerable and disadvantaged Iraqis understand and make use of the Iraqi legal system. The programme partners with civil service organisations who, as of 2013, have trained circa 5,000 law students and represented 3,788 vulnerable Iraqis, including children, in court to raise public awareness and inform Iraqis of their legal rights and services available to them.<sup>68</sup> Further, in 2012, the United Nations Development Programme (‘UNDP’) established three legal help desks in Erbil, Sulaimaniyah and Duhok, as part of its ‘Access to Justice Programme for Vulnerable Iraqis’. These help desk teams are each comprised of four Iraqi lawyers and a social worker. The

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<sup>64</sup> Ibid, Article 238(1).

<sup>65</sup> The Civil Procedure Act (n 16), Article 300.

<sup>66</sup> The Criminal Procedure Act (n 19), Article 123(b).

<sup>67</sup> The Civil Procedure Act (n 16), Article 40.

<sup>68</sup> Helping Vulnerable Iraqis: USAID's Access to Justice Program, available at: <http://www.epic-usa.org/access-to-justice/> (accessed on 27 October 14).

UNDP is part of the EU's support to projects supporting the rule of law and human rights in Iraq.<sup>69</sup>

It remains unclear whether or not there is an established culture of pro bono legal assistance amongst Iraqi lawyers, the research has not identified evidence of notable pro bono activities.

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

The time before which a case must be brought is dependent upon the type of violation that is committed.

The reporting of offences [crimes or misdemeanours], as set out in Article 3 of the Criminal Procedure Act, and hence the initiation of proceedings, must be made within three months of the date when the victim became aware of the offence or from the disappearance of any compelling excuse which prevented or delayed the submission of the complaint.<sup>70</sup>

Regarding matters of juvenile justice, charges cannot be brought against a child after the passage [from the date they were committed] of ten years for crimes and five years for misdemeanours.<sup>71</sup>

The research has not identified any legislative provisions indicating that limitation periods do not begin to run until a child reaches 18 years of age.

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

The Iraqi Criminal Procedure Act sets out the type of evidence that is permitted in court proceedings, which include: “[...] *admission reports, witness statements, written records of an investigation, other official discoveries, reports of experts and technicians, background information and other legally established evidence*”.<sup>72</sup>

In civil matters, the parties are to attend in person or their legal representatives are to attend on their behalf.<sup>73</sup> The courts are to accept the parties’ requests to be represented by their spouses or relatives up to the fourth degree in conciliatory matters, matters relating to Islamic Sharia and personal status proceedings;<sup>74</sup> this

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<sup>69</sup> ‘Legal help programme provides vulnerable Iraqis with access to justice’, available at: <http://arabstates.undp.org/content/rbas/en/home/ourwork/democraticgovernance/successstories/easy-and-affordable-counsel/> (last accessed on 27/10/14); ‘Iraq Commences Celebrations of the 22nd Anniversary of the Convention on the Rights of the Child’, 20 November 2011, available at: [http://www.unicef.org/iraq/media\\_6841.html](http://www.unicef.org/iraq/media_6841.html) (accessed on 22 August 2014).

<sup>70</sup> The Criminal Procedure Act (n 19), Article 6.

<sup>71</sup> The Juvenile Welfare Act (n 22), Article 70(1).

<sup>72</sup> The Criminal Procedure Act (n 19), Article 213.

<sup>73</sup> The Civil Procedure Act (n 16), Article 51(1).

<sup>74</sup> Ibid.

right is extended to corresponding cassation proceedings.<sup>75</sup> This ‘agency’ [representation] accords the representative the capacity to undertake the necessary tasks in order to safeguard the rights of the person(s) they are representing.<sup>76</sup> Although there is no express mention of children in these provisions, it would appear reasonable to deduce that they are applicable to them; as such, children may be exempted from attending civil proceedings.

