THE RIGHTS OF VICTIMS OF VIOLENCE BY NON-STATE ACTORS IN IRAQ POST-2003

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By

Faris Al-Anaibi

Abstract

Violence and victimisation in Iraq is a long story and, in recent times, specifically in the aftermath of the 2003 controversial occupation of the country by the United States and its allies, and the atrocities committed by so-called ISIS, the situation has escalated to a horrific extent. Ethno-sectarian violence, bombings, armed conflict and enforced disappearances have demonstrated the complete absence of any effective reaction by the state, and this has undermined efforts at consolidation by the Iraqi state and its legal system following the downfall of the previous oppressive regime in 2003. Hundreds of thousands of Iraqi citizens have become victims of violence by non-state actors, largely due to the failure of the 2003-transition process and the flawed constitution and divisive ethno-sectarian system. This fuelled political conflict, widespread corruption, insurgency, terrorism, and extremism, paralysing the Iraqi state and its criminal justice system. This thesis claims that the Iraqi state has failed to provide redress for non-state violence. It further argues, based on international human rights' instruments, that the state owes positive duties to citizens to protect them from such violence.

The thesis will be argue that one method – but not in isolation - of gradually addressing the failings of the Iraqi state would be for Iraqi citizens themselves to take 'substantive steps' to 'establish a healthy civil society reflecting social contract principles.' Such steps can and should be taken with the support of governmental bodies and other authorities, as part of a genuine and inclusive transitional justice programme in which accountability, truth recovery, reparations, legislative and institutional reform, and reconciliation will be vital, if any future stability and peaceful coexistence is to be established, especially after the ISIS conflict. Despite being a very lengthy task, at present the security situation is gradually improving following the defeat of ISIS. The foregoing steps are arguably also essential for the consolidation of the state and its institutions over the rule of law, in which

respect for and protection of the human rights of citizens is the primary objective. This will be imperative in restoring citizens' trust, confidence, and hope that the Iraqi state and its criminal justice system will gradually honour their positive obligations.

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Table of Contents

List of Cases

The United Kingdom

The Human Rights Committee

Sundara A. L. Rajapakse v Sri Lanka, Communication No. 1250/2004, U.N. GAOR, Hum. Rts. Comm., U.N. Doc. CCPR/C/87/D/1250/2004 (2006).

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The European Court of Human Rights

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Akhmadova and Sadulayeva v Russia App no 40464/02 (ECHR, 10 May 2007).

Aksoy v Turkey App no 21987/93(ECHR, 18 December 1996).

Al-Saadoon and Mufdhi v. United Kingdom App n 61498/08 (ECHR, 2 March 2010).

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Armani Da Silva v. The United Kingdom, App no 5878/08 (ECHR, 30 March 2016).

Aslakhanova and others v. Russia apps nos 2944/06, 8300/07, 50184/07,332/08 and 42509/10 (ECHR, 18 December 2012).

B v The Republic of Moldova App no 61382/09 (ECHR, 16 July 2013).

Bălşan v. Romania App no 49645/09 (23 May 2017)

Bazorkina v Russia App no 69481/01(ECHR, 27 July 2006).

Bevacqua and S v Bulgaria App no 71127/01 (ECHR, 12 June 2008).

Branko Tomašić and Others v. Croatia App no 46598/0 (ECHR, 15 January 2009).

Cakici v Turkey App no 23657/94 (ECHR, 8 July 1999).

Ciobanu v. The Republic of Moldova App no 62578/09 (ECHR, 24 February 2015).

Civek v. Turkey App no 55354/11 (ECHR, 23 February 2016).

Cyprus v. Turkey app no 25781/94 (ECHR, 12 May 2014).

Doorson v Netherland App no 20524/92 (ECHR, 26 March 1996).

Dujardin v France App no 16734/90, 72 Eur. Comm'n H.R. Dec. & Rep. 236 (244) (2 September 1991).

Edwards v UK App no 46477/99 (ECHR, 14 March 2002).

El-Masri v Former Yugoslav Republic of Macedonia app no 39630/09 (ECHR, 13 December 2012).

Eremia and Others v. the Republic of Moldova App no 3564/11 (ECHR, 28 May 2013).

Ergi v. Turkey App no 40/1993/435/514 (ECHR, 28 July 1998).

Finogenov and others v Russia App nos 18299/03 and 27311/03 (ECHR, 20 December 2012).

Finucane v The United Kingdom App no 29178/95 (ECHR, 1 July 2003).

Gül v. Turkey, App no 22676/93(ECHR, 14 December 2000).

H.R. and Mohamed Momani v. The Federation of Bosnia and Herzegovina, Case no CH/98/946, Human Rights Chamber for Bosnia and Herzegovina, Decision on Admissibility and Merits of 5 November 1999.

Hugh Jordan v United Kingdom Application no 24746/94 (ECHR, 4 May 2001).

Kajkaris v Cyprus App no 21906/04 (ECHR, 12 February 2004).

Kaya v. Turkey App nos 158/1996/777/978 (ECHR, 19 February 1998).

Keenan v United Kingdom app no 27229/95 (ECHR, 3 April 2001).

Kelly and Others v. United Kingdom Application no 30054/96 (ECHR, 4 May 2001).

Koku v Turkey App no 27305/95 (ECHR, 31st May 2005).

Kontrovà v. Slovakia App no 7510/04 (ECHR, 31 May 2007).

Kowal v Poland App no 2912/11 (ECHR, 18 September 2012).

Kurt v Turkey app no 15/1997/799/1002 (ECHR, 25 May 1998).

M.C. v Bulgaria App no 39272/98 (ECHR, 4 December 2003),

Mahmut Kaya v Turkey App no 22535/93 (ECHR, 28 Mar 2000).

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Ogur v. Turkey Application no 21594/93 (ECHR, 20 May 1999).

Öneryildiz v. Turkey App no 48939/99 (ECHR, 30 November 2004).

Opuz v. Turkey App no 33401/02 (ECHR, 9 June 2009).

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Z v United Kingdom, App no. 29392l95 (ECHR, 10 May 2000).

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Aloeboetoe et al. v. Suriname, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. I1 (Dec. 4, 1991).

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Bámaca Velásquez Case, Judgment of November 25, 2000, Inter-Am Ct. H.R. (Ser. C) No. 70 (2000).

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Bulacio v Argentina, Merits, Reparations & Costs, Inter-Am. Ct. H.R., (Ser. C) No. 100 (September 18, 2003).

Cantoral-Benavides v. Peru, Judgment of December 3, 2001, Inter-Am Ct. H.R. (Ser. C) No. 88 (2001).

Caracazo v Venezuela, reparations, Judgment of August 29, 2002, Inter-Am. Ct. H.R. (Ser. C) No. 95 (2002).

Carmelo Soria Espinoza v. Chile, Case 11.725, Inter-Am. C.H.R., Report No. 133/99, OEA/Ser.L/V/II.106, doc. 3 rev (19 November 1999).

Castillo Pdez v Peru, reparations, Judgment of November 27,1998, Inter-Am. Ct. H.R. (Ser. C) No. 43 (1998).

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El Amparo Case (Reparations) (1996) 28 Inter-Am. Ct. H.R. (Ser. C).

Garrido and Baigorria v Argentina, reparations, Judgment of August 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 39 (1998).

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Jessica Gonzales et al. v. United States, Case 1490-05, Report No. 52/07, Inter-Am. C.H.R., OEA/Ser. L/V/II.130 Doc. 22, rev. 1 (2007).

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Iraq

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International Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents New York, 14 December 1973.

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List of Abbreviations

ACHR	Arab Charter on Human Rights
ACHR	The Inter-American Convention of Human Rights
ADE	Advanced Detection Equipment
CAT	UN Committee Against Torture
CCCI	The Iraqi Central Criminal Court
CED	Committee of Enforced Disappearances
CPA	The Coalition Provisional Authority
ECHR	The European Convention on Human Rights
ECtHR	The European Court of Human Rights
GICJ	Geneva International Centre for Justice
HCHR	High Commission for Human Rights
HR	Human Rights
HRC	Human Rights Committee
IACtHR	The Inter-American Court of Human Rights
ICCPR	The International Covenant on Civil and Political Rights
ICESCR	The International Covenant on Economic, Social and Cultural Rights
ICJS	Iraqi criminal justice system
ICPC	Iraqi Criminal Procedure Code
IFSC	Iraqi Federal Supreme Court
ISIS	Islamic State of Iraq and Al-Sham
KRG	Iraqi Kurdistan Region
OAS	Organization of American States
PMU	Popular Mobilization Units
SATRC	South African Truth and Reconciliation Commission
TAL	Transitional Administrative Law
TRC	Truth and Reconciliation Commissions
UDHR	The Universal Declaration of Human Rights
UNAMI	United Nations Assistance Mission for Iraq
UNDP	United Nations Development Programme

Statement of Copyright

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Dedication

To my dear wife, ***Tahani***

To my dear friend, ***Bryan***

To all the victims of violence in my homeland of Iraq

Chapter 1: Introduction

1.1 The Context of the Thesis

Insecurity and physical violence have long been endemic in Iraq. However, it is becoming increasingly difficult to ignore the extent of physical violence by non-state actors, especially in the aftermath of the controversial occupation of the country in 2003 by the United States and its allies.[1] As well as contributing to the death or injury of hundreds of thousands of Iraqis,[2] the situation has also threatened the very existence of Iraq, particularly when part of it was controlled by the so-called Islamic State of Iraq and Al-sham (ISIS).[3]

Iraq lays claim to one of the oldest known codes of law, Hammurabi's Code, dating back to at least 1,700 B.C. The Code embodies important principles for the protection of the lower classes, for the state's authority to enforce the law, and for providing punishment which fits a crime.[4] By contrast, neither the oppressive pre-2003 regime nor the subsequent regime has had a legal system capable of instilling a sense of security and justice. A partial explanation of this leads back to 1920, when Iraq became a state after the British unified the three provinces of Basra, Baghdad and Mosul.[5] In accordance with the mandate of the League of Nations, Britain sought to build a single, modern, self-determining and democratic state.[6] However, there is a disturbing parallel between the

[1] It is clear that the invasion of Iraq in 2003 by the US and UK was illegal according to international law, including the United Nations Charter, regarding the use of force. See Karima Bennoune, 'Toward a Human Rights Approach to Armed Conflict: Iraq 2003' (2004) 11 *University of California, Davis* 171, 172; Dominisca Svarc, 'Using Force In International Affairs: The Role of International Law in Contemporary International Politics' in Mathew Happold, *International Law in Multipolar World* (Routledge 2012) 82; also, it has been suggested that this invasion was morally wrong and that those responsible for this atrocity deserve to be brought to justice and should make substantial reparations for the damages done to Iraq and its people. See J. Angelo Corlett, 'US Responsibility for War Crimes in Iraq' (2010) 16 *Res Publica* 227, 227-244; a clear, strong criticism of the UK's part in the toppling of the Saddam regime and subsequent occupation of Iraq has recently been made in the conclusions of the Chilcot Inquiry (The Iraq Inquiry). See 'Sir John Chilcot Public Statement' (The Iraq Inquiry, 6 July 2016) <http://www.iraqinquiry.org.uk/the-inquiry/sir-john-chilcots-public-statement/ > accessed 12 September 2016. For further details, see 'The Report of the Iraq Inquiry Executive Summary: Report of a Committee of Privy Counsellors' (2016).

[2] According to the Iraq Body Count (IBC), there have been approximately 158,347 to 176,949 civilian deaths from violence between 20 March 2003 and June 2016, Iraq Body Count (IBC) 'Documented Civilian Deaths from Violence' <https://www.iraqbodycount.org/database/> accessed 23 May 2016; it has been assumed that the invasion of Iraq worsened public security during the period of invasion, contrary to the requirements of international law that the occupying power has the responsibility to maintain political order and ensure public security. See John C. Williamson, 'Establishing Rule of Law in Post-War Iraq: Rebuilding the Justice System' (2004) 23 *Georgia Journal of International and Comparative Law* 229, 230.

[3] Some of the largest cities in Iraq, including Mosul and Anbar, fell under the control of ISIS in 2014 and 2015. See the discussion in Chapter 5, pages 179-181.

[4] Luther D. "Dan" Thomas, 'Establishing Justice in Iraq: A Journey into the Cradle of Civilization' (2008) *International Journal for Court Administration* 1, 1.

[5] For further details, see Zaid Al-ali, The Struggle for Iraq's Future: How Corruption, Incompetence and Sectarianism have Undermined Democracy (Yale University press 2014) 18-22.

[6] See Toby Dodge, 'Iraq: the Contradictions of Exogenous State-Building in Historical Perspective' (2006) 27 *Third World Quarterly* 187, 188. Iraq was administered by Britain on a mandate of the League of Nations from 1922 to 1932. After the latter date, Iraq became an independent state and was admitted to the League of Nations. M. Cherif Bassiouni, 'Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal' (2005) 38 *Cornell International Law Journal* 327, 329.

involvement of Britain in the formation of the state of Iraq and the role of the United States following the 2003 invasion.[7]

The external occupying powers (in the 1920s and 2003) intended, 'in coalition with a section of the indigenous population it has selected as its ally', to build a viable Iraqi state.[8] However, in itself 'external state-building is bound to be "top down," driven by dynamics, personnel and ideologies… outside the society they are operating in'.[9] In an ideal state-building project, the capacity of the new state's institutions to monopolise the use of legitimate violence to enforce decisions throughout its territory is the state's first fundamental test, especially in the aftermath of previous oppression by military force.[10] It has been suggested that when state institutions demonstrate their positive relevance to citizens, they are thus accepted and this contributes to the growth of state legitimacy and even hegemony.[11] In other words, the survival of the state rests not on its creation by indigenous or extraneous forces, but on its ability to follow the afore-mentioned steps.[12]

Many commentators have claimed that the project of state building in Iraq by both the British in 1920 and the US military in 2003 has failed because expensive necessary resources[13] led to the occupying powers imposing quick fixes to meet their short-term interests rather than those of Iraq as a whole in the longer term.[14] Meeting these short-terms interests may have weakened the early formation of Iraq, resulting in prolonged instability. Accordingly, Iraq is a fragile state which, through frequent changes of regime and policy, has undergone continual unrest and violence.[15] It has been asserted by Markus E. Bouillon that:

> If state fragility is the problem, […] then the answer must be state-building […] in terms of erecting a sustainable Iraqi state from the bottom up… [as] a long-term undertaking […] by Iraqis themselves. In consequence, outside actors can only support this endeavour, encouraging and enabling the negotiation of a domestic social contract in an Iraqi-led and Iraqi-owned process.[16]

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[7] Rodney Wilson, 'Review Article: Determinants and Consequences of Iraq's Troubled History: A Review of Eight Contemporary Books on Iraq' (2005) 32 *British Journal of Middle Eastern Studies* 241, 242.
[8] Ivo H. Daalder, Nicole Gnesotto and Philip H. Gordon, Crescent of Crisis: U.S.-European Strategy for the Greater Middle East (Brookings Institution Press, 2006) 127.
[9] Ibid; Jeremy Sarkin and Heather Sensibaugh, 'How Historical Events and Relationships Shape Current Attempts at Reconciliation in Iraq' (2009) 26 *Wisconsin International Law Journal* 1033, 1038.
[10] For further details, see Daalder, Gnesotto and Gordon (n 8) 128.
[11] Dodge (n 6) 189, 191.
[12] Toby Dodge, 'Can Iraq be Saved' (2014) 56 *The International Institute for Strategic Studies* 7, 10.
[13] Sarkin and Sensibaugh (n 9) 1039; see Stephen Blackwell, 'Between Tradition and Transition: State Building, Society and Security in the Old and New Iraq' (2005) 41 *Middle Eastern Studies* 445, 446.
[14] Markus E. Bouillon, 'Iraq's State-Building Enterprise: State Fragility, State Failure and a New Social Contract' (2012) 6 *International Journal of Contemporary Iraqi Studies* 281, 282.
[15] Ibid.
[16] Ibid; Robert I. Rotberg, State Failure and State Weakness in a Time of Terror (Brookings Institution Press, 2004) 16.

On this basis of social contract principles, it is essential that the presumed fragility of Iraq is seriously addressed for successful rebuilding to occur. Such a process indicates, in part, that the responsibility for state-rebuilding or consolidation lies mainly with Iraqi authorities and citizens, and also that any reasonable outcome of external intervention in Iraqi affairs re state building is likely to be limited. However, this suggested process is in complete contrast to what the occupying powers did in 2003. In spite of justifying their intervention in the name of state-building in Iraq, they have, by making serious mistakes, failed to 'deliver on the promise of creating stable, sustainable and democratic governing institutions'.[17] The Coalition Provisional Authority (CPA) which temporarily governed Iraq post-2003 dissolved the Iraqi military and security forces, and banned the ideological Baath Party, which had brutally ruled Iraq, committed atrocities against the human rights (HR) of Iraqi citizens, in particular the right to life, and made the state a 'republic of fear' for approximately 35 years.[18] Thus, the state system of those years was apparently eliminated and the external powers assumed administration of the country. This resulted in a vacuum due to the fall of the previous oppressive state and, consequently, it was unsurprising that violence and instability ensued, because:

> The weakness of seemingly strong yet inherently fragile states [such as Iraq] is compounded by the fact that since they are held together entirely by repression and not by performance, an end to or an easing of repression could create destabilizing battles for succession resulting anarchy, and the rapid rise of non-state actors. In nation-states made secure by punishment and secret intelligence networks, legitimacy is likely to vanish whenever the curtain of control lifts.[19]

As the 'curtain of control' was lifted in Iraq, various sub-national identities have asserted themselves and moved in to fill this vacuum; thereby, they have attempted to occupy the political space in 'anticipation of the re-creation of a state that could be shaped according to their preferences'.[20] In this atmosphere, indiscriminate violence, in particular sectarian violence,[21] broke out 'on one level exploiting the vacuum [… and] on the other seeking to capture and shape the new entity that would fill this space'.[22] It is therefore better to understand the dominance of indiscriminate violence against Iraqi citizens (whether by the state or non-state actors, in particular sectarian and inter-militia violence since 2003),

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[17] Dodge (n 6) 187; Al-ali (n 5) 62.
[18] For further details, see Ali A. Allawi, The Occupation of Iraq: Winning the War, Losing the Peace (Yale University Press, 2008) 133-150; Bassiouni (n 6) 330-331.
[19] Bouillon (n 14) 286-287.
[20] Ibid. 287.
[21] It has been suggested that the violence between the Sunni and Shi'ite groups in Iraq 'has a history: a history not based on religion but on access to resources, power, and the social contract'. For further details about the historical background of sectarianism in Iraq, see Sarkin and Sensibaugh (n 9) 1036-1038; according to the Chilcot Inquiry, 'deep sectarian divisions threatened both stability and unity. Those divisions were not created by the coalition, but they were exacerbated by its decisions on de-Ba'athifcation and on demobilisation of the Iraqi Army and were not addressed by an effective programme of reconciliation'. See 'The Report of the Iraq Inquiry Executive Summary: Report of a Committee of Privy Counsellors' (n 1), para. 792.
[22] Bouillon (n 14) 287.

and the increasing prominence of sectarian politics, as both 'a replay' of its post-independence period and 'the direct result of the collapse of an already fragile state'.[23] In other words, the violence and sectarian politics are the result of state collapse, rather than the agents of this collapse.

However, such sectarian politics may have been deliberately used to undermine any possibility for Iraqi citizens to learn from past violence and, thus, to consolidate their state and provide effective security and justice, which in turn would curb the illegitimate ambitions of different social groups to shape the state for their own sub-identities and interests. Instead of helping and enabling the Iraqi population to do this, the occupying powers deliberately or negligently undermined any real prospect of doing this. Indeed, the CPA has been criticised because it mainly focused on lustration and prosecutions rather than drawing upon the pantheon of transitional justice mechanisms available, such as truth commissions and reparations.[24]

The above mentioned circumstances will be further explored in Chapter 5,[25] but it can be concluded here that the intervention of the occupying powers, as suggested by Cordesman and Khazai, ended in the 'failure to create a viable political system and effective governance' following the invasion of Iraq.[26] This failure facilitated violence by criminal groups, including terrorists and insurgents, leading to fear and uncertainty about the future of the state, and the failure of Iraqi leadership in its governance.[27] As a result, the fabric of Iraqi society, with its diverse ethnic, religious and sectarian background, is likely to be torn apart.[28] In addition, the rule of law, if it can ever be said to have existed at all, will be weakened and even more violations of the right to life are likely to occur. Therefore, the obligations of the Iraqi authorities to promote social cohesion, the rule of law, the tackling of such violent activities, the provision of protection to their citizens, and justice and reparation for victims may be said to be seriously lacking.

This thesis will argue that the Iraqi state has failed to provide redress to the victims of violence by non-state actors. It will further argue, based on international HR instruments, that the state owes positive duties to citizens to protect them from such violence. In

[23] Ibid.
[24] Sarkin and Sensibaugh (n 9) 1073-1074.
[25] See pages 134-142.
[26] Anthony H. Cordesman and Sam Khazai, 'Iraq in Crisis' (2014) *Centre for Strategic& International Studies* iii; See also 'Sir John Chilcot Public Statement' (n 1).
[27] See Sam Khazai and Anthony H. Cordesman, 'Iraq and the Challenge of Continuing Violence' (2012) *Centre for Strategic & International Studies* 7.
[28] For further details of the impact of failed governance in Iraq, see Cordesman and Sam Khazai (n 26) 103-116.

addition, this thesis will claim, in the context of a very difficult and volatile security situation, that the Iraqi government has not fully investigated criminal activity, and shown some incompetence in investigating crimes, in terms of the mechanisms and processes that are in place to protect citizens from non-state actor violence. This is explored particularly in Chapter 5 in Section 5.3. It will be argued that the ethno-sectarian system of government tends to undermine the efficacy of the governing mechanism and taints the interaction between the architecture of the Iraqi governance order and its legitimacy, partly due to religious and sectarian divisions. Clearly, given that these factors are undermining public faith in the Iraqi legal order, it is possible that the application of positive obligations will merely introduce another raft of unfulfilled norms into the legal order. This thesis acknowledges that such a possibility cannot be excluded. However, Chapter 6 will develop the notions that the Iraqi government may gradually accept the positive obligations in question, at least to an extent, while awareness of them may gradually have an impact on citizens' expectations of government. Thus, a degree of implementation of such obligations may gradually have an impact on trust building and improved relations between citizens and government.

1.2 The Parameters of the Thesis

The thesis will mainly focus on the physical violence committed by non-state actors against human rights, especially the right to life. In the specific case of Iraq, it will neither address violent crimes committed by the occupying powers or private foreign security agencies, nor their arguable failure to provide adequate security and fulfil their positive obligation to protect the right to life of Iraqi citizens in accordance with international law and, specifically international and regional human rights law, during or following the 2003 occupation.

1.3 The Objectives of the Thesis

This study examines the status of the rights of Iraqi victims in the climate of widespread indiscriminate acts of violence against the right to life by non-state actors since 2003, and the lack of redress and protection. To do this, further important issues need to be examined, such as: how the duties of the state to protect the right to life and provide justice and reparation have been addressed, in accordance with philosophical/ethical principles, particularly social contract theory; the nature of the international and regional

legal obligations concerning the rights of citizens to security; the investigation, prosecution and punishment of violent crime, and reparation for victims, especially under the doctrine of 'positive obligation' established by the jurisprudence of international and regional human rights law. It will also consider whether the Iraqi legal system acknowledges that Iraq is bound by these obligations and, if so, whether it has failed to observe them. Should it have failed, the factors affecting the ability of the Iraqi state to comply, and how the political, legal and judicial systems of Iraq may be reformed to ensure a better level of compliance will be addressed.

1.4 An Original and Significant Contribution to Knowledge

Indiscriminate violence by non-state actors has been widespread in Iraq, especially post-2003. While the general principles as to the failure of the Iraqi state to control non-state violence have been covered in some detail in the literature, the key claim and argument developed in this thesis is that the Iraqi state has failed to provide redress to victims of non-state actor violence. It further argues, based on international HR instruments, that the state owes positive duties to citizens to protect them from such violence. Therefore, the application of these principles to Iraq is the real gap in the literature that the thesis will purport to address. The thesis will then explore possible future reforms in the post-ISIS conflict period of serious HR violations, to honour these principles gradually and restore trust in the Iraqi state and its criminal justice system. Such reforms, it will be argued, should include genuine coordinated efforts by both the government and all sections of society to produce their own new transitional justice system and measures of reconciliation. In so doing, people of various religions, and ethnic and sectarian identities may be able to live peacefully in a viable state based on legitimate social contract principles, and one where the redress of harms done to victims by non-state violence and the state's positive duties to protect citizens against such violence are taken seriously.

1.5 Structure of the Thesis

This first chapter provides the background to the main problems responsible for the instability of the Iraqi state and the reasons which may be adduced for the violence to citizens committed by non-state actors. The objectives of the research, the contribution to knowledge, and the structure of the thesis are also covered in this chapter.

Chapter 2 explores the nature of the obligation of the state to protect the right to life in accordance with philosophical/ethical principles, particularly social contract theory. Criticisms of social contract theory are also discussed in this chapter, before examining the protection of this right as required by international and regional HR law. In addition, various examples of the case law established by HR courts concerning this right to protection will be analysed, including the recent generation of cases regarding positive obligations, especially in the domestic violence context under the ECtHR. States' positive obligations under HR law are also extended in this chapter to cover a wide range of violence and sexual offences against a person and are not confined to threats to life.

Chapter 3 deals with the procedural obligations of the state to investigate the violation of their right to life by non-state actor violence, and to prosecute and punish violators, as demanded by the philosophical/ethical, international, and regional standards of law. It will also investigate the extent to which victims deprived of their right to life have a right to be provided by the state with justice, and the procedural obligations involved, in accordance with the jurisprudence of various HR courts. The HR cases relevant to investigatory duties which cover many of the major developments in the last five years are analysed. In addition, it will discuses the relationship between the theories of social contract and transitional justice and its impact on the gradual implementation of the state's positive obligations toward victims. The theory of the transitional justice is also introduced in this chapter as a counterpoint to the international standards for criminal investigations through exploring the potential of Amnesties/ Truth and Reconciliation Commissions (TRC) processes to offset these standards in a post-conflict or transitional scenario, in order to clarify which investigations Iraq should follow in the transition period.

Chapter 4 explores the right to reparation and the obligation of the state to make reparation to victims of violent crime by non-state actors. To understand the nature of this obligation, it discusses: the notion of state responsibility for reparation for the violation of the right to life; the philosophical/ethical justification for imposing this obligation; the nature of adequate reparation for the violation of the right to life; and, the extent of the state's obligation to provide this reparation, as required by international and regional HR law. In addition, the chapter also highlights the anchoring of reparations programmes within a holistic transitional justice framework to enable victims and society to reconcile the past and move beyond violence and conflict.

C**hapter 5** considers how far these obligations are acknowledged by the Iraqi state and provided for in its legal system, both in theory and practice. The background to the deficiencies of the transitional justice process post-2003 and their adverse effect on the ability of the Iraqi state and its criminal justice system to honour these obligations is presented. The first section examines the positive obligation of the Iraqi state to provide security and protection of the right to life of its citizens, particularly against non-state actor violence. It provides a wide portion of examples, literature, and analysis to support the arguments that the Iraqi state owes positive duties to citizens to protect them from such violence. The second section considers existing Iraqi criminal law with regard to its procedural obligations and explores the claim that, in the context of a very difficult and volatile security situation, the Iraqi government has not fully investigated criminal activity. It also discusses the potential of the 2016 Amnesty Law to become part of the transitional justice and reconciliation process post-ISIS. The third section examines whether a victim's right to adequate redress is fully provided for in Iraqi law. It explores the adequacy of the tort liability system under Iraqi Civil Law and Law No. 20 of 2009, and its practice to provide redress for non-state violence. This chapter, alongside Chapter 6, provides a more nuanced approach to the transitional justice issues facing Iraq post-ISIS conflict.

Chapter 6 synthesises the preceding chapters by relying on the findings, identifying what has gone amiss in Iraq, and who should be blamed for the failure of the Iraqi state and its legislative, executive, and judicial authorities to provide redress for non-state violence and fulfil the positive duty to protect. It examines future prospects and the difficulties in establishing an inclusive transitional justice process. Reconciliation initiatives and the role of TRC/Amnesties supported by government and all affected communities have also been considered in this chapter as potential ways of addressing past violence and allowing a healthy civil society to emerge post-ISIS. This chapter provides some indications, in the light of recent positive developments following the defeat of ISIS and the good leadership of the current Prime Minister, that the Iraqi government may gradually accept these positive obligations, at least to some extent, and that awareness of this may gradually have an effect on citizens' expectations of government.

Chapter 2: The Right to Security: An International Overview

2.1 Introduction

The concept of security plays a significant role in modern discussions about the role of HR in contemporary societies. The prevalence of indiscriminate violence indicates that we are living in a risk society, where fear about public security and social well-being may be well-founded.[1] According to Beck, a risk society requires 'a systematic way of dealing with hazards and insecurities induced and introduced by modernization itself'.[2] In this sense, modernisation has resulted in the lives of individuals being surrounded by uncontrollable risks, including the risk of violence from third parties.

The general public has the expectation that the state must ensure security and take preventive measures to protect people from crime,[3] including violence by non-state actors. For its part, the state is required to protect its citizens and is responsible for preventing criminal acts and punishing the perpetrators of crime. Doak states that this expectation is an essential element of a modern democratic society and it is also strongly linked to the rise of a HR culture and the requirement of fair treatment for citizens.[4]

The concept of the right to protection or security may be said to exist in two different contexts: the collective and the personal. In the former sense, society has a right to be protected by the state (for example, in times of civil unrest);[5] in the latter, it should guarantee the protection of the individual's right to liberty and security.[6] This right appears in major HR instruments alongside the right to liberty and used to emphasise simply the negative duty which obligates the state to refrain from infringing it without justification.[7] In addition to these HR instruments, the concept of a right to security can

[1] Ulrich Beck, 'The Terrorist Threat World Risk Society Revisited' (2002) 19 (4) *SAGE Theory, Culture and Society* 39, 45-46.
[2] Ulrich Beck, *Risk Society: Towards a New Modernity* (SAGE Publication Ltd 1992) 21.
[3] Jonathan Doak, Victim's Rights, Human rights and Criminal Justice: Preconceiving the Role of Third Parties (Hart Publishing 2008) 37.
[4] Ibid.
[5] Van Kempen notes four different concepts of security: 'international security; negative individual security against the state; security as justification to limit human rights; and positive state obligation to offer security to individuals against other individuals', Piet Hein Van Kempen, 'Four concepts of security – a human rights perspective' (2013) 13 *Human Rights Review* 1.
[6] Doak (n 3) 38; Van Kempen defines security as 'freedom from such phenomena as threat, danger, vulnerability, menace and attack'. Van Kempen (n 5) 2.
[7] See Sandra Fredman, 'The Positive Right to Security' in BJ Goold and Liora Lazarus, *Security and Human Rights* (Hart Publishing, 2007) 314; Liora Lazarus, 'Mapping the Right to Security' in BJ Goold and Liora Lazarus, *Security and Human Rights* (Hart Publishing, 2007) 333.

be traced back to the theory of the social contract proposed by Hobbes, Locke and Rousseau, inter alia.[8]

This chapter examines the positive obligation of the state to provide security and protection of the HR to life of its citizens, particularly against non-state actors of violence as dictated by moral philosophy (particularly social contract principles) and by international and regional HR law. It will argue that the state has no moral or legal basis on which to reject this responsibility. In particular, based on international HR instruments, it argues that the state owes positive duties to protect its citizens from non-state violence. While this obligation may involve some challenges in its implementation, it will be emphasised that the rules of international and regional HR law and domestic criminal justice law should be used concomitantly to strengthen state law concerning the HR to life.

2.2 The State's Positive Obligation to Protect the Right to Life

The concept of duty to protect the human right to life is well established in international HR law. The duty places a state under a positive obligation, in certain circumstances, to prevent private individuals from breaching the rights of other individuals.[9] This right applies equally to all individuals and any attack on it, it will be argued, whatever the degree of damage done, could amount to a violation of the human right to life and many well-established international norms.[10]

Before exploring the nature and extent of the state's legal obligations in this matter, it is worth pausing to consider the moral and ethical backdrop which underpins the international HR framework.

2.2.1 The Moral/ Ethical Philosophical Justifications for Imposing Such an Obligation on the State

The concept of a right to protection appears to have evolved with Hobbes, Locke, Rousseau and Blackstone. The ideas of these philosophers were highly influential in promoting recognition of the right of individuals to security and protection from harm.

[8] Jennifer Fahnestock, 'Renegotiating the Social Contract: Healthcare as a Natural Right' (2011) 72 *University of Pittsburgh Law Review* 549, 562-564.
[9] Sheri P. Rosenberg, 'Responsibility to Protect: A Framework for Prevention' (2009) 1 *Global Responsibility to protect* 442, 448.
[10] Ibrahim Mohammed Sheriff, 'Physical Damage and Compensation in Tort, A Comparative Study' (PhD thesis, University of Baghdad 2002) 33-35.

Their ideas and how they have affected contemporary ideas about the right to security will now be considered.

2.2.1.1 Hobbes' Conception of Security

Security, since Hobbes' *Leviathan*, has been acknowledged as the main benefit of forming a political community. This is the good for which individuals exchange their natural liberty.[11] According to Hobbes, the clear reason for the creation of the state and the basis of its legitimacy rests on its ability to afford security to its citizens.[12] For Hobbes, the social contract is the means by which humans overcome the circumstances in which 'every man is enemy to every man' and 'men live without other security'.[13] In this environment of fear in living without security and the horrific consequences of 'war', Hobbes was persuaded that there was no benefit to mankind, no possibility of civilisation or self-achievement and 'worst of all, continual fear, and danger of violent death'.[14] Therefore, it is the promise of security which lies behind the transition of mankind from being in a state of nature to being a member of a political community,[15] and which contributes to the creation of the conditions in which the lives of individuals can flourish.[16]

Hobbes considered that the provider of peace and security possesses absolute power and that individuals cannot challenge this power,[17] and it is the consent of those in the commonwealth which confers this sovereign power.[18] His social contract was an agreement between individuals to surrender most of their freedoms to the extent necessary to avert war.[19] Therefore, for Hobbes, security was both the reason for the creation of the state and the excuse for its absolute power over its followers.[20] Indeed, since the individuals agreed in their contract to reciprocally follow the rules of the sovereign in

[11] Thomas Hobbes, *Leviathan or the Matter, Forme, & Power of a Common-wealth Ecclesiasticall and Civill*, (1651) Ch XIII, 78 < https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/hobbes/Leviathan.pdf> accessed 4 February 2018.
[12] Ibid.
[13] Ibid.
[14] Ibid; see Rhonda Powell, 'Security and the Right to Security of Person' (DPhil thesis, University of Oxford 2008) 3; April L. Cherry, 'Social Contract Theory, 'Welfare Reform, Race and the Male Sex-Right' (1996) 75 *Oregon Law Review* 1037, 1045.
[15] Hobbes (n 11) Ch XIV, 81-82; see J. Peter Burgess, 'The Ethical Challenges of Human Security in the Age of Globalisation' (2008) 59 *International Social Science* 49, 55; Cherry (n 14) 1046.
[16] Liora Lazarus, 'The Right to Security' in Rowan Cruft, Matthew Liao and Massimo Renzo (eds), *The Philosophical Foundations of Human Rights* (OUP 2014) (forthcoming) 2.
[17] Hobbes (n 11) Ch XVII, 105-106. However, Hobbes acknowledged that the duty of the sovereign remains unfulfilled should he fail to protect the safety of his subjects. Hobbes (n 11) Ch XXI, 136; see Luke Glanville, 'The Antecedents of 'Sovereignty as Responsibility' (2011) 17 *European Journal International Relations* 233, 239.
[18] Jan Narveson, 'Social Contract: The Last Word in Moral Theories' (2013) 4 *Rationality, Markets and Morals Journal* 88, 95.
[19] Hobbes (n 11) Ch XIV, 82.
[20] Cherry (n 14) 1046.

exchange for security, the individuals cannot take any action to hold the sovereign accountable for violation of that contract.[21]

Hobbes' ideas about maintaining peace and security reflect his deep concern about the horrific impact of the English Civil War (1642-1648) on the country's population.[22] However, Hobbes' idea that the benefit of security is too valuable to be endangered by dispute, and that, therefore, the sovereign needs to hold absolute power, is much less persuasive.[23] This is because absolute power can be abused; it would allow the sovereign either to fail to protect HR or even infringe these rights with impunity.[24]

2.2.1.2 Locke, Rousseau and Montesquieu's Conception of Security

Locke made a significant contribution to the development of knowledge about HR, especially in his 'Second Treatise of Government'.[25] Locke contended that, before any societies or communities had been formed, human beings were free and equal to all others in the enjoyment of natural rights to life, liberty, and property.[26] The moral conduct of one human being towards themselves and others was governed only by their innate human nature, namely natural law, knowledge of which could be attained solely by reason.[27] In these circumstances, should an individual's life, freedom and property be attacked, they had a duty defend it and punish the violator. The problem with such a view was that individuals, by themselves, often lacked the strength or knowledge to do so. To overcome this conundrum, Locke agreed with Hobbes that 'safety and security' were the main reason for individuals to form societies,[28] and asserted that individuals surrender their power to others on the 'express or tacit trust, that it shall be employed for their good'.[29]

Unlike Hobbes' idea that 'subjects' give up their liberty to an almost absolute authority, Locke's social contract centred around the notion that individuals entered freely into

[21] Hobbes (n 11) Ch XVIII, 107-108; Glanville (n 17) 238.
[22] Hobbes (n 11) Ch XVIII, 112. For Hobbes, 'even the burdens of oppressive government were better than a complete chaos of the kind individuals suffer in war-torn contexts where social security, policing and law enforcement have broken down'. See Ian David Turner, Human Rights, Positive Obligations and the Development of a Right to Security (PhD thesis, the University of Central Lancashire 2016) 26.
[23] Narveson considers that 'Hobbes's authoritarianism is surely a mistake. It isn't just that government cannot be guaranteed to make us all better off than we would be in the state of nature –though indeed it can't'. Narveson (n 18) 95.
[24] Therefore, 'in condoning an oppressive government – assuming it continues to provide peace and order – Hobbes arguably failed to appreciate how the state itself might pose a threat to security'. See Turner (n 22) 27-28; Lazarus (n 16) 3.
[25] John Locke, *Two Treatise of Government* (Thomas Hollis ed., London: A. Millar et al, 1764).
[26] Donald L. Doernberg, 'We the People: John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action' (1985) 73 *California Law Review* 52, 59; Joshua Foa Dienstag, 'Between History and Nature: Social Contract Theory in Locke and the Founders' (1996) 58 *Journal of Politics* 985.
[27] Douglas G. Smith, 'A Lockean Analysis of Section one of the Fourteenth Amendment' (2002) 25 *Harvard Journal of Law & Public Policy* 1095, 1148.
[28] Locke (n 25) § 222; see Powell (n 14) 3; Liliya Abramchayev, 'A social Contract Argument for the State's Duty to Protect from Private Violence' (2004) 18 *ST John's Journal of Legal Commentary* 849, 851.
[29] Locke (n 25) § 171.

agreement to form a political community for the protection of their natural basic HR with mutual obligations between the individual and governing body, but without giving absolute, unaccountable power to that government, because 'no rational creature can be supposed to change his condition with an intention to be worse'.[30] Therefore, the essential purpose of the government is to ensure the protection of the individual members of society.[31]

Locke considered that the possession of absolute power by the government over its citizens would be a great threat to the security of individuals.[32] Consequently, he stated that 'to be free from such force is the only security of my Preservation'.[33] He thus maintained that the authority of the state was limited by its obligations towards its citizens to 'preserve the Members of that Society in their Lives, Liberties, and Possessions'.[34]

Locke, nevertheless, in his theory about the state prerogative, stated that it was in the interest of public good for the state to exercise this power without recourse to law, because a situation may arise which is not covered by existing law and which needs a speedy solution.[35] According to one commentator, it is better to interpret Locke's position in this matter to mean that 'the prerogative of the executive to act outside of the law might be located within the constitution'.[36] This gives rise to a dilemma as it seems to enable a state to exercise legal power outside the limitations of the law, 'in violation of the prescribed legal limitations on the use of that very power', making it unlimited or constrained in legal terms.[37]

Preservation of the lives, liberties and possessions of society members demands that the rules of society be just and legitimate, particularly since the individual members of the society participate in the rule-making process.[38] Therefore, when a government violates this agreement by enacting a rule that goes against the protection of life, liberty and property, the citizens can 'resume their original liberty', dissolve that government and

[30] Ibid §131; see Doernberg (n 26) 59.
[31] Fahnestock (n 8) 564.
[32] Powell (n 14) 4.
[33] Locke (n 25) Ch3, § 17.
[34] Ibid Ch XV, §171.
[35] Ibid Ch XIV, § 160.
[36] For further discussion, see David Dyzenhaus, 'Schmitt v Dicey: Are States of Emergency Inside or Outside the Legal Order? (2006) 27 *Cardozo Law Review* 2005, 2005-2039.
[37] Ibid.
[38] For Locke, the legitimacy of government depends on the actual consent of the governed. See Michel Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy' (2001) 74 *Southern California Law Review* 1307, 1311.

constitute a new one capable of properly protecting them.[39] As Locke stated, security must be achieved 'within the limits of law'.[40]

Like Locke, Rousseau asserted that the social contract was a reciprocal commitment, stating that the necessary balance between safety and liberty is, in fact, guaranteed by the social contract, which by definition is a mutual agreement between the members of a society to place themselves and the majority of their rights under the authority of the general will, where every member of the society is an integral part of the whole.[41] This implies that to be valid the social contract must be marked by free consent, reciprocity, and moral obligation, and should one of these provisions be absent the contract is constitutionally invalid and any government created by it is therefore illegitimate.[42] The philosopher Montesquieu similarly held that when individuals freely give some of their rights to a government, the protection of these rights becomes its responsibility.[43]

2.2.1.3 Blackstone and Contemporary Ideas about the Right to Security

Blackstone published his 'Commentaries on the Law of England' in the 18th century,[44] and certain statements contained in them are relevant to this study. Blackstone agreed with Hobbes and Locke that security was the prize for which individuals entered into social and political community.[45] He asserted that the 'right to personal security' stems from the three absolute, natural principal rights of man,[46] of personal security, personal liberty, and private property.[47] The primary and absolute rights which Blackstone referred to were those which belong 'to persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it'.[48]

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[39] Locke called the failure of government to achieve this end a breach of trust. Locke (n 25) § 222; see Abramchayev (n 28) 852; Dienstag (n 26) 991.
[40] Locke (n 25) § 137.
[41] Gherghe Anca Costina, 'Jean-Jacques Rousseau and Freedom as Foundation of Social Contract' (2011) 2 *AGORA International Journal of Juridical Sciences* 87, 88; Abramchayev (n 28) 850.
[42] Steven J. Heyman, 'The First Duty of Government: Protection, Liberty and the Fourteen Amendment' (1991) 41 *Duke Law Journal* 507, 515.
[43] David P. Currie, 'Positive and Negative Constitutional Rights' (1986) 53 *University of Chicago Law Review* 864, 864-867; Abramchayev (n 28). It is claimed that the concepts of rights and liberties which are found in the Declaration of Independence, the Bill of Rights and the American Constitution, are strongly influenced by the works of John Locke. See Anita L. Allen, 'Social Contract Theory in American Case Law' (1999) 51 *Florida Law Review* 1, 2. The US Supreme Court embraced the notion of the social contract. See, for instance, *Calder v. Bull*, 3 U.S. 386, 388 (1798); *Lee v. Weisman*, 505 U.S. 577, 606 (1992); *Carmell v. Texas*, 529 U.S. 513, 521 (2000).
[44] William Blackstone, Commentaries on the Law of England (1765, reprinted 1992) 524.
[45] Ibid. 25.
[46] Powell (n 14) 4.
[47] Blackstone (n 44) 129.
[48] Blackstone stated that 'The first and primary end of human laws is to maintain and regulate these absolute rights of individuals'. Blackstone (n 44) 124.