In criminal matters, children that have attained the age of fifteen prior to giving evidence are to do so under oath, those that have not are to give evidence only for the purposes of ‘inference’.<sup>77</sup> It is for the judge to note in the court report any factors that may affect the capacity of a witness to provide evidence, including their age.<sup>78</sup> The Criminal Procedure Act confirms the the provisions of the Juvenile Welfare Act are to be followed during investigations and proceedings involving juveniles; and the taking of fingerprints is exempted for juveniles during said process.<sup>79</sup>

- F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

The Civil Procedure Act states that it is prohibited for any court to refrain from ruling on the pretext of the ambiguity of law, the loss of text or its deficiency, or for any judge to deny a claimant their right(s);<sup>80</sup> there is equally a prohibition on undue delays to judgments.<sup>81</sup> ‘Urgent’ judgments are also possible, so long as they are delivered without any prejudice to the rights of those concerned;<sup>82</sup> this would appear to open the door for such celerity of proceedings where that is in the best interests of a child.

Other than the express prohibition of any obstacles to justice for claimants within the Iraqi legal system and the possibility for ‘urgent judgements’, the research has not identified any further information on the matter. As such, it cannot be ascertained with any accuracy how long it might take to get a decision from the courts in Iraq.

- G. Appeal. What are the possibilities for appealing a decision to a higher court?

Under the Criminal Procedure Act, all public prosecutors, defendants, complainants, civil prosecutors and ‘civil officials’ may appeal to the Court of Cassation judgments, decisions and measures adopted by the criminal tribunals or the higher criminal courts relating to crimes and misdemeanours if they are manifestly ill-founded [legally], contain an error in the application of the law, or due to a fundamental error in due process, errors in the assessment of evidence and the sanction(s) accorded, where such errors were crucial to the final

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<sup>75</sup> Ibid.

<sup>76</sup> Ibid, Article 52(1).

<sup>77</sup> The Criminal Procedure Act (n 19), Article 60.

<sup>78</sup> Ibid, Article 65.

<sup>79</sup> Ibid, Article 242.

<sup>80</sup> The Civil Procedure Act (n 16), Article 30.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid, Article 141(1).

judgment.<sup>83</sup>

Under the Civil Procedure Act, the legal ways to challenge judgments in court are: objection to ‘default’/in absentia judgments; appeal; retrial; cassation; correction of the cassation judgment; and the objection of ‘other’ (as aforementioned in part III.E).<sup>84</sup> Appeals are only to be made by the losing party to the proceedings, and are not accepted from anyone who has waived their rights in accordance with the law before the court or through a certified letter from the notary.<sup>85</sup> Appeals are only permitted following the final judgment and not in relation to prior decisions made during proceedings.<sup>86</sup> Parties may appeal judicial decisions within the following time periods:

- Court of First Instance decisions (appeal to Court of Appeal) - within 15 days of the decision;<sup>87</sup>
- Court of First Instance and Court of Appeal decisions (appeal to Court of Cassation) – within 30 days of the decision;<sup>88</sup>
- Personal Status Courts decisions (appeal to Court of Cassation) - within 10 days of the decision;<sup>89</sup>
- Juvenile Court judgments regarding crimes (appeal to Court of Cassation) - within 15 days of the decision;<sup>90</sup>
- Juvenile Court judgments regarding all other matters (appeal to the Court of Cassation) - within 30 days of the decision;<sup>91</sup> and
- Decisions of the Federal Supreme Court are final and not subject to any challenge.<sup>92</sup>

The Civil Procedure Act contains a section, Articles 224 to 230, stipulating that it is possible for ‘others’ to object to a judicial decision. All decisions of Courts of First Instance, Courts of Appeal and Personal Status Courts are subject to ‘objection’ [cassation] from others - ‘other’ to the parties, their representatives or third parties to proceedings - if they transgress or touch upon the rights of the ‘other’ concerned.<sup>93</sup>

The Court of Cassation has jurisdiction to review decisions of the Courts of Appeal and Courts of First Instance, as well as judgments of Personal Status Courts and other matters as prescribed by law.<sup>94</sup>

H. Impact. What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

There is no real practice of case reporting in Iraq, as such, it is difficult to assess

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<sup>83</sup> The Criminal Procedure Act (n 19), Article 249(1).

<sup>84</sup> The Civil Procedure Act (n 16), Article 168.

<sup>85</sup> Ibid, Article 169.

<sup>86</sup> Ibid, Article 170.

<sup>87</sup> Ibid, Article 187(1).

<sup>88</sup> Ibid, Article 204.

<sup>89</sup> Ibid.

<sup>90</sup> The Juvenile Welfare Act (n 22), Article 71(1).

<sup>91</sup> Ibid, Article 71(2).

<sup>92</sup> The Constitution of Iraq 2005 (n 4), Article 94.

<sup>93</sup> The Civil Procedure Act (n 16), Article 224(1).

<sup>94</sup> Ibid, Article 35.

what impact such cases might have. The research has not identified any notable instances in this regard. It would appear, regrettably, that the safeguards for children contained within the Juvenile Welfare Act are not enforced in practice, as confirmed by the Committee on the Rights of the Child - please see part V below.

- I. Follow up. What other concerns or challenges might be anticipated in enforcing a positive decision?

Measures decided upon by the Juvenile Courts have corresponding limitation periods; failure to implement a measure relating to a crime results in its nullification after the passage of 15 years; for all other matters, the measure(s) will be nullified after the passage of three years.<sup>95</sup>

The research has not identified any further information regarding the follow-up of court decisions in Iraq.

- V. **Additional factors.** Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

*Juvenile welfare legislation and its objectives regarding juvenile justice*

Iraq has a Juvenile Welfare Act in place, as aforementioned in this report, and in order to achieve its aims, it relies on the following bases: the early detection of signs of delinquency in children; emphasis on the responsibility, duty of care, of parents and guardians towards children with regard to their exposure to delinquency; invoking parental authority where required in the interests of the child and the community; the treatment [rehabilitation] of juvenile delinquents in accordance with scientific scientific bases, from a humanitarian perspective; aftercare for implicated juveniles as a means of reintegrating them into the community and avoiding recidivism; and the cooperation and contribution of governmental authorities and competent organisations in the development and implementation of a general plan for caring for juveniles.<sup>96</sup>

In this regard, the Juvenile Welfare Council has the following competences: discussing and approving policy on juvenile delinquency in Iraq; determining the procedures and making recommendations for the provision of social protection against the phenomenon of juvenile delinquency; and the council orders and decisions may only be passed with the approval of the Minister of Labour and Social Affairs.<sup>97</sup> The Department for Juvenile Rehabilitation, a subsidiary of the General Organisation for Social Reform in the Ministry of Labour and Social Affairs, is charged with the supervision of rehabilitation schools with their own operational plan/strategy, and Juvenile Courts have the right to supervise their operations.<sup>98</sup> Each Juvenile Court contains a bureau for the examination of a juvenile's character/personality, with a medical

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<sup>95</sup> The Juvenile Welfare Act (n 22), Article 70(2).

<sup>96</sup> Ibid, Article 2.

<sup>97</sup> Ibid, Article 8.

<sup>98</sup> Ibid, Article 9.

professional at the head of this team, appointed by the Minister of Justice.<sup>99</sup> This bureau's aim is to examine the juvenile psychologically, medically and their social environment, in order to determine their plight into delinquency.<sup>100</sup> Juvenile Courts render their judgments whilst taking into consideration the account of events and report of the bureau.<sup>101</sup> It is the aim of all of these organs, as aforementioned, to detect delinquency in advance, when possible, and to understand its causes in each reported case.

Juvenile Courts have jurisdiction over juvenile delinquency cases [crimes, misdemeanours] and juvenile 'displacement' [from the family home, homelessness] and deterioration of behaviour, as well as any other matters expressly stipulated by the Act.<sup>102</sup> Misdemeanour judges have jurisdiction, in 'administrative units' [governorates/states] where there is no Juvenile Court, over any contraventions or misdemeanours punishable by imprisonment of a period not exceeding three years, as governed by the provisions of this Act.<sup>103</sup> Juvenile Courts are to conduct their sessions in secret, with only one of the juvenile's guardians or relatives, as well as any person(s) concerned with juvenile welfare that the court deems necessary to attend.<sup>104</sup> In terms of locality, the case is to be brought before the Juvenile Court of the committed crime, that of the delinquency of the concerned juvenile or the deterioration in their behaviour, or the place of their domicile.<sup>105</sup>