Blackstone stated that the right to personal security includes the right of individuals to the protection of their life and that laws must be passed to combat murder and achieve this goal.[49] However, it should be borne in mind that these man-made laws do not themselves make these acts unlawful. They merely encapsulate the primary law of nature, which forbids violations of the natural rights of individuals.[50] Moreover, he observed that without adopting a method to enforce these rights, laws that recognise them would be a 'dead letter'.[51] His idea in describing security as a natural and legal right was the first attempt to substantially recognise the individual's right to security.[52]

During the 20th century, a debate about the essence of the right to security began to emerge in contemporary theories. Shue regards as basic HR 'the line beneath which no one is to be allowed to sink'.[53] From his perspective, rights are 'basic' if and when 'enjoyment of them is essential to the enjoyment of all other rights'.[54] He also holds that 'whether a right is basic is independent of whether its enjoyment is also valuable in itself'.[55]

Similarly to Blackstone, he determines security as one of the three essential rights, together with 'liberty' and 'subsistence'.[56] As opposed to Blackstone, his essential argument on the right to security is not based on the moral imperative that basic rights are intrinsic to human nature. Instead, he considers security to be a paramount 'meta-right' because it is a precondition without which it would be impossible to enjoy all other rights.[57] He describes the right to security as the right 'not to be subjected to murder, torture, mayhem, rape or assault'.[58] He asserts that, at least, if any rights exist at all, then the basic right to physical security is one.[59] For Shue, all rights are accompanied by both positive and negative duties,[60] and he places the essential duties for the protection of the right to security into three categories:

> Duties not to eliminate a person's security—duties to avoid depriving.

[49] Ibid. 52-53.
[50] Ibid. 42-43, 54; Heyman (n 42) 519.
[51] Ibid. 140-141; Heyman (n 42) 534.
[52] Lazarus (n 16) 7.
[53] Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (2nd edn., Princeton University Press 1996) 40.
[54] Ibid. 19.
[55] Ibid. 20.
[56] Lazarus (n 16) 8.
[57] Shue (n 53) 43; Lazarus states that 'if the right to security becomes the meta-principle upon which all other rights rest, this can also inadvertently legitimise security measures that encroach upon other human rights', Liora Lazarus and BJ Goold, 'Security and Human Rights: The Search for a Language of Reconciliation' in BJ Goold & Liora Lazarus (eds.), *Security and Human Rights* (Hart Publishing 2007) 20.
[58] Shue (n 53) 20.
[59] For further details, see Ibid. 21, 22-26.
[60] Shue (n 53) 51-64.

> Duties to protect people against deprivation of security by other people—duties to protect from deprivation.
>
> Duties to provide for the security of those unable to provide their own—duties to aid the deprived.[61]

State intervention to fulfil these duties is an essential factor in ensuring the enjoyment of other rights and, accordingly, if the state does not implement them, this enjoyment becomes impossible. This point of view has been criticised by Lazarus as appearing to perceive the right to liberty to be less important than the right to security. In addition, she claims that Shue is unclear about the practical methods of fulfilling these duties.[62] However, it should be noted that Shue is obviously aware of the potential use of excessive coercive powers by the state in protecting its citizens, and the harm this could cause.[63] He states that the best way to establish the good organisation of a society is to ensure self-restraint rather than encourage the adoption by the state of excessive coercive powers over its citizens.[64]

Like Shue, Fredman considers the right to security to be the primary precondition for liberty, meaning 'autonomy and genuine freedom of choice, rather than freedom from interference'.[65] Fredman and Powell have recourse to the theory of Sin and Nussbaum about human 'capabilities',[66] which states that to allow individuals to achieve autonomy and freedom of choice, they must be provided with certain protected 'capabilities', such as 'economic opportunities, political liberties, social powers, […] good health, basic education, and the encouragement and cultivation of initiatives'. They consider that such capabilities justify the need for both the positive and negative aspects of the right to security.[67] Fredman shares Shue's view about the positive and negative duty, asserting that the right to security cannot be diminished by the duty of restraint on the part of the state. At the very least, the positive duty must expand to encompass the protection of individuals against the threat of other individuals' acts. This requires a state to take positive measures when necessary to avert illegal acts by others. She indicates that the

[61] Ibid. 52.
[62] Lazarus (n 16) 8.
[63] Shue (n 53) 60-61.
[64] Ibid. 62.
[65] Fredman (n 7) 308.
[66] For Powell, 'security' is only a reference to the goods, attributes and things we want to secure and 'thus, [it] represents the endurance of certain valuable interests without threat', Powell (n 14)73; Fredman (n 7) 309-310.
[67] Amartya Sen, *Development as Freedom* (Oxford University Press, Oxford, 1999) 5; Martha C Nussbaum, *'Women and Human Development: The Capabilities Approach'* (Cambridge University Press, 2000) 101; Lazarus (n 16) 11.

state obligation to protect individuals is attributable to the social contract theory, according to which protection is considered a fundamental duty.[68]

The most recent formulation of the right to security was presented by Ramsay in his theory of 'vulnerable autonomy'.[69] He points out that the right to security should be provided in accordance with the need of individuals to be free from fear of crime, which is a prerequisite for exercising autonomy.[70] He also states that preventive provisions in criminal law are required because of the vulnerability of a citizen's autonomy and the duties of citizens to provide reciprocal reassurance.[71] Any failure to reassure others makes it necessary for accountability to be imputed according to the preventive measures of criminal law, such as Anti-Social Behaviour Orders and other such provisions. This is because the 'responsibility to protect the vulnerability of others is the reflex of those others' right to be free from the fear of crime, which is to say their right to security'.[72]

Ramsay deems that this right to security has affected not only the thinking of the political mainstream,[73] but has also had a key influence on the European Convention of Human Rights (ECHR).[74] Although this right appears indirectly in Article 5 of the Convention,[75] he notes that the demands of security establish a legitimate basis for limiting the rights of individuals, a limitation which is approved by Convention.[76] Therefore, he asserts that 'an individual has no cause for complaint if his human rights are interfered with when such interference is necessary to uphold another's right to security'.[77] However, Lazarus finds Ramsay's assertion to be debatable when he states that 'the right to security is enforced by means of a liability for failure to reassure others, and this liability implies a positive obligation to be aware of what will cause others insecurity'.[78] Thus, Ramsay advocates the widest possible interpretation of the right to security and offers a rational standard basis for the idea of prevention in the context of criminal law.[79]

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[68] Fredman (n 7) 308.
[69] Peter Ramsay, The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law (OUP 2012) 84-112.
[70] Lazarus (n 16) 12.
[71] Ramsay (n 69) 112-113.
[72] Ibid. 112-113; however, the argument that there was "a uniquely police failure on law and order" has been strongly criticised as 'it is wrong to hold the police responsible when any serious consideration of the [crime] problem would show that its causes go much wider and deeper. The police have not created the society in which we live, but they have to police it'. For further details, see Andrew Ashworth, 'Crime, Community and Creeping Consequentialism' (1996) 43 *Criminal Law Review* 220, 220-223.
[73] Ramsay (n 69) 113.
[74] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 3.
[75] Article 5 of ECHR states that 'everyone has the right to liberty and security of person. No one shall be deprived of his liberty…..'.
[76] Lazarus (n 16) 12.
[77] Ramsay (n 69) 120.
[78] Ibid.
[79] Lazarus (n 16) 13.

For Lazarus, Shue, Fredman and Ramsay do not adequately consider the possibility of the state using the right to security as an excuse for excessive coercion.[80] Lazarus rightly raises the possibility that the state may diminish individuals' rights because some states may abuse their power with impunity, a position which is clearly closer to the idea of Locke, as she indicates in 'The Right to Security'.[81] She affirms that the political and moral obligation of the state 'to secure individuals must always be clearly constrained'. Moreover, she adds that 'If there is a right to security correlative upon the State's broader duty of security, it must be balanced within a hierarchy of rights which places liberty, dignity and equality firmly at its apex'.[82]

It may therefore be appropriate to inspect the right to security with regards to the specific duty of the state to protect the right to life of its citizens from non-state actors of violence. It is understood that because the state shoulders the duty to regulate private conduct in order to minimise the risk of the violation of the HR of others,[83] infringement of these rights by private parties 'can never legally remove or impair any of these rights or freedoms, either generally or individually'.[84] Therefore, these rights, including the right to secure individuals' lives, still have a mandatory effect and are legally enforceable. Indeed, the state bears the responsibility to address acts of violence by private parties.[85]

2.2.1.4 Summary Remarks

From the above, at the very least, the state undoubtedly has a moral obligation to secure the right to life of its citizens against acts of violence according to social contract principles. This is despite the different, even contradictory, concepts of how this obligation should be achieved, but the right to security is not about living without the threat of violence at the expense of the illegitimate curtailment of individuals' liberty, such as excessive state coercion. It is about the recognition that every human deserves to live without violence. Excessive coercive measures by the state, claimed to be necessary

[80] Ibid.
[81] Ibid.; for example, the government of the USA, following the 11 September 2001 terrorist attacks, has, in the interests of security, adopted measures, considered by many, to be in violation of human rights and to have failed to subject them to the scrutiny of its judicial authorities. For further details, see Helen Duffy, 'The Role of the Courts: Human Rights Litigation in the 'War on Terror' in Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge University Press, 2015) 846-899.
[82] Lazarus (n 16) 13.
[83] In minimising the risk to their citizens and national security, state authorities must calculate risks posed to security; they must take appropriate measures to counter or pre-empt aggressive actions which may follow such threats. However, this risk assessment should be as strictly objective as possible, but this has often proved difficult to achieve in practice. State authorities may subjectively exaggerate the risks in order to pursue disproportionate policies which suit them, the worst scenario of which would be war. For further details, see Oren Gross and Fionnuala Ni Aolain, 'The Rhetoric of War: Words, Conflict, and Categorization Post-9/11' (2014) 24 *Cornell Journal of Law and Public Policy* 241, 241-289.
[84] Dimitris Xenos, *Taking the State's Positive Obligations Seriously* (PhD thesis University of Durham, School of Law, 2009) 20.
[85] Ibid.

for the fulfilment of its duty to protect, cannot be deemed inherent to the right to security. Therefore, this right is so fundamental that any state or other man-made law must conform with it and not misuse it to detract from basic HR. As Lazarus states:

> If security constitutes such an essential element of all other rights, then let us secure those rights in the first instance, instead of deploying the language of security to arrive at their protection. The right to security needs to […] correlate to clear and meaningful obligations and duties […]. The right to security must be […] meaningful in law, [and] not be so easily deployed to legitimate the State's coercive overreach.[86]

This misuse includes negative attitudes of the state, such as moral negligence, unwillingness, and culpable inability to provide security and protection of the right to life.

2.2.2 Criticisms of the Social Contract Theory

One criticism of the social contract theory, as a moral theory, is that it considers morality[87] as merely relative because its principal aims are to promote whatever necessary measures are required for collective survival and well-being. In Kant's words, it replaces categorical imperatives with hypothetical imperatives.[88] However, social contract theory is not a complete and independent system of morality, but is subject to a superior fundamental, philosophical morality. This means that it cannot solely work for the common good whatever the circumstances.[89] In any particular instance, should measures for the common good contradict philosophical morality, then such measures are null and void. As an example of this, an innocent individual could not be killed by the authorities, even if this would spare hundreds of others in that society. This is because philosophical morality forbids a fundamentally wrong act from being done to achieve something good.[90]

Social contract theory has also been accused of employing two distinct, concomitant contradictory moral concepts: first, that morality is required to institute society in the first place, and, second, that morality is dependent on society.[91] These two concepts, however, are complementary rather than contradictory. Because philosophical morality is necessary for the establishment of a society in the first place, it is not implied that society,

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[86] Lazarus (n 16) 13.
[87] Morality can be understood to mean 'the entire system of laws, principles, rules, and values by which we regulate our individual and social lives and conduct. It specifies our duties or obligations to others and to society, establishes standards of right and wrong conduct, and reflects society's understanding of the nature of moral good and evil'. See Richard A. Spurgeon Hall, Carolyn Brown Dennis and Tere L. Chipman, The Ethical Foundation of Criminal Justice (Boca Raton, Fl.: CRC Press 2000) 7.
[88] Ibid. 114.
[89] Ibid.
[90] Ibid.
[91] Ibid.

once formed, cannot institute further measures to support and strengthen morality. For example, the forbidding of crimes such as murder is a necessity for the very existence of civil society; for other kinds of wrongs, civil society can institute various measures to promote moral virtue among its members.[92]

It is disputed whether a state of nature is a valid concept at all, as it has been much discredited by modern social science, as the rudiments of social organisation seem to have always existed.[93] Accordingly, the state of nature is merely a convenient explanation of the formation of political society.[94] However, social contract theory does not depend on whether a state of nature exists or not. For instance, Locke, in his deliberations about the social contract, considers that 'the state of nature exists wherever rule of law is absent – that is, in the absence of a third judicial party to arbitrate disputes impartially among individuals with the authority and power to enforce such decisions'.[95] This means that whenever a government breaks down and anarchy prevails, a state of nature exists within that country, as the condition of its people is that they are outside the rule of any kind of civil law.[96] Since people, in a state of nature, 'tend to see their own affairs in a biased way and are often influenced by passions, such as desires for revenge, conflicts are likely [to result] in violence'.[97]

The social contract theory has also been criticised as too exclusive, and critics have maintained that only rational beings are capable of entering into a contract (tacitly or otherwise) and honouring its terms.[98] According to this theory, children and retarded adults cannot enter into a contract because they lack the necessary rationality, and so they would be less deserving of moral consideration than those who are rational. Any moral treatment they would be given would be supererogatory but not obligatory.[99]

Finally, the classical social contract theory has been criticised over the assumption that individuals have explicitly, implicitly or otherwise agreed to be ruled by a government of their choice and abide by laws instituted by that government for the common good.[100]

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[92] Ibid. Another criticism is that the social contract theory prevents any distinction between moral obligations and supererogatory acts. For further details, see Ibid. 115.
[93] Ibid.
[94] Ibid.
[95] Ibid.
[96] Ibid.
[97] See Frank Dietrich, 'Consent as the Foundation of Political Authority – A Lockean Perspective' (2014) 5 *Rationality, Markets and Morals* 64, 69.
[98] Hall, Dennis and Chipman (n 87) 116.
[99] Ibid.
[100] See Dietrich (n 97) 27-73; Against Social Contract Theory, 1 <http://rintintin.colorado.edu/~vancecd/phil215/anticontract.pdf> accessed 13 July 2017.

Critics maintain that such consent cannot be obtained or defended. Hume's arguments, for instance, are relevant here.[101] In his famous essay, "Of the Original Contract",[102] he denies that such an agreement can exist, and attempts to answer two empirical questions: 'first, for what reasons state institutions have evolved in almost all human societies, and, second, why individuals typically feel obliged to obey the law'.[103] Hume discusses consent mainly as a possible element of an explicatory theory for the justification of political authority, but not as a normative criterion.[104] To answer the first question, he considers the role of consent to be only in the early stages of the development of state institutions; for him, the main driving forces for such development in the interests of a state's citizens are security and economic prosperity.[105]

However, as states develop further, sovereigns are usually selected by the customary rule of succession.[106] In addition, citizens of many states have been ruled by force; those born into such a state passively accept its rules, without doing so by contract.[107] Hume maintained that 'Almost all the governments which exist at present, or […] in history, [are] founded […] on usurpation or conquest, or both, without any pretence of a fair consent or voluntary subjection of the people'.[108] In answer to the second question, Hume stated that 'neither governments nor citizens consider consent to be the foundation of political authority',[109] but rather that:

> Governments usually treat every citizen as a rebel who insists on his or her natural freedom and refuses to abide by the law. This holds even true for persons who could not have consented to their authority, such as young adults who were— according to Locke's theory—previously incapable of making binding promises. The citizens, on the other hand, typically do not believe that they or their ancestors have agreed to the sovereign's rule. They rather habitually acquiesce in his laws and tend to think that "they were born to such an obedience". The citizens' allegiance to their governments is strongly supported by their interests in preserving the social order and their fear of chaos and insecurity.[110]

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[101] Hume maintained that no such historic contractual moment ever existed. In addition, arguments from reason reveal flaws in social contract logic, especially in Locke's suggestion that residents of a country should be seen as giving tacit consent to their government's actions. Also, experience suggests that people 'are born to obedience' through education and habit, rather than through consent. See Amir Paz-Fuchs, The Social Contract Revisted: The Modern Welfare State (The Foundation for Law, Justice and Society 2011) 3.
[102] David Hume, *Selected Essays* (Oxford: Oxford University Press, 1993) 274-292.
[103] Dietrich (n 97) 72.
[104] Ibid; Christine Chwaszcza, 'Hume and the Social Contract. A Systematic Evaluation' (2013) 4 *Rationality, Markets and Morals* 108, 109.
[105] Hume maintains that because of the threat of external aggression facing members of a society, they may choose a military leader and submit to his commands. Dietrich (n 97).
[106] Ibid. 73.
[107] Ibid.
[108] Hume (n 102) 279.
[109] Dietrich (n 97) 73.
[110] Hume's thoughts directly impact social theorists on tacit consent because 'the observable behaviour of a person can only count as an instance of a tacit consent if he or she is aware of its meaning. […] Hence, the mere presence on a state's territory cannot plausibly be interpreted as a form of promise if the citizens do not understand it'. For further details, see Ibid.

To Hume, therefore, the answer to 'why should the social-contract theorist think that the legitimacy of a form of government or of a system of moral rules depends upon the hypothetical agreement of those who are subject to them', is that 'nothing is more advantageous to society than such an invention [i.e. government]'.[111] This means that the form of government or system of moral rules best serves the interests of the community members and, this sufficiently legitimatises it so that they comply with it. Therefore, it is entirely unnecessary to appeal to a hypothetical social contract to legitimatise a government or a system of moral rules.[112]

However, according to Frank Dietrich, Hume's arguments fail to dismiss 'consent' as a fundamental criterion of political legitimacy; at best, these arguments only demonstrate that any existing government does not meet, or only insufficiently meets, the requirement of consent.[113] Hume stated that 'my intention here is not to exclude the consent of the people from being one just foundation of government. Where it has place, it is surely the best and most sacred of any. I only contend that it has very seldom had place in any degree, and never almost in its full extent; and that, therefore, some other foundation of government must also be admitted'.[114] In Dietrich's opinion, even though Locke's criterion of tacit consent has disappointedly been little observed in practice, this 'does not invalidate the normative reasons motivating him to introduce this requirement' as both a justification for the exertion of political authority and for the legitimacy of states which effectively secure the lives and material possessions of their citizens.[115] However, he pointed out that employing Hume's interests ideas fails,

> to provide a sufficient foundation for the justification of governmental rights and civil duties. Only an individual's factual consent to the authority of a state is capable of conferring legitimacy to the exertion of political power. It may be worth noting that theories which refer to a hypothetical consent do not meet the above explained requirement either. The idea of an imaginary contract may illustrate why it would—under certain circumstances—be in the individuals' best interests to leave the state of nature. However, a hypothetical agreement has, unlike a factual one, no binding force and cannot entail any moral obligations.[116]

[111] Danny Frederick, 'Social Contract Theory Should Be Abandoned' (2013) 4 *Rationality, Markets and Morals* 178, 180.
[112] It has been claimed that 'the form of government or system of moral rules which best serves the interests of the individuals who make up a given community in a given environment is legitimate for that community in that environment'. Ibid. 180-181.
[113] Dietrich (n 97) 73-74; also, Hume has been criticised for failing to offer a proper political theory and that rather he offers only a political sociology which is incapable of adequately addressing the problem of political obligation: 'of why obedience is owed to established power, and why such power may legitimately coerce those who disobey by virtue of its possession of supreme rightful authority –that is –sovereignty'. For further details, see Paul Sagar, 'The State without Sovereignty: Authority and Obligation in Hume's Political Philosophy' (2015) *History of Political Thought* 1, 1-52.
[114] Hume (n 102) 280-281.
[115] Dietrich (n 97) 73-74.
[116] Ibid. 77.

Some of the above criticisms of the social contract theory have a degree of merit, but the theory still has many compensatory strengths. One of these is that it 'provides a firm criterion for deciding what we ought to do and for justifying that decision, which is that it must somehow help preserve or enhance our social life'.[117] It also provides a compelling rational incentive to obey certain moral rules which best promote social peace and prosperity.[118] The greatest strength of the theory is that it establishes both a normative and moral base for arguing that the state must protect the right to life, and it also justifies acts of civil disobedience should the state fail in this. Therefore, when a government whose primary reason for existence is to provide protection for its citizens fails to do this, it has breached its contract, enabling its citizens, on the principle of reciprocity, to cease to have any obligation to obey the law.[119]

It will be argued later that Iraq, until recently, specifically before the defeat of ISIS and, to some extent, consolidating the state institutions under the leadership of the current Prime Minister Haider Al-Abadi, can be viewed as having been in a state of nature, since it had failed to protect citizens against non-state violence. One method of moving from this state of nature necessitates the defining of a clear and strict relationship between the state and society based on the notion that the government must serve the people, in particular by providing protection against violence by non-state actors, by re-building legitimacy and addressing the fragility of the state. This, it will be argued, would be best served by the employment of legitimate social contract principles in a genuine Iraqi process of transitional justice from conflict and violence to peace.[120]

2.2.3 The Evolution of the Right to Life in International Human Rights Law

Social contract theory, as outlined above, has informed the development of the right to life under contemporary HR law. The horrific impact of the Second World War encouraged the international community to establish an effective international legal system capable of ensuring protection of the right to life, promotion of international peace, and prevention of repeated conflict. There is a broad agreement that the actual emergence

[117] Hall, Dennis and Chipman (n 87) 116.
[118] Ibid.
[119] Ibid. 117; Nertil Bërdufi and Desara Dushi, 'Social Contract and the Governments Legitimacy' (2015) 6 *Mediterranean Journal of Social Sciences* 392, 392-398.
[120] See the discussion in Chapters 5 and 6, pages 144, 183-185, 214, 234-235 and 257-262. It has been claimed that 'a significant strand of transitional justice theory has sought to theorize how transitional justice facilitates and consolidates transition in ways that echo the metaphorical path from state of nature to social contract, from war to peace, from anarchy to order. Yet one significant critical strand of transitional justice theorising has been efforts to contest the dots connecting the ends of transition to notions of social contract, peace, and political order'. Anne Orford, Florian Hoffmann and Martin Clark, Handbook of the Theory of International Law (Oxford University Press, 2016) 795.

of modern international HR law began with the UN Charter of the United Nations in 1945,[121] Article 1(3) of which states that one UN objective is to attain international co-operation in 'promoting and encouraging respect for HR and for fundamental freedoms for all without distinction as to race, sex, language or religion'.[122]

The right to life is considered to be the most essential of all HR, described by the UN Human Rights Committee (UNHRC) as 'supreme'[123] in a wide array of international and regional HR instruments. Although initially conceived as a mechanism to protect individuals from the abuse of power by the state, recent developments concerning the convergence of the vertical and horizontal aspects of HR law have meant that individuals are now able rely directly for the protection of HR on both aspects.[124]

There are currently several situations where the state must enact a legislative framework and practical measures to protect individuals from serious criminal acts that threaten their life or physical safety.[125] Such preventive obligations are broadly designed to protect society as a whole, but have particular relevance for vulnerable groups, such as women and children, which are subject to special protection within international mechanisms.[126] In addition, under international and regional HR law, in certain defined circumstances states can also have a positive obligation to take preventive operational measures to protect individuals from life-threatening injury posed by acts of terrorism.[127] In this context, 'states are required to establish effective mechanisms for identifying potential future threats of terrorist attack, to analyse the information with reasonable care, to reach an informed risk assessment and to take appropriate action', which may include, where

[121] The Charter of the United Nations; June 26, 1945; see Thomas Buergenthal, 'The Evolving International Human Rights System' (2006) 100 *American Journal of International Law* 783, 785.
[122] However, it should be noted that no specific details about human rights were identified in the UN Charter, nor were any mechanisms established to protect the human rights of the UN's members. See Organization for Security and Cooperation in Europe, 'Countering Terrorism, Protecting Human Rights: a Manual' (OSCE 2007) 43.
[123] United Nations Human Rights Committee, 1982.
[124] Doak (n 3) 38; Fredman (n 7) 308.
[125] Doak (n 3) 39.
[126] Ibid.; Van Kempen (n 5) 17.
[127] See Office of the United Nations High Commissioner for Human Rights (OHCHR), Human Rights, Terrorism and Counter-terrorism, 2008, No. 32, 8 <http://www.refworld.org/docid/48733ebc2.html> accessed 14 January 2018; UNHRC, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' UN Doc A/HRC/20/14, paras 18-20. In spite of attempts by intergovernmental organisations, governments, and academics to define terrorism, there is still no agreed definition in international law. According to one International Court of Justice judge 'terrorism is a term without any legal significance. It is merely a convenient way of alluding to activities, whether of States or individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both'. 'The difficulty in defining terrorism is that it is caught up with the notion that it can be, in particular circumstances, legitimate to use violence' and also 'an overly broad definition of terrorism can be used to shut down non-violent dissent and undermine democratic society'. For instance, the definition of terrorism stipulated in Article 2 of the draft Comprehensive Convention on Terrorism has been criticised because it provides a broad definition. For further details, see Organization for Security and Cooperation in Europe (n 122) 22-24; see also in this respect Cynthia C. Combs, Terrorism in the Twenty-First Century (7ed., Routledge 2016) 5-8; George P. Fletcher, 'The Indefinable Concept of Terrorism' (2006) 4 *Journal of International Criminal Justice* 894, 894; JO¨ RG Friedrichs, 'Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism' (2006) 19 *Leiden Journal of International Law* 69, 69-91.

appropriate, the duty to provide information to the public and not only to disrupt threatened attacks by law enforcement agencies.[128] However, as the countering of terrorism poses grave challenges to the protection and promotion of HR, states must ensure that all measures taken comply with their obligations under international law, especially international HR.[129]

The states' positive obligations under HR law, however, extend to a wide range of violence and sexual offences against a person and are not confined to threats to life. This chapter now proceeds to explore in detail the nature and extent of these obligations within international legal frameworks.

2.2.3.1 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was the first instrument under which individual HR became the subject of international legal concern.[130] The UDHR, along with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), [131] constitutes the foundation of international HR law.[132]

The UDHR established a universal language of HR, and those of individuals stem from being members of the international community, and the UN gives expression to these as global values. It is currently acknowledged that it is the obligation of a state to enhance and protect all HR and fundamental freedoms, regardless of its political, economic, and cultural systems.[133] The UDHR is based on the 'inherent dignity of all members of the human family' and are the 'foundation of freedom, justice and peace in the world'. It recognises that to ensure every person's right to life, liberty and security, HR need to be observed.[134]

However, it should be noted that the Declaration did not place any legal binding obligations on the state, even though it did anticipate future universal legislation

[128] UNHRC (n 127), para 21.
[129] OHCHR (n 127) 8-9.
[130] UDHR (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Art 5.
[131] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (1966), GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3 (adopted 1966, entered into force in 1976).
[132] Buergenthal (n 121) 787; David Weissbrodt and Connie de la Vega, International Human Rights Law: An Introduction (University of Pennsylvania Press 2007) 4.
[133] Organization for Security and Cooperation in Europe (n 122) 44.
[134] Art 3 of the UDHR (n 130); United Nation, Handbook on Criminal Justice Response to Terrorism (UN Publication 2009) 44.

concerning the right of all individuals to life, liberty and security.[135] In addition, many states have incorporated the principles of the UDHR in the fundamental rights or basic laws of their constitutions. Moreover, many of the provisions of the UDHR are considered to reflect customary international law, and therefore to be binding on states that have not signed some of the instruments subsequently adopted.[136] In this sense, it has been claimed that, among supporters of the development of international law, terrorism should be considered as a universal violation of customary international law because such acts violate many well established international norms and because widespread systematic attacks on civilians are considered to be crimes against humanity.[137] Therefore, even if the provisions of the Declaration specifically concerning the protection of the right to life were not legally binding on the states, it is important to note that violation of these provisions should be considered breaches of universal customary international law.[138]

2.2.3.2 The International Convention on Civil and Political Rights (ICCPR)

Unlike the UDHR, this treaty is legally binding on states that have ratified it. Article 6 (1) of the ICCPR states that:

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Under Article 6 of the Convention, the obligations of the state go beyond the duty of refraining from the unlawful taking of life by its own public officials. It also embodies the state's positive duty to take appropriate steps to safeguard the lives of individuals within its jurisdiction from attacks on their right to life.[139] However, it should be noted that the right to life under Article 6 of the Convention cannot be interpreted as making states stand as absolute guarantors against every threat, as this would impose a disproportionate duty on the authorities. Nevertheless, in certain defined situations, state authorities do have a positive obligation to take operational measures to prevent violence by non-state actors.[140] This positive obligation must be practical and effective not merely notional or indeterminate.[141]

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[135] Monica Hakimi, 'State Bystander Responsibility' (2010) 21 *European Journal of International Law* 341, 347.
[136] United Nations, Handbook on Criminal Justice Response to Terrorism (n 134) 19.
[137] Daniel J Hickman, 'Terrorism as a Violation of the "Law of Nations:" Finally Overcoming the Definitional Problem' (2012) 29 *Wisconsin International Law Journal* 447, 479-480.
[138] Organization for Security and Cooperation in Europe (n 122) 44. These values are continuously reaffirmed. See. For instance, the Vienna Declaration and Programme of Action (adopted by the World Conference on Human Rights on 25 June 1993) Doc. A/CONF.157/23, 12 July 1993.
[139] Shue (n 53) 52.
[140] UNHRC (n 127), para 20.
[141] Rosenberg (n 9) 453.

As a result, the Convention has established the UN Human Rights Committee (HRC) to consider reports submitted by its members, expressing the measures they have adopted to give effect to the rights set forth in the Convention.[142] The HRC can also receive appeals from victims whose rights have been violated, if the country in question has ratified the Optional Protocol which permits such petitions. Moreover, the victims must have exhausted all existing domestic remedies before a complaint can be made against the violation of their rights by the state.[143] It is indicated in the General Comment on Article 6 of the Covenant that state parties should take specific and effective measures to prevent the violation of the right to life by both criminal acts of individuals and state authorities.[144]

The notion of the positive obligation to prevent violation by private parties has developed as a standard requiring due diligence; this concept is recognised in many domestic tort law systems.[145] However, while due diligence requires that as many reasonable measures of prevention be put in place as could be expected from governments, if, in spite of such measures being taken, violations occur, then governments are not responsible for these breaches.[146] The HRC has comprehensively articulated the due diligence standard in General Comment No. 31 in Article 2 of the Convention.[147] Under Article 2(1) of the Convention, state parties are required to 'ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind'. Article 2 (2-3 (c) also requires states to adopt legislation and remedies necessary to effect the rights recognised by the Covenant.[148] The same Comment also imposes legal obligations on states to protect individuals from both state action and the violation of individual rights by private parties. Therefore, under the Convention, if states fail to exercise due diligence in protecting these rights against such violation, then the states are guilty of negligence.[149]

The jurisprudence of the HRC has contributed effectively to the promotion of the obligation of the state to take adequate measures to protect the right to life. For example,

[142] Bertrand G. Ramcharan, 'The National Responsibility to protect Human Rights' (2009) 39 *Hong Kong Law Journal* 361, 369; Weissbrodt and de la Vega (n 132) 38-40.
[143] See United Nation General Assembly, Report of the Human Rights Committee (2012) I A/67/40, para 114.
[144] UNHRC, *General Comment No 6: The Right to life*, 30 April 1982, HRI/GEN/1/Rev.6 at 127 (2003), para 3.
[145] Rosenberg (n 9) 453.
[146] Ibid, 454.
[147] UNHRC, General Comment No 31: The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 8.
[148] For further details, see Ramcharan (n 142) 369-372.
[149] Rosenberg (n 9) 454.

in *Krasovskaya v Belarus*,[150] concerning the disappearance of Anatoly Krasovsky, the Committee concluded that there was insufficient evidence linking the state authorities with this disappearance. However, the Committee also reminded the member states of their positive obligation to protect individuals against any violation of their Covenant rights, regardless of whether this violation is committed by its agents or by private individuals. Furthermore, the Committee recalled its General Comment, mentioned above, which requires member states to have an appropriate mechanism for both the judicial and administrative authorities to address allegations of the violation of HR.[151]

Similarly, *Djebbar and Chihoub v. Algeria*,[152] considered the allegation of the violation of the right to life of Djamel and Mourad Chihoub by the state authorities. The two boys were arrested by members of the army in 1996. The victims' family had not seen or heard from them since and had therefore lost hope of finding them alive, as 15 years had passed. The family also believed that they had died while in detention. The HRC noted that the member state had not released any information concerning the allegation and the other concerns of the family, and therefore concluded that the state party had failed to comply with Article 6 of the Covenant, which imposes a positive obligation on the state to protect the right to life of its citizens.[153]

The Human Rights Committee has also placed such an obligation on states, in cases other than life-threatening ones, including torture, ill treatment, and gender-based violence. In its General Comment on Article 7 of the Covenant, which concerns the prohibition of torture, the HRC extended the scope of protection to include acts of violence committed by individuals acting in their 'private capacity'.[154] It is also implicit in Article 7 that a state has to take positive measures to ensure that private persons or entities do not perpetrate torture or cruel, inhuman or degrading treatment or punishment on others within its jurisdiction.[155] Therefore, 'there are strong arguments for the claim that the

[150] *Krasovskaya v. Belarus*, Communication No. 1820/2008, CCPR/C/104/D/1820/2008 (2012); see United Nation General Assembly (n 143), para 158.
[151] UNHRC, General Comment No 31 (n 147), para 15.
[152] *Djebbar and Chihoub v. Algeria*, Communication No. 1811/2008, ICCPR/C/103/D/1811/2008 (2012).
[153] Ibid.; see also *Florentina Olmedo v. Paraguay*, Communication No. 1828/2008, U.N. Doc. CCPR/C/104/D/1828/2008 (2012); *Traoré v. Côte d'Ivoire*, Communication No. 1759/2008, U.N. Doc. CCPR/C/103/D/1759/2008 (2011); and *Kamoyo v. Zambia*, Communication No. 1859/2009, U.N Doc. CCPR/C/104/D/1859/2009 (2012); for further details, see United Nation General Assembly (n 143), paras 161-163, and 165-166.
[154] See UNHRC, General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (1992), paras 2 and 13; Lisa Grans, 'The State Obligation to Prevent Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: The Case of Honour-Related Violence' (2015) 15 *Human Rights Law Review* 695, 707; Sarah Joseph et al., A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies: Seeking Remedies for Torture Victims (2nd ed., World Organisation Against Torture (OMCT 2014) 163-164.
[155] See UNHRC, General Comment No 31 (n 147), para 8; Alice Edwards, Violence against Women under International Human Rights Law (Cambridge University Press, 2010) 241.

state's obligations in relation to the prohibition of torture under the ICCPR now extends also to the private sphere'.[156] The HRC, for instance, has followed this approach in its jurisprudence,[157] concluding observations on state parties' reports in cases involving gender-based violence, including sexual, domestic and honour-related violence.[158] It recognises that gender-based violence can breach Article 7, and, thus, state parties must take appropriate measures in accordance with the principle of due diligence to prevent and combat such violence.[159] However, Edwards notes that the standard of due diligence appears inadequate as a benchmark for the protection of women against violence since states are only required to take 'reasonable' steps to eradicate such violence, and it is unclear how to measure this failure.[160] Moreover, which type of measure states should undertake in line with the due diligence principle are affected by the particular right and circumstances.[161] For honour-related violence, states should be aware that violence which violates the prohibition of torture and other cruel, inhuman or degrading treatment or punishment is widespread in their society, and that they have an obligation under international HR law to take preventive measures on the societal level.[162] This means that addressing such a problem by criminal legislation alone is insufficient and so 'civil law measures are also often needed, such as amendments to the family law, as are policy measures, such as establishment of shelters and systems for relocating high-risk persons to other safe and long-term places of residence. A particularly important policy measure is the modification of stereo-typed gender roles and prejudices and practices based on the inferiority of women'.[163]

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[156] Grans (n 154) 707.

[157] For instance, in a non-refoulement case concerning the risk that the author's daughter would be subject to excision if removed to Guinea, the HRC concluded that 'although the threat of FGM [female genital mutilation] in the case was posed by private persons, FGM can be practised with immunity in the country to which Kaba would have been returned. Returning her would thus have violated the prohibition of torture in Article 7'. *Kaba v Canada (1465/2006), Views, CCPR/C/98/D/1465/2006*, para 10.1 and 2. See Grans (n 154); see also Joseph et.al (n 154) 194-195.

[158] Under Article 7 of the ICCPR, the HRC has condemned various forms of gender-based violence, including domestic violence, rape and sexual violence and female genital mutilation, and requires state parties to take adequate steps to prevent and combat all forms of gender-based violence. See, for instance, HRC Concluding Observations on Indonesia, paras 12 and 13; Tajikistan, para 7; Czech Republic, para 15; Ukraine, para 14; Mauritania, paras 10 and 11. For further details, see Report of the Human Rights Committee, UN Doc. A/69/40 (Vol. I) (2014).

[159] In that context, 'states parties must take appropriate measures to combat domestic and sexual violence, including the investigation of allegations, and prosecution and punishment of perpetrators [and] a legal framework criminalizing such acts needs to be adequately in place'. It has been noted, however, that 'unlike other international judicial or quasi-judicial human rights bodies, [the HRC] has never expressly addressed the question of whether grievous forms of sexual violence such as rape constitute a form of "torture" under Article 7'. See, for instance, the case of *L.N.P. v. Argentina*, Communication No. 1610/2007, U.N. Doc. CCPR/C/102/D/1610/2007 (2011) which concerns the reported rape of the author by unknown men. The author argued that 'her case was by no means exceptional since Qoom girls and women were frequently exposed to sexual assault in the area, while the pattern of impunity that exists in regard to such cases is promoted by the prevalence of racist attitudes' (para 2.7). She claimed that 'she had been a victim of discrimination on police premises after the incidents, and also during the medical examination and throughout the trial' (para 3.2). The HRC, found that 'the author was the victim of treatment of a nature that is in breach of Article 7 of the Covenant'. However, there was no scrutiny of the State party's obligations vis-à-vis the general situation presented by the author'. See Joseph et al. (n 154) 193.

[160] Edwards (n 155) 315.

[161] For further details, see Grans (n 154) 704-705.

[162] Ibid. 715.

[163] This is recognised in the HRC General Comment No. 20 (n 154), para 8. Grans (n 154) 714.

The practice of the HRC has been noted, however, to adopt a more restrictive view on the preventive obligations of the state regarding violence perpetrated by private individuals on the societal level, and that its jurisprudence has related to measures taken after harm has been caused, rather than prevention and, so 'the HRC has yet to articulate prevention obligations in the context of non-State abuse'.[164] Certain preventive measures, therefore, are sometimes required on an individual level to prevent private acts of violence. In Article 24(1), the HRC stated that 'in cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the State should intervene to restrict parental authority' and, therefore effective early prevention strategies are needed.[165]

2.2.3.3 The European Convention of Human Rights (ECHR)

The European Convention of Human Rights (ECHR) pays significant attention to the protection of the HR to life in Article 2:

> Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

The European Court of Human Rights (ECtHR) noted in *McCann and Others v United Kingdom*[166] that this right is one of the most fundamental in the Convention and establishes a basic value common to all democratic societies.[167] Under Article 2 of the ECHR states must not only refrain from taking life but must also protect it against threats from third parties. This will involve effective criminal law measures to prevent and deter criminal acts that threaten life.[168]

The principle of positive obligations placed on the state stems from the decision in *X and Y v Netherlands*[169] which stipulates that the signatory states of the European Convention of HR have a positive duty to establish preventive measures to ensure that non-state parties do not violate the HR of others.[170] The Court in this case found that the state had failed to safeguard the rights of victims to privacy over the failure to protect a woman

[164] The HRC addresses FGM 'similarly to other forms of physical violence, thus the main recommendation is to criminalize the practice. This disregards the essential need for measures aimed at attitude change'. See Grans (n 154) 715.
[165] Ibid. 717.
[166] *McCann v. United Kingdom* (1995) 21 EHRR 97. See Colin Warbrick, 'The principles of the European Convention on Human Rights and the response of states to terrorism' (2002) 3 *European Human Rights Law Review* 287, 292.
[167] *McCann v. United Kingdom* (n 166), para 147; see Louise McCamphill, 'The Right to Life Shall be Secured to Everyone by Law: The Extent to which the European Court of Human Rights has Developed the Concept of Positive Obligations in Relation to Article 2' (2010) 2 *King's Student Law Review* 103, 104.
[168] *McCann v. United Kingdom* (n 166), para 115; see A. R. Mowbray, The Development of Positive Obligation under the European Convention on Human Rights by the European Court of Human Rights (Hart Publishing 2004) 7.
[169] *X and Y v Netherland*. App no. 8978/80 (ECHR, 26 March 1985).
[170] Ibid., para 23; see Jonathan Rogers, 'Appling the Doctrine of Positive Obligation in the European Convention of Human Rights to Domestic Substantive Criminal Law in Domestic Proceedings' (2003) *Criminal Law Review* 690, 691.

with learning disabilities from sexual abuse. Although the decision is related to Article 8 of the Convention, it is widely acknowledged that it also applies to all provisions, including the right to life.[171]

The *Osman* case[172] has contributed towards a radical rethinking of the right to protection under Article 2 of the Convention. Ali Osman had been killed and his son wounded following sustained threats against them by a schoolteacher. The appellants, i.e. the wounded son and the widow of Ali Osman, complained that the failure of the police to take adequate and reasonable measures to protect the son from being exposed to assault and his father from being killed by a person whom the authorities knew, or ought to have known, was a danger to them had violated their right to life according to Article 2 ECHR. The Court documented that if someone suffers a 'real and immediate risk to life' from identified third parties, the state authorities should protect them.[173] However, it held that the appellants were unable to present evidence that the police knew, or ought to have known, that their lives were at risk and so the Court concluded that the obligation under Article 2 had not been violated by the state.[174]

This obligation was confirmed in *Mahmut Kaya v Turkey*.[175] The case related to the assassination of a doctor by the Contra fighters with the knowledge and support of the security forces, on the grounds that he had been suspected of helping the PKK. While the Court did not conclude that the state was involved in the assassination, it did conclude that the authorities failed to comply with a positive obligation to protect the deceased from the known risk to his life. As someone suspected of aiding and abetting the PKK, the deceased were at some risk of falling victim to an illegal attack. Since the state authorities were aware, or ought to have been aware, of this threat to the life of the victim, the authorities had failed to respond, and could therefore be indicted for failing to take reasonable and adequate measures to prevent the danger to the life of the victim.[176]

Similarly, in *Edwards v UK*,[177] concerning the killing of the appellant's son by his prison cell-mate, the ECtHR ruled that the victim's right to life under Article 2 had been breached. The Court held that although the authorities knew, or ought to have known, that

[171] Doak (n 3) 40.
[172] *Osman v The United Kingdom* (1998) 29 ECHR 245.
[173] Ibid., para 116; see Lorraine Wolhuter, Neil Olley and David Denham, Victimology: Victimisation and Victims' Rights (Rutledge-Cavendish, 2009) 126; Robert Weekes, 'Focus on ECHR, Article 2' (2005) 10 *Judicial Review* 19, 20.
[174] *Osman v The United Kingdom* (n 172), paras 90-92, 121.
[175] *Mahmut Kaya v Turkey* App no 22535/93 (ECHR, 28 Mar 2000).
[176] See Mowbray (n 168) 17-18. Doak (n 3) 41.
[177] *Edwards v UK* App no 46477/99 (ECHR, 14 March 2002).

the cell-mate represented a 'real and serious risk to the life of others', they had failed to take adequate and reasonable measures, which led to the loss of life.[178] Accordingly, the state was judged to have violated Article 2 of the Convention. Because criminal law demands that the state play an active role in the deterring of the commission of criminal acts by providing law enforcement mechanisms to prevent them and ensure punishment for the violation of the rules of non-aggression to the HR to life, the Court concluded there was a violation of Article 2 of the Convention.[179]

Under the ECHR, Article 2 should be read in conjunction with the general obligation of states under Article 1 to 'secure to everyone within their jurisdiction the rights and freedom defined'. The substance of Article 1 rests on the principle of effectiveness which is more than a mere theoretical concept of protection. Effectiveness is achieved only by providing positive practical measures. Thus, there is no doubt that member states cannot claim to fulfil their duties under Article 2 of the Convention by simply remaining passive.[180]

In cases concerning domestic violence in which victims or potential victims alleged that their states parties have, inter alia, failed to protect them from domestic violence, or to establish sufficient measures to prevent domestic violence, the ECtHR has handed down important judgments, finding violations of their HR on the ground of the failure of states to fulfil their positive obligations.[181] For instance, in the case of *Kontrovà v. Slovakia*[182] concerning the alleged failure of the authorities to protect the applicant's children's lives, since the authorities had sufficient knowledge of the husband's abusive and threatening behaviour, including death threats, due to the applicant's ongoing communication with the police, the Court held that there had been a violation of Article 2.[183] Specifically, given the criminal complaint of November 2002 made by the applicant against her husband, accusing him of assaulting and beating her with an electric cable, alongside the emergency phone calls of December 2002, the Court observed that the situation in the applicant's family had been known to the local police. However, as the domestic courts

[178] Ibid., paras 55-64, 61.
[179] See McCamphill (n 167) 111.
[180] See *Ozalp and others v Turkey* app no 32457/96 (ECHR, 8th July 2004), para 32; see Daniel Rietiker, 'The Principle of 'Effectiveness' in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law –No Need for the Concept of Treaty Sui Generis' (2010) 79 *Nordic Journal of International Law* 245, 259 in which he states that 'A restrictive approach to the interpretation of the Convention would endanger respect for the individual rights and freedoms enshrined in the Convention'.
[181] See Jamil Ddamulira Mujuzi, 'Preventing and Combating Domestic Violence in Europe: The Jurisprudence of the European Court of Human Rights' (2016) *The International Survey of Family Law* 165, 167.
[182] *Kontrovà v. Slovakia* App no 7510/04 (ECHR, 31 May 2007).
[183] Ibid., paras 52-55.

established and the Slovakian government acknowledged, although 'under the applicable law, the police had been obliged to: register the applicant's criminal complaint; launch a criminal investigation and criminal proceedings against the applicant's husband immediately; keep a proper record of the emergency calls and advise the next shift of the situation; and, take action concerning the allegation that the applicant's husband had a shotgun and had threatened to use it', the police has failed to do so and, instead, an officer had even assisted in changing her criminal complaint of November 2002 to minor offence calling for no further action.[184] The direct consequence of these failures by the police was the death of the applicant's children.[185]

The decisions of the ECtHR in the two cases of *Bevacqua and S. v. Bulgaria*[186] and *Opuz v. Turkey*[187] in 2008 and 2009 are considered a turning point for the Court and international law as they advanced the due diligence standard in the context of domestic violence by enumerating several identifiable minimums, including the existence of a judicial mechanism for obtaining protection measures, such as orders of protection, and the availability of prosecution in the public interest for all crimes of domestic violence; these gave practical substance to judging a state's adherence to the principles of protection, investigation, and prosecution contained in the due diligence standard.[188] In *Bevacqua and S. v. Bulgaria*, the first applicant claimed that she was regularly abused and assaulted by her husband, leading her to leave home with their son (the second applicant), and file for divorce.[189] However, her husband continued to assault her. In a shelter for abused women, the applicant spent four days with her son but she was allegedly warned that she could face prosecution for abducting the boy, leading to a court order for shared custody, which, she stated, her husband did not respect. Further violence against her was triggered when she pressed charges against her husband for alleged assault. Her

[184] Factsheet –Domestic violence –European Court of Human Rights, 2017, Council of Europe, 1 <http://www.echr.coe.int/Documents/FS_Domestic_violence_ENG.pdf> accessed 29 December 2017; see Ramunė Jakštienė, 'Domestic Violence in Case-Law of European Court of Human Rights' (2014) 11 *Public Security and Bublic Order* 68, 81-82.
[185] Factsheet –Domestic violence –European Court of Human Rights (n 184). In numerus cases of domestic violence, the Court found a violation of Article 2. See, for instance, the case of *Branko Tomašić and Others v. Croatia* App no 46598/0 (ECHR, 15 January 2009), in which the Court found such violation 'on account of the Croatian authorities' lack of appropriate steps to prevent the deaths of the child and his mother'. It observed that the domestic courts and psychiatric examination showed that the authorities had been aware that the threats made against the lives of the mother and the child were serious and that all reasonable steps should have been taken to protect them; the case of *Civek v. Turkey* App no 55354/11 (ECHR, 23 February 2016); see also the recent case of *Talpis v. Italy* App no 41237/14 (ECHR, 2 February 2017), in which the Court found a violation of Article 2, Article 3 (prohibition of inhuman or degrading treatment), and Article 14 (prohibition of discrimination). See Factsheet –Domestic violence –European Court of Human Rights, 2-3.
[186] *Bevacqua and S v Bulgaria* App no 71127/01 (ECHR, 12 June 2008).
[187] *Opuz v. Turkey* App no 33401/02 (ECHR, 9 June 2009).
[188] Lee Hasselbacher, 'State Obligations Regarding Domestic Violence: European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection' (2010) 8 *Northwestern Journal of International Human Rights* 190, 203; Kristina B. Houchins, Freedom from Domestic Violence as a Human Right: Evaluation of the use of the Due Diligence Standard within Local Contexts across the United States (MSc thesis, Columbia University 2016) 17.
[189] See Hasselbacher (n 188) 204; Factsheet–Domestic violence- European Court of Human Rights (n 184) 8.

demands for interim custody measures were not prioritised and only when her divorce was pronounced more than a year later did she finally obtain custody. She was again battered by her ex-husband in the following year, and on the grounds that it was a 'private matter' requiring a private prosecution, her requests for a criminal prosecution were rejected.[190] The applicant argued before the ECtHR that her right under Article 8 of the ECHR to respect for private and family life was violated by state authorities since they failed to take the necessary measures to provide an adequate legal framework that would protect her and her young son from the violent behaviour of her former husband.[191] She also claims that Bulgarian law was contrary to, inter alia, Article 3 and 8 of the ECHR because:

> the relevant law according to which the burden to prosecute for light bodily injury rested with the victim was incompatible with the State's duty to provide protection against domestic violence and was discriminatory in that the law's shortcomings impacted disproportionately on women.[192]

The Court found a violation of Article 8 on the grounds that the cumulative effects of the domestic courts' failure to adopt interim custody measures without delay in a situation of domestic violence amounted to a failure to assist the applicants, contrary to the state's positive obligation to secure respect for their private and family life.[193] The Court concluded that:

> the possibility for the first applicant to bring private prosecution proceedings and seek damages was not sufficient […] and could not serve to prevent recurrence […]. In the Court's view, the authorities' failure to impose sanctions or otherwise enforce [the perpetrator's] obligation to refrain from unlawful acts was critical […], as it amounted to a refusal to provide the immediate assistance the applicants needed. The authorities' view that no such assistance was due as the dispute concerned a "private matter" was incompatible with their positive obligations to secure the enjoyment of the applicants' Article 8 rights.[194]

In the second case, *Opuz v. Turkey*,[195] the applicant and her mother had suffered years of domestic violence and threats from the applicant's husband. Despite numerous complaints to the police and prosecuting authorities, claiming that their lives were in danger, the authorities had done little to protect them, and, ultimately the applicant's mother was killed by him.[196] The prosecution argued that the mother's right to life under

[190] Factsheet–Domestic violence- European Court of Human Rights (n 184).
[191] *Bevacqua and S v Bulgaria* (n 186), para 65.
[192] She also added that Bulgarian law is deficient because it 'treated domestic violence as a trivial family matter that did not warrant public prosecution'. Ibid, para 63; see Mujuzi (n 181) 168-169.
[193] See Factsheet–Domestic violence- European Court of Human Rights (n 184); Ganna Khrystova, 'State Positive Obligations and Due diligence in Human Rights and Domestic Violence Perspective' (2014) 1 *European Political and Law Discourse* 109, 117.
[194] *Bevacqua and S v Bulgaria* (n 186), para 83; see Mujuzi (n 181) 169; see also *Kowal v Poland* App no 2912/11 (ECHR, 18 September 2012), in which the Court found the related states to have violated their positive obligations under Article 8. See Factsheet –Domestic violence –European Court of Human Rights (n 184) 8-9.
[195] *Opuz v. Turkey* (n 187).
[196] See Hasselbacher (n 188) 209-211; Houchins (n 188) 18.

Article 2, and Opuz's own right to be free from torture and ill treatment under Article 3, had been violated by ineffective Turkish authorities. It was also contended that the law enforcement's inadequate response was a result of gender-based discrimination and, therefore, a violation of Article 14 of the ECHR.[197] In deciding the case, the Court observed that it was critical, despite the withdrawal of complaints by the victims, 'to consider whether the local authorities displayed due diligence to prevent violence against the applicant and her mother, in particular by pursuing criminal or other appropriate preventive measures' against the applicant's husband.[198] The Court's historic judgment found that because the state authorities failed to exercise due diligence in providing effective protection measures and prosecution, there had indeed been a violation of Article 2 concerning the murder of the applicant's mother and a violation of Article 3 concerning the state's failure to protect the applicant.[199] It found that the criminal law in place did not have the capability to provide an adequate deterrent effect and, thereby, ensure effective prevention of violence against the women. This was alongside the widespread passivity on the part of the police and prosecutors to respond to such complaints. The Court noted that 'the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors…indicated that there was insufficient commitment to take appropriate action to address domestic violence'.[200] This has also led the Court to conclude, for the first time in a case of domestic violence, in conjunction with Articles 2 and 3, that there had been a violation of Article 14 (prohibition of discrimination) of the Convention. It observed that 'domestic violence affected mainly women, while the general and discriminatory judicial passivity in Turkey created a climate that was conducive to it. The violence suffered by the applicant and her mother [was] therefore […]gender-based'.[201]

In cases where private violence, including domestic and all gender-based violence, have not resulted in death, the Court imposes positive obligations on member states.[202] In

[197] *Opuz v. Turkey* (n 187), paras 65-69.
[198] Ibid., para 77; see Houchins (n 188) 19.
[199] Ibid., para 200; see Houchins (n 188) 19; for further details, see Hasselbacher (n 188) 211-214.
[200] Ibid., para 200; Khrystova (n 193) 118; the Court found that the authorities failed 'to set up and implement a system for punishing domestic violence and protecting victims. The authorities had not even used the protective measures available and had discontinued proceedings as a "family matter" ignoring why the complaints had been withdrawn. There should have been a legal framework allowing criminal proceedings to be brought irrespective of whether the complaints had been withdrawn'. See Factsheet –Domestic violence –European Court of Human Rights (n 184) 10.
[201] See Factsheet –Domestic violence –European Court of Human Rights (n 184).
[202] See *M.C. v Bulgaria* App no 39272/98 (ECHR, 4 December 2003), concerning the alleged rape of a 14-year-old by two private individuals. The Court held that the approach taken in the case fell short of the Bulgaria Government's positive obligation to 'establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse' (paras, 185-187) and, thereby, it found a violation of Articles 3 and 8. For further details, see Madeleine Eklund, Violence against Women as a Violation of the European Convention on Human Rights: Due Diligence and State Responsibility for Violence against Women by Private Actors (2016) 15-16.

Eremia and Others v. the Republic of Moldova,[203] the first applicant and her two daughters complained that their rights under Articles 3 and 14 had been violated because of the failure of Moldovan authorities to provide protection from the violent and abusive behaviour of their husband and father, who was a police officer.[204] For the first applicant, the Court held that, despite the knowledge of the state authorities of the abuse that the applicant endured, the authorities had failed to take effective measures to protect her, in violation of Article 3 of the Convention.[205] The Court further for the daughters that, despite the detrimental psychological effects of them witnessing their father's violence against their mother in the family home, little or no action had been taken to prevent the recurrence of such behaviour, in violation of Article 8. Lastly, the Court also found a violation of Article 14 in conjunction with Article 3 in respect of the first applicant on the grounds that 'the authorities' actions had not been a simple failure or delay in dealing with violence against her, but had amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards the first applicant as a woman'.[206]

2.2.3.4 The American Convention on Human Rights

It is clear that instruments of international HR law which impose a positive obligation on member states should be interpreted along with the general obligation of states to respect and secure the rights of individuals, as provided for by the same law. Such an interpretation is shared by the Inter-American Court of Human Rights (IACtHR), as illustrated in the case of *Velasquez Rodriguez v Honduras*.[207] The case concerned the unresolved disappearance of Velasquez-Rodriguez in Honduras in alleged violation of Article 4 'Right to Life' and Article 7 'Right to Personal Liberty' of the American Convention on Human Rights (ACHR).[208] The disappearance was believed to be committed by persons connected to, or acting in, pursuance of orders from the armed forces of Honduras, according to the findings of the Inter-American Commission. The Court interpreted Article 1(1) in conjunction with Article 7 to mean that the states members must take steps to prevent, investigate, and punish' any breach of rights

[203] *Eremia and Others v. the Republic of Moldova* App no 3564/11 (ECHR, 28 May 2013).
[204] Ibid., paras 38, 67-68, 70; see R. J. A. McQuigg, 'The European Court of Human Rights and Domestic Violence: Valiuliene v Lithuania' (2014) *International Journal of Human Rights* 1, 20.
[205] McQuigg (n 204).
[206] Ibid.; see also the recent cases in which the ECtHR found that there had been state violations of positive obligations, such as *Valiulienė v. Lithuania* App no 33234/07 (ECHR, 26 March 2013), a violation of Article 3, paras 79-86. See McQuigg (n 204) 4-6; see also *B. v. The Republic of Moldovia* App no 61382/09 (ECHR, 16 July 2013); *M.G. v. Turkey* App no 646/10 (ECHR, 22 March 2016); *Bălşan v. Romania* App no 49645/09 (23 May 2017). See Factsheet –Domestic violence –European Court of Human Rights (n 184) 11-13.
[207] *Velasquez Rodriguez v Honduras*, (1989) 28 ILM 291.
[208] American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

acknowledged by the Convention, and provide adequate compensation for damages resulting from such.[209]

The Court further stated that the state has a legal obligation to ensure that all reasonable measures are taken to prevent the violation of HR, and to conduct an effective investigation into the violation committed within its jurisdiction, determine and punish those responsible, and provide adequate reparation for the victims. It noted that the state duty to take preventive measures should also include the protection of individuals against violence by non-state agents. [210] Moreover, the Court applied the concept of 'due diligence' regarding state responsibility for violence by non-state agents in this case. The Court indicated that an unlawful act 'which violates human rights and which is initially not directly imputable to a state … can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the (ACHR)'.[211]

This means that where rights are guaranteed, in this case by the ACHR, the state is compelled to implement 'due diligence' to ensure their fulfilment.[212] The Court also stated that the existence of a legal system is not enough to claim that the rights of individuals are treated with respect; the government must also 'conduct itself so as to effectively ensure' the enjoyment of rights.[213] While the Court has confirmed this position in later decisions,[214] it must be proved that the state authorities knew, or ought to have known, of the existence of a 'real and immediate risk to the life' of a recognised individual or group of individuals within its jurisdiction.[215] Only in these circumstances will states be held to have failed in their duty to take appropriate measures to prevent the criminal acts of a third party and also have failed to comply with their international obligations in this matter.

The *Jessica Gonzalez* case,[216] heard by the Inter-American Commission on Human Rights, underlines the fact that the state has a duty to take all information about violations

[209] *Velasquez Rodriguez v Honduras* (n 207), para 166.
[210] Ibid., paras 176-177; see Alexandra R. Harrington, 'Life as We Know It: The Expansion of the Right to Life Under the Jurisprudence of the Inter-American Court of Human Rights' (2012-2013) 35 *Loyola of Los Angeles International and Comparative Law Review* 'Forthcoming' 313, 319.
[211] *Velasquez Rodriguez v Honduras* (n 207), para 172.
[212] Ibid., paras 180-182.
[213] Ibid., para 67; see Hasselbacher (n 188)193-194.
[214] See, for example: *Huilca Tecse v. Peru*, Merits, reparations and costs, IACHR Series C No 121 (2005), para 66; para 153; *Uzcategui et al. v. Venezuela*, Judgment of September 3, 2012, I/A Court H.R., Series C No. 249 (2012), para 143.
[215] For further details, see UNHRC (n 127), para 20.
[216] *Jessica Gonzales et al. v. United States*, Case 1490-05, Report No. 52/07, Inter-Am. C.H.R., OEA/Ser. L/V/II.130 Doc. 22, rev. 1 (2007).

of the right to life seriously and to effectively reveal the facts about them. Jessica Lenahan was a domestic violence survivor from Colorado whose three daughters had been murdered in 1999 by their father, who was also her ex-husband. The applicant's lawyers attributed the death of her daughters to the failure of the Castle Police Department to adequately respond to the applicant's frequent and urgent calls over several hours, reporting that her estranged husband was in violation of the restraining order against him and had taken her minor daughters away. It was argued that the United States had failed to comply with the American Declaration on the Rights and Duties of Man,[217] which demanded the exercise of due diligence to protect the applicant and her daughters from domestic violence acts.[218]

The Commission, after a comprehensive review of the evidence and arguments presented by the parties, considered that two questions needed to be answered to determine whether the United States had violated its duty to protect the applicant and her daughters from domestic violence. First, 'whether the state authorities should have known that the victims were in a situation of imminent risk of domestic violence'; and secondly, 'whether the authorities undertook reasonable measures to protect them from these acts'.[219] It noted that the issuance of the restraining order, which required and authorised law enforcement officials to take every reasonable measure to prevent acts of violence by the applicant's ex-husband, meant that the judicial authorities knew that the beneficiaries were exposed to harm and therefore state protection should have been provided.[220] Moreover, the Commission noted that while the applicant had contacted the police department eight times when her daughters had disappeared, and in each call informed them about the restraining order, there was no indication that the police officers who responded to her calls and those who visited her house had taken any action to review the context of the restraining order or to find where her children were.[221]

Consequently, the Commission concluded that the failure of the comprehensive system of the United States to provide an effective response to protect the applicant's daughters from the deprivation of the right to life constituted a violation of their right to life under Article 1 of the American Declaration, and their right to be afforded special protection as

[217] American Declaration of the Rights and Duties of Man, May 2, 1948, OAS Res. XXX, adopted by the Ninth International Conference of American States (1948), 43 AJIL Supp. 133 (1949).
[218] See for further details Caroline Bettinger-Lopez, 'Jessica Gonzales v. United States: An Emerging Model for Domestic Violence & Human Rights Advocacy in the United State' (2008) 21 *Harvard Human Rights Journal* 183, 183-195.
[219] See the Report No.80/11 Case 12.626 Merits Jessica Lenahan (Gonzales) et al. United States, July 21, 2011. Para 138.
[220] *Jessica Gonzales et al. v. United States* (n 216), paras 139- 146.
[221] Ibid., para 153.

a vulnerable group under Article VII of the same Declaration. It underlined that although the state authorities were aware of the necessity to take immediate action,[222] they had failed to fulfil this obligation.[223] As 'the State's duty to apply due diligence […] to protect girl-children from right to life violations requires that the authorities […] have the capacity to understand the seriousness of the […] violence perpetrated […] and to act immediately'.[224] It also concluded that the right to judicial protection of the applicant under Article XVIII of the Declaration had been breached by the United States at two levels: 'fail[ing] to undertake a proper inquiry into systemic failures and the individual responsibilities for the non-enforcement of the protection order [and] not perform[ing] a prompt, thorough, exhaustive and impartial investigation into the deaths […] and fail[ing] to convey information to the family members related to the circumstances of their deaths'.[225]

The above case, and the two earlier cases of *Maria da Penha v. Brazil*[226] and *Gonzalez et al. v. Mexico*,[227] are considered landmark cases in which the due diligence doctrine has decided the responsibility of the state on violence against women perpetrated by private actors.[228] In *Maria da Penha v. Brazil*, Maria da Penha had been subjected throughout her married life to domestic violence by her husband, including two murder attempts, and as a result she became a paraplegic. The petitioners alleged that the violence she endured had been implicitly condoned by Brazilian authorities, because for more than 15 years they had failed to protect her or take effective measures to prosecute and punish her husband, despite her repeated complaints.[229] The Commission found violations of Articles 8 (fair trial) and 25 (judicial protection) of the ACHR, indicating that the violence she had suffered was 'part of a gender pattern of negligence' and ineffective action by the State on domestic violence, and that the general 'judicial ineffectiveness' had been 'conducive to domestic violence', in society.[230]

[222] Ibid., para 164.
[223] Ibid., para 160.
[224] Ibid., para 165.
[225] Ibid., para 197.
[226] *Maria da Penha v Brazil*, Case 12 051 IACommHR Res No 54/01 (16 April 2001).
[227] *González et al. ("Cotton Field") v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009). The discussion of this case will be included in Chapters 3, pp. 67-68 and 4, pp. 127-128.
[228] For further details, see Karin Henriksson, State Responsibility for Acts of Violence Against Women by Private Actors: An Analysis of the Jurisprudence of the Inter-American System of Human Rights (MSc thesis, Uppsala University 2016) 36-67.
[229] *Maria da Penha v Brazil* (n 226), paras 1-20; See Houchins (n 188) 13-14.
[230] Ibid., paras 55-56, 60; Henriksson (n 228) 37-40.

2.2.3.5 Summary Remarks

Having analysed the jurisprudence of various different HR fora, it can be concluded that the state has a legal duty to positively protect its citizens against violent attacks by non-state actors. If the state fails to take adequate measures, then it can be held in breach under international and regional HR law. In addition, the failure by the state and its criminal justice agency to pursue and investigate such criminal acts would constitute a violation of the above instruments, as would any bias, prejudice or absence of independent judgment.[231]

2.3 The Nature and Scope of the State's Positive Obligations

The precise nature and scope of the protective obligations imposed on states remains uncertain.[232] The above study of case law related to the ECHR revealed the recent trend towards imposing expanded obligations upon the state to prevent violation of HR, including the right to life. However, there has been little guidance from the Court about these obligations when private individuals, rather than the state, are the perpetrators of violence.[233] It may seem obvious that there is a wide margin in the estimates of what the expanded obligations should be, and this grants member states a degree of freedom in determining how to protect the rights of individuals against the criminal acts of private individuals.[234] Certainly, the standards contained in the Convention require member states to take reasonable and proportionate measures, and do not require extraordinary ones, as the state cannot anticipate every single violation committed by private individuals.[235]

The legitimacy of measures taken by the state to protect and secure the right to life of its citizens depends on whether these measures comply with the rule of law,[236] and the

[231] Doak (n 3) 44.
[232] Ibid.; Xenos (n 84)110-111.
[233] Warberic considers that the state's 'positive obligation with regard to the acts of violence by third parties is a narrow one and this will leave the state with a wide margin of discretion in which protective measures it employs', Warbrick (n 166) 290.
[234] Because state authorities, provided that they are competent, are better positioned to deal with HR issues, it is to them that primary responsibility belongs to ensure the protection of the rights in the Convention. Thus, international human rights bodies have only a subsidiary role in ensuring that HR are upheld. For further details, see George Letass, 'Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705, 706-722.
[235] See *Edwards v UK* (n 177), para 55; *Osman v The United Kingdom* (n 172), para 116. Rosenberg (n 9) 453.
[236] The rule of law consists of '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', see para 6 of The report of the Secretary-General to the Security Council on the rule of law and transitional justice in conflict and post-conflict societies, S/2004/616.

necessity of respecting HR.[237] In the *McCann* case,[238] the ECtHR had to judge whether the fatal shooting of three IRA members, suspected of carrying a bomb, by British special forces in Gibraltar in 1988 violated Article 2 of the ECHR.[239] The Court recognised that the British authorities had faced a dilemma: 'to have regard to their duty to protect the lives of the people in Gibraltar including their own military personnel and, on the other, to have minimum resort to the use of lethal force against those suspected of posing this threat in the light of the obligations flowing from both domestic and international law'.[240] The Court ruled that the use of force must be strictly proportionate to the entitlement of individuals to be protected against illegal acts of violence,[241] and made it clear that recourse to lethal force to prevent such acts must be as limited as possible.[242] Before using extreme force, authorities should consider the endangerment of innocent lives and those merely suspected of committing an offence. If the threat to the lives of individuals can be averted by alternative measures, then these should be employed. As the authorities in the *McCann* case could have prevented the suspects from travelling into Gibraltar, there was no excuse to have recourse to lethal force, and so the Court deemed the shooting to be unnecessary.[243]

Similarly, a recent case brought before the Court reflects the deep concerns about the legitimacy of protective measures taken by state authorities to respond to the threat of terrorist acts and the possibility of trespassing the HR of innocent individuals. The case of the fatal shooting of a Brazilian citizen, Jean Charles de Menezes in 22 July 2005 involved two Special Firearms Officers (SFOs) and various British security forces.[244] These forces were hunting would-be terrorist bombers following the discovery of explosive devices in rucksacks left on public transport on 21 July 2005, as 'it was feared that the failed bombers would regroup' and 'attempt to detonate further explosions'.[245] This operation was launched two weeks after four suicide bombers detonated explosions

[237] For example, it is understood that respecting human rights while countering terrorism is not only a matter of legal obligation but also essential to the ultimate success of any counter-terrorism strategy, see Edward J. Flynn, 'Counter-terrorism and human rights: the view from the United Nations' (2005) 10 *European Human Rights Law Review* 29, 30.
[238] *McCann and Others v United Kingdom* (n 166).
[239] The extended duties of states under Article 2(1) must be considered in connection with Article 2(2), which sets out the circumstances and conditions upon which the state may lawfully have recourse to force which results in the death of an individual; Ibid., para 148; see Anja Seibert-Fohr, 'The Relevance of International Human Rights Standards for Prosecuting Terrorists' in Walter Vöneky, Röben, Schorkopf (eds), *Terrorism as a Challenge for National and International Law: Security Versus Liberty?* (Springer 2004) 136; Warbrick (n 166) 291.
[240] *McCann and Others v United Kingdom* (n 166), para 192.
[241] Ibid., para 194; Seibert-Fohr (n 239) 137; McCamphill (n 167) 106.
[242] *McCann and Others v United Kingdom* (n 166), para 194; see Warbrick (n 166) 292.
[243] Ibid., para 213. see Mowbray (n 168) 8.
[244] *Armani Da Silva v. The United Kingdom*, App no 5878/08 (ECHR, 30 March 2016), paras 15-28.
[245] Ibid., para 15.

on London public transport on 7 July 2005, which left fifty-six people dead and many injured.[246]

Intelligence information indicated that two terrorists were intent on exploding bombs on 21 July. On the next day, security forces followed Mr. De Menezes as he went to work, believing that he had 'a good possible likeness' to one of the suspects.[247] As he entered the underground station, an order was issued 'to stop the subject getting on the tube'[248] and when Mr. de Menezes took his seat on a stationary train, he was killed by the two FSOs.[249] It then became apparent that Mr. de Menezes had not been involved in the attempted terror attacks on 21 July, and so the British authorities expressed their profound regret at his death and an official representative of the MPS (Metropolitan Police Service) travelled to Brazil to apologise to his family and make an ex gratia payment to them.[250] Later, specifically in 2009, the MPS reached a monetary settlement with the family after they brought a civil claim for damages.[251] Previously, Mr. de Menezes' cousin had brought a complaint in January 2008 before the Court, following the decision of the Crown Prosecution Service (CPS) not to prosecute any individuals in respect of her cousin's death.[252] She argued that because the authorities responsible for the investigation were precluded from considering whether the use of force by the implicated officers was necessary and reasonable, they were unable to evaluate whether force was justified.[253] It also submitted that where a fatal shooting by a police officer was concerned, securing public confidence by ensuring accountability is needed and that a perceived failure to prosecute public officials undermines such confidence.[254]

The ECtHR ruled that the UK had not violated Article 2 of the Convention. It stated that:

> The frustration of Mr. de Menezes' family at the absence of any individual prosecutions is understandable. However, it cannot be said that any question of the authorities' responsibility for the death ... was left in abeyance.[255]

[246] Ibid., para 13.
[247] Ibid., paras 29-32.
[248] Ibid., para 35.
[249] Ibid., para 37.
[250] Ibid., para 38.
[251] Ibid., para 142.
[252] It should be noted that the applicant's 'complaints fall solely under the procedural limb of Article 2 of the Convention and relate solely to the fact that no individual police officer was prosecuted following the fatal shooting of Jean Charles de Menezes'. Ibid., para 190.
[253] Ibid., para 243. See Jan Hessbruegge, ECtHR Da Silva v UK: Unreasonable Police Killings in Putative Self-defence? 4 April 2016, Blog of the European Journal of International Law <https://www.ejiltalk.org/ecthr-armani-da-silva-v-uk-unreasonable-police-killings-in-putative-self-defence/> accessed 5 January 2018.
[254] *Armani Da Silva v. The United Kingdom* (n 244), para 201.
[255] Ibid., para 283.

The Court further added:

> Sometimes lives are lost as a result of failures in the overall system rather than individual error entailing criminal or disciplinary liability. Indeed, […] in complex police operations failings could be institutional, individual or both. In the present case, both the institutional responsibility of the police and the individual responsibility of all the relevant officers were considered in depth by the IPCC [Independent Police Complaints Commission], the CPS, the criminal court, the coroner and the inquest jury […]. Neither was the decision not to prosecute any individual officer due to any failings in the investigation or the State's tolerance of or collusion in unlawful acts; rather, it was due to the fact that […] a prosecutor […] concluded that there was insufficient evidence against any individual officer to meet the threshold evidential test […] of criminal offence.[256]

Consequently, the Court concluded that:

> The domestic authorities have [not] failed to discharge the procedural obligation under Article 2 of the Convention to conduct an effective investigation into the shooting of Mr. de Menezes which was capable of leading to the establishment of the facts, a determination of whether the force used was or was not justified in the circumstances and of identifying and – if appropriate – punishing those responsible.[257]

Although the ECtHR in its previous jurisprudence concerning putative self-defence had endorsed a combination of a subjective standard (honest belief) with an objective one (good reasons for that belief) to decide whether the use of force was necessary, it seems that in the Armani da Silva case to they have strongly moved toward a subjective standard.[258] The Court considered, firstly, that the 'existence of "good reasons" should be determined subjectively' and that it never regarded 'reasonableness as a separate requirement but rather as a relevant factor in determining whether a belief was honestly and genuinely held'.[259] Therefore, the test to assess killings in putative self-defence is now framed by the Court as follows: the person should have an 'honest and genuine belief' that force is necessary, which the Court consider in terms of it being subjectively reasonable based on the circumstances at the relevant time. If this belief is not so, the Court will not be likely to accept that it was 'honestly and genuinely held'.[260]

To determine the state's responsibility for unlawful lethal force under HR law, this subjective standard was considered by most of the Grand Chamber as 'inappropriate', since it would allow states to absolve themselves of responsibility, even where their

[256] Ibid., para 284.
[257] Ibid., para 286. See the discussion about the procedural obligation of the state in chapter 3 of the thesis, pages 59-84.
[258] See *McCann and Others v United Kingdom* (n 166), para 200. In this case, the Court indicated that the state can still claim self-defence under Article 2(2), even where no actual attack has occurred if its agents acted in an 'honest belief' in the attack which 'is perceived, for good reasons, to be valid at the time which subsequently turns out to be mistaken'. For further details, see Jan Arno Hessbruegge, Rights and Personal Self-Defense in International Law (Oxford University Press, 2017) 133-134; Hessbruegge (n 253).
[259] *Armani Da Silva v. The United Kingdom* (n 244), paras 245-246; Hessbruegge (n 253).
[260] Ibid., para 248; Hessbruegge (n 253). Contrary to the applicant's submission, the Court, in its moving towards subjective standard, went on to conclude that the standard applied by the European Court was not significantly different from the test of self-defence in England and Wales. Ibid., para 252. See Council of Europe, European Court of Human Rights, Overview of the Case-Law of the European Court of Human Rights (Wolf Legal Publishers (WLP), 2016) 17-18.

agents used defensive force with negligence or gross negligence, without any good reason to believe that the attack was imminent or underway.[261] In practice, victims would be placed at an unfair disadvantage in their attempts to hold states responsible for HR violations. [262]

In a joint opposite opinion to the decision of the Court, three judges pointed out that:

> There has been a violation of Article 2 under its procedural limb in the instant case…. [According to the international standards on the use of force by the police],[263] if the police plan an operation which may require the use of firearms, they have the duty to act with the utmost care and in particular to meticulously check all the relevant information on which the operational plan is based. While planning their operations, the police also have the obligation to carefully assess the available alternatives and to choose the means which entail the least risk for human life and health.[264]

They consider that the '[f]orce used in putative self-defence is never absolutely necessary' on the grounds that Article 2 (2) requires the use of force not in defence of reasonably perceived violence, but rather 'in defence of any person from unlawful violence'.[265] They further stressed the serious danger that the police may use excessive lethal force where killings in putative self-defence based on unjustified error are not properly criminalised and punished under domestic law.[266] According to one judge 'it is surprising that such heavy institutional responsibility would not translate into at least some individual responsibility'.[267] This view, however, has been said to be troubling since the Grand Chamber pointed out that Article 2 is concerned with the investigation itself rather than its outcomes or lack thereof. This is in line with the state's 'margin of appreciation,' as the Court 'could discern no uniform standards across the ECHR's contracting states when it came to the appropriate evidential burden to be used in decisions as to whether or not to prosecute'.[268] Nevertheless, the lack of a 'positive' outcome to an investigation will inevitably say something about its effectiveness in securing both the effective

[261] Hessbruegge (n 258) 137; Hessbruegge (n 253).
[262] Hessbruegge (n 253).
[263] According to these standards, 'Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty'. For further details, see *Armani Da Silva v. The United Kingdom* (n 244), para 3 of the Joint Dissenting Opinion of Judges Karakas, Wojtyczek and Dedov.
[264] Ibid., paras 1-3.
[265] Ibid., para 5. This approach appears unconvincing because 'the textual requirement of "absolute necessity" can also be interpreted from an ex ante view point of a reasonable observer placed in the position of the officer in question.' For further details, see Hessbruegge (n 253).
[266] See Jim Duffy, de Menezes: No individual prosecutions, but an effective investigation – ECtHR, 1 April 2016 UK Human Rights Blog <https://ukhumanrightsblog.com/2016/04/01/de-menezes-no-individual-prosecutions-but-an-effective-investigation-ecthr/> accessed 5 January 2018.
[267] Ibid.
[268] Ibid.

implementation of domestic laws protecting the right to life and the accountability of state agents for deaths occurring at their hands.[269]

2.3.1 Criticisms of the State's Positive Obligation

The horizontal aspect of the right to life is not, however, without its critics. Van Kempen, for example, argues that the horizontal application of HR through the auspices of criminal law undermines these rights for several reasons.[270] Firstly, he states that to assert the need to empower individuals to achieve individual security, which is an essential precondition for freedom, does not necessitate that the state obligation to protect individuals against the misconduct of others should be based on HR. If it did, he argues, it would disregard the fact that not all duties of the state are or should be based on HR.[271] Moreover, protection of citizens against serious threats was a state's responsibility before the concept of HR existed. Rather, what is important is that HR 'came into development in defence of the liberty of the individual against the power of state authorities and not to counter threats from private parties'.[272] Furthermore, in his opinion, it would fail to acknowledge the difference in order and scope between HR and the value on which they are based.[273]

Second, Van Kempen contends that the inappropriateness of employing criminal law against private individuals in fulfilment of the state's positive obligation is that it leads the state authority to trespass their HR.[274] Third, he maintains that relying on criminal law to fulfil the state's positive obligation may unintentionally contribute to the entrenchment of the notion that this law is the solution to every security problem, and even possibly deter state authorities from implementing further additional security measures.[275] Having criminal law fulfil such a function is contrary to the fundamental principle that criminal law should be used only to criminalise illegal acts and then only as a last resort.[276] Finally, Van Kempen considers that it would be much more acceptable if this responsibility were not based on civil HR. As a more appropriate alternative, which avoids the problems of the concept of positive security within criminal law, he prefers the concept of state

[269] Ibid.
[270] Van Kempen (n 5) 19.
[271] Ibid. 17.
[272] Ibid. 18.
[273] Ibid.
[274] Ibid. 19. The relationship between criminal law and human rights has been seen as a paradox in the fact that 'the criminal law appears to be both a protection and a threat for fundamental rights and freedoms' or, in other words, not only 'a law which protects' but 'a law from which protection is required', see Francoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 *Journal of International Criminal Justice* 577, 578.
[275] Van Kempen (n 5).
[276] Ibid. 19, 22.

sovereignty, where the essential function of the state is to provide security to its citizens.[277] This concept, as defined by the International Commission on Intervention and State Sovereignty (ICISS), is threefold in its significance:

> First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And thirdly, it means that the agents of state are responsible for their actions [either of] commission [or] omission. The case for thinking of sovereignty in these terms is strengthened by the ever-increasing impact of international human rights norms, and the increasing impact in international discourse of the concept of human security.[278]

While Van Kempen has a legitimate concern about the potential abuse of HR by the state, he has arguably paid insufficient attention to the context of the development of positive obligations and their rationale. In Dickson's view, the characterisation of obligations in positive and negative terms (on which Van Kempen's argument appears to rest) is essentially false.[279] Dickson invokes Hohfeld's idea that all rights have correlative duties and therefore it is not necessary to speak of obligations as negative and positive.[280] This means that the positive nature of any obligation is already inherent without the need to explicitly declare it; the function of national and international HR courts is merely to ensure that rights which already exist are fully implemented. It can be argued that any extension in the role of HR to govern illegal acts committed by private individuals falls within the legitimate scope of HR law. This is because, even if HR were concerned only with ensuring that the state refrains from the violation of HR of its citizens, these rights would still require that passive attitudes by the state should not promote the idea that such violent conduct by private parties against HR will be tolerated or neglected. It must be admitted that the use of criminal law to pursue the positive obligation of protecting the right to life may involve the minimising or even violation of HR. However, every measure by the state, whether according to the concept of positive obligation or the principle of sovereignty, should be subject to the scrutiny of international and regional instruments and domestic law, and be condemned if illegitimate. In addition, allowing the state to choose its own appropriate measures to counter acts of violence would help to eliminate any excuse that the state could put forward to dismiss this responsibility.

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[277] Ibid., 20; see also Glanville (n 17) 233; Luke Glanville, 'The Responsibility to Protect Beyond' (2012) 12 *Human Rights Law Review* 1, 9.
[278] ICISS, The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (Ottawa: IDRC, 2001) 13.
[279] Brice Dickson, 'Positive Obligations and the European Court of Human Rights' (2010) 61 *Northern Ireland Legal Quarterly* 203, 203.
[280] Ibid.

2.4 Conclusions

It seems reasonable to claim that the state is morally and legally bound by its citizens' expectations to protect them from violent acts of non-state actors. Although the nature and scope of the state's positive obligations may differ from one situation to another according to the circumstances of each particular case,[281] the law-making bodies and the criminal courts must take compelling concrete measures to ensure the protection of those at risk of losing their lives or being subjected to other forms of violence, including torture or gender-based violence, as a result of criminal acts by non-state actors. While the implementation of these preventive steps may involve practical difficulties in anticipating and detecting future criminal acts, the refusal to acknowledge that the existence of the social right to life requires adequate protection from criminal acts is, to say the least, highly contentious.[282] This is in line with modern legal thinking about the social contract which in modern times has been the subject of more detailed in-depth exploration than ever before.[283] However, it should be noted that no state can fully protect citizens from being murdered or injured by non-state actors. All states can do is establish mechanisms that reduce the risk, such as an efficient police force. Therefore, the state should not be held responsible for the consequences of acts of violence if it has fulfilled its positive obligations with due diligence.

[281] Xenos (n 84).
[282] Doak (n 3) 51.
[283] Ibid.

Chapter 3: International Procedural Obligations of Investigation, Prosecution and Punishment

3.1 Introduction

The concept of a 'right to remedy' for victims of violent actions by non-state actors has led to the identification of various elements which need to be considered in the rectifying of wrongs.[1] Shelton suggests that this right to remedy refers to 'the range of measures that may be taken in response to an actual or threatened violation of human rights'.[2] These measures can be divided into two. First, the procedural measures required to provide a remedy,[3] namely the state's duty to respond vigorously to criminal acts in order to fulfil its responsibility, not only to prevent such acts but also to put in place an effective criminal legal system capable of investigating, prosecuting and punishing perpetrators.[4] The second is the substantive duty of the state to make adequate reparation to victims of violent acts against the right to life.[5]

From the victim's perspective, the obligations of the state to effectively investigate deaths and injuries caused by criminal acts and prosecute and punish the perpetrators should be seen as a 'right to justice'.[6] This has been considered as giving victims the right to know and pursue the whole truth about their targeting,[7] and to see the perpetrators prosecuted and punished.[8]

This chapter examines how the victims' right to justice and the procedural obligations of the state are recognised under moral/ethical, international and regional law and the jurisprudence of various HR courts. It can be argued that victims of violent acts have a moral and legal right to have the state investigate, prosecute and punish those responsible for the violation of their right to life. Should a state neglect to uphold this right, the moral and legal legitimacy of the state's authority over its citizens would be questionable. In addition, while certain international standards for criminal investigation can be identified,

[1] Doak (n 3) Ch. 2, 159.
[2] Dinah Shelton, Remedies in International Human Rights Law (2d ed, Oxford University Press 2005) 8.
[3] Ibid.
[4] Thomas M. Antkowik, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' (2008) 46 *Columbia Journal of Transnational Law* 351, 356.
[5] Ibid.
[6] Doak (n 3) Ch. 2, 159.
[7] Ibid. 180.
[8] Mykola Sorochinsky, 'Prosecuting Torturers 'Child Molesters': Toward a Power Balance Model of Criminal Process for International Human Rights' (2009) 31 *Michigan Journal of International Law* 157, 185.

the argument accepts that at the present point in the post-conflict situation in Iraq, it cannot yet be expected that these standards will be fully adhered to, as will be discussed in Chapter 5, Section three. Moreover, these standards have themselves some limitations, which raises the question of whether amnesties/ Truth and Reconciliation Commissions (TRC) processes in a transitional scenario should be considered; these processes may to some extent be found to replace adherence to such standards during the transitional period in Iraq.