The Criminal Procedure Act also contains a number of provisions aimed at juveniles accused of a criminal offence: Article 233 states that children up to the age of seven cannot incur criminal responsibility, and that the age of the juvenile at the time of the crime is the determinant factor with regard to which court has jurisdiction over the case;<sup>106</sup> should the juvenile attain 18 years of age prior to proceedings, they are to be tried in the criminal courts or Grand Criminal Courts; however, if they attain majority during proceedings before the juvenile court, the case remains under said court's jurisdiction.<sup>107</sup> If a juvenile and an adult are both charged for having committed a crime together, it is for the judge of investigations to separate their trials and to refer each of them to their corresponding/separate jurisdiction;<sup>108</sup> this is reiterated in Article 53 of the Juvenile Welfare Act. The judge of investigations and the court hearing the case of a juvenile are to rely on official social and health services and other experts, including medical professionals, in order to assess the juvenile's state of social, mental, health wellbeing and the environment in which they are being nurtured, with the aim of ascertaining the reason(s) that led them down the path of criminality.<sup>109</sup>

The Juvenile Welfare Act, which aims to reduce the phenomenon of juvenile

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<sup>99</sup> Ibid, Article 12.

<sup>100</sup> Ibid, Article 14.

<sup>101</sup> Ibid, Article 62.

<sup>102</sup> Ibid, Article 56.

<sup>103</sup> Ibid, Article 57.

<sup>104</sup> Ibid, Article 58.

<sup>105</sup> Ibid, Article 65.

<sup>106</sup> The Criminal Procedure Act (n 19), Article 233(1) and 233(2).

<sup>107</sup> Ibid, Article 233(3).

<sup>108</sup> Ibid, Article 235(1).

<sup>109</sup> Ibid, Article 236.

delinquency through a focus on prevention and ‘social adaptation to the moral values of the community’,<sup>110</sup> contains some pertinent provisions regarding matters of juvenile justice. Interestingly, it divides childhood into four stages; a ‘youngster’/child is any person that has not yet attained the age of nine years old; a juvenile is any person between the ages of nine and eighteen; a juvenile is considered a preadolescent if they are between the ages of nine and fifteen; and a juvenile is considered an adolescent if they are between the ages of fifteen and eighteen.<sup>111</sup> A guardian is a father or mother, or anyone who has a child or juvenile placed in their care, or is assigned their upbringing by court order.<sup>112</sup> The Juvenile Welfare Act is to be applied to any juvenile that attains the age of majority during proceedings.<sup>113</sup> The Act stipulates that no child under the age of nine can incur criminal responsibility for a crime (this age is set lower at seven, as discussed above, in the Criminal Procedure Act).<sup>114</sup>

There are a number of measures that Juvenile Courts are competent to take in the best interests of the child. When a juvenile commits an offence, they may be given a warning of non-repetition of the illegal act in a hearing and handed over to a guardian or relative, who must undertake the implementation of what has been ordered by the court concerning the upbringing and behaviour of the juvenile; this is pursuant to a financial pledge, payable for a period of six months to one year, or they will risk receiving a fine.<sup>115</sup> It is for the court to decide, whenever handing over a juvenile to their guardian, on their placement under probation.<sup>116</sup> The Act also states that where a juvenile has committed a misdemeanour, they are to receive one of the measures [listed in the Article] as punishment in place of any potential deprivation of liberty under law.<sup>117</sup> Articles 76 and 77 of the Act stipulate measures to be administered to ‘preadolescents’ and ‘adolescents’ respectively, if they commit crimes punishable by temporary or life imprisonment under penal legislative provisions; these are mostly focused on parental/guardianship duties, probationary surveillance, rehabilitation schooling and the like. In instances of multiple sentencing, there are limitations placed for maximum stays in rehabilitation schooling, at five years for preadolescents and fifteen years for adolescents [there are preadolescent and adolescent rehabilitation schools, age groups are kept separated].<sup>118</sup> Should convicted juveniles attain certain ages during the completion of their sentencing, they may be transferred to other institutions: a preadolescent who attains 15 years of age during their sentence is to be transferred to a rehabilitation school for adolescents; an adolescent who attains 18 years of age during their sentence is to be transferred to a rehabilitation school for young adults; and if an individual attains 22 years of age, they are to be transferred to the department of reform for adults.<sup>119</sup> Juveniles sentenced to such measures of deprivation of liberty, or their guardians, may apply to the Juvenile Courts for their release if

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<sup>110</sup> The Juvenile Welfare Act (n 22), Article 1.

<sup>111</sup> Ibid, Article 3.

<sup>112</sup> Ibid, Article 3(5).

<sup>113</sup> Ibid, Article 5.

<sup>114</sup> Ibid, Article 47(1).

<sup>115</sup> Ibid, Article 72.