3.2 The Moral/Ethical Justification for Imposing such an Obligation on the State

Punishment needs to be morally justified if the rights of victims of violence to seek justice from the state against the perpetrators are considered to be legitimate. There has long been controversy regarding the nature of punishment and by what authority the state possesses the right to punish.[9] In *Leviathan,* Hobbes enquires whether there is a right to punishment, asking, 'by what door the right or authority of punishing, in any case, came in?'[10] Hobbes answer to this question asserts that, while a sovereign has a right by nature to punish, it is also true that, as punishment is an evil,[11] a subject cannot give his consent to accept it.[12]

From these assertions,[13] it seems that although a subject has the right to resist punishment, a legitimate state has no duty to respect a subject's right to resist if they have offended against the rules of the social contract.[14] This, according to one commentator, even if the members of a newly created state cannot give their consent to accept punishment for the violation of the social contract because no one has a pre-political right to punish, this does not prevent the possibility that a state can take upon itself the right to punish.[15] A state acquires the right to punish on behalf of its members through the authorisation left, but

[9] The legitimacy of punishment according to Hobbes' and Rousseau's social contract theory, can be found in Corey L. Brettschneider, 'Rights within the Social Contract: Rousseau on Punishment' in Austin Sarat, Lawrence Douglas, Martha Merrill Umphrey (eds), *Law as Punishment/ Law as Regulation* (Stanford University Press 2011) 52; Arthur Lansing Yates, 'Thomas Hobbes on Punishment' (PhD thesis, Western University 2012).
[10] Hobbes (n 11) Ch. 2, Ch XXVIII, 190 ; see Alan Norrie, 'Thomas Hobbes and the Philosophy of Punishment' (1984) 3 *Law and Philosophy* 299, 302; Yates (n 9) 4.
[11] Hobbes (n 11) Ch. 2, Ch XXVIII, 190; Yates (n 9) 37.
[12] Norrie (n 10).
[13] See Hobbes (n 11) Ch. 2, Ch XXVIII, 190-191.
[14] Brettschneider (n 9) 69-73.
[15] Yates (n 9) 16-18.

not given, to it by its members. The right to punish, for Hobbes, 'is an artificial right submitted by an artificial person'.[16]

In discussing the right to punishment, Rousseau viewed the rightness of justice to be a moral principle, but also considered what in practical politics a legitimate right to prosecute and punish should be and how far it should extend.[17] This argument is based on the social contract. As outlined in Chapter 2, this basically states that when individuals freely form a body such as a state and freely agree to a constitution for the governing of that state, then, by general will, they freely give consent to legitimately enacted state laws.[18] As Rousseau asserts, 'in order then that the social compact may not be an empty formula, it tacitly includes the undertaking … that whoever refuses to obey the general will shall be compelled to do so by the whole body'.[19] Rousseau affirms that all citizens must recognise that removal of the right to life is contrary to social contract principles and, therefore, must be punished.[20] He holds that the general will of the members of a state is only valid if it not only binds individuals to the legitimate law and sanctions of the state for the protection of its citizens, but also prevents the state from unjustly depriving innocent individuals of their rights, with the intention of promoting the common or alleged common good.[21]

Drawing on Rousseau, Brettschneider maintains that the rights of individuals in matters of criminal justice which arise from the social contract can be understood in two senses: first, that the notion of 'hypothetical consent' to punishment implies that citizens in the formation of a state freely give the right to punish to its governing body; second, that the authority given to the state to punish does not allow the fundamental rights of citizens, guaranteed by the social contract, to be infringed.[22] Thus, the existence of a social contract provides a very good pragmatic basis for the promotion of morality. By enshrining a moral code within the state's criminal justice system for the benefit of society, the right of justice for victims is much more achievable than was the case when mankind existed in a state of nature before society and social contracts were formed.[23] This does not mean that a state without a social contract is not bound by principles of right and

[16] Ibid. 19.
[17] Brettschneider (n 9) 51.
[18] See Chapter 2 of the thesis, pages 12-14; Brettschneider (n 9) 52.
[19] Jean-Jacques Rousseau, The Social Contract (Maurice Cranston tr, Baltimore, Md.: Penguin Books 1968) Ch vii, para I.
[20] Brettschneider (n 9) 59.
[21] Rousseau (n 19) 56-57; Jean-Jacques Rousseau, The Basic Political Writings (Donald A. Cress ed, 2ed, Hackett Publishing 2010) 135.
[22] Brettschneider (n 9) 67.
[23] See Hall, Dennis and Chipman (n 87) Ch. 2, 113.

wrong and that punishment for wrongdoing is unjustified. For instance, in an unjust state which has no legitimate social contract, the criminality of murder must be acknowledged as a serious wrong because it violates the natural rights of individuals which must be respected, even where a social contract is absent.[24] Accordingly, it is necessary for the state to punish criminals because this is demanded by moral law,[25] even when a social contract is absent. This is because all rights to justice may be said to stem from the moral law which not only transcends the social contract but also requires the social contract to conform to its norms.[26]

3.2.1 Summary Remarks

The right of victims to have perpetrators brought to justice should be seen as a fundamental requirement of both moral law and social contract principles and that all criminal justice systems must conform with this. It follows that victims have a moral right to compel states to bring their criminal justice systems up to standard and fully implement them in practice. Only if the state does this can it claim to have legitimate authority over its citizens in the sphere of HR. However, this requirement may bring about conflict with state law, as a state, in formulating its criminal justice system and putting it into practice, seeks not only to provide justice for its own sake but also for utilitarian reasons.[27]

3.2.2 The Controversy Concerning the Rights of Victims to Justice

This controversy will be addressed in terms of the following.

3.2.2.1 Justice for Utilitarian Reasons

Cesare Beccaria, inspired by Rousseau's social contract, states, in his work *On Crimes and Punishment*, that the criminal justice system is justified as a necessary instrument to protect against individuals intending to breach the social contract.[28] He states that one of the functions of these systems is to provide redress to private victims from perpetrators

[24] According to Rousseau, without a legitimate social contract, the state does not possess a legitimate right to punish. See Brettschneider (n 9) 67-69.
[25] The principles of moral law universally bind the behaviour of mankind. Without it, there would be no way of rationally distinguishing between right and wrong. See Hall, Dennis and Chipman (n 87) Ch. 2, 7-9; Thom Brooks, 'Kant's Theory of punishment' (2003) 15 *Utilitas* 206, 219.
[26] Hall, Dennis and Chipman (n 87) Ch. 2, 220. For further discussion of individuals possessing a moral right independently of the existence of any recognition by society or the legal system of a state, see Peter Jones, 'Moral Rights, Human Rights and Social Recognition' (2013) 61 *Political Studies Association* 267, 267-281.
[27] Hall, Dennis and Chipman (n 87) Ch. 2, 218.
[28] Becarria C, An Essay on Crime and Punishment (1764) <http://thefederalistpapers.org/wp-content/uploads/2013/01/Cesare-Beccaria-On-Crimes-and-Punishment> accessed 15 September 2016; see Guyora Binder, 'Punishment Theory: Moral or Political?' (2002) 5 *Buffalo Criminal Law Review* 321, 335; William F. Mcdonald, 'Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim' (1976) 13 *The American Criminal Law Review* 649, 654; Kalyn P. Hoggard, 'On Crime, Punishment, and Reform of the Criminal Justice System' (2013) 1 *Athene Noctua: Undergraduate Philosophy Journal* 1, 4.

of violence. However, since these systems originate from the terms of the social contract, they are more concerned with the well-being of the whole of society than with the rights of victims.[29] As the only justification for punishment is to serve social utility it should not be inflicted to redress private damage.[30] Furthermore, punishment for a crime must be proportionate to the degree of debt created by it to society.[31] If it is too harsh, then it is unjust and if it is too lenient then it would not act as a sufficient deterrent.[32] Similarly, Jeremy Bentham maintained that punishment should be utilitarian and proportionate because 'the greater an offence is, the greater reason there is to hazard a severe punishment for the chance of preventing it'.[33] As punishment harms the criminal, it can only be justified if the benefits it gives to society exceed the harm which has been done.[34]

This view considers that violence against the individual as an offence against society, and punishment inflicted on criminals as a means of deterring future crime,[35] to considerably limit the rights of individual victims, as the affected persons, to be granted justice. Individuals, before any human political society was formed, had a natural right to defend themselves against acts of violence by others.[36] When individuals became victims of violence they or their relatives had the right to administer justice by themselves against the perpetrators.[37] As societies were formed, individuals agreed by social contract to entrust this right to the state.[38] In return for this entrustment, the state became morally obliged not only to prevent the violation of the human right to life of its citizens, but also, after violations have occurred, to ensure that victims' rights are upheld by investigating, prosecuting and punishing perpetrators. This means that acts of violence should be regarded as harmful to individual victims and not only as an offence against the state,[39] and it is fair for the state to punish perpetrators because they are guilty of 'non self-restraint' towards certain rights protected by criminal law which are obeyed by others. To tolerate criminals benefitting from their illegal actions cannot be justified.[40]

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[29] Becarria (n 28).
[30] Ibid. 74.
[31] Ibid. 62-66; Joel Goh, 'Proportionality –An Unattainable Ideal in the Criminal Justice System' (2013) 2 *Manchester Student Law Review* 41, 48; Binder (n 28).
[32] Becarria (n 28) 20-21; Hoggard (n 28); Binder (n 28) 336.
[33] Jeremy Bentham, *The Theory of Legislation* (London: Trübner, 1894) 326.
[34] See Andrew Ashworth, 'Punishment and Compensation: Victims, Offenders and the State' (1986) 6 *Oxford Journal of Legal Studies* 86, 92. For further details about Bentham's utilitarianism, see Binder (n 28) 338-349
[35] McDonald (n 28) 656; Hall, Dennis and Chipman (n 87) Ch. 2, 209.
[36] For further details about the right of individuals to self-defence, see James Q. Whitman, 'Between Self-Defense and Vengeance/Between Social Contract and Monopoly of Violence' (2004) 39 *Tulsa Law Review* 901, 913-915.
[37] For further details about the development of the rights of victims to participate in the prosecution system, see John William Stickels, 'Victim Satisfaction –a Model of the Criminal Justice System' (PhD thesis, The University of Texas at Austin 2003) 18-26.
[38] Whitman (n 36) 903.
[39] McDonald (n 28) 650.
[40] Ashworth (n 34) 93-94.

3.2.2.2 Justice for its Own Sake

This view of punishment is supported by Immanuel Kant, who was an early proponent of the theory of punishment as a morally 'just desert'. Kant criticised the use of punishment as a means to achieve other ends;[41] for Kant, judicial punishment was only justified if exercised solely against the perpetrator for his illegal actions and not to achieve external goals.[42] Moreover, forms of punishment need to be in proportion to the seriousness of the criminal acts committed.[43] Kant's theory of punishment seems clearly to favour retributive justice.[44] For Kant, without such justice there can be no talk of 'any value in human beings living on the Earth'.[45]

Kant clearly considers that retributive punishment must be imposed for the violation of moral law; he considered this to be a 'categorical imperative'.[46] On the other hand, he certainly recognised that juridical or positive law is primarily concerned with pragmatic matters and that the state must impose punishment on criminals not only to achieve justice, but also to deter future criminal actions.[47] While Kant was persuaded that punishment by death is necessary for the crime of murder, there are circumstances in which he considers that it could be socially dangerous.[48] This dichotomy is rarely acknowledged by commentators on Kant's theory of punishment. On the whole, they consider that Kant supported only retributive justice and rejected the idea of formulating positive law for utilitarian purposes.[49] However, according to Brooks and Scheid, it can be argued that he supports both, even though he definitely gave much greater priority to retributive justice.[50] Bradley, like Kant, also holds that murder is a violation of the moral law, and therefore requires retributive punishment, which must be imposed solely because it is deserved by the offender. To impose punishment for any other reason is grossly wrong

[41] Ted Honderich, Punishment: The supposed Justification (Polity Press & Basil Blackwell, 1989) 60; Hall, Dennis and Chipman (n 87) Ch. 2, 196; Mary Margaret Giannini, 'Redeeming an Empty Promise: Procedural Justice, the Crime Victims' Rights Act, and the Victim's Right to be Responsibly Protected from the Accused' (2010) 87 *Tennessee Law Review* 47, 79.
[42] Immanuel Kant and M. J. Gregor, *The Metaphysical of Morals* (Cambridge University Press, 1996) 105, para 6: 331; Brooks (n 25) 210.
[43] Brooks (n 25); Binder (n 28) 355-356; Giannini (n 41) 79.
[44] This can be seen in what he wrote concerning 'blood guilt'. See Kant and Gregor (n 42) 106, para 6:333.
[45] Ibid. 105, para 6:332.
[46] Ibid. 105, para 6:331.
[47] Brooks (n 25) 212; Don E. Schield, 'Kant's Retributivism' (1983) 93 *The University of Chicago Press* 262, 266.
[48] See Kant and Gregor (n 42) 107, para 6:334 and 109, para 6:336-7. For further details, see Brooks (n 25) 213, 216.
[49] Brooks (n 25) 216; Schield (n 47) 266.
[50] Brooks (n 25) 207; Schield (n 47) 265. Kant's clear preference for retributive justice to provide justification for punishment has been criticised. See Russell L. Christopher, 'Deterring Retributivism: The Injustice of 'Just' Punishment' (2002) 96 *Northwestern University Law Review* 843, 861-862.

and immoral.[51] However, there has been criticism of the exercise of justice for purely retributive reasons as this excludes punishment for the social benefit of society.[52]

The prioritisation of retributive punishment, however, is not always achievable, nor is it the best solution to the many atrocities facing societies,[53] especially where states, such as Iraq, have experienced violent conflict and/or grave and large-scale violations of HR. In this context, to achieve broad notions of justice while maintaining peace and stability, the field of transitional justice has been developed by practitioners, policy makers, and academics to guide government responses toward these objectives.[54] It refers to a set of judicial and non-judicial approaches that societies may use to cope with the legacy of such violations, to bring those responsible to justice, establish the rule of law, and provide repair following such atrocities.[55] By looking backward and forward, transitional justice affirms that 'successive governments must build institutions that will bring justice to the past, while showing their commitment to good governance in the future'.[56] In addition, by balancing the ideals of justice and the realities of politics, it might be able to create a radical transformation of the foundations of society, including its principles.[57] Therefore, when this transformation is realised, it can become a starting point which permits a state to fully embrace the rule of law, restore stability and civic trust in a political system and its institutions, and construct a new social contract.[58]

Transitional justice has been described by Pablo de Greiff as performing a social contract function. He believed it to have 'two mediate goals, namely recognition and civic trust, and two final goals, reconciliation and democracy'.[59] The processes of transitional justice are considered an enabling path to social contract re-negotiation (often in the form of

[51] F. H. Bradley, The Vulgar Notion of Responsibility, edited. Gertrude Ezorsky (State University of New York Press, 1972) 109-110; see also H. J. McClosky, A Non-Utilitarian Approach to Punishment, in Gertrude Ezorsky, *Philosophical Perspectives on Punishment* (State University of New York Press, 1972) 121.
[52] Jaime Malamud-Goti, 'Transitional Governments in the Brach: Why Punish State Criminals?' (1990) 12 *Human Rights Quarterly* 1, 6; Russell L. Christopher has criticised retributive theory because it also uses victims as a means to determining the just punishment of the perpetrator, Christopher (n 50) 933-953.
[53] Alexandra Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 *The American Journal of International Law* 1, 14.
[54] Sam Szoke-Burke, Searching for the Right to Truth: the Impact of International Human Rights Law on National Transitional Justice Policies (2015) 33 *Berkeley Journal of International Law* 526, 527-528.
[55] See Kora Andeieu, 'Transitional Justice: A New Discipline in Human Rights', (2010) *Online Encyclopedia of Mass Violence* 1, 2; Anne Orford, Florian Hoffmann and Martin Clark, Handbook of the Theory of International Law (Oxford University Press, 2016) 484. Transitional justice's discussion will be fully developed in Chapters 5 and 6, pages 207-213 and 248-268.
[56] Andeieu (n 55) 2-4.
[57] Humberto CANTÚ Rivera, 'Transitional Justice, Human Rights and the Restoration of Credibility: Reconstructing Mexico's Social Fabric' (2014) VII *Mexican Law Review* 57, 60.
[58] Ibid.; the social contract's aims are arguably compatible with some of the objectives of transitional justice in their attempts to address past atrocities and/or violent conflict in transitional states to restore peace and stability. In other words, the two theories are not mutually exclusive. See United Nations Development Programme, Engaged Societies, Responsive States: The Social Contract in Situations of Conflict and Fragility (April 2016) 11.
[59] Orford, Hoffmann and Clark (n 55) 786.

constitutional drafting) via the abuse of power condemnation, a justification for citizens' expectations of justice and reparations for victims of HR abuse.[60] In addition, social contract principles can produce a philosophical framework to facilitate movement away from past atrocities and vicious cycles of grievance and vengeance, because transitional justice helps 'knit society together across different lines of social tension', and renewing a social contract can provide this.[61] This may arguably be the key to the restoration of trust and hope, for new respectful shared norms of reciprocal relationships of accountability, the re-establishment of stability, security, and a peaceful, stable and healthy civil society in Iraq. In turn, the implementation of the state's positive obligations toward victims as discussed in this thesis might then be a more realistic prospect.[62]

3.2.2.3 Summary Remarks

The foregoing discussion indicates that to provide legitimate justification for judicial punishment of violations of the right to life, punishment must be imposed to restore victims' sense of protection and justice in their criminal justice system. Nevertheless, because of the flaws of the strictly retributive-centred approach to addressing the needs of victims and society in the wake of mass HR atrocities, transitional justice has recently evolved towards a more holistic restorative justice.[63] The latter pays less attention to perpetrators and focuses on finding the truth about the past, and helping victims and communities through the process of reconciliation and finding collective memory.[64] It also assumes that victims, offenders and their respective communities participate in the process of justice.[65] Until recent times, victims have been neglected by the retributive and utilitarian criminal judicial procedures of states, and denied effective participation in them.[66]

[60] Ibid.
[61] Ibid 786-787.
[62] See the discussion in Chapter 6, pages 257-268.
[63] For further details, see Andeieu (n 55) 7-11.
[64] Ibid. 4, 9-10.
[65] Restorative justice's basic assumptions are that crime is not only about lawbreaking, but about the harm done to individuals and communities; therefore, criminal justice should try to reconcile parties and repair the harm caused, rather than just punish the criminal. Ibid. 9-10.
[66] Participation, according to Edwards, involves 'being in control, having a say, being listened to, or being treated with dignity and respect….'. Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' 44 (2004) *British Journal of Criminology* 967, 973.

3.2.3 The Right of Victims to Participate in the Criminal Justice System

Until the late 20th century,[67] the diminishment of the participatory right of victims in criminal justice procedures is attributable to the two systems which have shaped the manner of public prosecution, namely the crime control and due process models.[68] Packer sees these models as a means of collectively ensuring the promotion of the goals of the social contract.[69] For Packer, the crime control model is based on the control of criminal conduct being the most significant function of the criminal process.[70] It is primarily concerned with achieving efficiency in crime control and with the prosecution of offenders in order to serve the interests of society and not the victims.[71] This model aligns itself with the utilitarian concept of criminal justice.[72] The other model, the due process model, concentrates on preventing abuse by the state in the formation and execution of its criminal justice system. To do this, it seeks to impose limitation on the crime control model,[73] and this process aims to provide safeguards for those accused of acts of violence to prevent miscarriages of justice.[74] This model may be said to align itself with retributive rather than utilitarian justice theory.[75]

These two Packer models of the criminal process have been criticised as not taking into account victims of crime and their right to participate in the criminal process.[76] Christie, in his 'Conflicts as Property'[77] holds that victims have not only been left to live with their suffering, material loss or physical injuries, but have had the right to witness the cross-examination of their aggressors in court removed, leaving them humiliated and aggrieved.[78] Also, society itself has lost the opportunity to be clearly informed of the details of the violations, while offenders have lost the opportunity to communicate with victims, thus losing the important possibility of receiving forgiveness.[79]

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[67] For the historical background about the role of victims in early western justice systems, see Stickels (n 37) 20-26; Anna Moss Cellini, 'The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim' (1997) 14 *Arizona Journal of International and Comparative Law* 839, 842-850; McDonald (n 28) 649-650, 660.
[68] Giannini (n 41) 76; for further details of these two models of public prosecution, see Kent Roach, Due process and Victims' Rights: The New Law and Politics of Criminal Justice (University of Toronto Press, 1999) 12-19.
[69] Herbert L. Packer, 'Two Models of the Criminal Process' (1964) 113 *University of Pennsylvania Law Review* 1, 9.
[70] Ibid.
[71] Ibid. 10-11.
[72] Giannini (n 41) 77. For the essential features of criminal justice systems according to this model, see Paul S. Hudson, 'The Crime Victim and the Criminal Justice System: Time for A Change' (1984) 11 *Pepperdine Law Review* 23, 24; McDonald (n 28) 663-667.
[73] Packer (n 69) 16.
[74] Hudson (n 72) 24.
[75] Giannini (n 41) 77.
[76] Further significant criticisms have been made of Packer's two models. For further details, see Roach (n 68) 20-27.
[77] Nile Christie, 'Conflicts as Property' (1977) 17 *The British Journal of Criminology* 1.
[78] Ibid. 8.
[79] Ibid. 9.

3.2.3.1 Modern Developments

Many studies indicate that, although victims of violent crime have been left with a feeling of powerlessness, isolation and fear,[80] they have, in fact, been more affected by being allowed only limited involvement in the prosecution system than by the crime itself.[81] This has resulted in it now being acknowledged that a third model of criminal justice needs to be established, a new approach called the Victims Participation Model.[82] Its essential elements are recognition of the primacy of victims of criminal acts and that they should be treated with dignity, respect, and fairness.[83]

It has been stated that to secure both the effective participatory right of victims in criminal justice systems and expedite retributivist and utilitarian justice in public prosecution systems, the theory of 'procedural justice' should be adopted.[84] Procedural justice requires that individual victims be satisfied not only with the fairness of the final judgment in their cases, but also with the process by which this judgment has been reached.[85] From a utilitarian perspective, a legal system which treats victims with respect and allows them to participate appropriately in the prosecution of perpetrators can be said to condone harm victims while also responding to the broader damage done to society.[86] By acknowledging harm to victims, social welfare is strengthened,[87] and trust in the legal system is more likely to be maintained as fear of intimidation and victimisation are overcome.[88] In addition, fair process strengthens the participants' trust in decision makers and may subsequently lead them to be more honest and cooperative.[89] Hence, even if outcomes are unfavourable, long-term compliance with the law by participants is more likely.[90] Respect shown for the dignity of individuals provides the opportunity to be heard

[80] See Ilyssa Wellikoff, 'Victim-Offender Mediation and Violent Crimes: On the Way to Justice' (2003) 5 *Journal of Conflict Resolution* 1, 8; Giannini (n 41) 82.
[81] Edna Erez and Pamela Tontodonato, 'Victim Participation in Sentencing and Satisfaction with Justice' (1992) 9 *Justice Quarterly* 393, 394.
[82] See Douglas E. Beloof, 'The Third Model of Criminal Process: The Victim Participation Model' (1999) *Utah Law Review* 289, 290-293.
[83] Ibid. 226.
[84] Giannini (n 41) 85.
[85] Ibid.
[86] Jamie Malamud Goti, 'Equality, Punishment, and Self-Respect' (2002) 5 *Buffalo Criminal Law Review* 497, 504.
[87] Giannini (n 41) 92.
[88] Larry Heuer, 'What's Just About the Criminal Justice System? A Psychological Perspective' (2005) 13 *Journal of Law and Policy* 209, 255.
[89] See Tom R. Tyler, 'Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority' (2007) 56 *DePaul Law Review* 661, 676-677; Giannini (n 41) 86-87.
[90] Tom R. Tyler, 'The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings' (1992) 46 *Southern Methodist Law Review* 433, 439.

and taken seriously, whilst also confirming their self-worth and standing in society, and increasing their trust in the morality and legitimacy of the state's legal processes.[91]

Procedural justice can be incorporated into both the utilitarian approach to criminal prosecution and retributive theory.[92] When retributivists consider when and to what extent criminals deserve to be punished, as well as address the basic question of why punishment is deserved at all, the victim inevitably becomes part of the discussion.[93] However, although social contract principles give a state the authority to hold individuals accountable for violating and harming collective social norms,[94] a particular injury suffered by victims is also a specific, individual personal harm.[95] Therefore, a criminal justice system cannot be said to be legitimate unless it considers the harm which victims as individuals have suffered.[96] Fletcher suggests that a relationship of dominance has been created by the perpetrator over the victim,[97] and so the reason for the state to arrest, try and punish perpetrators is to redress this dominance and the inequality between victim and offender.[98] Should a state not prosecute and punish perpetrators of acts of violence, it would fail in this redress and be complicit, and thus the state would have the same dominant, harmful status as the victims.[99] According to Hampton, when reacting to crime, there is a moral duty to lower the status of the perpetrator and raise that of the victim, to annul 'the act of diminishment'.[100]

3.2.3.2 Summary Remarks

To conclude, social contract theory does not recognise victims' rights to demand justice and or take a full part in criminal justice proceedings, because it considers the punishment for violations of the right to life only as a breach of the contract in terms of the general harm to society. Nevertheless, it can be argued that the right of victims to make these demands is based on the universally binding principles of moral law which outweigh social contract principles, and from which all forms of justice ultimately derive. Accordingly, victims have a moral right, even if their state's criminal justice system fails

[91] See Deborah Epstein, 'Procedural Justice: Tempering the State's Response to Domestic Violence' (2002) 43 *William & Mary Law Review* 1843, 1875-1877; Tyler (n 90) 440-441.
[92] Giannini (n 41) 92.
[93] Christopher (n 50) 936-937; George P. Fletcher, 'The Place of Victims in the Theory of Retribution' (1999) 3 *Buffalo Criminal Law Review* 51, 55.
[94] See Jean Hampton, 'Correcting Harms Versus Righting Wrongs: The Goal of Retribution' (1992) 39 *UCLA Law Review* 1659, 1685-1698.
[95] Giannini (n 41) 92.
[96] For further details, see Christopher (n 50) 935.
[97] Fletcher (n 93) 57.
[98] Ibid. 58.
[99] Ibid. 61-63.
[100] Hampton (n 94) 1686-1687.

to recognise these rights.[101] If not, citizens, particularly victims, would have no reason to believe that their criminal justice system is based on moral and legitimate foundations. Thus, any concept of criminal justice which considers that victims' participation in the judicial process interferes with or is irrelevant to the state's purpose to achieve justice and control crime should be considered invalid.

3.3 The Current Provisions of International Law

The international community has established a comprehensive set of legal instruments to ensure that victims of violent crimes are adequately provided with a remedy. However, the state's duty to investigate the violation of HR and prosecute perpetrators under international law is not expressly referred to in general HR instruments, even though these instruments recognise the right to a remedy when a violation of HR has occurred.[102] The first recognition of the right was documented in 1948 in the Universal Declaration of HR.[103] Since then, the right to a remedy has been contained in several instruments.[104]

The most important promotion of remedial action for victims of criminal acts is contained in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the Basic Principles and Guidelines).[105] According to Principle 3, the state's duties to respect and guarantee respect for, and implementation of, international obligations includes:

> the duty to (a) take appropriate legislative and administrative and other appropriate measures to prevent violations; (b) investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law; (c) provide […] victims of a HR or humanitarian law violation with equal and effective access to justice […] irrespective of who may […] bear[…] responsibility […]; and (d) provide effective remedies to victims, including reparation.[106]

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[101] Concerning the right of individuals to have a moral right, see Jones (n 26) 267-281.
[102] Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 *California Law Review* 449, 475.
[103] See Article 8 of the Universal Declaration of Human Rights (n 130) Ch. 2.
[104] Among these is the ICCPR, Article 2(3). Also, several international treaties on counter-terrorism emphasise the need to combat terrorist acts and bring those responsible to justice. Among the main treaties: are the International Convention against the Taking of Hostages, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979), entered into force June 3, 1983; the International Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 947 U.N.T.S 178, January 26, 1973; the International Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 14 December 1973; and the International Convention for the Suppression of Terrorist Bombings, 1997. In addition, under the Security Council resolutions Nos. 1267 (1999), 1373 (2001) and 1540 (2004) on counter-terrorism, all states are obliged to take effective preventive measures and dissuasive provisions to combat terrorism. Res 1373, para 2. See also Stefano Betti, 'The Duty to Bring Terrorists to Justice and Discretionary Prosecution' (2006) 4 *Journal of International Criminal Justice* 1104, 1105.
[105] Proclaimed by General Assembly Res 60/147 of 16 December 2005. See Marten Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal' (2006) 24 *Netherlands Quarterly of Human Rights* 641, 641-645.
[106] See Ramcharan (n 142) Ch. 2, 382-384.

However, while the Basic Principles and Guidelines refer to the 1985 Basic Principles of Justice (The Victims' Declaration),[107] which considers that all victims have a right to remedy for acts of violence, it has, crucially, failed to extend these rights to victims of non-state crime.[108] While the principles enshrined in the Victims' Declaration are not legally binding on states, they provide guidance on how victims should be treated within their criminal justice systems.[109] According to Principle 4 of the Victims' Declaration, all victims should be treated with 'compassion and respect for their dignity' and require access to 'justice and to prompt redress'. However, Doak notes that the Declaration does not explicitly provide for a duty to investigate, prosecute and punish criminal acts or reveal the truth about past violent acts, and this has permitted a variety of interpretations. Therefore, it is reasonable to claim that Principle 4 is not only inadequate to achieve a remedy for the victims of crime, but even positively adds to the problem of achieving reparation for these victims.[110] Nevertheless, the Declaration importantly draws explicit attention to the rights of victims in criminal processes internationally.[111]

3.3.1 The Duty to Investigate and bring Perpetrators to Justice under the Jurisprudence of HRC

The comments and the jurisprudence of the HRC have substantially clarified the nature of the state's duty of remedy under Article 2(3) of the Covenant to include the obligation to conduct an effective investigation and prosecution of violators of the right to life and the other HR.[112] The Committee established this obligation by combining the general right to a remedy under Article 2 with Article 7 of the Covenant which concerns the prohibition of torture.[113] The Committee concluded in its comment on Article 7 that complaints about ill-treatment require effective investigation by proficient authorities, and any persons found guilty must be held accountable. Victims must be able to access effective remedies, including the right to compensation.[114]

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[107] United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. 40/34, annex, 40 U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/40/53 (1985).

[108] Doak noted that these principles, applying primarily to victims of violations of humanitarian and human rights, have failed to encapsulate the doctrine of positive obligations so important in both the European and Inter-American instruments which have linked in law victims of both state and non-state crime. Doak (n 3) Ch. 2, 164, 214.

[109] See Jo-Anne Wemmers, 'Victims' Rights are Human Rights: The importance of recognizing victims as persons (2012) *Timida* 71, 75-76.

[110] Doak (n 3) Ch. 2, 164.

[111] Sorochinsky (n 8) 182.

[112] Raquel Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes' (2004) 26 *Human Rights Quarterly* 605, 645.

[113] Micah S. Myers, 'Prosecuting Human Rights Violations in Europe and America: How Legal System Structure Affects Compliance with International Law' (2004) 25 *Michigan Journal of International Law* 211, 221; Roht-Arriaza, (n 102) 477.

[114] Human Rights Committee, *General Comment No. 7: Torture or cruel, inhuman or degrading treatment or punishment* (Art. 7), 30 May 1982, U.N. Doc. HRI/GEN/1/Rev.1 at pp. 7-8, para 1.

This right to remedy as demanded by the HRC was invoked in several cases concerning allegations of arbitrary arrest, death, torture, and disappearance in Uruguay during the late 1970s. The Committee found in the case of *Bleier v Uruguay*,[115] which concerned the alleged forced disappearance of *Eduardo Bleier* in October 1975, that the state had a duty to uncover what had happened to Bleier, bring to justice those responsible, pay compensation, and ensure that similar violations did not recur.[116]

The previous decisions of the HRC also reflect the fact that payment of compensation by itself is an insufficient remedy in cases concerning serious allegations of HR abuse. *Bautista v Colombia*,[117] concerned the disappearance, torture and murder of Bautista by armed men posing as civilians. Although two military officials were found responsible for the disappearance by the *National Procuraduria Delegado* for HR, the victim's family was only offered financial compensation. One of the two officials was dismissed from his post but neither were subjected to criminal punishment. The Committee declared these disciplinary and administrative decisions to be completely inadequate because they were ineffective within the meaning of Article 2, Paragraph 3 of the Covenant.[118] Therefore, it is reasonable to state that administrative adjustments and payment of compensation are insufficient in serious cases of HR violation, such as disappearance and breaches of the right to life.[119]

Although the Committee has frequently maintained that the Covenant does not afford individuals the right to oblige the state to prosecute another person with criminal charges, it does assert the need for a thorough investigation, criminal prosecution, and punishment of violations of HR.[120] The Committee also found that amnesty laws which prevent the victims from obtaining the prosecution of the perpetrators are an adequate remedy and contrary to the state's obligation to investigate and prevent grave HR abuses.[121] According to Seibert-Foher, the concept of bringing perpetrators to justice is ambiguous and raises the question of whether the state must secure the prosecution and imprisonment of those held responsible for violating HR.[122] It is true that the Committee has sometimes

[115] *Eduardo Bleier v Uruguay*, Communication No. R. 7/30, U.N. Doc. Supp. No. 40 at 130 (1982).
[116] Ibid., para 15; Doak (n 3) Ch. 2, 162. See also *Hugo Rodriguez v Uruguay*, Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 (1994).
[117] *Bautista de Arellana v Colombia*, Communication No 563/ 1993, U.N. Doc. CCPR/C/55/D/563/1993 (1995).
[118] Ibid., para 8.2.
[119] See also *Arhuacos v Colombia*, Communication No 612/1995, UN Doc CCPR/C/60/D/612/1995 (1997), para 8.8.
[120] *Bautista de Arellana v Colombia* (n 117), para 8.6.
[121] *Hugo Rodriguez v Uruguay* (n 116), para 12.3 and para 12.4; see Harmen van der Wilt and Sandra Lyngdorf, 'Procedural Obligations under the European Convention on Human Rights: Useful Guidelines for the Assessment of 'Unwillingness' and 'Inability' in the Context of the Complementary Principle' (2009) 9 *International Criminal Law Review* 39, 72.
[122] Anja Seibert-Fohr, Prosecuting Serious Human Rights Violations (Oxford University Press 2010) 14.

given member states a degree of freedom to identify suitable measures to bring a perpetrator to justice.[123] However, in other cases of the violation of HR, the Committee has explicitly demanded that the state impose criminal punishment for the breach of the right to life. This is clearly explained in the General Comment in Article 6 on the right to life of the ICCPR.[124] Moreover, the Committee has also specified that a state is obliged to guarantee that criminal proceedings are begun against the persons responsible.[125]

Ironically, while states are obliged to investigate allegations of HR abuse and prosecute and punish the perpetrators of these criminal acts, the concept of 'right to remedy' has usually been limited to abuse of victims' HR by public officials, and does not extend to reflect the aims of international standards to deal either entirely or substantially with victims of non-state crime.[126] The criminal behaviour of private persons may be as dangerous as that of official authorities, particularly if it is known they have such significant powers that they are even more dangerous to the lives of individuals than any criminal action by a state.[127] Therefore, in the context of large numbers of victims of violent acts, in considering that HR standards are concerned only with the accountability of public authorities for the perpetration of HR violations by themselves, it may be doubted whether private individuals responsible for acts of violence qualify as violators of HR.[128]

The HRC recognises in its General Comment No. 31 the need to investigate, prosecute and punish the violent acts of non-state actors.[129] The Committee recalled its General Comment in the case of *Krasovskaya v. Belarus*,[130] which concerned the disappearance or presumed death of Anatoly Krasovkaya. It noted that although the appellants had submitted many complaints to the authorities, this had not led to the arrest or prosecution of any offender.[131] It further observed that the state authorities had failed both to conduct a proper investigation and clarify what stage their proceedings had reached ten years after the disappearance of Mr. Krasovsky.[132] It concluded that in the absence of an explanation of the lack of progress in the investigation, the state party had undoubtedly violated its

[123] See *Thomas v Jamaica*, Communication No 321/1988, UN Doc CCPR/C49/D/321/1988 (1993), para 11.
[124] UNHRC, *General Comment No 6* (n 144) Ch. 2, para 3.
[125] See Seibert-Fohr (n 122) 14.
[126] Doak (n 3) Ch. 2, 163.
[127] John H. Knox, 'Horizontal Human Rights Law' (2008) 102 *the American Journal of International Law* 1, 19; Seibert-Fohr (n 122) 33.
[128] See Organization for Security and Cooperation in Europe (n 122) Ch. 2, 74.
[129] See UNHRC, General Comment No. 31(n 147) Ch. 2, para 8.
[130] *Krasovskaya v. Belarus*, Communication No. 1820/2008, CCPR/C/104/D/1820/2008 (2012).
[131] See United Nation General Assembly, Report of the Human Rights Committee (2012) I A/67/40, para 114.
[132] Ibid.

duties under Article 2, paragraph 3 and Articles 6 and 7, by failing 'to properly investigate and take appropriate remedial action regarding the disappearance'.[133]

Clearly, the HRC acknowledges the state's duty to punish horrific, large-scale deprivations of the right to life, whether by private individuals or public officials. Even when committed by non-state agents, these acts of violence still constitute a serious threat to life and security. The enforcement of these standards of the HRC clearly demonstrates that member states of the Covenant have an obligation to criminalise, prosecute and punish violent acts, including terrorism.[134] As an example, the Committee employed these standards when it emphasised that those responsible for killings in Northern Ireland should be prosecuted.[135] In its Comments on the report submitted by the UK, it expressed deep concerns that, although significant time had passed since the killings of individuals in Northern Ireland, no fully independent and comprehensive investigation had occurred into the many murders, and that the responsible offenders had not been prosecuted. It considered it particularly concerning because, after persistent allegations of involvement and collusion by members of the state party's security forces, the situation remained unresolved. It thus emphasised that the British state should urgently take measures to ensure a thorough explanation of violations of the right to life in Northern Ireland.[136]

The HRC has regularly insisted that punishment is necessary if HR are to be adequately protected. For example, the Committee urged the Colombian government to ensure full implementation of children's rights by adopting punitive measures against acts of child murder.[137] The state's efforts to bring to justice those responsible for past HR violations were welcomed by the Committee as measures which comply with the demands of Article 2, paragraph 2.[138] Seibert-Fohr notes that even if prosecution is considered an inadequate method of prevention, it is certainly a strong option that the state can take to combat serious acts of violence, such as terrorism, and meet the requirements of HR conventions.[139] She also claims that the state's failure to act against these criminal acts may be interpreted as acquiescence and can even embolden perpetrators to commit further

[133] Ibid.
[134] See Seibert-Fohr (n 239) Ch. 2, 131.
[135] UN Human Rights Committee: Concluding Observations: United Kingdom and UK Overseas Territories, 6 December 2001, UN Doc. CCPR/CO/73/UK; CCPR/CO/73/UKOT, para 8.
[136] Ibid.
[137] Human Rights Committee, Concluding Observations of the Human Rights Committee: Colombia, 1997, U.N. Doc. CCPR/C/79/Add. 76, para 42.
[138] Seibert-Fohr (n 122) 17.
[139] Seibert-Fohr (n 239) Ch. 2, 131.

acts.[140] Nevertheless, not every failure to prosecute a crime is a violation of the victims' right. The requirement is limited to particular situations and thereby suggests that it does not apply to every individual case.[141] Clearly, the duty of the state to prosecute and punish private violations of the right to life under the due diligence principle is merely an obligation of conduct and not of result.[142] Accordingly, member states of the Covenant should only be considered in violation of their obligation if they do nothing or respond inadequately.[143]

Efforts have been made to persuade the Committee that, indeed, every victim of acts of violence has a right to justice. It has been argued in many cases brought before the Committee that victims are entitled under the Covenant to insist on the prosecution of the perpetrators and that various substantive rights provide a legal basis against immunity.[144] Nevertheless, the HRC did not acknowledge that these provisions entitled victims to the right to require punishment of the criminals on the grounds of violation of HR.[145]

For instance, the complainants in *Acuña Inostroza* asserted that the Chilean amnesty law No. 2.191 of 1978 violated Article 14 (1) (the right to fair trial) because victims and their families were not given access to the court on equal terms, nor were they given the right to a fair and impartial hearing.[146] Nevertheless, the HRC rejected this assertion but without explaining in any detail the actual meaning of Article 14.[147] This Article applies only to the 'determination of any criminal charge' and not to the determination of whether or not criminal charges should be brought. If no charges have been made then Article 14(1) does not provide the victim with the right of review.[148]

On the other hand, Article 15(2) (the exception to prevent the retroactivity of criminal law for crimes under customary international law) does not provide protection against immunity.[149] The complainants in *Acuña Inostroza* asserted that the refusal of Chile to prosecute those who committed executions in the 'Baños de Chihuio' incident violated

[140] Seibert-Fohr (n 122) 33.
[141] Ibid. 17.
[142] Knox (n 127) 23.
[143] Auguset Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors' in Philip Alston, *Non state-actors and Human Rights* (Oxford University press 2005) 79.
[144] Seibert-Fohr (n 122) 17.
[145] Ibid.
[146] *Acuña Inostroza et al. v. Chile*, Communication No. 717/1996, U.N. GAOR, Hum. Rts. Comm., U.N. Doc. CCPR/C/66/D/717/1996, (1999), para 3.3.
[147] See *H. C. M. A. v. The Netherlands*, Communication No. 213/1986, U.N. Doc. CCPR/C/35/D/213/1986 (1989), para 11. 6; see Juan Carlos Ochoa, The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations (Martinus Nijhoff Publishers, 2013) 101.
[148] Seibert-Fohr (n 122) 19.
[149] Ibid.

Article 15(2) by granting immunity for these criminal acts.[150] They interpreted Article 15(2) as obliging states to try all criminal acts in accordance with international law, whether or not domestic law acknowledges these acts as criminal offences.[151] This Article specifically states that the application of prevention of retroactive domestic criminal law does not prohibit trials and punishment, as this may be required by the demands of the general principles of international law.[152] The phrase, *does not prejudice the trial and punishment*, means merely that the state may prosecute violators of HR in the absence of criminal statutes but does not mandate such a trial; it is purely permissive, that is to say, that it is up to the state to prosecute such acts without being legally bound to do so.[153]

3.3.2 Summary Remarks

To sum up, it seems that the ambiguity of the provisions mentioned above has led the Committee to disregard the right of victims to demand the prosecution and punishment of violators of the right to life. This position of the Committee is demonstrated by its interpretation of Article 2(3), in that while criminal proceedings are a necessary remedy for victims, it does not acknowledge that victims actually have a *right* to require them.[154] The Committee has regularly made a distinction between the right to a fully effective remedy according to Article 2(3), and the general obligation of the state to prosecute criminals and prevent future crimes.[155] Where civil remedies depend on criminal proceedings, this should not be taken to affirm a *right* of individual victims to receive criminal justice.[156]

3.4 Regional HR Law

In recent years, the nature and scope of an 'effective remedy' and related positive procedural obligations have been demonstrated by the monitoring of regional HR' bodies in a rich body of case law, which has provided a legal basis for the establishment of the concept that a state owes victims a remedy of criminal investigation and prosecution.[157]

[150] *Acuña Inostroza et al. v. Chile* (n 146), paras 3.2, 3.4.
[151] Seibert-Fohr (n 122) 19.
[152] Ibid.
[153] Ibid. 20.
[154] *Sundara A. L. Rajapakse v Sri Lanka,* Communication No. 1250/2004, U.N. GAOR, Hum. Rts. Comm., U.N. Doc. CCPR/C/87/D/1250/2004 (2006), para. 9.3; *Bautista de Arellana v Colombia* (n 117), para 8.6.
[155] Seibert-Fohr (n 122) 24.
[156] *Sundara A. L. Rajapakse v. Sri Lanka* (n 154), para 9.5. See Seibert-Fohr (n 122) 25.
[157] Ochoa (n 147) 103.

This has, also, contributed to the establishment of the right of victims to participate in judicial procedures.[158]

3.4.1 The Current Approach under the Inter-American Instruments

The Inter-American system entitles individuals under Article 18 of the American Declaration of the Rights and Duties of Man[159] to resort to the courts to guarantee respect for their legal rights and obtain protection of their essential constitutional rights against violation by authorities.[160] The ACHR goes beyond this, enabling individuals to have 'effective recourse to a competent court or tribunal' for protection from acts violating their fundamental rights, acknowledged by the 'constitution or laws of the state or by the Convention', even if these acts are committed by persons acting in an official capacity.[161]

The IACtHR states that Article 25 of the ACHR concerning the right to judicial protection 'incorporates the principle recognized in the international law of human rights of the effectiveness of the procedural instruments or means designed to guarantee such rights'.[162] Accordingly, the member states of the Convention are required to provide victims of HR abuse with effective judicial remedies, which must be applied in accordance a fair trial, as prescribed by Article 8. This is used to ensure fairness to, and participation by, victims of criminal acts, and also in accordance with the general duty which states have to respect and ensure all rights guaranteed by Article 1, paragraph 1.[163]

The Court stated in the case of *Velasquez-Rodriguez*, which concerned the arrest, torture and execution of an Honduran student activist by the military authorities,[164] that the embedding of the phrase 'ensure to all persons' contained in Article 1(1) of the IACHR establishes the obligation of member states to investigate, prosecute and punish grave violations of HR in accordance with Convention's standards.[165] It also asserts that the obligation to punish violators of HR should not be limited to cases involving criminal acts committed by state authorities, but should also cover crimes by private individuals.[166]

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[158] Aldana-Pindell (n 112) 621.
[159] American Declaration on the Rights and Duties of Man (n 217) Ch. 2.
[160] See Antje Pedain, 'The Emergence of State Duties to Prosecute Perpetrators of Gross Human Rights Violations in International Law: A Jurisprudential Perspective' (2002) 13 *The King's College Law Journal* 53, 61.
[161] Article 25 of the Inter-American Convention on Human Rights (n 208) Ch. 2.
[162] Inter-American Court of Human Rights, Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, October 6, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 9 (1987).
[163] *Godínez Cruz Case,* Judgment of January 20, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 5 (1989); see Shelton (n 2)137; Aldana-Pindell (n 112) 623.
[164] *Velasquez Rodriguez v Honduras case*, (1989) 28 ILM 291.
[165] Ibid., para 166; For further details, see Roht-Arriaza (n 102) 469-472; Huneeus (n 53) 8; Pedain (n 160) 36-69.
[166] Ibid., para 172; see Fernando Felipe Basch, 'The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers' (2007) 23 *American University International Law Review* 195, 201.

In addition, the state obligation to punish is independent of the duty to prevent and investigate.[167] According to the Court, if the violation of criminal acts goes unpunished and the right of victims to life and physical integrity is unrestored, the state will have failed to secure the rights of victims under the Convention.[168]

The large-scale failure of member states to prosecute and punish perpetrators is clearly attributable to the widespread recognition of impunity, which, according to the Inter-American Court, means 'the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention'.[169] Two different forms of impunity have been distinguished by the Inter-American Commission, namely, *de jure* and *de facto* impunity.[170] While *de jure* impunity can be described as the provisions by which perpetrators of criminal acts are pardoned or given amnesty,[171] *de facto* impunity applies when the state has taken inadequate measures to investigate, prosecute and punish offenders.[172] Such impunity may be said to exist when states are corrupted and shield perpetrators and, also, when there is a culture of disrespect for the law.[173] Therefore, the Court asserts that impunity in itself is a violation of HR[174] and, therefore, member states of the Convention must 'use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of HR violations, and total defencelessness of victims and their relatives'.[175]

For instance, in the case of *Cotton Field*,[176] which concerned sexual violence, torture and the death of women and girls, the Court noted that Mexican authorities countenanced a culture of impunity for such acts, leading to violation of the victims' right to life.[177] The Court found that the police and prosecution had failed to act or acted inadequately to prevent and investigate violations, which allowed them to continue.[178] Moreover, the

[167] Ibid., para 176; Seibert-Fohr (n 122) 54.
[168] Ibid., para 176.
[169] *Paniagua Morales et al. Case*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 37, (8 March 1998), para, 173; Basch (n 166) 203.
[170] Seibert-Fohr (n 122).
[171] See Inter-Am. C.H.R., *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, doc. 59 rev. (2000), para 207. For instance, the Inter-American Court held that 'All amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible…..' *Barrios Altos v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar 14, 2001), paras 41-44; see Naomi Roht-Arriaza, 'After Amnesties are Gone: Latin American National Courts and the New Contours of the Fight Against Impunity' (2014) *Human Rights Quarterly*, Forthcoming: UC Hastings Research Paper No. 96 1, 9.
[172] Inter-Am. C.H.R., Second Report on the Situation of Human Rights in Peru (n 171), para 206.
[173] Inter-Am. C.H.R., *Third Report on the Situation of Human Rights in Paraguay*, OEA/Ser.L/V/II.110, doc. 52 Chapter III, Impunity (2001), para. 2.
[174] *Myrna Mack Chang Case*, Reasoned Opinion of Judge Cançado Trindade, 2003 Inter- Am. Ct. H.R. (ser. C) No. 101 (25 November 2003), para 10.
[175] *Paniagua Morales et al. Case* (n 169), para 173; see also the case of the *La Rochela Massacre v. Colombia*, Merits, Reparations, and Costs, 2007 Inter-Am. Ct. H.R. (ser. C) No. 163 (11 May 2007), para 289; Basch (n 166) 203.
[176] *González et al. ("Cotton Field") v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009).
[177] See Harrington (n 210) Ch. 2, 321.
[178] Ibid.

Court emphasised that failure by the state to prosecute violators of the right to life was itself a violation of that right.[179] The Court's condemnation of impunity was also joined by the Inter-American Commission, which asserted that states should not only be held accountable for failure to prevent the violation of HR under international law, but also for allowing acts of violence to go unpunished.[180] Consequently, to enforce HR, prosecution and punishment must occur because they are the most effective means[181] which the state possesses by reason of its monopoly over punitive measures.[182]

In a similar vein, *Jessica Gonzalez et al. v. United States*[183] may also be cited. This case concerned the allegation of Jessica Lenahan of the murder by her ex-husband Simon Gonzales of their three daughters. The Inter-American Commission on HR added a social dimension to the case by emphasising that unless the state complies with its responsibility to investigate HR abuses against girl-children committed by a non-state agency and overturn any impunity, the culture of repetition of such violence against women will be enhanced. The Commission noted that although the state authorities had established two investigations to clarify the circumstances surrounding the death of the girls, these investigations were taken mainly to reveal the facts of the shooting to death of Simon Gonzales by the police.[184] Therefore, the Commission emphasised that the state was obligated to investigate the Gonzales' deaths, to establish that violence against girl-children is intolerable, even when perpetrated by private individuals.[185] Moreover, the Commission explained that inaction on violence against women promotes the repetition of violence, 'since society sees no evidence of willingness by the State […] to take effective action [against] such acts'.[186] Therefore, it may be said that within the jurisprudence of the Court and Commission, the obligation of member states of the Convention to combat impunity has been firmly established.[187]

3.4.1.1 The Right to Justice within the Inter-American Systems

[179] Ibid.; *González et al. ("Cotton Field") v. Mexico* (n 176).
[180] See *Arges Sequeira Mangas v. Nicaragua*, Case 11.218, Inter-Am. C.H.R., Report No. 52/97, OEA/Ser.L/V/II.98 doc. 6 rev (18 February 1998), para. 154.
[181] See *Carmelo Soria Espinoza v. Chile*, Case 11.725, Inter-Am. C.H.R., Report No. 133/99, OEA/Ser.L/V/II.106, doc. 3 rev (19 November 1999), para. 66.
[182] See *Meneses Reyes et al. v. Chile,* Case 11.228, 11.229, 11.231, and 11.182, Inter-Am. C.H.R., Report No. 34/96, OEA/Ser.L/V/II.95, doc. 7 rev (15 October 1996), para. 63.
[183] *Jessica Gonzalez et al. v. United States*, Case 1490-05, Report No. 52/07, Inter-Am. C.H.R., OEA/Ser. L/V/II. 130 Doc. 22, rev. 1 (2007). See Chapter 2 of the thesis, pages 37-38.
[184] See Report No.80/11Case 12.626 Merits Jessica Lenahan (Gonzales) et al. United States, July 21, 2011, Para 186.
[185] Ibid., para 195.
[186] Ibid., para 168.
[187] Seibert-Fohr (n 122) 55.

The right to justice emerged with cases such as *Bulacio v Argentina*,[188] which concerned the detention, beating and death of a minor by the Argentine Federal Police. The Inter-American Court reminded member states of the Convention of their duty to investigate HR violations, and punish perpetrators, and that the victims of violations and their next of kin should have access to justice not only for their own satisfaction but for the benefit of all society.[189]

The Inter-American Commission declared prosecution to be an essential element of both the right to fair trial (Art. 8) and the right to judicial protection (Art. 25). It further considered that denying victims a part in criminal proceedings was contrary to Article 8.[190] This is clear in the interpretation of this Article by the Commission in the case of *Mendoza v Uruguay*,[191] in which the victim's participation in the criminal proceedings had been denied. The Commission criticised this failure,[192] and described criminal procedures as appropriate to determine criminal liability and punishment. In order to maintain its claim that this participatory right should be respected by the state, it referred to the Uruguayan Code of Criminal Procedure.[193] Under this statute, victims have the right to participate and demand that measures be taken to properly address the crime.[194] The Commission emphasised that, by virtue of Article 8, the domestic right became subject to the protection of the Convention and, thereby, guaranteed that each victim was granted access to the criminal proceedings of the court.[195] It concluded that victims are entitled under Article 8 to a judicial investigation to reveal the facts concerning those responsible for the crime, and impose the appropriate punishment.[196] Dismissal of the charges would constitute a denial of this right.[197]

The Commission specifically noted that victims and their relatives have the 'right to obtain justice' through effective action against violators of their HR.[198] This right, according to the Commission, goes beyond merely allowing participation by the victims and, also, as well as the right to investigation, it requires that perpetrators be duly

[188] *Bulacio v Argentina*, Merits, Reparations & Costs, Inter-Am. Ct. H.R., (Ser. C) No. 100 (September 18, 2003).
[189] Ibid., paras 110, 111.
[190] Seibert-Fohr (n 122) 59.
[191] *Mendoza et al. v. Uruguay*, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Inter-Am. C.H.R., Report No. 29/92, OEA/Ser.L/V/II.83, doc. 14 (2 October 1992).
[192] Ibid., para 40.
[193] Seibert-Fohr (n 122) 60.
[194] Ibid.
[195] *Mendoza et al. v. Uruguay* (n 191), para 41.
[196] Ibid., para 39.
[197] Seibert-Fohr (n 122) 60.
[198] See *Carmelo Soria Espinoza v. Chile* (n 181), para 81.

prosecuted and punished.[199] Therefore, if the state fails to prosecute and punish the perpetrators, this is a denial of justice contrary to the judicial right of victims under Article 8.[200] The Commission states that this right exists independently of whether or not domestic law recognises a victim's right to have criminal charges brought against the perpetrator.[201]

Similarly, the Inter-American Court criticised the absence of effective legal proceedings. In the case of *Paniagua Morales*,[202] which concerned illegal detention, ill-treatment and deprivation of life, the criminal proceedings instigated by two of the victims had been inadequately conducted.[203] The criticism of the Court was that the case was not heard independently and impartially in an appropriate time frame, with victims not being permitted to take part in the process.[204] Therefore, the obligation of the state under Article 8 of the Convention had been violated.[205] Also, the Court in the *Street Children* case expressed the requirements of criminal proceedings under Article 8, as the right to be heard, and the punishment of perpetrators through criminal prosecution.[206]

To ensure the protection of the right of victims to justice, the Inter-American Court and Commission combined Articles 25 and 8.[207] Therefore, it is a requirement both that the state brings violators of the right to life to justice. According to the Court and the Commission, the right to justice applies to all member states of American HR, irrespective of their domestic criminal procedure laws.[208] Moreover, the Court considers this right as *jus cogens*.[209] This is to say that the right to judicial protection ensured by these articles would be denied to the detriment of the victim should the state fail to investigate and prosecute violations of HR.[210]

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[199] Ibid., para 90; *Ignacio Ellacuría et al. v. El Salvador*, Case 10.488, Inter-Am. C.H.R., Report No. 136/99, OEA/Ser.L/V/II.106 doc. 3 rev (22 December 1999), para 191.
[200] *Carmelo Soria Espinoza v. Chile* (n 181), para 78.
[201] See *Garay Hermosilla et al. v. Chile* 10.843, Inter-Am. C.H.R., Report No. 36/96, OEA/Ser.L/V/II.95 doc. 7 rev (15 October 1996), para 64; *Lucio Parada Cea et al. v. El Salvador*, Case 10.480, Inter-Am. C.H.R., Report No. 1/99, OEA/Ser.L/V/II.95 doc. 7 rev (27 January 1999), para 119
[202] *Paniagua Morales et al. case* (n 169).
[203] Seibert-Fohr (n 122) 61.
[204] *Paniagua Morales et al. case* (n 169), para 155.
[205] Seibert-Fohr (n 122) 61.
[206] *Villagran-Morales et al. v. Guatemala*, (The Street Children Case), Judgment of May 26, 2001, Inter-Am Ct. H.R. (Ser. C) No. 77 (2001), para 227.
[207] See *Loayza-Tamayo v. Peru*, reparations, Judgment of November 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 42 (1998), paras 169-170. See also *Durand & Ugarte Case*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 68 (16 August 2000), para 130.
[208] *Carmelo Soria Espinoza v. Chile* (n 181), para 82.
[209] See Case of *Goiburú et al. v. Paraguay*, Merits, Reparations and Costs, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153(22 September 2006), paras 84, 131.
[210] *Durand & Ugarte Case* (n 207), para 146.

When these provisions are taken in conjunction with Article 1(1) of the ACHR, they impose a positive obligation on states to observe the right of victims to justice, thereby, giving them an effective remedy.[211] Further, in recent cases, the Court has considered that there is a correlation between the denial of the victims' rights to effective justice in a criminal trial and the failure to guarantee surviving victims or their families the right to truth through withholding information concerning the crime and the perpetrators.[212] The Commission has emphasised that female victims of violence must be able to access judicial protection, truth, and an impartial investigation in accordance with international standards. Moreover, the state must show that this investigation is not simply a procedural formality and is itself responsible for finding the truth, rather than the victim or her next-of-kin. Such a duty is essential in cases involving the right to life of girls.[213]

However, it is important that the right to truth is not limited to individual victims and their families but also given to society, which is entitled to know the truth about the incidents committed and the reasons for and circumstances of serious criminal acts,[214] as the Court asserted.[215] There are different objectives between the right of society to know the truth, which is mainly to avoid future violence, and that of victims and their relatives, which is to be provided with an effective remedy for their suffering. The state must be held responsible if its agents have made deliberate attempts to obstruct the criminal process or have been guilty of grave irregularities or omissions that have ignored the right of victims to truth and justice.[216] However, the state should not be held responsible if it has taken reasonable measures to ensure the rights of victims to truth and justice. This is to say that the state's fulfilment of its duty to provide truth and justice to the victims in the criminal process is to be judged by its due diligence in providing an effective prosecution, not by the final results.[217] The effectiveness of the criminal process can be undermined if victims receive unfair treatment during it. An example of this is where the Court considered the failure of the state to communicate information about the fate of victims in cases of forced disappearance, and to lead an investigation into the

[211] See, for example, the case of *Villagran-Morales et al. v. Guatemala*, (The Street Children Case) (n 206), paras 216-227; Aldana-Pindell (n 112) 627; Thomas M. Antkowiak, 'Truth as Right and Remedy in International Human Rights Experience' (2002) 23 *Michigan Journal of International Law* 977, 986.
[212] See *Bámaca Velásquez Case*, Judgment of November 25, 2000, Inter-Am Ct. H.R. (Ser. C) No. 70 (2000), para 201; *Castillo Pez,* Case No. 43, Inter-Am. C.H.R., paras 105-106; *Barrios Altos v. Peru* (n 171), para 48; see Aldana-Pindell (n 112) 625; for further details of the right to truth, see Antkowiak (n 211) 996-1002.
[213] See Laura L. Finley, Encyclopedia of Domestic Violence and Abuse (ABC-CLIO, 2013) 649-650.
[214] Seibert-Fohr (n 122) 70.
[215] *Bámaca Velásquez v. Guatemala, Reparations*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 91 (22 February 2002), para 77.
[216] Aldana-Pindell (n 112) 628.
[217] See *Villagran-Morales et al. v. Guatemala*, (The Street Children Case) (n 206), para 226.

identification of those responsible and to punish them, as unfair treatment which created much uncertainty, anxiety and feelings of powerlessness for the families of victims.[218]

3.4.1.2 Summary Remarks

It seems reasonable to claim that Inter-American jurisprudence has established comprehensive procedural obligations on signature states of the Convention to acknowledge the rights of victims of acts of violence to justice, truth and fair treatment. However, the recognition of the right of victims to demand prosecution against violations of their rights should be taken in conjunction with the duty of the state to prosecute.[219] In other words, such prosecution is not dependent solely on the right of victims, as it would be possible for them to cede this right by, for instance, not requiring the state to prosecute.[220] The Inter-American Court removed any doubt in this matter by stating that the state would be in breach of its duty to secure the full exercise of the right of all individuals under its jurisdiction should it fail to punish an offence at the request of victims.[221]

3.4.2 The Current Approach under European Instruments

Under Article 13 of the ECHR,[222] an effective remedy should be provided by a national authority if an individual's rights have been violated under the Convention, irrespective of whether or not this violation has been committed by officials of the state.[223] In a number of judgments, the ECtHR has scrutinised the combined impact of Article 13 (the right to remedy), Article 1 (the requirement of a state to 'secure to everyone within its jurisdiction the rights and freedoms' laid down by the Convention), Article 2(1) (the obligation to protect the right to life) and Article 3 (the right to be free from torture or inhuman treatment).[224] These judgments confirm that the victim's right of access to an effective remedy may also be breached when the state fails in its duties under the Convention.[225]

[218] Ibid., para 173. See Seibert-Fohr (n 122) 71.
[219] See Aldana-Pindell (n 112) 621.
[220] Ibid.
[221] See *Villagran-Morales et al. v. Guatemala,* (The Street Children Case) (n 206), para 99.
[222] European Convention on Human Rights (ECHR) (n 74) Ch. 2.
[223] See van der Wilt and Lyngdorf (n 121) 46; Axelle Reiter, 'Victims of 'private' crimes and application of human rights in interpersonal relations' (2013) *Temida* 55, 59.
[224] Doak (n 3) Ch. 2, 166.
[225] Ibid.

This right of the victim to a remedy implies that the state has a positive obligation to effectively investigate any violation of the right to life; this was explicitly recognised by the Court in the case of *McCann and Others v United Kingdom.*[226] The Court held that the statutory prohibition of arbitrary killing by state authorities would be practically ineffective if a procedure to review the unlawful use of lethal force by the state were lacking.[227] Therefore, the Court asserted that the duty to protect the right to life under Article 2 of the Convention, in conjunction with Article 1, requires a state to establish an 'effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the state'.[228] The inclusion of the phrase, inter alios*,* means that the duty to investigate arises whether those alleged to have been responsible were state agents or not.[229]

The Court in *Ergi v Turkey* [230] adopted the same stance. Although the Court was not convinced beyond reasonable doubt that the accidental killing of the applicant's sister, Havva Ergi, was by security forces during a counter-terrorism operation, the Court held that the duty of the state to investigate is not limited to killings by state agents, nor based on the lodging of a formal complaint by a family member about the killing. In *Ergi v Turkey*, the authorities' knowledge of the killing created an obligation under Article 2 of the Convention to conduct an effective investigation into the death.[231] However, the Court concluded that the Turkish authorities had failed to comply with Article 2, which obliged them to establish an effective investigation.[232]

Although the scope of the obligation under Article 13 varies according to the nature of the complaint under the Convention, the right to a remedy must be both practically and legally effective, and not 'unjustifiably hindered by the acts or omission' of the state.[233] Accordingly, while the Court, in general, leaves some discretion to member states to choose appropriate remedial measures, provided they are 'effective in law and practice',

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[226] *McCann v. United Kingdom* (1995) 21 ECHR 97, para 161; see Juliet Chevalier-Watts, 'Effective investigations under article 2 of the European Convention on Human Rights: securing the right to life or an onerous burden on a state'? (2010) 21 European Journal of International law 701, 702.
[227] Chevalier-Watts (n 226) 703.
[228] *McCann v. United Kingdom* (n 226), para 161; see Alastair Mowbray, 'Duties of Investigation under the European Convention on Human Rights' (2002) 51 *The International and Comparative Law Quarterly* 437, 437. see also *Armani Da Silva v. The United Kingdom*, App no 5878/08 (ECHR, 30 March 2016), para 230.
[229] Doak (n 3) Ch. 2, 169.
[230] *Ergi v. Turkey* App no 40/1993/435/514 (ECHR, 28 July 1998).
[231] Ibid., para 82. See Rachel Harvey and Emilia Mugnai, 'The 'Right to life' Commentary on Article 2' (2002) 1, 8.
[232] *Ergi v. Turkey* (n 230), para 82. See also *Tanrikulu v. Turkey* App no 23763/94 (ECHR, 8 July 1999), para 103; Antkowiak (n 211) 983. See also the Court judgment in the case of *Mahmut Kaya v Turkey* App no 22535/93 (ECHR, 28 March 2000), para 98. Doak (n 3) Ch. 2, 166.
[233] *Mahmut Kaya v Turkey* (n 232), para 124; Doak (n 3) Ch.2, 167.

the extent of this discretion depends on the nature and gravity of the alleged abuse.[234] Therefore, because of the seriousness of the deprivation of the right to life, the Court considered that Article 13 requires both compensation and investigation which leads to punishment, allowing the complainant to be effectively involved.[235]

There is some ambiguity surrounding the Court's judgments about the interpretation of the state's duty to effectively investigate and punish perpetrators of serious violations of HR. Some commentators have maintained that, according to the judgments of the Court, investigation is not an end but a means, which must explicitly lead to the identification and punishment of perpetrators.[236] In other words, the state has a duty to punish HR violators,[237] a duty repeatedly referred to by the Court which stressed that all violations of the right to life should be curbed and punished.[238] Nevertheless, the Court still appears to be unclear about the duty to punish, as it merely insists on the duty to criminalise, and establish an enforcement mechanism to effectively implement the criminal law.[239]

This can be clearly seen if a comparison is made between the European Court's requirement to make an effective 'investigation capable of leading to identification and punishment' and the prescription of the HR Chamber for Bosnia and Herzegovina[240] which observes the European Convention on HR. The HR Chamber has repeatedly ordered the Federation of Bosnia and Herzegovina not only to hold a criminal investigation into HR abuses on the grounds of the European Convention but also 'to bring to justice' their perpetrators.[241] The reason behind the Court's use of unclear terminology regarding the right of criminal sanction may be because the Court holds that the obligation of the state to carry out criminal investigation is not a duty of outcome, but of means.[242] Therefore, according to Seibert-Foher, punishment is not a remedial component and it would be a mistake to interpret the demand of the Court to conduct an

[234] See *Gül v. Turkey*, App no 22676/93(ECHR, 14 December 2000), para 10.
[235] See *Kaya v. Turkey* App nos 158/1996/777/978 (ECHR, 19 February 1998), para 107; see Seibert-Fohr (n 122) 124-125; Sorochinsky (n 8) 202.
[236] See Doak (n 3) Ch. 2, 167; van der Wilt and Lyngdorf (n 121) 48.
[237] See Roht-Arriaza (n 102) 449, 478.
[238] *Öneryildiz v. Turkey* App no 48939/99 (ECHR, 30 November 2004), para 91.
[239] Seibert-Foher (n 122) 115.
[240] The Human Rights Chamber was established in 1996 under Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement).
[241] See, for instance, *H.R. and Mohamed Momani v. The Federation of Bosnia and Herzegovina*, Case no CH/98/946, Human Rights Chamber for Bosnia and Herzegovina, Decision on Admissibility and Merits of 5 November 1999, paras 121, 146-147; *Srebrenica Cases (Selimovic and Others)*, Case nos CH/01/8365 et al., Human Rights Chamber for Bosnia and Herzegovina, Decision on Admissibility and Merits of 3 March 2003, paras 206, 212.
[242] See Case of *Ramsahai and Others v The Netherlands* App no 52391/99 (ECHR, 15 May 2007), para 324; *Anguelova v Bulgaria*, App no 38361/97 (ECHR, 13 June 2002), para 139; *Bazorkina v Russia* App no 69481/01(ECHR, 27 July 2006), para 118; see Sorochinsky (n 8) 202; Seibert-Foher (n 122).

investigation capable of leading to punishment as confirmation of an actual right to punishment.[243]

In *Armani Da Silva v. the United Kingdom*,[244] the Court re-asserted its position that for the investigation to be effective in the context of Article 2 of the Convention, specifically regarding the use of lethal force by the state, those investigating must be impartial, and the investigation must establish the truth, in order to punish those responsible; the conclusions must be based on 'thorough, objective and impartial analysis' and 'sufficiently accessible to the victim's family'.[245] Thus, the authorities must take the necessary steps to secure evidence, including testimony and all relevant evidence.[246] The Court found that the obligation to punish would apply only 'if appropriate', although it had initially stated that an investigation should be capable of leading to the 'identification and punishment of those responsible'.[247]

This obligation to conduct an effective investigation has also been emphasised by the Court in *The Tagayeva and Others v Russia,*[248] in which the judgment of the Court found the Russian authorities had failed to prevent a terrorist attack, and conduct an effective investigation. This was described as 'a high watermark for the human rights protection of hostages and for confirming the responsibility of states in conducting counter-terrorism operations under the European Convention on HR'.[249] The case of the 2004 terrorist attack on a school in Beslan, Russia, in which about 800 children and 300 parents were taken hostage for over fifty hours, ended in the authorities storming the school after unsuccessful negotiations.[250] Following this armed intervention by Russian forces, 330 people lost their lives, including more than 180 children, and over 750 people were injured.[251] Because some of the victims and their families were not satisfied with how the authorities responded to the attack, they complained to the ECtHR, asking it to examine

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[243] Seibert-Foher (n 122) 126.
[244] *Armani Da Silva v. The United Kingdom* (n 228). See the discussion of this case in Chapter 2, pages 41-45.
[245] Ibid., para 233, 240, 243.
[246] Ibid., para 233.
[247] See Council of Europe, European Court of Human Rights, Overview of the Case-Law of the European Court of Human Rights (Wolf Legal Publishers (WLP), 2016) 18.
[248] *The Tagayeva and Others v Russia* App no. 26562/07 and 6 other applications (ECHR, 13 April 2017).
[249] It has been noted that 'Acknowledging the limits of its role, the Court distinguished between political choices made in the course of fighting terrorism that fall outside its supervision, and operational aspects of the authorities' actions that have a direct bearing on rights protected under the Convention'. See Jessica Gavron and Jarlath Clifford, Victims placed at the centre in Beslan School Siege Judgment (*Tagayeva and Others v. Russia*), 24 May 2017, Strasbourg Observers <https://strasbourgobservers.com/2017/05/24/tagayeva-and-others-v-russia-victims-placed-at-the-centre-in-beslan-school-siege-judgment/ > accessed 10 January 2018.
[250] *The Tagayeva and Others v Russia* (n 248), paras 23-28.
[251] See Sofia Galani, Hostages and Human Rights at the European Court of Human Rights: *The Tagayeva and Others v Russia* Case, 2 May 2017, University of Bristol Law School Blog <http://legalresearch.blogs.bris.ac.uk/tag/tagayeva-and-others-v-russia/> accessed 10 January 2018.

if the Russian authorities had sufficiently protected their lives and safety.[252] They made allegations ranging from the failure of the authorities to: prevent the hostage taking, although they knew there was a real risk of civilians being targeted; establish the causes of death of 116 victims and the type of ammunition employed during the operation; and, adequately plan and control the rescue operation, leading to the use of excessive and indiscriminate lethal force.[253]

The Court concluded unanimously that despite the specific and sufficient information available to the authorities about the intended magnitude and nature of the planned terrorist attack in the area, at least several days in advance, they had failed to take reasonable preventive and protective measures against the attack and, had thus violated their positive obligation under Article 2;[254] this obligation applies not only to the protection of identifiable individuals, but can also be invoked to afford general protection to society.[255] The Court further found a violation of Article 2 because the investigation conducted by the authorities fell short of requirements for an adequate investigation.[256] In reaching this conclusion, four crucial aspects were examined in detail by the Court: (1) poor forensics, which led to the failure to determine the cause of death of one third of the victims; (2) procedural failures with essential evidence which caused 'irreparable harm' to the ability to conduct a 'thorough, objective and impartial analysis;' (3) the subsequent failure to determine the lethal force used by state agents; and (4) the failure to meet public scrutiny requirements by limiting victims' access to key reports.[257] Such procedural findings reassert the position of the Court that even in complex scenarios resulting in large-scale killings, the obligation to conduct effective investigation is applied.[258]

In cases involving violence against women, including domestic violence resulting in death, criminal remedies are deemed necessary by the Court.[259] In displaying its view on

[252] Janneke Gerards, Procedural review: a solution for the European Court of Human Right's problems? 1 May 2017, Blog of the Montaigne Centre for Judicial Administration and Conflict Resolution <http://blog.montaignecentre.com/index.php/647/procedural-review-a-solution-for-the-european-court-of-human-rights-problems/> accessed 10 January 2018.
[253] Galani (n 251).
[254] *The Tagayeva and Others v Russia* (n 248), para 493. The Court held that 'A threat of this kind clearly indicated a real and immediate risk to the lives of the potential target population […] The authorities had a sufficient level of control over the situation and could be expected to undertake any measures within their powers that could reasonably be expected to avoid, or at least mitigate this risk'. Ibid., para 491.
[255] Ibid., para 482; Gavron and Clifford (n 249).
[256] See also the Court decision in other case against Russia regarding the taking of hostages. In *Finogenov and Others v Russia* App nos 18299/03 and 27311/03 (ECHR, 20 December 2012), the Court found that there is 'sufficient evidence to conclude that the investigation into the authorities' alleged negligence in this case was neither thorough nor independent, and, therefore, not "effective". The Court concludes that there was a breach of the State's positive obligation under Article 2 of the Convention on this account'. Ibid., para 282.
[257] Gavron and Clifford (n 249); *The Tagayeva and Others v Russia* (n 248), paras 507-509, 516, 537. A number of failures were also found by the Court in relation to the planning and control of the operation. See Galani (n 251).
[258] Gavron and Clifford (n 249); Galani (n 251).
[259] See Eklund (n 202) Ch. 2, 10. See *Opuz v. Turkey* App no 33401/02 (ECHR, 9 June 2009), paras 150-151.

the effectiveness of criminal investigations by states, the Court held in *Opuz v Turkey*[260] that, where criminal proceedings concerning an intentional killing have lasted for more than six years, these proceedings are not a sufficient response from the state[261] and, thus, an obligation to conduct criminal proceedings within a reasonable time by states is also required under Article 2.[262] Therefore, a failure in the obligation to effectively investigate and punish in cases of violence against women may result in a violation of the procedural limb of Article 2.[263] The Court also considers the failure to initiate an effective investigation of complaints of domestic violence and other forms of violence perpetrated by private actors, including rape and sexual abuse, to be incompatible with the due diligence standard under Articles 3 (the right to be free from torture or inhuman treatment) and 8 (the right to respect for private and family life) and, thus, violates these provisions.[264] In this regard, the Court has identified that even in the absence of a formal request by the victim, the authorities have an obligation to begin an investigation if they are aware of the abuse.[265] When it comes to the obligation to prosecute perpetrators of violence, the Court warned that 'the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints'.[266] This implies, inter alia, that in addition to the satisfaction of the victim, a broader public interest objective can be achieved from the prosecution of serious offences of domestic violence, including punishment of such acts, providing reassurance to victims, and deterring others.[267] It is important to note that it is in the public interest that the perpetrators of such violence are prosecuted, especially where victims withdraw charges due to pressure or intimidation.[268] Moreover, a state has an obligation to punish the perpetrators of sexual and domestic violence. The Court held that the states have a duty to impose criminal punishments and effectively enforce the punishments ordered in practice.[269] It also considers that, 'long and unexplained delays'

[260] *Opuz v. Turkey* (n 259).
[261] Ibid., para 150.
[262] Eklund (n 202) Ch. 2, 10.
[263] Ibid.
[264] See *Opuz v. Turkey* (n 259), para 169; *P. v the Republic of Moldova* App no 33708/12 (ECHR, 28 April 2015), paras 33, 36; For instance, the Court declared investigations to be ineffective and member states to be in breach of Articles 3 and 8 because of the significant delays in conducting an investigation, the failure of the authorities to question important witnesses or a failure to sufficiently assess the credibility of conflicting statements made by them. For further details, see Eklund (n 202), Ch. 2, 22-23
[265] *T.M. and C.M. v the Republic of Moldova* App no 26608/11 (ECHR, 28 January 2014), para 46; Eklund (n 202) Ch. 2, 22.
[266] See *B v The Republic of Moldova* App no 61382/09 (ECHR, 16 July 2013), para 54. Therefore, a failure to do this is incompatible with due diligence in Articles 2 and 3. In this regard, the Court 'has never established that the failure to prosecute is incompatible with Article 8'. However, there may still be a similar obligation under Article 8 to, under certain circumstances, prosecute the perpetrator in the public interest'. For further details, see Eklund (n 202) Ch. 2, 23-24.
[267] See Mujuzi (n 181) Ch. 2, 168.
[268] Ibid.
[269] *A. v Croatia* App no 55164/08 (ECHR, 14 October 2010), paras 78-79.

to enforce these punishments and protection orders are incompatible with due diligence.[270]

For instance, in *Valiuliene v Lithuania*,[271] the applicant complained that she had been beaten by her partner on several occasions and argued that the state authorities had failed to protect her sufficiently and investigate the violence against her, and to hold the abuser accountable, and that the criminal proceedings she had established against her abuser had been excessively lengthy and fruitless.[272] Moreover, although the Court was persuaded that the national law of Lithuania provided a sufficient regulatory framework to pursue the crimes against the applicant, it concluded that the practices and manner in which the criminal law mechanisms had been implemented were defective and insufficient to protect the rights of the applicant, to the point of constituting a violation of Lithuania's positive obligations under Article 3 of the Convention.[273] In reaching this decision, the Court noted that, because the flaws of the actions in Lithuanian authorities' investigation, criminal proceedings were discontinued due to the fact that 'the circumstances of the case were never established by a competent court of law'.[274] The Court noted that one reason to impose punishment was to deter the offender from causing further harm, and without having the facts of the case established by a criminal court, this aim could not be achieved.[275] Therefore, the Court stated that it could not deem that rights had been adequately protected against ill treatment when criminal proceedings are ended due to the prosecution being time barred because of state inaction.[276]

The problematic nature of recent European Court case law seems to make its judgments less clear than those of the Inter-American Court judgments, by failing to declare the substantive nature of victims' rights or expressly address the right of punishment.[277]

[270] See Eklund (n 202) Ch. 2, 24.
[271] *Valiulienė v Lithuania* App no 33234/07 (ECHR, 26 March 2013).
[272] For further details, see McQuigg (n 204) Ch. 2, 1-4.
[273] *Valiulienė v Lithuania* (n 271), paras, 78, 79-86. See McQuigg (n 204) Ch. 2, 6; Jakštienė (n 184) Ch. 2, 75.
[274] Jakštienė (n 184) Ch. 2; according to the Court, 'the choice of the means to secure compliance with Article 3 in the sphere of the relations of individuals between themselves […] falls within the domestic authorities' margin of appreciation, provided that criminal-law mechanisms are available to the victim'. In its view, 'it was not therefore appropriate for it to speculate on the question of whether the applicant's criminal complaint should have been pursued by the public prosecutor or by way of a private prosecution'. See McQuigg (n 204) Ch. 2, 6.
[275] McQuigg (n 204) Ch. 2.
[276] *Valiulienė v Lithuania* (n 271), para 85; McQuigg (n 204) Ch. 2.
[277] For further details, see Sorochinsky (n 8) 203-205.

3.4.2.1 The Reasons for Criminalisation and the Establishment of Effective Judicial Procedures

The Court considers that criminal prosecution is necessary for the protection of the right to life and to uphold the rule of law and maintain public confidence in it. In the case of *Öneryildiz v Turkey*,[278] concerning the death of 13 individuals in a methane-gas explosion at a municipal landfill site,[279] the complainants claimed that as the state was negligent over the dangers of the site, it should be held responsible for the deaths of their relatives.[280] The Court considered all the circumstances surrounding the disaster, and declared that the failings of state authorities amounted to more than errors of judgment or carelessness,[281] as although the deaths were unintentional, the clear danger to life which the state had ignored demanded prosecution by criminal law.[282] The Court further stated national courts must punish life endangering offences, to maintain public confidence and observance of the law, and prevent 'any appearance of tolerance of or collusion in unlawful acts'.[283] Also, prosecution was seen as a means of re-establishing public confidence in the state's criminal system.[284]

Although the Court's decisions requiring member states to criminalise and allow recourse to criminal law through individual cases to be brought before it, it has done so in the interest of general HR protection, using cases to examine how well a state has complied with the Convention more generally.[285] Therefore, when the Court assesses to what extent the state has complied with its *substantive and procedural obligation* under Article 2 (the right to life) and Article 13 (the right to remedy), it is not only concerned with providing victims with remedies, but also with improving that state's criminal justice systems to deter future violations.[286]

[278] *Öneryildiz v Turkey* (n 238); see McCamphill (n 167) Ch. 2, 114.
[279] See Seibert-Foher (n 122) 113.
[280] Ibid.
[281] *Öneryildiz v Turkey* (n 238), para 13.
[282] Ibid., paras 93, 109; see McCamphill (n 167) Ch. 2, 114.
[283] Ibid., para 96; McCamphill (n 167) Ch. 2, 114-115; see also *Anguelova v Bulgaria* (n 242), para 140; Case of *Ramsahai and Others v The Netherlands* (n 242), para 321. The Court in a recent case also asserted that 'where the official investigation leads to the institution of proceedings in the national courts, the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect the right to life through the law. In this regard, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished' and that 'the Court's task therefore consists in reviewing whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by Article 2 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined'. *Armani Da Silva v. The United Kingdom* (n 228), para 239.
[284] *Ramsahai and others v The Netherlands* (n 242), para 325.
[285] Seibert-Foher (n 122) 119.
[286] Ibid. 120.

Many attempts have been made to persuade the Court that denial of the right to justice is also a violation of Article 6 of the Convention, which states that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.[287] Victims have complained that in their cases violators have not been prosecuted, amounting to a denial of their right to a judicial hearing. However, as we have noted in the parallel provisions of Article 14 of ICCPR and Article 8 of ACHR, the right to access the court does not also entitle the victim to the right to have the violator criminally prosecuted and punished.[288] This is because the quotation above from Article 6 of the Convention refers only to fairness towards the defendant, not towards the victim.

Neither can the right of a victim to have a violator prosecuted be justified by recourse to the civil rights or obligations which require a fair hearing. Such rights or obligations are not within the remit of criminal prosecution.[289] In a civil case, a victim has the right to claim compensation, but this is not so in criminal law, which only demands that the state punish offenders,[290] and the European Court and Commission have repeatedly stated this.[291] The right to a fair trial which a victim participates in as a legal process only occurs in jurisdictions where civil remedies depend on criminal prosecution.[292] This is so in France, where such criminal proceedings necessarily involve the victim as a civil party in order to uphold their civil rights,[293] as in *Perez v France*.[294] However, in this, the Court stressed that the Convention does not recognise the right of the victim to have an abuser tried and punished.[295] According to Article 6 of the ECHR, the right to a fair trial in criminal proceedings demands only an investigation and 'proper examination of the submissions, arguments and evidence adduced by the parties',[296] not the conviction of the defendant.[297] If this has occurred, the Court holds that 'the applicability of Art. 6 has reached its limits'.[298]

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[287] For further details about Article 6 of the Convention, see the Council of Europe, Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights (Council of Europe Publication 2007) 62.
[288] See *Dujardin v France* App no 16734/90, 72 Eur. Comm'n H.R. Dec. & Rep. 236 (244) (2 September 1991).
[289] See Stefan Trechsel and Sarah Summers, Human Rights in Criminal Proceedings (Oxford University Press, 2006) 42.
[290] Seibert-Foher (n 122) 122.
[291] See Case of *Ramsahai and Others v. The Netherlands* (n 242), paras 359–360.
[292] See Seibert-Foher (n 122).
[293] Under French law victims may pursue a civil action not only in the civil court (Art. 4(1) Code of Criminal Procedure) but also simultaneously in the criminal court (Art. 3(1) Code of Criminal Procedure).
[294] *Perez v. France* App no 47287/99 (ECHR, 12 February 2004); see Ana Medarska, 'Rights of Crime Victims under the European Convention on Human Rights: Invading Defendant's Rights?' (LL.M. Human Rights thesis, Central European University 2009) 58.
[295] *Perez v. France* (n 294), para 70.
[296] Ibid., para 80.
[297] Also, in the *Perez v. France* (n 294) case, the Court stated that under Article 6 there is no right to fair proceedings for a victim in the criminal court unless compensation for that victim is directly dependant on criminal proceedings. This means that if compensation can be achieved by any other means, a victim has no rights in criminal proceedings. See Seibert-Foher (n 122) 123.
[298] *Perez v France* (n 294); Seibert-Foher (n 122).