<sup>116</sup> Ibid, Article 74.

<sup>117</sup> Ibid, Article 73.

<sup>118</sup> Ibid, Article 81.

<sup>119</sup> Ibid, Article 82.

they have served two-thirds of their sentence if it's no less than six months in duration,<sup>120</sup> this is dependent upon good behaviour during their stay and the likelihood that this will persist following their release.<sup>121</sup>

The Penal Code reiterates the aforementioned measures of the Juvenile Welfare Act in Articles 67 to 78. It also extends the prohibition of the death penalty, which applies to all persons under 18 years of age, to anyone that was 18 years of age at the date of crime in question but who had not yet attained 20 years of age, replacing it with life imprisonment.<sup>122</sup>

### *Implementation of international human rights treaties*

It is unknown to what extent these ratified treaties have been implemented and enforced in practice in Iraq to date. According to a United Nations Assistance Mission For Iraq Human Rights Office Report published in June 2013,<sup>123</sup> the Government of Iraq has yet to establish a formal mechanism for child protection and information sharing with the United Nations and/or other non-governmental organisation on the monitoring and reporting of grave child rights violations.

In addition to the formal legislative framework discussed above, court procedures in Iraq are determined by actual practice as applied by the relevant governmental authorities and courts. This practice can change at short notice and this memorandum should be read in this context.

### *Regional unrest and armed conflict*

As with neighbouring Syria, Iraq is currently facing great instability and upheaval at the hands of ISIL militants, threatening the country's territorial integrity and displacing a great number families. These militants are responsible for numerous abhorrent human rights violations, including many directed at children,<sup>124</sup> and the slaughter of civilians.<sup>125</sup> This enduring armed conflict has resulted in the loss of great swaths of territory from government control, essentially rendering them lawless and subject to the authoritarian ideological whims of the militants. Consequently, such a state of affairs has had great ramifications for children and their protection from violations of their rights, as neither they nor their families are capable of reporting violations for fear of

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<sup>120</sup> Ibid, Article 84(1).

<sup>121</sup> Ibid, Article 84(2),(3).

<sup>122</sup> Law No. 111 of 1969, the Penal Code, Article 79, available at (Arabic): <http://www.rwi.uzh.ch/oe/cimels/law/countries/iraq/penalcode1969.pdf>.

<sup>123</sup> United Nations Assistance Mission for Iraq Human Rights Office Report, 'Report on Human Rights in Iraq: July - December 2012', June 2013, available at: [http://www.ohchr.org/Documents/Countries/IQ/HRO\\_July-December2012Report.pdf](http://www.ohchr.org/Documents/Countries/IQ/HRO_July-December2012Report.pdf) (accessed on 19 May 2015).

<sup>124</sup> International Business Times, 'ISIS News: 9-Year-Old Girl Pregnant After Being Raped By Islamic State Group Militants', 10 April 2015, available at: <http://www.ibtimes.com/isis-news-9-year-old-girl-pregnant-after-being-raped-islamic-state-group-militants-1877291> (accessed on 10 July 2015).

<sup>125</sup> UN Office of the High Commissioner for Human Rights, 'Widespread human rights violations and killings of civilians continue unabated in Iraq – UN report', 13 July 2015, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16229&LangID=E#sthash.pauBbeTf.dpuf> (accessed on 14 July 2015).



punishment at the hands of their tormentors, and this is further compounded by the unavailability of judicial resolution in these occupied areas.

### *The federalised state system in Iraq*

The federal system in Iraq consists of a decentralised capital, regions (including Kurdistan) and governorates, as well as local administrations.<sup>126</sup> One or more governorates have the right to organise into a region based on a request to be voted on by referendum.<sup>127</sup> Each region is to adopt its own constitution, with its own defined structures of power, authorities and mechanisms for the exercise thereof; these may not contradict the federal Constitution, however.<sup>128</sup> These competences include legislative and judicial powers, save for authorities stipulated as being of the exclusive authority of the federal government;<sup>129</sup> in cases of diverging regional and national legislation in respect of matters outside the exclusive authority of the federal government, regional authorities shall have the power to amend the application of the national legislation within that region.