3.4.2.2 The Participatory Right in the Framework of the European System

The European system has consistently rejected the right of a victim to participate in sentencing procedures. In the case of *McCourt v United Kingdom*,[299] the mother of a murder victim complained that her right to privacy and family life under Article 8 of the Convention had been violated by the state in barring her from taking part in sentencing procedures.[300] The European Commission of HR did not accept that the actions of the UK court constituted a breach of Article 8 of the Convention and therefore dismissed her complaint.[301] It is thought that the Court and the Commission will not be prepared, in the near future, to change its mind about victim participation out of fear that to do so may clash with the right of a defendant to a fair public hearing under Article 6(1).[302] Despite this, some initial steps have been taken by member states in their domestic law to give some acknowledgment to victims' participatory rights.[303] Even the Court itself, while still denying the right of victims to have offenders brought to justice, has stated that member states should consider the interests of victims and witnesses in criminal trials.[304]

The Court, in some cases, for instance against the United Kingdom, considered that Article 2 of the Convention had been violated because certain rights of victims to participate in the criminal process were denied.[305] Whether Article 2 has been violated in an investigation or its results may be subject to different degrees of scrutiny from case to case, the Court has stated that in all UK cases 'the next-of kin […] must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests'.[306] The failure of British criminal law to demand to know why prosecutors had did not prosecute, and the reasons for not submitting the reasons for this lack of demand to judicial review, was specifically criticised by the Court because it undermined the confidence of both

[299] *McCourt v United Kingdom* App no 20433/92 (unreported) (ECHR, 2 December 1992); see Jonathan Doak, Ralph Henham and Barry Mitchell, 'Victims and the Sentencing Process: Developing Participatory Rights? (2009) 29 *Legal Studies: the Journal of Society Legal Scholars* 651, 659.
[300] See Doak, Heham and Mitchell (n 299) 659.
[301] Ibid.
[302] See F Leverick, 'What has the ECHR done for Victims?' (2004) 11 *International Review of Victimology* 177, 193.
[303] Doak, Heham and Mitchell (n 299).
[304] See Medarska (n 294) 55. See, for instance, the Court judgment in the case of *Doorson v Netherland* App no 20524/92 (ECHR, 26 March 1996), para 70.
[305] See the cases, such as *Hugh Jordan v United Kingdom* App no 24746/94 (ECHR, 4 May 2001*); McKerr v United Kingdom* App no 28883/95 (ECHR, 4 May 2001); *Kelly and Others v. United Kingdom* App no 30054/96 (ECHR, 4 May 2001); *Shanaghan v. United Kingdom* Appl no 37715/97 (ECHR, 4 May 2001); see Aldana-Pindell (n 112) 666.
[306] *Hugh Jordan v United Kingdom* (n 305), para 109; *McKerr v United Kingdom* (n 305), para 115; *Kelly and Others v. United Kingdom* (n 305), para 98; *Shanaghan v. United Kingdom* (n 305), para 92; see Aldana-Pindell (n 112) 666; it should be noted that although the Court asserted that 'the investigation must be accessible to the victim's family to […] safeguard their legitimate interests [and that] there must also be a sufficient element of public scrutiny of the investigation, the degree of which may vary from case to case […], disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects on private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under Article 2. The requisite access of the public or the victim's relatives may therefore be provided for in other stages of the procedure […] Moreover, Article 2 does not impose a duty on the investigating authorities to satisfy every request for a particular investigative measure made by a relative in the course of the investigation'. *Armani Da Silva v. United Kingdom* (n 228), paras 235-236.

victims and the general public in the justice system.[307] In addition, the Court criticised the fact that next-of-kin had not been given copies of witness statements before oral testimony, which placed them 'at a disadvantage in terms of preparation and ability to participate in questioning'.[308] Therefore, the Court suggested that, in these UK cases, although there was no violation as far as the facts were concerned, a violation of Article 2 may have occurred because of the lack of legal aid given to victims or next-of-kin during criminal proceedings.[309]

In this respect, the case of *Finucane v United Kingdom*[310] provides a good example. The case concerns the murder of the HR lawyer Pat Finucane in Belfast in 1989 in front of his three children and wife, the applicant, who was also injured, by two masked gunmen of the loyalist paramilitary group, the Ulster Defence Association.[311] The applicant alleged that there had been no effective investigation into her husband's death, which had occurred in circumstances giving rise to suspicions of collusion between his killers and the security forces.[312] The Court found that the UK government had breached its procedural obligations under Article 2[313] because the investigations following the murder had not fulfilled the requirements of the general principles in terms of independence, effectiveness, promptness and expeditiousness, and public scrutiny. The Court's findings were also indicated in the Report of the Patrick Finucane Review, part of a comprehensive independent review into the question of state involvement and collusion in the murder.[314]

The Court noted that the first police investigation in the murder lacked independence since it had been conducted by colleagues of the Royal Ulster Constabulary (RUC), who were suspected by the applicant and other members of the community of issuing death threats against Patrick Finucane.[315] This investigation was led by the RUC Chief Constable, who played 'a role in the process of instituting any disciplinary or criminal proceedings' against members of his force. In the view of the Court, there was 'a lack of

[307] For further details, see Aldana-Pindell (n 112) 666-667.
[308] Ibid.
[309] Ibid.
[310] *Finucane v United Kingdom* App no 29178/95 (ECHR, 1 July 2003).
[311] Ibid., para 10; see Desmond de Silva, *The Report of the Patrick Finucane Review*, Volumes I (London, HMSO, 2012) 3 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/246867/0802.pdf> accessed 13 January 2018.
[312] Ibid., para 60; de Silva (n 311) 434.
[313] *Finucane v United Kingdom* (n 310), para 84.
[314] de Silva (n 311) 434-436.
[315] *Finucane v United Kingdom* (n 310), para 76.

independence' about this part of the investigation, which also increased doubts about the 'thoroughness or effectiveness' of the investigation of the collusion aspect.[316]

Regarding the effectiveness of the investigation, the first two inquiries had not dealt substantially with the death of Mr Finucane.[317] The wider allegations of the collusion had been ignored at the inquest, which was only concerned with its immediate circumstances and lasted for one day.[318] The Court further noted that the alleged murder weapon had been obtained by loyalists via a member of the Ulster Defence Regiment (UDR). However, the officer leading the investigation stated at the inquest that none of the fourteen persons interviewed about the murder had any connection with the security forces.[319] In the light of this, the Court expressed its concern that it was 'not apparent to what extent the initial police investigation included inquiries into possible collusion by the security forces in the targeting of Patrick Finucane by a loyalist paramilitary group'.[320] After assessing the case, the possibility of collusion by the security forces in the murder of Mr Finucane had not been examined by the Criminal Investigation Department (CID).[321] Moreover, the request of the applicant to make a statement regarding allegations of threats made by the police against her husband had been rejected by the coroner on the basis that it was not relevant to the proceedings.[322]

The Court also examined whether the authorities had responded promptly to the murder, which would 'generally be regarded as essential in maintaining public confidence in their adherence to the rule of law'.[323] The Court found that the RUC investigation started 'immediately after the death and that the necessary steps were taken to secure evidence at the scene'. [324] Although a number of loyalist suspects were interviewed, the investigation had not resulted in sufficient evidence to support a prosecution.[325] It noted, in relation to the third Stevens Investigation, which was mainly concerned with the murder, that it was not begun until a decade after the events.[326] To achieve accountability in the investigative process, public scrutiny plays an essential part, and despite the level

[316] Ibid.
[317] Ibid., para 79.
[318] de Silva (n 311) 435.
[319] *Finucane v United Kingdom* (n 310), para 75.
[320] Ibid.
[321] de Silva (n 311) 435.
[322] *Finucane v United Kingdom* (n 310), para 78.
[323] Ibid., para 70.
[324] Ibid., para 74.
[325] de Silva (n 311) 435.
[326] *Finucane v United Kingdom* (n 310), para 62.

of such scrutiny varying according to what is appropriate from case to case,[327] the participation of the victim's immediate family in the procedure should be considered. However, the results of the first two Stevens Investigations were not publicised and the applicant not informed about the findings.[328] Because of these failings, the Court concluded that the investigation by the RUC, as well as the Stevens investigations and the inquest, were not in themselves or jointly satisfactory of the requirements of Article 2. Thus, the Court maintained there was a failure to investigate the alleged collusion in the death of Mr Finucane effectively.[329]

In earlier cases made against Turkey, the Court also held that Article 2 had been violated because the authorities had not informed the victim or close relatives of the decision not to prosecute.[330] This lack of information was considered significant by the Court as it prevented the possibility of the next-of-kin from referring the Turkish court's decision not to prosecute to the scrutiny of a higher authority.[331] In addition, because the next-of-kin had not been given access to the investigation or court documents, or been allowed to present incriminating evidence, the Court found that Article 2 had been further violated.[332] However, these adjudications of the Court may, perhaps, be considered more symbolic than substantial, as the Court has made no precise declaration about the rights of victims to participate fully in criminal proceedings.[333]

3.4.2.3 Summary Remarks

In conclusion, the European system, as we have seen, is clearly hesitant in requiring prosecution and punishment to be imposed on violators of the right to life. Nevertheless, at least, the state has an obligation to protect the right to life of its citizens against acts of violence and provide them with effective remedy once these acts have actually occurred. Therefore, if member states fulfil their duty to prosecute perpetrators, this is a step towards fulfilling their obligations under Articles 2 and 13 of the Convention.[334] However, the approaches of the HRC and Inter-American Court differ from that of the

[327] Ibid., para 71.
[328] Ibid., 79.
[329] de Silva (n 311) 436. According to the de Silva, 'the ECHR [found that] the investigation into the murder of Patrick Finucane lacked the requisite independence and did not examine the question of collusion. The additional material available to me tends to reinforce the findings of the court in this regard'; for further details about the nature of collusion between the British state and loyalist paramilitary organisations during the conflict in Northern Ireland in this case and other cases, including the mass killings at Loughin Island, see Mark McGovern, 'State Violence and the Colonial Roots of Colonial Roots of Collusion in Northern Ireland' (2015) 57 *Sage Journal* 3, 3-23; Mark McGovern, 'See no evil': collusion in Northern Ireland' (2017) 58 *Sage Journal* 46, 46-63.
[330] See, for instance, *Güleç v. Turkey* (n 234), para 82; *Ogur v. Turkey* App no 21594/93 (ECHR, 20 May 1999), para 92.
[331] *Ogur v. Turkey* (n 330), para 92.
[332] Ibid.; see Aldana-Pindell (n 112) 667.
[333] For further details, see Medarska (n 294) 58-59.
[334] Seibert-Foher (n 239) Ch. 2, 135.

European Court because they explicitly impose the duty to prosecute and punish those responsible for the violation of the right to life. This difference underlines the willingness of the Inter-American Court to explicitly consider the right of victims to justice as a *jus cogen*s on all member states of the American HR Convention, irrespective of their individual domestic criminal laws and procedures.

3.5 Conclusions

This chapter examined the right of victims to justice and the procedural obligations of the state regarding the deprivation of the human right to life, particularly by non-state actors, and the right of victims to participate in the criminal justice process, is recognised under philosophical/ethical principles, international and regional law and the jurisprudence of various HR bodies. It is clear that both general ethical principles, international and regional instruments of HR, and case law recognise, in principle, that states have a positive obligation to provide an effective remedy if an individual's right to life has been violated, whether or not this violation has been committed by officials of the state. The object of this obligation, from the perspective of victims of crime, should be to revive and strengthen their trust in the states' protection of them and confidence that their criminal justice systems will deliver them with justice.[335] To completely confirm this trust, it is necessary that states thoroughly and effectively investigate violations of HR to reveal the truth and bring perpetrators to justice. In addition, states must allow victims to participate actively in the criminal justice process.

While certain international standards regarding criminal investigation can be identified, the argument accepts that now, in the post-conflict situation in Iraq, full adherence to these standards cannot yet be expected, given the raft of practical limitations that Iraq may face in this period of transition. In addition, these international standards have themselves some limitations, including a combination of the limitation inherent in the Van Boven/Bassiouni Principles,[336] the state-actor focus of much international jurisprudence on investigations (therefore it does not apply to non-state actors, the subject of the thesis),[337] and the "good faith" investigation limit to much of the relevant

[335] See interviews held by Wemmers and Manirabona with ten victims whose human rights were violated under the previous Haitian regime. The interviews explored victims' perceptions of justice and how to restore their sense of justice following gross violations of human rights. The interviewers noted that, from the perspective of victims, unless justice is guaranteed for victims of crime, trust in state authorities cannot be restored. Jo-Anne Wemmers and Amissi Manirabona, 'Regaining trust: The Importance of Justice for Victims of Crimes against Humanity' (2013) 9 *International Review of Victimology* 1, 4-8.
[336] See the above pages 59-60.
[337] See above for a discussion of some of this international jurisprudence, pages, 60-84.

jurisprudence.[338] This raises the question of whether Truth and Reconciliation Commissions (TRC)/Amnesties' processes in a transitional justice scenario should be considered. These processes may to some extent replace adherence to such standards during the transitional period in Iraq.

The truth commissions 'have the potential to be of great benefit in helping post-conflict societies establish the facts about past HR violations, foster accountability, preserve evidence, identify perpetrators and recommend reparations and institutional reforms'.[339] An effective TRC is considered a serious alternative to address past atrocities because it goes beyond the establishment of mere judicial truth to a 'global truth'. Thus, the TRC could perhaps constitute an integral part of the rebuilding of society and contribute to the promoting of national reconciliation.[340] On the other hand, in their attempts to recover from periods of serious HR abuse, transitional states often need to balance the competing demands of various stakeholders. These demands vary from claims that immunity is required to ascertain peace, to the notion that no peace can be achieved without satisfactory justice.[341] For instance, while some commentators applaud the prohibition of amnesties by the Inter-American Court, others are concerned that, in demanding punishment, the Court is effectively removing an important negotiating peace tool for societies that have experienced many atrocities.[342] The arguments in favour of amnesty usually contend that without amnesty, peace can never be achieved. These question whether prosecutions are always 'in the interests of justice' since the attempts of states to prosecute those alleged to be responsible for past atrocities, in certain circumstances, may continue the violence. To avoid this, states need to consider the path of amnesties which could arguably contribute to the realisation of peace and stability.[343] However, amnesties

[338] 'Good faith' and the term 'genuinely' have sometimes been used interchangeably. The latter 'was inserted to give the unwillingness/inability test a more concrete and objective meaning. However, the term is highly normative, calling for good faith and seriousness on the part of the respective state with regard to the investigation and prosecution'. It follows, as noted above, that it cannot speak of 'genuine' investigation or prosecution under the jurisprudence of human rights bodies unless states satisfy their obligation by using all the legal means at their disposal to conduct serious and effective investigations and prosecutions leading to the identification and punishment of the responsible. See Kai Ambos, Treatise on International Criminal Law: Volume III: International Criminal Procedure (Oxford University Press, 2016) 306.

[339] These are 'official, temporary, non-judicial fact finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years. These bodies take a victim-centred approach and conclude their work with a final report of findings of fact and recommendations'. For further details, see Kai Ambos, The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC, in K. Ambos et al. (eds.), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Springer Science & Business Media, 2009), para 13, pages 40-49; Priscilla B. Hayner, Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions (2nd, Routledge 2011) 20-23; see also See Daniel J. Hendy, 'Is a Truth Commission the Solution to Restoring Peace in Post-Conflict Iraq' (2005) 20 *Ohio State Journal on Dispute Resolution* 527, 534-538; Monica Dorothy ACIRU, Transitional Justice in Practice: Truth Commissions and Policies of Victims Reparation (PhD thesis, KU Leuven 2017) 54-57.

[340] Ambos (n 339), para 15, pages 44-45.

[341] Louise Mallinder, 'Can Amnesties and International Justice be Reconciled?' (2007) 1 *The International Journal of Transitional Justice* 208, 208, 218, 225. For further details, see Ambos (n 339), paras 3-6, 30, pages 23-28, 62.

[342] Huneeus (n 53) 14-15.

[343] Mallinder (n 341).

may create a complicating factor regarding the state's duty to bring perpetrators to justice, since they potentially make such a duty impossible to wholly fulfil.[344] For this reason, even if the process of amnesties is justified as an attempt to foster the disclosure of information by perpetrators, granting a blanket amnesty for HR abuse is becoming increasingly untenable for states. This granting has been repeatedly held to be invalid even when broad satisfaction of the right to truth might be ensured.[345] Therefore, the challenge is designing a transitional justice system that can satisfy states obligations concerning the unveiling of the truth and the duty to bring perpetrators to justice. Each of these obligations stands independently and, thus, meeting one of them will not be sufficient for the state to meet its obligations.[346] The two obligations 'often lead to complementary, rather than conflicting, transitional justice mechanisms. Just as prosecutions include truth-finding, so too can facts found by truth commissions assist future prosecutions'.[347]

The points on the potential of Amnesties/TRC processes to offset international standards for criminal investigation and, in general, the acceptance of the transitional justice theory as a counter-argument to the applicability of these standards in the post-conflict period in Iraq, are fully developed in Chapters 5 and 6.[348]

[344] See Szoke-Burke (n 54) 548.
[345] Ibid.
[346] Ibid. 551-552.
[347] Ibid.
[348] See Chapters 5, pages 203-208 and 6, pages 250-257.

Chapter 4: The Right to Reparation: An International Overview

4.1 Introduction

The provision of reparation for victims of HR violations is widely considered to be one of the most respected and central of legal principles.[1] As mentioned in the previous chapter, the substantive aspect of the right to remedy involves the right of victims of HR abuses, particularly of the right to life, to reparation for the horrific impact of such criminal acts.[2] The term reparation is regularly used to refer to various measures aimed at correcting wrongs created by criminal acts, in other words, to redress the harm caused to the victim, whether physical, material or moral, and, if possible, to restore the victim to their position before the occurrence of these acts.[3]

Marked international unanimity in recent years indicates that reparation should be defined to include 'material' and 'symbolic' forms of redress.[4] Roht-Arriaza proposes that symbolic forms of moral reparation are just important as material ones, because they are contained in a wide range of measures, 'most deal[ing] with a felt need for telling the story, for justice, and for measures to avoid repetition'.[5] Both material and symbolic reparation are usually applied in cases of serious large-scale violations of HR.[6] One main objective of both forms of reparation is to centre an approach on a victim who has been offended and to empower that victim.[7] However, whether both measures of reparation are capable of redressing the harm depends on its nature. This is because the effects of certain crimes against individuals' HR may cause such serious damage, for instance, physical damage, that no reparation can compensate.[8] As Roht-Arriaza neatly puts it, 'what could replace lost health and serenity; the loss of a loved one or of a whole extended family; a whole generation of friends; the destruction of home and culture and community and peace'.[9] Therefore, in such serious crimes, reparation may serve merely to ease the consequences for victims and their families[10] by acknowledging their suffering,

[1] Doak (n 3) Ch. 2, 207.
[2] See Chapter 3 of the thesis, p 48.
[3] See Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 *Hastings International and Comparative Law Review* 157, 160; Dinah Shelton, Remedies in International Human Rights Law (2d ed, Oxford University Press 2005) 10.
[4] Doak (n 3), Ch. 2, 208.
[5] Roht-Arriaza (n 3) 159.
[6] See Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff, *The Handbook of Reparations* (Oxford University Press 2006) 452.
[7] Doak (n 3) Ch. 2, 208.
[8] Ibid. 207.
[9] Roht-Arriaza (n 3) 158.
[10] Doak (n 3) Ch. 2, 207.

condemning their aggressors and, to some extent, restoring humanity and dignity to victims.[11] Further, according to Urban Walker, to respond adequately to the wrong and harm done to victims, 'moral repair' should be considered, defined as 'the attempt to address offence, harm, and anguish caused to those who suffer wrong' by 'the process of moving from the situation of loss and damage to a situation where some degree of stability in moral relations is regained'.[12] Moral repair in essence means 'restoring or creating trust and hope in a shared sense of values and responsibilities' between victims and responsible parties. It is about 'setting things right' in the first instance, for the victim'.[13] Like Roht-Arriaza, Walker acknowledges that no reparation can fully repair the damage to victims of serious crimes against their HR.[14]

For redress, at least two aspects of the damage caused by criminal acts against an individual's right to life, which could be called *damage of death*,[15] should be considered. One is fixed and objective, the other variable and subjective.[16] The objective aspect concerns the right of victims not to be deprived of the full period of an average life-time. This right applies to all people equally, and, it will be argued, when violated, requires compensation in itself independent of any pecuniary and moral redress.[17] Nevertheless, *damage of death* in its objective aspect cannot be sufficiently repaired by merely monetary compensation and, therefore, acknowledgement of responsibility for the damage and correction of its injustice is an essential requirement for comprehensive reparation.

The subjective aspect varies from person to person because it is linked to how much the individual talent and ability of a victim is diminished, and applies only to the economic implications of any impairment of that talent, and how valuable that talent was in the first place.[18] Moreover, a victim's family also deserves to be compensated for its pecuniary loss as well as for its grief in losing a loved one.[19]

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[11] M. Cherif Bassiouni, 'International Recognition of Victims Rights' (2006) 6 *Human Rights Law Review* 203, 231.
[12] Margaret Urban Walker, Moral Repair: Reconstructing Moral Relations after Wrongdoing (Cambridge University Press, 2006) 6-7.
[13] Ibid. 7, 23-28.
[14] Ibid. 6.
[15] It is important to note that whether the death of an individual by illegal acts is considered to be in itself damage is a highly problematic issue. See Steve Hedley, 'Death and Tort' in Belinda Brooks-Gordon et al, *Death Rites and Rights* (Hart Publication Ltd 2007) 244.
[16] Shariff (n 10) Ch. 2, 33; Faris Kareem Al-Anaibi, The Death of Damage and its Compensation: Comparative Study, (MSc thesis, University of Babylon 2007) 24-25.
[17] Mohammed Naji Yaqout, Compensation for the Loss of Life Expectancy: A Comparative Study in Civil Liability in Anglo-American law, the Egyptian and French law (Modern Arab printing press, 1980) 40-41.
[18] Shariff (n 10) Ch. 2, 35.
[19] Al-Anaibi (n 16) 167.

To understand the role of the state to make reparation to victims of violent crimes of non-state actors and mitigate harm, the following issues will be investigated: the development of the notion of state responsibility for reparation of the violation of the HR to life; the philosophical/ethical justification for imposing such an obligation; and, finally the extent of the state's obligation in international and regional HR law to bear the burden of doing so. It is argued that unless victims who have lost their life are fully recognised to have the moral and legal right to reparation for objective, subjective and moral damage done to them, along with the pecuniary and moral damage to their dependants, justice has not been done. It follows that the state must take moral and legal responsibility for the comprehensive reparation of victims of crime, whether on the grounds of failing to deal with real and serious risk to life, or for making reparation for the fact that damage has occurred. Although such reparation may be insufficient to repair the damage of death, it should be understood to be recognition that reparative justice is needed because of the seriousness of the violation of the HR to life. It will be contended further that international and regional HR instruments are capable of playing a significant role in strengthening the moral and legal rights of victims to reparation.

4.2 The Development of the Notion of State Responsibility for the Reparation of Violations of HR

The idea of the state's obligation to make reparation for personal injuries caused by the criminal acts of private individuals is not new, and can be found in ancient history. Since approximately 2,300 BC, King Hammurabi's legal provisions have formed the basis of legal protection for Babylonian and subsequent communities in the region of Iraq. Articles 22-24 of the Hammurabi Code provided that should an individual have been killed in the course of being robbed, and the person(s) responsible could not be identified, the city and its ruler were obliged to pay the heirs a sum in silver as compensation.[20] Although this idea of compensation for victims of crime by the state appeared throughout the Code of Hammurabi and other ancient legal rules, it never gained popular appeal.[21] Instead, what is entrenched in history is the idea that criminals must be responsible for

[20] See Sections 22 to 24 of the Code of Hammurabi. Robert Francis Harper (tr), The Code of Hammurabi (1904); Robert D Childres, 'Compensation for Criminally Inflicted Personal Injury' (1964) 39 *New York University Law Review* 444, 444; Harold R. Hanson, 'Compensation for Victims of Crimes of Violence' (1968) 30 *Albany Law Review* 325, 325; Marlene A. Young, 'The Role of Victim Compensation in Rebuilding Victims' Lives' International Organization for Victim Assistance, 1; as in the Code of Hammurabi, compensation of victims of crime is also found in the ancient laws. For further details, see Bassiouni (n 11) 207-208; Ilaria Bottigliero, Redress for Victims of Crime under International Law (Martinus Nijhoff Publishers 2004) 16-23.

[21] Hanson (n 20) 325; Childres (n 20) 444.

compensating victims and their families directly and this idea has appeared in various forms in different periods of history.[22]

According to the classical view, reparation is rooted in the law of tort and the principle of state responsibility, the latter of which obliges the state to repair damage caused to other states.[23] Victims have been left to suffer the consequences of crime since they have borne the responsibility to pursue the reparation of their damage in accordance with the law of tort,[24] which, in most jurisdictions, has proved to be highly ineffective in obtaining reparation from offenders.[25] Therefore, as Goodey rightly notes, reparation is now made by offenders to the state rather than the victim, and is seen as damage to the state; as a citizen, the victim has become the medium through which the crime occurred.[26]

Regarding the principle of state responsibility, before the appearance of HR norms in international law, individual victims were not viewed as the subject of international norms or as direct beneficiaries of the legal implementation of HR;[27] victims were only able to have recourse to the state to receive compensation from the actual perpetrators of violations of HR. This is because reparation only applied in the legal framework of the relationship between individual sovereign states,[28] and the state was viewed in customary international law as the protector of its citizens' rights, and therefore, should its citizens' right to life be violated within the territory of other states by the agents of such states, the state whose citizens have been victimised has the right to take legal and diplomatic action to obtain redress.[29]

The dominance of HR law following World War II has contributed to the remarkable development of the traditional law of state responsibility. Principles whose source was once in the law of state responsibility have now been implanted in the international law

[22] Childres (n 20) 446; George J. Bryan, 'Compensation to Victims of Crime' (1968) 6 *Alberta Law Review* 202, 202; Pablo J. Drobny, 'Compensation to Victims of Crime: An Analyses' (1971) 16 *Saint Louis University Law Journal* 201, 201-203; For further details, see Marvin E. Wolfgang, 'Victim Compensation in Crimes of Personal Violence' (1966) 50 *Minnesota Law Review* 223, 223-225.
[23] See Roht-Ariaza (n 3) 160.
[24] The law of tort is 'essentially concerned with […] granting damages to a specific plaintiff and against a particular defendant'. See LeRoy G. Schultz, 'The Violated: A Proposal to Compensate Victims of Violent Crime' (1965) 10 *Saint Louis University Law Journal* 238, 238.
[25] See Drobny (n 22) 203.
[26] See Jo Goodey, 'Compensating Victims of Violent Crime in the European Union with a Special Focus on Victims of Terrorism' (2003) the National Roundtable on Victim Compensation Washington, DC: National Centre for Victims of Crime, 9; Thomas G. Feeney 'Compensation for the Victims of Crime: A Canadian Proposal' (1967) 2 *Ottawa Law Review* 175.
[27] See UNHR (n 127) Ch. 2, para 50; for further details, see Bottigliero (n 20) 79-88.
[28] Shelton (n 3) 7.
[29] See Ben Saul, 'Compensation for Unlawful Death in International Law: A Focus on the Inter-American Court of Human Rights' (2004) 19 *American University International Law Review* 523, 529; This legal position of the state was codified in the Hague Conventions of 1899 and 1907, and asserted in an historic ruling of the Permanent Court of International Justice in the *Chorzow Factory* (Germany v. Poland), P.C.I.J. (ser. A) No. 17 (Sept. 13, 1928). See Bottigliero (n 20) 80-81.

of HR.[30] This means that the state is obliged to provide reparation for the violation of an HR norm that it has ratified.[31] HR conventions have put individual victims in a position to rely directly on the rules of these treaties to access rights.[32] Changes in state functions have also increased the limits of its responsibility to repair the damage caused by its violation of HR treaties, which has helped to draw attention to the concerns of society with regard to the harmful consequences of violent crimes committed by private individuals against the HR of others.[33] The focus of this new interest is on the role of the state in meeting the needs of victims when circumstances prevent the affected persons from receiving compensation from the person causing the damage.[34]

The recognition of the new duty of the state to make reparation to victims began to emerge after the grave violations of HR in the Second World War in many international and regional HR instruments containing various concepts of the right to remedy.[35] However, a stronger development in the recognition of the needs of victims was witnessed in developed countries in 1957 when Margery Fry called upon the state to bear the burden of paying criminal damages and work towards having a system which compensates of victims of crime.[36] Following the above initiatives, several states established criminal injury compensation schemes for victims of physical injury who had not received monetary compensation or contributed to the commission of the injury.[37]

On the international level, the 1985 United Nations Basic Principles of Justice (Victims' Declaration) offer a legal basis for affirming that the state has a duty to provide redress for victims of HR violations.[38] Although, these principles point to the necessity of enabling victims to return to as full a life as possible, and offer a variety of measures that

[30] Doak (n 3) Ch. 2, 211; Bottigliero (n 20) 88.
[31] Doak (n 3) Ch. 2; Saul (n 29) 531.
[32] For further details, see Doak (n 3) Ch. 2, 210-212; Bottigliero (n 20) 87-88.
[33] See Bryan (n 22) 203.
[34] See Katharina Buck, 'State Compensation to Crime Victims and the Principle of Social Solidarity: Can Theoretical Analysis Contribute to a Future European Framework?' (2005) 13 *European Journal of Crime, Criminal Law and Criminal Justice* 148, 149.
[35] For instance, see Article 8 of the UDHR; Articles 2.3 and 9 (an enforceable right to compensation) of the ICCPR; Articles 25 and 10 (adequate compensation), Article 63 (fair compensation) and Article 68 (compensatory damages) of the IACHR; Article 13 and Article 50 (just satisfaction to victims) of the ECHR; see Roht-Arriaza (n 3) 160-161; De Greiff (n 6) 455.
[36] Margery Fry, 'Justice for Victims, reprinted in Compensation for Victims of Criminal Violence: A Round Table' (1959) 8 *Journal of Public Law* 191, 191-194; see Wolhuter, Olley and Denham (n 173) Ch. 2, 125-126. For further details, see Wolfgang (n 22) 226-227.
[37] For example, many states have put in place compensation schemes. For further details, see Rianne Letschert and Karin Ammerlaan, 'Compensation and Reparation for Victims of Terrorism', in Rianne Letschert, Ines Staiger and Antony Pemberton, *Assisting Victims of Terrorism: Towards a European Standard of Justice* (Springer Science & Business Media 2010) 223. The European Convention on the Compensation of Victims of Violent Crimes has set minimum standards of compensation for victims of criminal acts. Council of Europe, The European Convention on the Compensation of Victims of Violent Crimes Signed in Strasbourg on 24 November 1983, European Treaty Series (ETS) no. 116.21, Articles 1, 2, and 4. The Guidelines on Protecting the Victims of Terrorist Acts, 2005, also require that victims of terrorism be eligible for compensation by the state. For further details, see Letschert and Ammerlaan, 218-219.
[38] See Principles 12, 13 and 14 of the United Nations, Basic Principles of Justice for Victims of Crime and Abuse of Power (n 107) Ch. 3. See M Groenhuijsen, 'The Development of International Policy in Relation to Victims of Crime' (2014) 20 *International Review of Victimology* 31, 37.

may be therapeutic or material, they fail to give details about the exact scope of such assistance or support.[39] Nevertheless, by calling for social solidarity with victims of crime, such principles send an important message that, even where a state does not accept that it is legally bound to make reparation for damages suffered by victims of serious crime, it cannot simply ignore the fact that such crime has severely impacted on the victims.[40]

The 2005 Basic Principles and Guidelines[41] are considered the most important attempt to establish a unified system of existing international legal norms concerning the recognition of the right of victims of HR violations to be provided with effective, adequate and prompt reparation.[42] Such reparation may take various forms such as 'restitution, material compensation, rehabilitation through legal, medical, and social services, [and] guarantees of non-repetition through institutional reform'; it also includes satisfaction by 'truth telling, exhumation of human remains from atrocities, public apology, communication, and educational activities'.[43] Reparation also needs to be proportional to the severity of the harm suffered by victims and obtainable by them 'without any discrimination of any kind or ground, without exception'.[44] The aim of the Basic Principles and Guidelines, therefore, is to promote justice by redressing humanitarian and HR abuses and, also, to emphasise that such redress should be provided to victims even if the state itself was not responsible for such violations.[45]

4.2.1 Summary Remarks

From the foregoing review of international and regional instruments, in principle, reparation for physical injuries caused to victims by non-state actors has recently been acknowledged as the responsibility of the state. Therefore, the state should establish practical mechanisms for compensation when circumstances prevent them from receiving it by other means. The state's responsibility for this is based on various arguments, such as those made in the Explanatory Report on the European Convention on the Compensation of Victims of Violent Crimes; all express the same idea that crime is a

[39] See Doak (n 3) Ch. 2, 212.
[40] Groenhuijsen (n 38).
[41] United Nations, Basic Principles and Guidelines (n 105) Ch. 3; for further details, see Ramcharan (n 142) Ch. 2, 384-388.
[42] See Margaret Urban Walker, 'The Expressive Burden of Reparations: Putting Meaning into Money, Words, and Things' in Alice MacLachlan and Allen Speight, *Justice Responsibility and Reconciliation in the Wake of Conflict* (Springer, Netherlands 2013) 207.
[43] United Nations, Basic Principles and Guidelines (n 105) Ch. 3; see Walker (n 42).
[44] See Ramcharan (n 142) Ch. 2, 385.
[45] Ibid.

social problem and solidarity with victims must be provided to limit its effect.[46] As such, this discussion now proceeds to explore the various philosophical/ethical principles that may be relied upon for imposing an obligation on the state to repair the damage to victims, and the capability of such reparation to constitute an effective form of justice for victims of violent crime.

4.3 The Philosophical/Ethical Justifications for Imposing Reparatory Obligations on the State

Two fundamental justifications for requiring the state to provide redress for victims of violent crime may be cited: these are the notions of the state's failure to protect, and the social welfare principle.

4.3.1 The Failure to Protect

Relying on this right of protection, some commentators consider that one main moral and legal justification for the state being responsible for compensation is if it fails in its duty to protect them adequately.[47] This claim is based on the principles of social contract and tort law.[48] The social contract requires that when individuals agree to a contract with the state and relinquish some of their rights, including that of protecting their right to life against criminal acts, the protection of these rights must then be undertaken by the state.[49] Failure of the state to provide adequate protection would constitute a breach of contract with citizens.[50] This, according to Bentham, justifies the placing of responsibility on society to compensate victims when its efforts to protect them have failed.[51]

It has been argued that to assume society should bear responsibility to control and prevent acts of violence is unfair, because society has not progressed enough to be able to know the causes of these acts fully or how to prevent them.[52] Even in totalitarian states which possess all kinds of electronic devices, it is doubtful that the majority of violent crimes

[46] See Buck (n 34) 151; also, for instance, the British government's White Paper No. 2323. Home Department, *Compensation for Victims of Crimes of Violence* Cmd. 2323 (1964) 4; see Brayan (n 22) 204; for further details, see David Miers, State Compensation for Criminal Injuries (Blackstone Press Limited, 1997) 9-16.
[47] See Betsy J. Grey, 'Homeland Security and Federal Relief: A Proposal for a Permanent Compensation System for Domestic Terrorist Victims' (2006) 9 *Legislation and public policy* 663, 683; Charlene L. Smith, 'Victim Compensation: Hard Questions and Suggested Remedies' (1985) 17 *Rutgers Law Journal* 51, 62.
[48] Grey (n 47) 684.
[49] See Chapter 2 of the thesis, pages 12-14; Hudson (n 72) Ch 3, 31; Ashworth argues that the reciprocity agreement does not imply that citizens should abide by legal rules in the expectation that others do likewise, and that the state has a duty to protect every citizen from criminal acts. Ashworth (n 34) Ch. 3, 103.
[50] See Smith (n 47) 63; Grey (n 47) 684; Hudson (n 72) Ch. 3, 31.
[51] See Childres (n 20) 446; Young (n 20) 2. Similarly, Garofalo, the Italian Positivist, took this same position about the responsibility of society to compensate victims of crime. See Schultz (n 24) 239-240.
[52] See Schultz (n 24) 241.

could be prevented.[53] Therefore, victim compensation should be based on reasons other than society's failure to fulfil its obligation to prevent acts of violence.[54] However, such an argument cannot entirely deny that where evidence indicates that the state, as the representative of society, is unwilling or unable to provide protection to its citizens, it must accept the consequence of this failure by compensating victims of violent crime.[55]

It has even been asserted that the state's responsibility to compensate victims should be understood in a wide sense, because 'Society, in acting in furtherance of its interests of punishing, deterring, and rehabilitating the offender, interferes with the interests of the victim in obtaining compensation for his injury'.[56] This is to say that not only has the state failed in its duty to protect its citizens from criminal acts, but also, after such acts have been committed, the actions of the state continue to violate the right of victims to restitution from offenders.[57] However, it seems that reliance on the rationale of failure to protect to claim that the state has the duty of insulating its citizens from the consequence of crime has failed to gain any legal acceptance.[58] This may be because such acceptance could imply that the state's authorities should bear legal responsibility for the compensation of all victims of crime for all damage done to them by acts of others, such as theft and criminal damage.[59] If the state did bear a legal responsibility of protection, it has been claimed that it would have exceeded its remit to provide a general condition of public order[60] and, thus the assumption that the common law system of the state involves the promise to protect all people at all times cannot be realised.[61] In addition, the intervention of the state to fulfil the duty of prosecuting wrongdoings will bring more benefits to its citizens than they lose.[62] Overall, this legal acceptance would lead to the

[53] Ibid.
[54] Ibid.
[55] For instance, see the comments of Chief Justice Marshall of the United States Supreme Court in the case of *Marbury v. Madison* concerning the power to provide judicial remedy when victims lack protection. *Marbury v. Madison,* 5 U.S (1 Cranch) 137, 163 (1803). See Shelton (n 2) 29; however, in the case of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195 (1989), the Supreme Court stated that, according to the Due Process Clause of the Constitution against private violence, a right to governmental protection does not exist. See Grey (n 47) 685.
[56] See Drobny (n 22) 205.
[57] Ibid.; Atiyah criticises this argument by stating that 'the State has analogous duties at least to people injured by non-criminal but still unlawful conduct (such as tortious negligence), and that victims of crime deserve no better treatment than these others'. Peter Cane, Atiyah's Accidents Compensation and the Law (7th edn, Cambridge University Press 2006) 307.
[58] See Editors, Law Review, 'Compensation for Victims of Crime' (1966) 33 *The University of Chicago Law Review* 531, 537; Ashworth argues that it is implausible to rely on the social contract argument to impose the duty of compensation on the state because 'it is too widely framed, covering not only violent and sexual offences but also property crimes and the whole gamut of offences which find a place in modern systems of criminal law, and because it is well known that it would create a duty which is impossible of performance. A social contract theory can have little value if it seems implausible that its contents would ever have been accepted'. Ashworth (n 34) Ch. 3, 103; David Miers upholds this position. Miers (n 46) 4. See also further criticisms of the social contract theory presented in Chapter 2, pages 19-23.
[59] See Robert E. Scott, 'Compensation for Victims of Violent Crimes: An Analysis' (1976) 8 *William and Mary Law Review* 277, 280; Miers (n 46) 4.
[60] Editors, Law Review (n 58).
[61] See Miers (n 46); Ashworth (n 34) Ch. 3, 103.
[62] Miers (n 46); Ashworth (n 34) Ch. 3, 102-104.

recognition that victims have a *right* to be compensated and, thus, would involve public expenditure running out of political control.[63] Nevertheless, although such a rationale for compensation has never been fully adopted in state compensation systems,[64] it has to a large extent become the basis for arguments that seek to compensate victims of violence, as a partial requirement of justice.[65]

Similarly, victims of violent crime have the right to take action in tort against state authorities and would be entitled to receive compensation from them for the damage caused if these authorities, in taking upon themselves the duty to protect them from criminal acts, have failed to fulfil their duty of protection as a duty of care under tort.[66] According to Wolfgang, victims have a legitimate right to claim compensation for their criminal injuries if adequate protection by the state's agencies is lacking 'due to negligence, corruption, insufficient appropriations, or simply the obvious inability of the police to be in all places at all times'.[67] This position has previously been taken by the Italian positivist Ferri.[68]

However, it is important to note that, even if victims choose to sue the state for negligence in accordance with tort law for failing to take reasonable measures against the risks of harm by criminal acts,[69] including terrorist acts, the state may rely on its discretionary policy to claim immunity for such negligence.[70] Moreover, from the perspective of victims, 'tort law litigation often stands for a complicated, challenging, long-lasting, stressful experience, which can –though hard scientific evidence is not yet available – result in secondary victimisation. Due to the fact that some of the compensation issues are related to immediate needs, a long process for meeting those needs seems ill-suited'.[71] Nevertheless, although these difficulties in confronting the state with its negligence to protect its citizens may weaken tort claims to obtain compensation, such claims of negligence 'still provide a policy rationale for governmental funding of compensation'.[72]

4.3.2 The Social Welfare Principle

[63] See John Haldane and Anthony Harvey, 'The philosophy of state compensation' (1995) 12 *Journal of Applied Philosophy* 273, 280; Smith (n 47) 63.
[64] Young (n 20) 3; Goodey (n 26) 12.
[65] Young (n 20).
[66] See Smith (n 47) 62-63; Grey (n 47) 684.
[67] Wolfgang (n 22) 233.
[68] See Ferri, Criminal Sociology 513-514 (1917) cited by Wolfgang (n 22) 234.
[69] For further details concerning the concept of negligence, see Kenneth W. Simons, 'Negligence' in Ellen Frankel Paul, in Fred D. Miller, Jr., and Jeffrey Paul, *Responsibility* (Cambridge University Press 1999) 52-56.
[70] See Letschert and Ammerlaan (n 37) 251.
[71] Ibid. 252.
[72] Grey (n 47) 692.

An alternative justification to the notion of failure to protect, namely social intervention, has been introduced to support the necessity of paying attention to the victims' needs. It is often said that in civilised society the state presumably assumes the duty to exact retributive justice for unlawful harm to its citizens, and enables them to take civil action against criminals by suing offenders for damages in accordance with tort and, also, to afford health and social services. Once this is done, the state has no further duty in respect of the victim.[73] If civil action is inadequate in circumstances where the offenders are not apprehended or lack the means to provide compensation, such possibilities are merely part of 'life's lottery'.[74] However, it has been suggested that the application of this policy would be perceived by victims as unfair because it does not solve the problem of reparation and, thus, claiming that the state has no obligation to compensate rebuts the practice of the courts that an element of reparation should, where appropriate, be included in every punishment directed by the state.[75] In addition, over-concentration on the approach of 'individual responsibility' by civil and criminal courts may be insufficient to compensate the majority of victims of violent crimes, especially when offenders are not apprehended or are insolvent.[76] A sense of fairness, therefore, may require the state to meet the needs of victims even if there is no actual fault in the administration of its duty of protection.[77]

However, this intervention of a no-fault state to compensate victims of violent crimes should be accepted by society at large, because it involves the expenditure of public money. One rationale for such intervention is the so-called of 'wheel of fortune', which is premised on the affirmation that since the hazard of and exposure to criminal conduct are inherent in our complex society, then everyone in that society is a potential victim and, thus, the whole society should participate in the mitigation of the harm done to innocent victims.[78] Such an assertion also asserts that '[crime] inevitably falls upon someone though the particular victim may be "selected" by chance, and […] the individual as victim should not have to bear his misfortune alone';[79] thereby, compensation is viewed as the way in which the more fortunate recompense the les

[73] See Haldane and Harvey (n 63) 276-277.
[74] Ibid. 277.
[75] Ibid.; for instance, this idea has been legally emphasised by the Criminal Justice Acts 1972, 1982 and 1988 of the United Kingdom. See Luica Zender, 'Reparation and Retribution: Are they Reconciliation' (1994) 57 *Modern Law Review* 228, 231.
[76] See Schultz (n 24) 242.
[77] Drobny (n 22) 206.
[78] See Feeney (n 26) 178; Drobny (n 22) 206; Childres (n 20) 457.
[79] Feeney (n 26).

fortunate.[80] Accordingly, it is fair to suggest that society as a whole should share with the victim the consequences of a violent crime,[81] because, as with terrorist acts, individuals may be selected as targets not simply by chance, but as symbols of a national government or culture.[82] The terrorists do not care about individuals as long as victims are citizens of the government or culture which is targeted.[83] Therefore, the compensating of victims of terrorism who have been involuntarily sacrificed 'on behalf of the state'[84] and society rests on the fundamental principle of fairness.[85]

However, this trend has been criticised on the grounds that victims of criminal violence are no different from those who suffer other misfortune and, therefore, should not receive special treatment.[86] In reply, supporters of the 'wheel of fortune' concept hold that victims of violent crime have suffered from a specific danger inherent in collective life,[87] and that 'in our modern system of collective responsibility for sickness and injury, we have evolved a machinery for assuring compensation which could well be extended to injuries criminally caused'.[88]

Consequently, an alternative rationale for the intervention of the state is based on the 'social welfare' principle, which holds that society should mitigate the damage caused by violent crimes to one of its members just as it assists the most vulnerable individuals in society, such as those affected by industrial injury, and the unemployed, sick and elderly.[89] Proponents of the social welfare concept are persuaded that it is appropriate for all society to share victim compensation,[90] meaning that spreading the risk confronting each member of society to the whole society ensures the protection of each individual against unexpected misfortune at very small cost to themselves.[91] In addition, a sense of justice requires that victims should be provided with compensation[92] similar to those who suffer other misfortune.[93] The supporters of the welfare rationale also assert that, because criminals select their victims in a random manner and some have the ability to provide

[80] Ibid.
[81] Drobny (n 22) 206; Smith (n 47) 67.
[82] Grey (n 47) 690; Letschert and Ammerlaan (n 37) 257, 259.
[83] Grey (n 47) 690; Letschert and Ammerlaan (n 37) 257, 259.
[84] See UNHRC (n 127) Ch. 2, para 54.
[85] Grey (n 47).
[86] Drobny (n 22) 206
[87] See Wolfgang (n 22) 233.
[88] See Fry (n 36) 192.
[89] See Schultz (n 24) 242; Editors, Law Review (n 58) 539; Smith (n 47) 63.
[90] See Editors, Law Review (n 58) 539; Scott (n 59) 281.
[91] Editors, Law Review (n 58); Schultz (n 24) 242.
[92] Editors, Law Review (n 58).
[93] See Haldane and Harvey (n 63) 279; Smith (n 47) 64.

for their needs and others have not, the state has a certain interest in enacting a programme which ensures assistance to victims unable to afford care for their injuries by, for instance, private insurance.[94]

However, such arguments are open to three main criticisms. First, they disregard the fact that these programmes of compensation for victims of violence do not have a justification for their existence in the same way as the social programmes to which they have been compared.[95] In addition, welfare programmes tend to be based on the concept of the needs of victims, rather than on the absence of the wrongdoer to provide compensation directly.[96] Secondly, adopting such arguments weakens the notion of individual responsibility and enhances reliance on collective responsibility for victims and the paternalism of the state.[97] Thirdly, 'because crime rates vary substantially among racial, cultural, and economic groups, it is apparent that every citizen does not run an equal risk of becoming a victim of violence and that compensation would inevitably redistribute the costs of crime from some groups which at present bear a heavy portion of those costs to others on which they fall more lightly'.[98] This redistribution would occur even if compensation were only limited to those unable to attend to their injuries by private insurance.[99]

In spite of these criticisms, there is a strong rationale to support the compensation of victims of violent crime through social legislation.[100] In addition, many commentators assert that, while there are no persuasive justifications to demand the state to compensate victims on the grounds of failure to protect, interference with their tort rights, or a sense of fairness, a sufficiently strong case can be made that the state should compensate victims on the grounds of communal responsibility.[101] However, it is important to note that the state's programme of compensation in line with the social welfare concept does not mean that the state has a duty to do so and that victims have a right to compensation; it is rather a kind of humanitarian sympathy and solidarity with victims who suffer the serious consequence of violent crime because of the absence of redress from other sources.[102]

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[94] See Smith (n 47) 63; Editors, Law Review (n 58) 540; Childres (n 20) 457.
[95] Smith (n 47) 65.
[96] Ibid.
[97] See Scott (n 59) 281; Smith (n 47) 65-66.
[98] Editors, Law Review (n 58) 539; Scott (n 59) 281.
[99] Editors, Law Review (n 58) 540.
[100] See Scott (n 59) 281.
[101] Drobny (n 22) 208; Editors, Law Review (n 58) 541.
[102] Feeney (n 26) 178; Drobny (n 22) 207; for instance, the state compensation programmes in most European and others countries have been instituted as pragmatic responses to meet the needs of victims of violent crime. See Goodey (n 26) 11-12; Bottigliero (n 20) 31.

Nevertheless, it has been asserted by Haldane and Harvey that human life and dignity are dominant social priorities, and that the various forms of compensation, whether symbolic recognition or monetary reparation, can partially contribute to improving quality of life and restoring dignity to the victim.[103] However, since only the state has the resources and ability to adopt the programmes which ensure the provision of compensation, 'the damaging consequences of violent crime for the life and dignity of the victim lay a positive duty on the government to respond with such means as are available'.[104]

If it is recognised that the state has a duty to provide such compensation, it may lead to the acknowledgement that victims have a right to compensation, and politicians would worry that public expenditure would overly escalate as victims would be legally entitled to whatever level of compensation was determined by the court or other official agency.[105] However, to deny compensation to victims in such programmes as a *right* is a misunderstanding of the meaning of rights. There is a difference between the existence of a right and the claiming of it.[106] For example, it may be said that every citizen has the right to health care and education, but to claim them applicants should show that they meet the required conditions, such as an illness or the educational qualifications required for a particular course.[107] In addition, the existence of such a right is considered to be limited to that which a state can reasonably afford.[108] Likewise, the right of victims to compensation is 'a right to an equitable share in such provision for compensation as the government can reasonably afford'.[109] Accordingly, the lack of the state's obligation to provide such compensation should not, however, 'be confused with absence of a legal right to receive benefits when one has been granted by the legislature to eligible claimant'.[110]

Further rationales for the requirement of the state to adopt compensation programmes, alongside the social welfare view, may be attributed to the necessity of achieving consequential goals.[111] It is argued that to promote respect for the administration of justice by individuals and prevent them from taking the law into their hands to obtain redress, the criminal justice system should guarantee that effective reparation is provided for

[103] Haldane and Harvey (n 63) 279.
[104] Ibid.
[105] Ibid.
[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] Editors, Law Review (n 58) 541.
[111] See Haldane and Harvey (n 63) 279.

them.[112] In the same vein, it has been stressed that the lack of compensation programmes may deter victims from reporting offences and cooperating with state authorities in the criminal justice process.[113] Moreover, 'if we make the government responsible for the losses incurred by victims of crime, the government will then have an incentive to make communities safer for its citizens'.[114]

However, such consequential objectives have been criticised. Atiyah asserts that, with some exceptions, 'taking the law into one's own hands' is generally forbidden and not limited to victims of crimes themselves and, that 'the state accepts no general obligation to make good the lack of a defendant worth suing'.[115] On the other hand, in practice, there is little evidence that the award of compensation has contributed to convincing victims to cooperate with state authorities in the criminal justice process.[116] One explanation for this is that victims may be dissatisfied with the criminal justice system from their own experiences, and consider that their cooperation has not contributed to the handling of their cases with respect and care. Even if successful, they will not substantially relieve their suffering;[117] rather, such involvement in the criminal justice process may lead them to feel 'twice-victimised' as well as creating for them some additional problems including 'lost wages, time away from normal activities, anxiety and feelings of bewilderment as a result of their victimisation'.[118] Moreover, the argument that imposing compensation on the state will make it more willing to protect its citizens is unsustainable in many cases. Nevertheless, in democratic societies, where state authorities are subject to the rule of law, more pressure may be placed on such authorities to review or even change their policies of protection when both measures making them accountable for their actions and responsible for compensation are supported by the whole community.

4.3.3 Summary Remarks

Whatever the nature of the arguments cited to justify the intervention of the state to compensate victims of violent crimes, the fact that the state has acceded to the necessity

[112] Ibid; Cane (n 57) 306.
[113] Young (n 20) 3; Cane (n 57) 305; Para 7 of the Explanatory Report on the European Convention on Compensation presumably, is to be taken in this sense, as it refers to the need 'to quell the social conflict caused by the offence and make it easier to apply rational, effective crime policy'. See Haldane and Harvey (n 63) 280.
[114] Smith (n 47) 68.
[115] See Cane (n 57) 306.
[116] Smith (n 47) 70; for instance, studies by Shapland (1984) and Doerner and Lab (1980) found that compensation to victims of violent crime has failed to bring greater cooperation with criminal justice systems. See Joanna Shapland, 'Victims, Criminal Justice System and Compensation' (1984) 24 *British Journal Criminology* 131, 140.
[117] Smith (n 47) 70.
[118] Ibid.

to play a vital role in addressing damage to victims, whether on the grounds of failure to protect the right to life or of social intervention claims, places victims in a strong moral and legal position to have their right to reparation observed by the state. While these arguments depend for their theoretical justification on more than one philosophical theory, this does not by any means weaken their increasing force.[119] This is because it is legitimate for moral claims to be supported by different moral theories as 'the resulting moral consensus is often more significant than the different routes by which it is reached'.[120] In the same vein, where this conclusion is reached by both the failure to protect and social intervention rationales, the force of the argument may be considered particularly strong.

Admittedly, not all the above rationales are of equal weight in convincing the state to take upon itself the duty to compensate victims of violent crime when such compensation has not been made by offenders. However, taken together they amount to a very strong case, and 'any government today which sought to evade or reduce its responsibility for compensation would properly incur severe moral censure'.[121] Therefore, it can be argued that the state is morally and legally bound to adequately repair the harmful consequences of the violation of the right to life of its citizens, whether on the grounds of its failure to protect them or because violation has occurred despite the state's adequate protection, according to the concept of social intervention. This gives rise, however, to the question of what constitutes *adequate* reparation for the infringement of the right to life.

4.4 Adequate Reparation for the Violation of the Right to Life

To determine what constitutes adequate reparation for the violation of the right to life it is important to explore whether this violation should be considered a form of 'damage' to victims which requires compensation in itself.

4.4.1 Does it Matter that Death Resulted from an Illegal Act?

There is considerable disagreement among commentators on whether the death of a victim constitutes a form of damage in itself.[122] It is difficult to imagine that a human being who loses their life has been damaged by death, because death is an inevitable fate

[119] Haldane and Harvey (n 63) 280.
[120] Ibid.
[121] Ibid.
[122] Al-Anaibi (n 16) 35.

and the dead person does not feel or lose anything;[123] therefore, to assume that the dead can be damaged is unconvincing because a person must be in a state of existence to experience damage and this is obviously not so.[124] Then, where death by an illegal act has been instantaneous, the legal personality of that individual and their capacity to have rights, including the right to compensation, has ceased.[125] The assumption by opponents that the right of the victim to compensation arises at the moment of their death is ultimately flawed since it rests on the idea that any potential victim has not yet died, and it cannot be predicted whether or when death might occur as a result of a criminal act.[126] Even if this assumption were correct, death would terminate this right because a dead person no longer possesses any right as their legal personality has ceased.[127] Therefore, supporters of this position do not recognise either that a victim has been damaged by death or has a legal right to compensation which can be claimed by the heirs to the victim's estate.[128]

By contrast, the right to compensation ought to exist for a number of reasons. First, although it is true that death is inevitable for any human being and that no one holds that any compensation should be made if this happens from natural causes, where death has resulted from the illegal acts of others, compensation should be given as these acts have shortened the victim's legitimate life expectancy.[129] In addition, the argument that a victim who loses his life instantaneously through a third party criminal act does not suffer any damage seems to be contrary to reality and law, as life is most precious and humans usually vigorously resist being deprived of it and its enjoyment.[130] The violation of the right to life, and the corresponding right of a victim to be compensated for its loss, is a matter of principle and no positive law can justifiably preclude it.[131] Moreover, to assume that a person who is killed does not suffer any sensory pain may be doubtful, as they may also suffer from the psychological damage of the loss of all the usual legitimate

[123] Ibid.
[124] See Joel Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others (Oxford University Press 1987) 79, 80, 82; David Price, Property, Harm and the Corpse, in Belinda Brooks- Gordon et al, *Death Rites and Rights* (Hart Publication Ltd 2007) 202; Jeff McMahan, 'Death and the Value of Life', (1988) 99 *The University of Chicago Press* 32, 32. However, although no damage to the body or mind can be done after death, wrong still exists because rights or morally protected interests have been violated. For further details, see John Harris, 'Law and Regulation of Retained Organs: the Ethical Issue' (2002) 22 *Legal Studies* 527, 534-537.
[125] For further details about the arguments of those who do not acknowledge the right of a victim to compensation for his death, see Shariff (n 10) Ch. 2, 375-377; Al-Anaibi (n 16) 36-39; See also Joseph Raz, The Morality of Freedom (Oxford: Clarendon Press 1986) 166.
[126] Al-Anaibi (n 16) 36.
[127] For instance, early English common law held that 'a personal action dies with the person' and, therefore, 'death of either party to personal injury litigation terminated it; and causing the death of another was not a ground for civil action'. See Hedley (n 15) 243.
[128] Al-Anaibi (n 16) 36.
[129] Shariff (n 10) Ch. 2, 379.
[130] Ibid. 375; Yaqout (n 17) 29; Al-Anaibi (n 16) 41; Feinberg (n 124) 82.
[131] Al-Anaibi (n 16) 41; however, law, in principle, tends to agree with the view that dead themselves are beyond harm. See Hedley (n 15) 241-256.

expectations associated with life.[132] It has been asserted that the concept of deprivation which holds that death does harm a person because it deprives a person of all the goods that they might otherwise have achieved seems to be much more plausible.[133]

Secondly, to argue that the right of a victim to compensation for the damage of death cannot exist at the moment of death is contrary to the source of the right to compensation.[134] The source of this right is the illegality of acts against the right to life which precede death, even if just for a moment, because every action precedes its outcome.[135] Therefore, at the moment when a victim is dying, they still have the legal right to compensation for all damages arising from the illegal act, a right which can be claimed by his family following his death.[136] In other words, on death such a right is transferred from the deceased to their next of kin. In addition, it seems wrong to state that the right to compensation for victims who continue to live following injuries must be respected but not for those who die instantaneously from their injuries.[137] Such a position defies logic and reason as it places an offender who ends a victim's life instantaneously in a better position than one who injures a victim without bringing about death.[138] Such an outcome may also act as an incentive that could actually encourage an offender to kill a victim instantaneously in order to deny or limit that victim's right to compensation, which would be contrary to the primary objectives of good legislative policy which require that the perpetrator of an unlawful act must not be given reason to believe that the death of the victim does not matter in terms of an obligation for them to make compensation.[139]

Weighing up the above arguments on the right to compensation for the damage of death, it can be argued that those who deny that a victim's death is a damage in itself are in the contradictory position of refusing to acknowledge such a right to exist before death actually occurs and then, when death does occur, they still deny this right, as they consider that a person's legal identity ceases to exist upon death. It is not reasonable to ignore this contradictory position when dealing with such serious damage as the loss of life, since a

[132] Taha Abdel Mawla, Compensation for Physical Damages in Civil Law in terms of Jurisprudence and the Judiciary (Dar Alfikr and Law, Mansoura 2000) 103.
[133] See Price (n 124) 203.
[134] Mohammed Saad Khalifa, The Right to Life and Bodily Integrity: A Comparative Study of Civil and Islamic Law (Dar-Alnahda Arab, Cairo 1996) 44.
[135] Ibid.
[136] Shariff (n 10) Ch. 2, 376.
[137] Ibid.; Al-Anaibi (n 16) 42.
[138] Al-Anaibi (n 16).
[139] Ibid.

lack of compensation may undermine civil accountability and civil protection and would lead perpetrators to conclude that they had no obligation to restore justice by healing the consequences of their violation of the victims' right to life. Accordingly, justice requires the compensation of a victim for the illegal deprivation of their right to life.

However, in practice, some systems of law do not consider a victim's death in itself to be a damage requiring compensation, such as the Iraqi legal system, as will be discussed later.[140] Some legal systems and the judicial rulings of other states have clearly considered death as a damage requiring compensation.[141] An example of an award of compensation for death can be found in Article 248 of the Kuwait Civil Code,[142] which states that if the violation of the right to life results from illegal acts, compensation should be provided for this violation, in accordance with the provisions of 'Diya' in Islamic law.[143] These provisions must be made equally and without distinguishing between age, social status, occupation, sex or subjective issues, and moreover should not affect the right to compensation for financial and moral damages in accordance with the provisions of liability for an unlawful act.[144] Moreover, the state must compensate for damage of death in cases where compensation cannot be obtained from other sources.[145] This reflects the idea that the state cannot absolve itself from its moral and legal responsibility to respond effectively to the violation of the right to life and recognise it as a serious damage requiring reparation.

4.4.2 Summary Remarks

The death of a victim is a serious form of damage and any attempt to rely on theoretical objections or pragmatic reasons to deny the legitimacy and eligibility of a victim's next of kin to receive compensation undermines any adequate recognition of the seriousness of violations of the right to life. However, a victim cannot ever be compensated for loss of life, and so a distinction should be made between the acknowledgment that a victim

[140] See Chapter 5, pages 216 and 219. English law also does not compensate for the loss of life, as 'the deceased's life is valued in terms of the loss inflicted by death on the deceased's dependants'. English courts have rejected the right to compensation for the damage of death; for further details, see Hedley (n 15) 241-256.
[141] The Egyptian Court of Cassation has emphasised that death caused by illegal acts is a damage and should be compensated. See its decisions No 352 for the year 31Q in 02/17/1966, No 4 for the year 43Q in 03/07/1974, No 1466 for the year 48 in 23.01.1981, No 651 for the year 52 Q in 12/01/1986 and No 3063 for the year 61 Q in 21/05/1997. See Al-Anaibi (n 16) 44-45.
[142] The Kuwait Civil Code No 67 of 1980.
[143] Article 251 of the Kuwait Civil Code states that the amount of diya as compensation must be ten thousand dinars and can be amended by decree. See Al-Anaibi (n 16) 31; Diya in Islamic law refers to the blood money owed to a family for the killing of a loved one. It is a form of punishment for murder and bodily injury and 'in cases of deliberate homicide it is due only when the nearest relatives of the victim do not insist on Qisas (retaliation) against the culprit'. See Farrukh B. Hakeem, M. R. Haberfeld and Arvind Verma, 'The Concept of Punishment Under Sharia', in Farrukh B. Hakeem, M. R. Haberfeld and Arvind Verma, *Policing Muslim Communities: Comparative International Context* (Springer New York 2012) 15.
[144] Al-Anaibi (n 16).
[145] See Article 256 of the Kuwait Civil Code; Al-Anaibi (n 16)163.

has been damaged by death; thus, the victim also has the right to be compensated for the wrongness of the actions of those responsible for the damage and, similarly, have their symbolic right to retributive justice secured against those responsible, and for it to be recognised that no compensation can ever make up for such damage. Therefore, it is argued that the symbolic recognition of a victim's right to both retributive and compensatory justice needs to be considered as an integral part of any domestic justice system in order to demonstrate that the death of a victim has been taken seriously. In the next part, further forms of reparation for the violation of the right to life will be examined.

4.4.3 Other Forms of Reparations

In cases of mass violence against the right to life, it is doubtful whether the moral, political and legal principles which govern the state and society are sufficient to achieve justice for victims of such violence. One such difficulty may be attributed to the lack of a comprehensive view about the various measures of reparation available to remedy the damage caused by violations of the right to life, or even ignorance of what these reparation measures are capable of doing to restore to victims their sense of dignity and justice. This seems to be particularly the case in Iraq, where reparation is limited to financial compensation only.[146] Achieving justice for victims requires more than material compensation; as Walker notes, pure financial compensation is never sufficient to remedy grave harms, and is 'not always necessary to reparations'.[147] Reparations should consist of acts which intentionally afford appropriate goods to victims to acknowledge the seriousness of the wrong, the responsibility of those who did the wrong, or the liability of those responsible for its repair and their intention of achieving justice for this specific wrong.[148]

This spirit and intention are crucial in determining what should be done for victims, even if it is appropriate in terms of the damage caused to make actual reparations.[149] This means that any support or compensation given to victims by others, which is given in a voluntary spirit, as a good deed, does not in itself strictly constitute reparations since it is

[146] For further discussion, see Chapter 5, pages 223-232.
[147] Walker (n 42) 208; see also Yael Danieli, 'Healing Aspects of Reparations and Reparative Justice for Victims of Crime against Humanity' in Jo-Ann M. Wemmers, *Reparation for Victims of Crimes Against Humanity: The Healing Role of Reparation* (Routledge 2014) 13.
[148] Walker (n 42) 208.
[149] Ibid. 205.

done without the intention of bearing the responsibility either for the wrong suffered or for redressing it.[150]

Many commentators consider that the recent moral and political conceptions of reparations which aim to restore dignity to victims and establish respectful, trustworthy and mutually accountable relationships within their communities are more important or even an alternative to the dominance of the legal perspective of juridical and tort-based measures of compensation for unjust loss or injury.[151] This is because the legal perspective of compensatory or reparative justice has been criticised as inadequately addressing grave HR abuses and injustice.[152] Reparative justice is more about redressing 'injustice and wrongful harms that aims at the reordering of individuals' standing, their relationships and their communities'.[153] In addition, from the psycho-social perspective, reparations 'seek relief of the suffering, distress, anger and sense of violation experienced by victims'.[154] However, this should not undermine the role of monetary compensation measures when these are effective in obtaining from the parties responsible for the wrong done, or for its repair, the intention to provide reparative justice for victims.[155]

4.4.3.1 The Communicative and Exemplifying Aspects of Gestures of Reparation

While the communicative aspect seeks to send a vindicatory message to victims, wrongdoers, and communities acknowledging the reality of the wrong, the exemplifying aspect involves an act of repair which alludes to what the correct relationship should be between the victims and the parties responsible for making reparation.[156] All forms of reparations, including purely material forms, have an essentially symbolic expressive or communicative function even though the term symbolic is mainly used for non-tangible measures such as the 'publication of the truth about abuses, public apologies, memorial, or education projects'.[157] Studies appear to suggest that 'symbolic' reparations are valued

[150] Ibid. 206; for instance, see the criticisms of the Victims Compensation Fund of 9/11 2001 of the United States made by Samuel Issacharoff and Anna Morawiec Mansfield, 'Compensation for the Victims of September 11' in Pablo De Greiff, *The Handbook of Reparations* (Oxford University Press 2006) 284.
[151] See Walker (n 42) 208; for instance, Roht-Arriaza called for collective and symbolic reparations to be made to communities. Roht-Arriaza (n 3) 159-160.
[152] Walker (n 42); Margaret Urban Walker, 'Moral Vulnerability and the Task of Reparations' in Catriona Mackenzie, Wendy Rogers and Susan Dodds, *Vulnerability: New Essays in Ethics and Feminist* (Oxford University Press 2013) 113.
[153] Walker (n 42); Bernard Boxill, decades ago, deeply connected the concept of reparations with wrongfulness and responsibilities. See Bernard R. Boxill, 'The Morality of Reparation' (1972) 2 *Social Theory and Practice* 113, 118.
[154] Walker (n 42) 209.
[155] Ibid.; Walker (n 152) 128.
[156] Walker (n 42) 209.
[157] Ibid.

more highly by victims than monetary ones,[158] and that financial payments are, therefore, less acceptable and may be challenging without gestures conveying acknowledgement and respect.[159] Nevertheless, all reparations, whether material or symbolic in nature, are considered by victims to be communicative gestures.[160] Walker explains that these communications are essential in creating 'real effects of psychological, moral, social and political kinds' and 'if the reparative communication misfires or is poorly executed, very real effects often follow: the victims may be insulted, outraged, or bitterly disappointed, and may react with protest, withdrawal, or litigation'.[161] Therefore, the communicative dimension is essential to any reparations programmes or gestures because it conveys an important vindicatory message.[162] This vindicatory message may be sent explicitly by means of a complete apology, accepting responsibility for the wrong or its repair and the repudiation of the behaviour involved.[163] Failure to convey this message in programmes of reparations would result in a lack of clarity about the attitude of the responsible parties towards past wrongs and their duty of justice to respond to them, or show a lack of proper respect or real care for those who are owed reparations.[164]

However, there is the risk that reparations programmes are perceived as an isolated gesture if they seem to only send a vindicatory message.[165] For such programmes to transcend this, they need to exemplify a rectified relationship that, if sustained, becomes the basis for acceptable and stable moral, civil, and political relations.[166] The purpose of this exemplifying reparative function is to convey to victims and society the appropriate attitude for amend-makers to take to demonstrate respect, compassion and responsibility.[167]

It has been suggested that, for the exemplification function of reparations to be convincing, the vindicatory message should send the right message regarding the reparations process

[158] See Heather Strange, Justice for Victims of Young Offenders: The Centrality of Emotional Harm and Restoration, in Allison Morris and Gabrielle Maxwell, *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Hart Publishing 2001) 184-185; Doak (n 3) Ch. 2, 216; Walker (n 12) 9; Jo-Ann M. Wemmers, 'Restoring Justice for Victims of Crimes against Humanity' in Jo-Ann M. Wemmers, *Reparation for Victims of Crimes Against Humanity: The Healing Role of Reparation* (Routledge 2014) 34.
[159] Walker (n 42) 212.
[160] Ibid.
[161] Ibid.
[162] Ibid.
[163] There is considerable evidence that 'victims place a high value on receiving apologies and this prospect is often an important factor influencing their decision to become involved in mediation and restorative justice programs'. Jonathan Doak, 'Enriching Trial Justice for Crime Victims in Common Law System: Lessons from Transitional Environments' (2015) *International Review of Victimology* 1, 12.
[164] According to Walker, the adequacy of gestures of reparations must be judged on the strength of their interactiveness, usefulness, fittingness, and effectiveness. For further details, see Walker (n 42) 213-216.
[165] Ibid. 217.
[166] Ibid.
[167] Ibid.

to give the hope that the right moral relationship will be established between victims and responsible parties, which may lead to the rebuilding of trust. In turn, this may mean that some confidence will emerge that gross violence will not be repeated in future.[168] Further, it has been specifically suggested that restoration of the correct moral relationship of confidence, trust and hope damaged by serious wrongdoings is essential for any gestures or programmes which seriously intend to comprehensively repair wrongs on the social and civic level.[169] Any serious wrongdoing against individuals raises the question of whether the moral standards that govern the relationship of an individual with others, and the interest and dignity of individuals harmed by wrongdoing, are being taken seriously.[170] In other words, it means 'what are the shared norms' of 'our mutual expectations of each other's behaviour' and how do we 'express the authority of those standards' when they are violated and 'authority [is] in question'.[171]

It is the responsibility of communities to answer this question,[172] because having taken upon themselves the basic duty of producing standards of responsibility, they have a duty to take action against violations of these standards in order to: reaffirm moral understandings which have been contravened by wrongdoing; clarify their scope; and, stabilise confidence in their authority.[173] If community standards are found to lack respect for some of its members, the community has an obligation to take action to change them.[174]

4.4.3.2 Problems in Achieving Reparation Gestures

It is unlikely that the expressive function of these reparations gestures will be fully achieved for a variety of reasons. First, the adequacy of all reparations messages is restricted by the inevitable economic, political and social pressures surrounding mass reparations for HR violations.[175] More importantly, such achievement depends on the willingness of the state and society to comply with these messages of reparations, specifically the exemplifying commitment to the repairing of future right relationship, in order to adequately respond to the mass violations of HR. It also depends on the actual

[168] Walker (n 42) 220.
[169] For further details, see Walker (n 12) 23-28, 73-74, 107-108; Walker (n 42) 209-2011; Walker (n 152) 111-124.
[170] Walker (n 12) 29.
[171] Ibid.
[172] The concept of community should be taken in a wide sense to include, for instance, a neighbourhood or society or nation and, perhaps, a 'world community' or a 'community of nations'. A community requires a 'collective of moral judges to whom people look as a reference point for the validity of claims of injury and claims of repair'. Ibid. 30.
[173] Ibid.
[174] Ibid.
[175] Walker (n 42) 221.

status of victims in moral, social and legal systems. This is because victims in many states, and specifically in Iraq, have faced marginalisation, indifference, denial and abandonment. It has been further suggested that despite the internal clarity of reparations measures and homogenous forms of justice on reparations, there are difficulties with reparations programmes involving victims who are 'marginalized or [have] unequal status', including women and minority ethnic or indigenous populations. This leads to 'disrespect or mistreatment despite a reparations effort for particular injustice at a particular point in time'.[176]

Secondly, the demands of different features of the expressive adequacy of a reparations process may create a tension between them.[177] Symbolic reparations, which involve acknowledgment of serious wrongs to victims and the taking of responsibility for them, are often considered by victims to be the most fitting. On the other hand, material compensation may be more easily deliverable and less socially controversial when a society is in an unsettled political state.[178] However, victims often place much greater value upon public acknowledgement of wrong, which explains why they may often be dissatisfied with money payments alone.[179] The reparative importance of money payments depends on whether, along with other gestures, it carries a message of acknowledgement of wrong, and thus affirms reciprocal accountability under shared standards.[180] Although money in itself does not count as reparations, when the state is involved it is clearly a powerful means of accountability.[181] Even when this is so, taking responsibility for wrong, which is the essence of accountability, is often of greater importance for victims.[182] Nevertheless, in some cases money is considered by victims to be reparation, even when acknowledgement of responsibility or of the obligation to provide justice are lacking on the part of those responsible.[183]

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[176] Ibid.
[177] Ibid.
[178] Ibid.
[179] There may be a temptation to offset some forms of adequacy against others. For instance, in the aftermath of conflict, governments may seek to make reparations by material investment in affected communities. By doing this as collective reparation, it can 'mute or cancel the fittingness of what is offered, as victims find what they receive is perhaps only what they deserved as citizens regardless of the specific injuries the have suffered, and that the public goods offered equally benefit others who are not victims (and in some situation those who have been perpetrated'. See Ibid.
[180] Walker (n 152) 128.
[181] Ibid.
[182] For instance, monetary reparations programmes by countries such as Germany, Argentina, and Chile have been made in stages and have expanded the norms of accountability for victims of human rights abuses, thus, increasing the numbers of victims to be compensated. Ibid.
[183] Ibid. 128-129; however, a comparative study of the status of victims in Chile, Argentina, El Salvador, Guatemala and South Africa, carried out primarily through interviews, found that 'for the victims, moral and legal measures of reparation are fundamental, while monetary compensation is controversial and problematic. […] All agreed that compensation was never enough, or even the most important thing. They especially noted the hollowness of material reparations when there has been a pronounced reluctance to prosecute those responsible'. See Roht-Arriaza (n 3) 180.

Finally, it has been claimed that it is unrealistic to expect that gestures of reparations, specifically in attempting to acknowledge the reciprocal accountability relations between victims and those responsible for the violations or their repair, should be burdened with too much responsibility for the restoration of right future relationships.[184] Reparation gestures concern what can be achieved in the present to deal with the past relative position of victims and responsible parties; this might be seen as 'a bridge from a past, not just of unrepaired harms but also of accountability denied to a present of reciprocal accountability acknowledged'. This view clarifies the complexity of the 'threats, wounds, tentative steps, and difficult new understandings' so typical of reparations.[185] Ideally, hope of better future relations between victims and responsible parties is created when successful reparations operations, which embody fair terms of accountability and shared recognition of the moral standards predicated by them, are undertaken.[186]

The provision of reparations may best be understood as 'a maker of present achievement in the history of relations among people or among peoples, an achievement measured by its distance from the past scene of wrongdoing'.[187] In addition, in the aftermath of gross violence, the expectation that reparations by themselves are capable of achieving long-term trusting relations may be unrealistic, since reparations 'can only at best set an example and make a promise or commitment based on what achieved in the present instance'. [188] Where the wrongs of the past have given rise to reasonable fear, disillusionment, hatred, or cynicism, in the present, reparations gestures can help to create hope for the future, which, in turn, provides motivation to build the right relations that are heralded by good reparative interaction.[189]

4.4.4 Summary Remarks

It seems fair to claim that to adequately respond to the implications of violations of the right to life of individuals caused by serious acts of violence, the best scenario is that all forms of reparations gestures, both material and symbolic, must carry, in principle, an expressive vindicatory message. This message should include a genuine intention to address the implications of violence against the right to life by standing with victims, through acknowledgement and confirmation of their entitlement to stand in equal moral

[184] For further details, see Walker (n 152) 125-127.
[185] Ibid. 127.
[186] Ibid.
[187] Ibid.
[188] Ibid.
[189] Ibid.

relations of accountability, to witness condemnation of, and receive genuine apology for, serious wrongs committed, and oblige those responsible for these or for their repair to make amends as a matter of justice. Reparations should also be forward-looking, through setting an example and making a commitment based on what is done in the present to deal with the implications of violence in the hope that right relationships of confidence, trust and hope between victims, responsible parties and their communities will be restored in future.[190] This is why it has been suggested that, in spite of the fact that problems may arise from the inability to achieve what this message involves, because of economic, political and social pressure or the marginalising of victims in states, reparations for mass violations of HR would, nevertheless, be incomplete should it be concluded merely with the fulfilment of obligations to repair these past violations in the present.[191] Rather, reparations are the beginning of a long process of creating commitments, in the hope that what is done in the present will set a good example for the emergence and restoration of consistent right relationships between victims, responsible parties and their communities.[192]

The community in any state where grave HR abuses occur against its members, specifically, has a duty to lead the social process of moral validation by which victims should feel confident that they are entitled to share the community's norms of accountability and recognise that they are valued members of that community. This moral validation requires a community to respond to claims of serious wrongdoing and to evidence concerning it with careful attention by affirming the standards violated and by confirming the reality of the injury to the victim, an injury which deserves redress.[193] In the absence of such validation by wrongdoers or the community, it could be said that victims and others will question whether the violation of HR and the moral standards governing responsibility for wrongs are being taken seriously.[194] Realistically, re-building or re-affirming these moral standards or, even changing them because of the enormity of indiscriminate violence, especially sectarian violence and conflict, such as that suffered by the Iraqi community post-2003, is too difficult to establish unless the roots of violence are seriously tackled. This requires, as will be noted in the next two chapters,[195] anchoring reparations programmes within a holistic transitional justice

[190] See Leif Wenar, 'Reparations for the Future' (2006) 37 *Journal of Social Philosophy* 396, 404-405.
[191] See Walker (n 42) 220.
[192] Ibid.
[193] See Walker (n 152) 122.
[194] Ibid. 122-123.
[195] See Chapters 5 and 6, pages 234-235 and 244-268.

framework to enable victims and society to reconcile the past and move beyond violence and conflict. In a transitional justice framework, reparations are the foundation of healing and reconciliation since they acknowledge damage. They facilitate the healing process and can be the most concrete indicator of attempts by the state to redress the harms that victims have endured. It is especially important when such recompense also addresses the structures which empowered the initial violence. [196]

4.5 The Extent of the State's Obligation in International and Regional HR Instruments

This section will focus on the practices of the HRC, and the European and Inter-American HR systems regarding the right to reparation.

4.5.1 Reparations under the HRC Practices

The HRC, as interpreter of rights with universal applicability, has been able to employ the right to an effective remedy as a normative source and legal basis on which to demand reparation for victims.[197] This interpretation offered by the Committee indicates that Article 2(3a) requires member states to make reparation to individuals whose Covenant rights have been violated.[198] The Committee's interpretation also obliges states to act as guarantors for the provision of reparation in circumstances where the violation was by non-state actors and they cannot provide reparation because they are insolvent or unidentified.[199]

In considering reparation essential for the protection of HR, the Committee has required member states to implement different forms of reparation measures.[200] Although it primarily still focuses on compensation, it asserted in General Comment No. 31 that 'where appropriate', the duty to repair may involve a broad set of measures other than compensation, including 'rehabilitation, and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition, and changes in relevant law and practices, as well as bringing to justice the perpetrators of HR violations'.[201] Whereas

[196] For further details, see ACIRU (n 339) Ch. 3, 59-71.
[197] See Valeska David, 'The Expanding Right to an Effective Remedy: Common Developments at the Human Rights committee and the Inter-American Court' (2014) 3 *British Journal of American Legal Studies* 259, 281.
[198] UNHRC, General Comment No. 31 (n 147) Ch. 2, para 16; see Cecily Rose, 'An Emerging Norm: The Duty of States to Provide Reparations for Human Rights Violations by Non-State Actors' (2010) 33 *Hastings International and Comparative Law Review* 307, 316.
[199] Rose (n 198).
[200] Maria Chiara Campisi, 'From a Duty to Remember to an Obligation to Memory? Memory as Reparation in the Jurisprudence of the Inter-American Court of Human Rights' (2014) 8 *International Journal of Conflict and Violence* 61, 63.
[201] UNHRC, General Comment No. 31 (n 147) Ch. 2, para 16; Shelton (n 3) 117; Campisi (n 200); David (n 197) 281.

reparation measures of satisfaction play a vital role in addressing the gravity of acts of violence against the right to life, since it is their aim to restore to victims their sense of justice and dignity, the assurances of non-repetition have a broader effect, as they address the preventive aim of reparation.[202] From the Committee's perspective, payment of financial compensation is insufficient in itself to repair the harm done to victims of grave HR violations, especially in cases of enforced disappearance,[203] since they involve the continuation of the violation by the extra suffering a victim's family experiences until their fate is known and, also, because a disappeared victim remains outside the protection of law until state authorities disclose what has happened.[204] The Committee consistently found that suffering resulting from the refusal or failure of the state to inform the next of kin of the truth is so grave as to constitute a violation of Article 7, which prohibits their torture and ill-treatment.[205] Revealing the truth surrounding the victim's fate is considered an essential right of family members in cases of serious HR violations and should be provided as a part of effective remedies.[206] For instance, in the case of *Almeida de Quinteros v Uruguay* concerning enforced disappearance, the Committee held that it 'understands the anguish and stress caused to the mother by the disappearance of her daughter and the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter'.[207] Therefore, where family members continue to suffer from not knowing the truth regarding the fate of their relatives at the hands of the state, it has been suggested that it is impossible for the psychological and social aspects of reparation, including the restoration of victims' dignity to both the disappeared persons and their family members, to be met.[208] When this is the case, the symbolic meaning of any form of reparation will be undermined by the continuing refusal or failure of the state to end family members' suffering by revealing the truth to their

[202] Valeska David, 'Reparations at the Human Rights Committee: Legal Basis, Practice and Challenges' (2014) 32 *Netherlands Quarterly of Human Rights* 8, 10.
[203] See *Eduardo Bleier v Uruguay*, Communication No. R. 7/30, U.N. Doc. Supp. No. 40 at 130 (1982), para 15. For instance, the Committee concluded that Algeria violated the victims' right to an effective remedy in cases brought against it for the disappearance of individuals in the 1990s, allegedly by terrorists. It reached this conclusion because of the ineffectiveness of investigation by Algerian's authorities and the denial of just access to the judicial proceedings. Any payment of compensation did not change this. See *Mihoubi v. Algeria*, Communication No. 1874/2009, UN Doc. CCPR/C/109/D/1874/2009, 19 October 2013, paras 7.10-7.11; see Sarah Fulton, 'Redress for Enforced Disappearance: Why Financial Compensation is Not Enough' (2014) 12 *Journal of International Criminal Justice* 769, 779.
[204] Fulton (n 203) 772.
[205] See, for instance, the case of *Almeida de Quinteros. v. Uruguay*, Communication no. 107/1981, UN Doc. CCPR/C/OP/2 at 138, 21 July 1983, para 14; Fulton (n 203) 773.
[206] This right is to be understood as 'an autonomous right, independent of other claims of the victims and their relatives, that is owed to society as a whole, as an objective state obligation flowing from the duty to ensure human rights to all'. For further details, see International Commission of Jurists, The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners' Guide No. 2, 44 (2006) 81-89.
[207] *Almeida de Quinteros v. Uruguay* (n 205), para 14.
[208] Fulton (n 203).

loved ones.[209] Moreover, as part of reparation, where disappeared persons have been killed, the Committee obliges the state to end the violation by searching for and, where possible, returning their bodies so that their families may begin to grieve and heal.[210] In a few instances, the Committee has also requested that states offer other forms of reparation, such as protection from harassment[211] and a formal apology.[212]

The Committee usually does not demand that victims' relatives claim reparation or produce evidence of the harm suffered for reparation to be made.[213] However, when the Committee appears in these cases to have addressed the mental distress, uncertainty and intimidation experienced by close relatives as a violation of Article 7 of the Covenant,[214] it has not always clarified exactly whose harm is being repaired. In some cases, the Committee has clearly stated that the reparation is intended to redress the next of kin's own injuries and moral damage,[215] whereas in others it has stated that the reparation is based on the harm suffered by the actual victim.[216] Monetary compensation is usually the form of reparation made to victims' families. The Committee, however, does not prescribe a definite amount of compensation to be awarded to these families of the murdered or disappeared; it merely states that the compensation has to be 'adequate'.[217] In addition, the Committee has specifically stated that the entitlement of families to compensation should not be based on a civil declaration of the death of the disappeared, as this would be inhumane and degrading for the families.[218]

In cases where the victim has survived the violation, for instance those of torture, compensation is not usually granted to the next of kin.[219] This has been rightly criticised as it considers the families of murdered or disappeared persons also to be victims, but rarely does so for the families of victims who survive.[220] These families, thus, should be

[209] Ibid.
[210] See *Mihoubi v. Algeria* (n 203), para 9; see Fulton (n 203) 773; see also the case of *Salem Saad Ali Bashasha v. The Libyan Arab Jamahiriya*, Communication No. 1776/2008, U.N. Doc. CCPR/C/100/D/1776/2008 (2010), paras 7.3, 9.
[211] *Bautista de Arellana v. Colombia*, Communication No 563/ 1993, U.N. Doc. CCPR/C/55/D/563/1993 (1995), para 10.
[212] See the case of *Annakkarage Suranjini Sadamali Pathmini Peiris v. Sri Lanka*, Communication No. 1862/2009, U.N. Doc. CCPR/C/103/D/1862/2009 (2012), paras 7.2, 9.
[213] David (n 202) 36.
[214] See *Almeida de Quinteros v. Uruguay* (n 205), para 14.
[215] See *José Antonio Coronel et al. v. Colombia*, Communication No. 612/1995 (14 June 1994), CCPR/C/60/D/612/1995, para 8.8; *Farida Khirani v. Algeria*, Communication No. 1905/2009, U.N. Doc. CCPR/C/104/D/1905/2009 (2012), para 9.
[216] For instance, in the case of *Salem Saad Ali Bashasha v. the Libyan Arab Jamahiriya* (n 210), the Committee in para. 9 requested the state 'provide adequate compensation for the author and Milhoud Ahmed Hussein Bashasha's family for the violations suffered by the author's cousin'; See David (n 202) 36.
[217] David (n 202); should the Committee not fix the amount of monetary compensation, a state may make inadequate compensation, falsely claiming it to be adequate.
[218] See *Rizvanovic v. Bosnia and Herzegovina*, Communication No. 1997/2010, UN Doc. CCPR/C/110/D/1997/2010, 21 March 2014, para 9.6; Fulton (n 203) 779.
[219] David (n 202) 37.
[220] See Ruth Rubio-Marin, Clara Sandoval and Catalina Diaz, 'Repairing Family Members: Gross Human Rights Violations and Communities of Harm' in Ruth Rubio-Marın, *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human*

considered on equal terms as those of victims who have disappeared or been murdered and, therefore, the suffering or harm done to them should be considered by the Committee.[221] On the other hands, the Committee's decisions concerning compensation for deprivation of the right to life seem only to consider moral and pecuniary damage and do not view loss of life as a damage requiring compensation in itself. Whilst violent death is not seen as a specific, additional damage in terms of compensation, it seems not to deserve compensation in its own right. Rather, a state which is responsible for the violation of individuals' right to life or for its repair is often required to compensate for damage suffered by the families of the murdered victims. [222]

Important challenges also remain to increasing the impact and efficacy of the Committee's rulings on reparations.[223] Among these challenges are both the insufficiency of satisfaction measures and the need to further develop guarantees of non-repetition in cases of gross violations of HR.[224] It has been noted that four reparation measures of satisfaction are still absent or inadequately addressed in the Committee's rulings,[225] and the capacity of symbolic reparations has not been appreciated, in general, in order to reach more victims and repair relationships with society.[226] As the High Commissioner for HR has stated:

> By making the memory of the victims a public matter, they disburden their families from their sense of obligation to keep the memory alive and allow them to move on. This is essential if reparations are to provide recognition to victims not only as victims but also as citizens and as rights holders more generally.[227]

The reparation measure of ensuring that similar violations do not occur again in future has not yet been developed or fully explored.[228] The Committee has not asked for specific measures of non-repetition, such as the reform of law and legal systems, training of state officials in human standards, promotion of oversight mechanisms and campaigns to better

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Rights Violations (Cambridge University Press 2009) 170-171. See *Bakhtiyari v. Australia,* Communication No. 1069/2002, U.N. Doc. CCPR/C/79/D/1069/2002 (2003). See David (n 202) 37-38.