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In 2010, a number of Iraq's 18 governorates publicly announced the intention of establishing Child Welfare Committees within governorate councils, the aim of which is to help promote the rights of children within those governorates. Said Child Welfare Committees have since been established, and they have helped to draft a Federal Child Protection Policy, prepare a draft regional Child Law in the Kurdistan region of Northern Iraq and take steps towards developing a Federal Child Law; however, these laws are yet to be fully developed and/or implemented.<sup>131</sup>

### *Committee on the Rights of the Child concluding observations, 02 March 2015*

The Committee on the Rights of the Child has made the following concluding observations following Iraq's most recent reporting cycle.<sup>132</sup> The Committee has mentioned the detrimental effect of the aforementioned ongoing conflict;<sup>133</sup> that Iraq should reconsider its reservation to Article 14 of the CRC on the freedom of religion;<sup>134</sup> to draft bills that are positive in nature for the benefit of children, with the approval of the Committee, and to do so promptly;<sup>135</sup> the Committee expressed concerns over the independence of bodies such as the High Commission for Human Rights of Iraq and the Independent Board of Human

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<sup>126</sup> The Constitution of Iraq 2005 (n 4), Article 116.

<sup>127</sup> Ibid, Article 119.

<sup>128</sup> Ibid, Article 120.

<sup>129</sup> Ibid, Article 121(1).

<sup>130</sup> Ibid, Article 121(2).

<sup>131</sup> 'Iraq Commences Celebrations of the 22nd Anniversary of the Convention on the Rights of the Child', 20 November 2011, available at: [http://www.unicef.org/iraq/media\\_6841.html](http://www.unicef.org/iraq/media_6841.html) (accessed on 27 August 2014).

<sup>132</sup> Committee on the Rights of the Child, Concluding Observations, CRC/C/IRQ/CO/2-4, 02 March 2015, available at:

[http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=IRQ&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=IRQ&Lang=EN)

<sup>133</sup> Ibid, para. 6.

<sup>134</sup> Ibid, para. 7.

<sup>135</sup> Ibid, para. 9.

Rights in the Kurdistan Region;<sup>136</sup> the need for a specialised child unit in each of the aforementioned authorities, or the establishment of a children’s ombudsman;<sup>137</sup> the Committee expressed deep concern over continued gender discrimination and the continued practice of ‘honour killings’, as well as the deplorable ‘honourable motives’ for murder contained within the Penal Code;<sup>138</sup> there is concern over the absence of any legislative provisions guaranteeing the child’s right to be heard and express their views, and that many decisions, including marriage, continue to be imposed upon children;<sup>139</sup> that there is no complaint mechanism accessible to children in Iraq;<sup>140</sup> there is concern that children continue to be routinely subjected to corporal punishment;<sup>141</sup> there is a lamentable prevalence in sexual exploitation and concern that the Penal Code allows for rapists to marry girls that they have abused;<sup>142</sup> children of minority groups continue to face discrimination and attacks against them are carried out with impunity, compounded by legislative and practical obstacles to justice;<sup>143</sup> and the continued sale, trafficking and abduction of children due to the ongoing sectarian violence, as aforementioned.<sup>144</sup> In acknowledging the Juvenile Welfare Act, the Committee stated that the stipulated alternatives to detention are in fact seldom used in practice; the number of children being held in pretrial detention for long periods and in poor living conditions is of great concern.<sup>145</sup> This includes children being sentenced to death and held in detention until they reach the age of majority so that the sentence may be carried out.<sup>146</sup> Consequently, the Committee has strongly urged Iraq to bring its system of juvenile justice in line with the provisions of the CRC and the protections afforded to children thereunder.<sup>147</sup> The Committee has also recommended that Iraq ratifies the Optional Protocol to the CRC on a communication procedure, in order to “*further strengthen the fulfilment of children’s rights*”.<sup>148</sup>

*This report is provided for educational and informational purposes only and should not be construed as legal advice*

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<sup>136</sup> Ibid, para. 11.

<sup>137</sup> Ibid, para. 12.

<sup>138</sup> Ibid, para. 25.

<sup>139</sup> Ibid, para. 29.

<sup>140</sup> Ibid, para. 37(b).

<sup>141</sup> Ibid, para. 38.

<sup>142</sup> Ibid, para. 42.

<sup>143</sup> Ibid, para. 78.

<sup>144</sup> Ibid, para. 84.

<sup>145</sup> Ibid, para.86.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid, para. 87.

<sup>148</sup> Ibid, para. 88.