[221] David (n 202).

[222] See *Djebbar and Chihoub v. Algeria*, Communication No. 1811/2008, CCPR/C/103/D/1811/20 (2012), para 10.

[223] For instance, the Committee's practice on reparations is inconsistent and reparations which it has required have not been accompanied by an adequate system to monitor their implementation. See David (n 197) 282; the Committee should avoid imposing a merely indeterminate duty on states to provide an effective and appropriate remedy without specifying any particular measures to be taken. See David (n 202) 23-28.

[224] David (n 202) 29.

[225] Ibid.

[226] Ibid.

[227] See UN Office of the High Commissioner for Human Rights (OHCHR), *Rule of Law Tools for Post-Conflict States: Reparations Programmes*, HR/PUB/08/1 (2008) 23.

[228] David (n 202) 22.

inform the public and encourage complaints, and in so doing may have missed important opportunities.[229]

4.5.1.1 Summary Remarks

It is fair to claim that the Covenant does not include express provisions by which the right of victims of HR violations to reparation, specifically the violation of the right to life, must be guaranteed by member states; however, through the exercise of its vital authority in interpreting the right to an effective remedy embodied in Article 2(3), the HRC has guaranteed this right to victims in the course of its review of individual cases. States under the jurisprudence of the Committee are required to provide victims with various measures of reparation, including compensation and just satisfaction, irrespective of the identity of perpetrators, whether state or private individuals. This requirement exists even in circumstances where private perpetrators are unidentified or insolvent, since states, according to the Committee's interpretation, are guarantors of the right of victims to reparation. However, the Committee needs to give further consideration to compensation for the damage of death and, also, to the limits of just satisfaction measures which states are requested to provide in cases of infringements of the right to life. In addition, the Committee needs to determine precisely the measures that should be taken by member states to give strong effect to the requirement of the guarantee of non-repetition of violations of the right to life. Nevertheless, the development of the jurisprudence of the Committee is particularly notable when compared to the practice of the ECtHR.

4.5.2 Reparations under the Jurisprudence of the ECtHR

The right of victims to remedy encompassed in Article 13 is strengthened by Article 41, which empowers the ECtHR to provide 'just satisfaction' for the injured party.[230] For the Court to exercise its authority under Article 41, the conduct of a state must constitute a violation of the rights and obligations contained in the Convention, the applicant must suffer an injury of moral or financial damage, and, finally, only partial reparation has been made available to victims in the domestic laws of the state, for which the Court must find that just satisfaction is required.[231] The latter condition, according to many commentators,

[229] For further details, see Ibid. 27, 30.
[230] Doak (n 3) Ch. 2, 217.
[231] Ingrid Nifosi-Sutton, 'The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: a Critical Appraisal from a Right to Health Perspective' (2010) 23 *Harvard Human Rights Journal* 51, 52.

clearly reflects the subsidiary nature of the role of the European Court in awarding reparation for the violation of the Convention rights.[232]

However, the provision of just satisfaction by the Court under Article 41 may be limited merely to the issuing of a declaratory judgment which establishes that one or more Convention rights have been breached, reflecting the minor remedial role of the Court in accordance with the principle of subsidiarity.[233] Nevertheless, in certain circumstances, the Court may accompany its declaratory judgment with the requirement that compensation be awarded for pecuniary and/or non-pecuniary damage caused by such violation.[234] The Court recognises that the next of kin of victims can be awarded reparation in cases of unlawful death only in the two following scenarios: (1) where they receive reparation on behalf of victims, as heirs, for the financial and/or moral damage the victims themselves; and (2) where the next of kin are considered to be autonomous victims and, thus, are awarded reparation for their own moral and/or material damage.[235]

Where the Court finds 'without reasonable doubt'[236] that the state is responsible for death (substantive violation) and for the procedural violation of Article 2, such as failure to investigate the victim's death, it awards pecuniary damages for loss of earning and potential earnings, for funeral expenses and other costs connected with the death.[237] When the Court only finds a procedural violation of Article 2, it does not make an award for pecuniary damage since the state is not directly linked with the actual violation and damage caused. Thus, it only awards for the non-pecuniary damage to the next of kin to compensate for the frustration, distress, anxiety and pain suffered.[238] A more robust response than procedural abuses is considered when a state actor is found responsible for substantive rights abuse.[239] In cases of domestic violence, where the Court found a breach

[232] Rubio-Marin, Sandoval and Diaz (n 220) 221; Nifosi-Sutton (n 231) 52-53; Kirill Koroteev, 'Legal Remedies for Human Rights Violations in the Armed Conflict in Chechnya: The Approach of the European Court of Human Rights in Context' (2010) 1 *International Humanitarian Legal Studies* 275, 285.
[233] See Nifosi-Sutton (n 231) 53-55. See, for instance, the judgments of the Court in the cases of *Al-Saadoon and Mufdhi v. United Kingdom* App n 61498/08 (ECHR, 2 March 2010); *Kajkaris v Cyprus* App no 21906/04 (ECHR, 12 February 2004). See Gabriella Citroni, 'Measures of Reparation for Victims of Gross Human Rights Violations: Development and Challenges in the Jurisprudence of Two Regional Human Rights Courts' (2012) 5 *Inter-American and European Human Rights Journal* 49, 59.
[234] Nifosi-Sutton (n 231) 53.
[235] See Rubio-Marin, Sandoval and Diaz (n 220) 222.
[236] According to the ECHR, the term 'beyond reasonable doubt' is 'a doubt for which reasons can be given drawn from the facts presented'. See Ophelia Claude, 'A Comparative Approach to Enforced Disappearances in Inter-American Court and the European Court of Human Rights Jurisprudence' (2010) 5 *International Human Rights Law Review* 407, 424.
[237] A 'causal link between the damage claimed by the applicant and the violation of the Convention' should be the legal base for pecuniary reparation. See Rubio-Marin, Sandoval and Diaz (n 220) 225; the amount awarded by the Court for pecuniary damages usually depends on proof of pecuniary losses. The Court, for instance, in many cases, has awarded pecuniary compensation in full when applicants have provided proof of present and future losses. See various cases refer to by Shelton (n 3) 304.
[238] See Rubio-Marin, Sandoval and Diaz (n 220) 225-226; Shelton (n 3) 303.
[239] The ECtHR has found that 'where the alleged violations have implied direct responsibility of the State agents, the requirements of Article 13 are broader than a Contracting State's obligation under Articles 2, 3 and 5 to conduct an effective investigation into the death and/or disappearance of a person who has been shown to be under their control, and for whose welfare they were responsible.

of Article 2 and/or other articles, such as Articles 3, 8 and 14, of the Convention, it awarded compensation for non-pecuniary damage, although smaller than claimed.[240] Non-pecuniary damage is also awarded on behalf of the direct victim when evidence shows that they suffered torture or ill treatment prior to death or disappearance.[241]

4.5.2.1 Difficulties in Obtaining Compensation

Victims' next of kin face difficulties gaining compensation from the Court on behalf of both the victims themselves and in their own names as autonomous victims.[242]

a) Monetary Compensation

With compensation for pecuniary damages, the Court is very conservative since it will award relatives of victims, as successors, only moral damages, unless they make a claim before the Court and can prove such damages.[243] In addition, the Court is unwilling to lessen the standard of proof for gross HR violation, which makes proof that such damages occurred very difficult to prove 'beyond reasonable doubt'.[244] Moreover, claims for pecuniary damage by family members are not usually met by the Court in full[245] and only exceptionally has it awarded to applicants material damages as successors of the deceased.[246] Consequently, it has been claimed that the award of appropriate pecuniary damages to successors has failed to be granted by the Court.[247] Lack of proper redress for damages has serious consequences for the family, especially women and children who

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In such circumstances, where a criminal investigation into a lethal attack has been ineffective and the effectiveness of any other remedy that might have existed, including the civil remedies suggested by the Government, has consequently been undermined, the State would fail in its obligation under Article 13 of the Convention'. On the other hand, Article 13 may not always require the state authorities to assume responsibility for investigating the allegations where the case concerns an alleged failure to protect people from the acts of others. 'There should, however, be available to the victim or the victim's family a mechanism for establishing any liability of State officials or bodies for acts or omissions involving the breach of their rights under the Convention. In the Court's opinion, the authority referred to in Article 13 may not necessarily in all instances be a judicial authority in the strict sense. Nevertheless, the powers and procedural guarantees an authority possesses are relevant in determining whether the remedy before it is effective. The Court has held that judicial remedies furnish strong guarantees of independence, access for the victim and family, and enforceability of awards in compliance with the requirements of Article 13 of the Convention'. See *The Tagayeva and Others v Russia* (n 248) Ch. 2, paras 619 and 620.

[240] See the discussion of some of these cases presented in Chapters 2 and 3, pages 32-36 and 76-78, including *Kontrova v. Slovakia* App no. 7510/04 (ECHR, 31 May 2007), para 72; *Opuz v Turkey* App no. 33401/02 (ECHR. 9 June 2009), para 210; *Branko Tomašić and Others v Croatia* App no. 46598/06 (ECHR, 15 Janury 2009), para 78; *Eremia v the Republic of Moldova* App no 3564/11 (ECHR, 28 May 2013), para 98. For further details, see Jakštienė (n 184) Ch. 2, 81-82.

[241] See *Mahmut Kaya v. Turkey* App no 22535/93 (ECHR, 28 Mar 2000), paras 135, 138-142. *Aksoy v Turkey* App no 21987/93(ECHR, 18 December 1996), para 113; *Anguelova v. Bulgaria* App no 38361/97 (ECHR, 13 June 2002), paras 170-173. For further details, see Shelton (n 3) 303-304.

[242] See Rubio-Marin, Sandoval and Diaz (n 220) 226, 232. For instance, see the judgment of the Court in the case of *McCann v United Kingdom* (1995) 21 EHRR 97, paras 177-178.

[243] Rubio-Marin, Sandoval and Diaz (n 220) 226.

[244] In calculating loss of earnings, the Court is reluctant to rely on presumptions, and should it do so this would be at the request of the claimants. For instance, the Court made such presumption in the case of *Akhmadova and Sadulayeva v Russia* App no 40464/02 (ECHR, 10 May 2007), para 140.

[245] See *Akhmadova and Sadulayeva v Russia* (n 244), paras 139-143. See Rubio-Marin, Sandoval and Diaz (n 220) 226.

[246] Shelton (n 3) 304; Rubio-Marin, Sandoval and Diaz (n 220) 226. For instance, see the judgment of the Court in *Cakici v Turkey* App no 23657/94 (ECHR, 8 July 1999), para 127.

[247] Rubio-Marin, Sandoval and Diaz (n 220) 226.

are often left in penury, since frequently the killed or disappeared person was the breadwinner.[248] Similarly, family members can also face difficulties in obtaining compensation for their own pecuniary damages because of the death or disappearance of a relative.[249] Despite clear evidence that the family members of the deceased have lost opportunities and income, and incurred costs (including funerary, medical, and legal expenses), the Court has not usually granted pecuniary damages to applicants; when it has done so, it has often required thorough substantiation of the claims.[250]

b) Moral Compensation

Difficulties also arise regarding compensation for moral damages which include the pain and suffering caused by the victims' death. Although the Court considers that the graver the violation, the higher award,[251] it lacks systematic rules to calculate what an award should be.[252] Only when it has been proved that the victim was arbitrarily detained or tortured before being killed or disappearing will the Court award reparations for moral damages to successors on behalf of the deceased.[253] For moral damages to successors, the Court has been inconsistent in granting them. In making such decisions, the Court seems to have depended on whether applicants claim moral damages on behalf of the victim.[254]

As far as compensation to relatives for their own suffering because of the loss of a family member is concerned, the Court has adopted a narrow interpretation of what constitutes a violation of Article 3 of the Convention regarding prohibition of torture and inhuman treatment.[255] It rarely considers relatives of victims who have been killed to be themselves victims of inhumane treatment. Even where the relatives of victims of enforced disappearance have been considered by the Court to have possibly suffered inhumane treatment, this happens only under special circumstances and the applicants are still required to prove the intensity of that suffering and anguish.[256]

c) Other Measures of Reparation

[248] Ibid.
[249] Ibid. 238.
[250] See, for instance, *Akhmadova and Sadulayeva v Russia* (n 244), para 141.
[251] Rubio-Marin, Sandoval and Diaz (n 220) 227; see, for instance the case of *Mahmut Kaya v. Turkey* (n 241), paras 138-142.
[252] Ibid. 227.
[253] Ibid.; see, for instance the case of *Timurtas v. Turkey* app no 23531/94 (ECHR, 13 June 2000), para. 127.
[254] For further details, see Rubio-Marin, Sandoval and Diaz (n 220) 227.
[255] Ibid. 233.
[256] See the Court judgment in *Cakici v Turkey* (n 246), para 98. See Citroni (n 233) 66-67; see also *Bazorkina v Russia* app no 69481/01 (ECHR, 27 July 2006), para 139. For further details, see Rubio-Marin, Sandoval and Diaz (n 220) 233-235.

The Court has often indicated that pecuniary compensation alone is inadequate to remedy the violation of the right to life and, therefore, has required member states to adopt further specific measures of reparation.[257] For instance, although the Court has not explicitly referred to 'the right to know the truth', it has acknowledged that, in cases such as enforced disappearance, the right of the relatives of the disappeared person not to be the subject of cruel and inhuman treatment as required by Article 3 of the Convention may be violated when the state has failed to investigate such violations and to inform the relatives of the results.[258] The denial of this right, therefore, is not just a denial of the right to a remedy, or investigation or reparation, but is also painful, inhuman and debasing behaviour as it leads to new grief for victims and relatives.[259] Some have maintained that when the Court takes a non-restrictive interpretation to reparation by including rehabilitation, satisfaction, and non-repetition, specifically in cases of gross HR violation, it undoubtedly adopts an attitude more in line with the aims and purpose of the Convention.[260]

The Court has recently tended to adopt broader measures of reparation in addition to pecuniary compensation.[261] For instance, in the case of *Aslakhanova and Others v. Russia*,[262] the Court for the first time 'felt compelled to provide some guidance on certain measures that must be taken, as a matter of urgency'. This was achieved to end the ongoing misery of the family of the disappeared, by effectively investigating the kidnapping, illegal imprisonment and disappearance allegedly committed by service personnel, to ensure that families are given adequate compensation.[263] These measures included creating a high level body to investigate disappearances and the allocation of adequate resources 'to carry out large-scale forensic and scientific work on the ground, including the location and exhumation of presumed burial sites; the collection, storage and identification of remains and, where necessary, systematic matching through up-to-date genetic databanks'.[264] In addition to providing pecuniary compensation, the Court

[257] See Chapter 3 of the thesis, pages 72-80; Doak (n 3) Ch. 2, 217.
[258] See, for instance, the Court judgment in the case of *Kurt v Turkey* app no 15/1997/799/1002 (ECHR, 25 May 1998), para 174. See International Commission of Jurists (n 206) 88-89.
[259] International Commission of Jurists (n 206) 89.
[260] See Citroni (n 233) 62-63; Bottigliero (n 20) 156; Shelton (n 3) 148-151.
[261] See Fulton (n 203) 780; Citroni (n 233) 64. In cases of enforced disappearance, the procedural obligations under Articles 2 and 3 of the ECHR are important in providing redress to applicants and helping affected societies come to terms with the past. However, the states concerned may be obstructive by creating difficulties over applications to the Court and denying the events in question; they may, thus, actively undermine the proceedings of the Court. For further details, see Helen Keller and Corina Heri, 'Enforced Disappearance and the European Court of Human Rights: A 'Wall of Silence', Fact-Finding Difficulties and States as 'Subversive Objectors' (2014) *Journal of International Criminal Justice* 1, 1-16.
[262] *Aslakhanova and others v. Russia* apps nos 2944/06, 8300/07, 50184/07,332/08 and 42509/10 (ECHR, 18 December 2012).
[263] Ibid., para 221; see Fulton (n 203).
[264] *Aslakhanova and others v. Russia* (n 262), paras 225-226.

demanded that the state clearly admit responsibility for the pain and suffering caused to the victims' families.[265]

In the recent case of *Cyprus v Turkey*, the Grand Chamber considered a claim for just satisfaction on behalf of two groups of victims of enforced disappearance.[266] In this case, financial compensation for non-pecuniary damage was the only remedy claimed and awarded to the victims. However, the Court noted that as 'the impact of the violation may […] have impinged so significantly on the moral well-being of the applicant', this meant that there was a moral aspect to the monetary award and, therefore, more was required than the mere recognition of wrong doing in the judgment.[267] In order 'to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage' the Court awarded appropriate damages.[268]

However, broader measures of reparation, such as the provision of medical or psychological rehabilitation, social assistance, public apologies, acknowledgment of international responsibility by the authorities, commemorations or tributes to the victims or the building of a memorial monument, have never been taken into serious consideration by the Court or by states involved in violations of HR.[269] In addition, the Court has not adequately paid attention to the fact that society is also damaged by such violation and, therefore, is entitled to measures of reparation, especially regarding future non-repetition.[270] Despite giving some recognition to the existence of this damage to the whole society,[271] the Court has not deemed it appropriate to order any relevant measure of reparation for it.[272] Moreover, it has refrained from ordering other forms of reparation, such as the overturning of decisions of domestic authorities, the negating of domestic legislation that is not compatible with the European Convention, or the alteration of a state's legislation.[273]

4.5.2.2 Summary Remarks

[265] Ibid., para 227; see Fulton (n 203) 781; Citroni (n 233) 64.
[266] In the case of *Cyprus v. Turkey*, while the Grand Chamber for the first time stated that just satisfaction could be made between states in cases of inter-state conflict, it also required that this should always be done for the benefit of individual victims. *Cyprus v. Turkey* app no 25781/94 (ECHR, 12 May 2014), para 46; see Fulton (n 203).
[267] *Cyprus v. Turkey* (n 266), para 56; Fulton (n 203).
[268] *Cyprus v. Turkey* (n 266), para 56; Fulton (n 203).
[269] Citroni (n 233) 68; Octavian Ichim, Just Satisfaction under the European Convention on Human Rights (Cambridge University Press, 2014) 19-20.
[270] Citroni (n 233).
[271] For instance, see the Court judgment in *El-Masri v Former Yugoslav Republic of Macedonia* app no 39630/09 (ECHR, 13 December 2012), para 191.
[272] Citroni (n 233) 68.
[273] See Doak (n 3) Ch. 2, 217; Bottigliero (n 20) 156.

It is clear that the Court generally narrows the interpretation of Article 41 of the ECHR in ordering states to provide merely pecuniary compensation for the financial or moral damages resulting from the violation of individuals' right to life; even when all conditions of Article 41 have been fulfilled, at its discretion it may allow this compensation to be granted to the next of kin for damages incurred by the victims or for their own damages. Although the Court will in principle award moral damages to the next of kin in cases of disappearance and killing, it does not always award pecuniary compensation. If it does make pecuniary compensation, the amount is generally smaller than claimed and it requires thorough substantiation of such claims.[274] In addition, the Court does not pay any attention to the loss of life as a damage in itself in awarding compensation. Moreover, the Court has repeatedly affirmed that the main responsibility for the determination and implementation of other measures of reparation lies with the respondent state and the Committee of Ministers.[275] It has been suggested that the position of the Court, therefore, requires development as other international standards may better guarantee 'redress to victims of HR violations',[276] such as the Inter-American Court. Nevertheless, the Court, in asserting that compensation must in principle be only part of redress of mechanisms in cases of the violation of the right to life, it recognises the need for further reparation measures.[277] However, the Court may be said to have failed to fully enhance redress mechanisms by which the moral and legal rights of victims of the violation of the right to life to holistic reparation can be promoted against their states.

4.5.3 Reparations under the Jurisprudence of the IACtHR

The Court's judgments have been described by commentators as representing 'the most wide-reaching remedies afforded in international HR law'.[278] Article 63(1) expressly authorises the Court to order three kinds of reparations for the violation of HR by the state, namely, the ensuring of the enjoyment of rights or freedoms, remedy for violations and

[274] See Rubio-Marin, Sandoval and Diaz (n 220) 288.
[275] For instance, see *Aslakhanova and others v. Russia* (n 262), paras 220, 238. See Citroni (n 233) 65-66.
[276] Doak (n 3) Ch. 2, 217.
[277] See, for instance, the judgment of the Court in case of *Keenan v United Kingdom* app no 27229/95 (ECHR, 3 April 2001), para 130; for further details, see Rianka Rijnhout and Jessy M. Emaus, 'Damages in Wrongful Death Cases in the light of European Human Rights Law: Towards a Rights-Based Approach to the Law of Damages' (2014) 10 *Utrecht Law Review* 91, 95-97. In addition to its order to pay compensation for non- pecuniary damage victims have incurred, the ECtHR recently indicated that 'the above found violations should be addressed by a variety of both individual and general measures consisting of appropriate responses by the State institutions, aimed at drawing lessons from the past, raising awareness of the applicable legal and operational standards and deterring new violations of a similar nature. Such measures could include further recourse to non-judicial means of collecting information and establishing the truth, public acknowledgement and condemnation of violations of the right to life in the course of security operations, and greater dissemination of information and better training for police, military and security personnel in order to ensure strict compliance with the relevant international legal standards'. *The Tagayeva and Others v Russia* (n 248) Ch. 2, paras 640 and 649. See Chapter 3, pages 75-76.
[278] See Shelton (n 3) 153.

the award of fair compensation.[279] Interestingly, it has been suggested that, unlike the reparation required by the European Court, the reparation orders of the Inter-American Court will be effective and independent of any limitation by domestic law.[280] Because Article 63(1) makes no reference to domestic law, the Court can therefore 'proceed to the determination of the measures of reparation on the basis –autonomously –of the American Convention itself and of the applicable general principles of international law'.[281]

The Court has repeatedly stated that the authority given to it by this Article to order reparation for the violation of HR embodies 'one of the fundamental principles of international law'.[282] Such authority allows the Court to demand the full reparation measures recognised by international law without any restriction in terms of domestic law.[283] In *Velasquez Rodriguez v Honduras*,[284] it was held that such reparation might entail:

> the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.[285]

The decision of the Court in this case, in recognising for the first time that the state has a duty, in certain circumstances, to provide reparation to victims of HR violations committed by non-state or unidentified actors, has been claimed to be significant.[286] This claim is based on the Court's assertion that the state must 'if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation'.[287] This may be reasonably interpreted to mean that, although the Court did not detail when the state would be obliged to provide compensation if the perpetrators of the violation of HR are unknown or are unable to provide compensation themselves, the state has a duty to guarantee such compensation.[288]

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[279] Douglas Cassel, 'The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights' in Koen Feyter, *Out of the Ashes. Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentianv 2005) 192; Jo M. Pasqualucci, The Practice and Procedure of the Inter-American Court of Human Rights (Cambridge University Press 2013) 191-192.

[280] G. Donoso, 'Inter-American Court of Human Rights' Reparation Judgments. Strengths and Challenges for a Comprehensive Approach' (2009) 49 *Revista Instituto Interamericano de Derechos Humanos* 29, 42.

[281] See Manfred Novak, 'The Right to Reparation of Victims of Gross Human Rights Violations' (2001) 7 *Human Rights in development* 275, 296; see also Donoso (n 280) 42.

[282] Cassel (n 279) 192. See *Cantoral-Benavides v. Peru,* Judgment of December 3, 2001, Inter-Am Ct. H.R. (Ser. C) No. 88 (2001), para 40. Shelton (n 3) 217.

[283] Cassel (n 279). See *El Amparo Case (Reparations)* (1996) 28 Inter-Am. Ct. H.R. (Ser. C), para 15. See also the judgments of the Court in *Velásquez Rodríguez v Honduras* (1989) 28 ILM 291, paras 30-31; *Myrna Mack Chang Case* (2003) 101 Inter-Am. Ct. H.R., (Ser. C), paras 234-236. For further details, see Saul (n 29) 540-542.

[284] *Velásquez Rodríguez v Honduras* (n 283).

[285] Ibid., para 26.

[286] See Rose (n 198) 326. *Velásquez Rodríguez v Honduras* (n 283), paras 172, 174, 182.

[287] Rose (n 198); *Velásquez Rodríguez v Honduras* (n 283), para 166.

[288] However, the phrase 'if possible' used in this passage could open the way to an exemption to this obligation, since it could imply that a state would not be bound by this obligation if there were practical difficulties, such as a state's poor financial situation. Rose (n

a) Compensation for Pecuniary and Moral Damage Suffered by Victims

For the right of victims who have lost their lives to be compensated for the pecuniary and moral damages they suffered, and the capacity of this right to be transferred to their surviving relatives, the Court has established clear principles and presumptions regulating the award of compensation to successors.[289] The basic principle followed by the Court is that the victim's right to repair for damage experienced up to the time of death is transferred to their family.[290] In deciding the amount of compensation for the loss of earnings of a person who has disappeared or been killed, the Court has considered age at the time of death, life expectancy in the country to which the victim belonged, and the particular facts of the case. This has enabled the Court to determine the income that the victim would have received had their right to life not been violated, and 'based upon the income the victim would have received […] up to the time of [their] possible natural death'.[291] Such compensation has been guaranteed even in cases where the applicant or Court or both have been unable to assess what the victims' income would have been.[292] The Court has also awarded compensation for the moral damages suffered by victims of violation of their right to life to their successors on the basis that, in grave cases, such as killings or forced disappearances, 'anyone subjected to aggression and abuse will experience moral suffering'[293] and, therefore, once responsibility is established, no evidence of proof of moral suffering is required.[294] This is to say that moral suffering is self-evident,[295] in spite of the Court's assertion that 'the reparations must have a causal

198); Arthur J. Carrillo, 'The Relevance of the Inter-American Human Rights Law and Practice to Repairing the Past' in Pablo de Greiff, *The Handbook of reparation* (Oxford University Press 2008) 506.

[289] See Rubio-Marin, Sandoval and Diaz (n 220) 228. Respecting the identification of who is a successor, the children and the spouse or partner of the direct victim have been designated by the Court, in principle, as his/her successors. Ibid. 230. While such designation is normally guided by national law, the Court went beyond this, as in *Aloeboetoe et al. v. Suriname.* In this case, the Court looked at the indigenous cultural understanding of successors. *Aloeboetoe et al. v. Suriname*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. I1 (Dec. 4, 1991), para 62; Diana Contreras-Garduño and Julie Fraser, 'The Identification of Victims Before the Inter-American Court of Human Rights and the International Criminal Court and its Impact on Participation and Reparations: A Domino Effect?' (2015) *Inter-American and European Human Rights Journal*, Forthcoming 174, 195.

[290] *Garrido and Baigorria v Argentina*, reparations, Judgment of August 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 39 (1998), para 50.

[291] *Velásquez Rodríguez v Honduras* (n 283), para 46; Rubio-Marin, Sandoval and Diaz (n 220) 228; Pasqualucci (n 279) 230.

[292] The Court in such cases 'will presume with respect to loss of earnings that a person would have had a job earning at least the minimum wage in the country at the time of the violation, and will adjust that wage according to inflation until the moment the person would have died at the age of life expectancy in the country'. See, for instance, the Court judgments in the following cases, namely *Castillo Pdez v Peru*, reparations, Judgment of November 27,1998, Inter-Am. Ct. H.R. (Ser. C) No. 43 (1998), para 75; *Caracazo v Venezuela*, reparations, Judgment of August 29, 2002, Inter-Am. Ct. H.R. (Ser. C) No. 95 (2002), para 88. For further details, see Rubio-Marin, Sandoval and Diaz (n 220) 228- 229; Saul (n 29) 552-254; Pasqualucci (n 279) 230-231.

[293] See, for instance, the Court judgments in *Garrido and Baigorria v Argentina* (n 290), para. 49; *Loayza Tamayo v Peru*, reparations, Judgment of November 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 42 (1998), para 138; see Rubio-Marin, Sandoval and Diaz (n 220) 229; Saul (n 29) 556.

[294] For instance, see the case of *Aloeboetoe et al. v. Suriname* (n 289), paras 62-65; *Garrido and Baigorria v Argentina* (n 290), paras 86, 87-90; The *Street Children* case, reparations, Judgment of May 26, 2001, Inter- Am. Ct. H.R. (Ser. C) No. 77 (2001), para 90. see Rubio-Marin, Sandoval and Diaz (n 220) 229-231

[295] See Pasqualucci (n 279) 236.

link with the facts of the case, the alleged violations, the proven damages, as well as with the measures requested to repair the resulting damages'.[296]

b) Compensation for the Damage of Death

The Court has limited itself to order compensation for the moral and material damages resulting from the victim's loss of life and never awarded such compensation in respect of the violation of the intrinsic value of the deceased's life which, according to Shelton, is a 'concept... linked to self-actualization of the person', nor for the loss of enjoyment of life.[297] Shelton explained that, although the Court has accepted the concept of awarding damages for the intrinsic value of life, what is called a 'life plan',[298] it has failed to make any actual award.[299] For instance, although the Court in the case of *Loayza Tamayo*, acknowledged the possibility of grave damage to a life plan by violations of HR, it has stated that 'neither case law nor doctrine has evolved to the point where acknowledgment of damage to a life plan can be translated into economic terms. Hence, the Court is refraining from quantifying it'.[300] Similarly, the Court rejected the claim of the Inter-American Commission in the case of *Bámaca Velásquez,* which asserted that there was evidence to suggest that the victim, a guerilla leader, had planned to serve civil society following peace accords in Guatemala, and that his killing by the state violated his right to live out his life plan, as well as causing him material and moral damages.[301]

While such acceptance of the damage to a life plan of the deceased is a form of recognition of the hedonistic value of life,[302] the intrinsic value of life should be understood in a holistic way, focusing on the broader notion of appreciating various aspects of life, rather than just the victim's professional or personal goals and aspirations.[303] In addition, there is a distinction between the harm done to the value of life, and the moral suffering or loss of earnings suffered by the dependants of the victim.[304] Saul further states that 'courts may fail to recognize the difference between damages for the value of human life, as distinct from the deceased's loss of earnings or moral suffering'.[305]

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[296] For further details, see Contreras-Garduño and Fraser (n 289) 195-196.
[297] See Saul (n 29) 570; Dina Shelton, Remedies in International Human Rights Law (Oxford University Press 1999) 230.
[298] See the Court judgment in the case of *Loayza Tamayo v Peru* (n 481), para 147-148. Saul (n 29) 564; Pasqualucci (n 279) 245.
[299] Shelton (n 297) 229.
[300] *Loayza Tamayo v Peru* (n 293), para 153. Saul (n 29) 565.
[301] *Bámaca Velásquez Case*, Judgment of February 22, 2002, Inter-Am. Ct. H.R (Ser. C) No. 91 (2002). See Saul (n 29) 565.
[302] Shelton (n 297) 229, 245; Saul (n 29) 571.
[303] Shelton (n 297) 245; Saul (n 29) 572.
[304] Shelton (n 297) 262.
[305] Saul (n 29) 571.

c) Compensation for the Next of Kin for Suffering

The Court has accepted that victims' next of kin can suffer material damages in their own right, including consequential damages and loss of earnings.[306] Consequential damages have been usually recognised by the Court for a next of kin who suffered economic damage incurred in expenses in dealing with consequences of the violation.[307] Where such loss has been proven or presumed to have been incurred, the Court will order the state to compensate for them.[308] For instance, in the *Cotton Field v. Mexico*[309] which concerned the abduction, sexual abuse and killing of more than 300 women and girls by non-state actors, the Court recognised that the next of kin of three of the girls had suffered consequential damage as a result both of trying to find them and then paying their funeral expenses.[310] Like consequential damages, the Court also awarded compensation for the damages of loss of earnings incurred by the next of kin who were considered to have suffered damages in their own right.[311]

Moral harm (pain and suffering) to the next of kin of victims has also been taken into consideration by the Court. For instance, the Court in *Blake v Guatemala case*,[312] considered the next of kin of a disappeared person to be victims, since it found that their own right to human treatment encompassed by Article 5 had been violated.[313] The Court considered that the burning of the mortal remains of Mr. Blake added to the Court's declaration that 'the circumstances of such disappearances generate suffering and anguish [in the family], in addition to a sense of insecurity, frustration and impotence in the face of the public authorities' failure to investigate'.[314] The crucial factor in determining whether the right of the next of kin of victims under Article 5 has been violated is not the inadequate conduct of the state authorities regarding their requests, but has always been the harm caused by the HR violation, in its own right, to family members.[315] According

[306] Rubio-Marin, Sandoval and Diaz (n 220) 245-246.
[307] Ruth Rubio-Martn and Clara Sandoval, 'Engendering the Reparations jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment' (2011) 33 *Human Rights Quarterly* 1062, 1085.
[308] Rubio-Marin, Sandoval and Diaz (n 220).
[309] *González et al. ("Cotton Field") v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009).
[310] Ibid., paras 561-567. For further details, see Rubio-Martn and Sandoval (n 307) 1085.
[311] See, for instance, the judgment of the Court in the case of *Bámaca Velásquez Case* (n 301). See Rubio-Marin, Sandoval and Diaz (n 220) 258.
[312] *Blake v. Guatemala*, judgment, January 24, 1998, Inter-Am. Ct. H.R. (ser. C) No. 36 (1998).
[313] Rubio-Marin, Sandoval and Diaz (n 220) 242.
[314] *Blake v. Guatemala* (n 312), para 115. See also *Street Children Case* (n 294). Rubio-Marin, Sandoval and Diaz (n 220) 243.
[315] Rubio-Marin, Sandoval and Diaz (n 220) 244.

to the Court, the attitude of the state authorities is just one factor in determining the gravity of the suffering.[316]

4.5.3.1 Satisfaction Measures of Reparations

Moral reparations and future deterrence in cases of gross HR violations may well be important consequences derived from the measures of satisfaction required by the Inter-American Court.[317] Such remedies are non-financial in nature and meant to contribute to repairing the suffering and anguish caused by such violations, and to underline the significance of the harm done to human values by them.[318] For instance, in the case of *Cotton Field v. Mexico*,[319] the Court responded positively to the request of the Commission and the legal representatives of the victims to order the state to provide victims with satisfaction measures, including acknowledgement by the Mexican authorities of their international responsibility for the serious damages done to victims, the publication of the Court's judgment, and the construction of a memorial.[320]

The Court has also regularly ordered the offending state to make an official and public apology to the victims or their next of kin for the violation of victims' HR.[321] For instance, in the case of *Moiwana Village v. Suriname*[322] concerning the alleged massacre of over 40 men, women and children in an attack by members of the armed forces of Suriname, which razed the village of the N'djuka Maroon of Moiwana in 1986, the Court asserted that:

> as a measure of satisfaction to the victims and in attempt to guarantee the non-repetition of the serious HR violations that have occurred, the State shall publicly recognize its international responsibility for the facts of the instant case and issue a[public] apology to the Moiwana community members.[323]

The publication of the judgment of the Court in national newspapers is also a measure of satisfaction regularly ordered by the Court in cases of HR violations.[324] The Court has also, for instance, in the case of *Yatama v. Nicaragua*[325] required its judgment to be broadcast in a number of local languages using community radio to publicise the

[316] See *Goiburú et al. v. Paraguay*, Judgment of August 22 September 2006, Inter-Am. Ct. H.R. (Ser. C) No. 153 (2006), para 197. For further details, see Rubio-Marin, Sandoval and Diaz (n 220) 244-256.
[317] See *Cantoral-Benavides v. Peru* (n 282), para 81; *Myrna Mack Chang Case* (n 283), pars 285-286; see Cassel (n 279) 204.
[318] Pasqualucci (n 279) 204.
[319] *González et al. ("Cotton Field") v. Mexico* (n 309).
[320] Ibid., paras 465-466. See Rubio-Martn and Sandoval (n 307) 1087.
[321] See, for instance, the Court's judgments in the following cases: *Cantoral-Benavides v. Peru*, para 81; *Montero-Aranguren et al (Detention Center of Catia) v. Venezuela* Judgment of July 5, 2006, Inter-Am Ct. H.R. (Ser. C) N0. 150, para 150.
[322] *Moiwana Community v. Suriname*, Judgment of June 15, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124 (2005), para 216.
[323] Ibid., para 216; see Antkowiak (n 4) Ch. 3, 379-380.
[324] Pasqualucci (n 279) 205; Antkowiak (n 4) Ch. 3, 380.
[325] *Yatama v. Nicaragua* judgment of June 23, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127 (2005).

verdict.[326] In a recent development, the Court ordered the state to publish its judgment on state websites for a period of at least one year.[327] Such broad publication is considered a necessary measure to restore the dignity of victims by informing the general public of the Court's findings.[328] In the words of the psychiatrist, Judith Herman, 'remembering and telling the truth about terrible events are prerequisites both for the restoration of the social order and for the healing of individual victims'.[329]

In line with the above measures of restoring dignity to victims and honouring their memory, the Court has further ordered states to adopt initiatives to keep their memory alive, such as the placing of commemorative plaques in places were victims were killed,[330] the erection of monuments,[331] and the naming of streets, schools and squares after victims in memory of them.[332] These memory-related measures ordered by the Court are meant to give satisfaction to victims and be a reminder, to ensure that the violation will not be repeated.[333] In the *Street Children Case*, for instance, the Court reasoned that its order to name an education centre after the victims and to place upon it a plaque would serve to awaken the nation's conscience and help avoid repetition of harmful acts.[334] It is important to note that reparations ordered by the Court are not solely directed to individual victims. In its judgments, the Court has a well-established practice of repairing the damage done to the entire community where violations of HR had been committed against entire communities with the intention of altering social relations, the dynamic of families, and the rest of the community.[335]

4.5.3.2 Summary Remarks

It can be said that although the right of victims to seek redress directly from perpetrators has been slow to be recognised in international law, the Inter-American Court's decisions

[326] Ibid., paras 252-253; Pasqualucci (n 279) 206; Antkowiak (n 4) Ch. 3, 380.
[327] *Manuel Cepeda Vargas v. Colombia* judgment of May 26, 2010 Inter-Am. Ct. H.R. (ser. C) No. 213 (2010), para 220; Pasqualucci (n 279) 206.
[328] Pasqualucci (n 279) 205.
[329] Antkowiak (n 4) Ch. 3, 380.
[330] The *Ituango Massacres v. Colombia* Judgment of July 1, 2006 Inter-Am. Ct. H.R. (ser. C) No 148 (2006), para 408; *La Rochela Massacre v. Colombia*, Merits, Reparations, and Costs, 2007 Inter-Am. Ct. H.R. (ser. C) No. 163 (11 May 2007), para 277; *Kawas-Fernández v. Honduras* Judgment of April 3, 2009 Inter-Am. Ct. H.R. (Ser. C) No. 196 (2009), para 206; for further details, see Maria Chiara Campisi, 'From a Duty to Remember to an Obligation to Memory? Memory as Reparation in the Jurisprudence of the Inter-American Court of Human Rights' (2014) 8 *International Journal of Conflict and Violence* 61, 67-74; Pasqualucci (n 279) 206.
[331] See, for instance, the Court judgments in cases of the *Moiwana Community v. Suriname* (n 322), para 218; *Cotton Field v. Mexico* (n 309), para 471; *Plan de Sánchez Massacre v. Guatemala*, Judgment of November 19, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116 (2006), paras 100-101.
[332] The *Street Children Case* (n 294), para 103; *Servellón-García et al. v. Honduras* Judgment of September 21, 2006 Inter-Am. Ct. H.R. (ser. C) No. 152 (2006), para 199.
[333] Campisi (n 330) 73; Pasqualucci (n 279).
[334] The *Street Children Case* (n 294), para 103; Pasqualucci (n 279); Antkowiak (n 4) Ch. 3, 381.
[335] See *Plan de Plan de Sánchez Massacre v. Guatemala* (n 331), paras 86, 105, 117, resolutions 6-8. For further details, see Pasqualucci (n 279) 210-211.

on reparations have made an invaluable contribution, not only to the recognition of a legally enforceable right of reparation for victims of HR violations,[336] but also in demonstrating what regional enforcement mechanisms can make to the progressive development of international law. The Court has relied on the authorisation given to it by Article 63(1) of the ACHR to regularly order offending states to provide victims with compensation for material and moral damages caused by such violation; moreover, it has gradually become more generous in awarding such compensation.[337] Although the Court has seriously considered the whole aspect of the damage to life, including the damage to the life plan, it has, nevertheless, refrained from granting compensation for the intrinsic value of life or hedonistic damage.[338] More importantly, the Court has disregarded requiring the objective aspect of the damage of death (the loss of life) to be a damage deserving of compensation in itself. However, the Court has acknowledged that monetary compensation is inadequate to redress the damage of death and, therefore, has ordered offending states to adopt a wide range of non-monetary measures, including rehabilitation, satisfaction, and guarantees of non-repetition. It has done so to restore to victims a sense of justice and dignity, as well as to strengthen their status in their domestic legal systems.

4.6 Conclusions

The main aim of this chapter was to investigate the nature of international legal obligations concerning the right of victims to reparation for the violation of the right to life. International and regional instruments in recent times have stressed that it is the responsibility of the state to provide reparations for victims. Many rationales have been introduced to justify placing a duty on the state to compensate such victims. One rationale is that the state has a social contract with its citizens to protect them in return for their acceptance of limitations to the right of individuals to protect themselves against violent crimes.[339] Similarly, the state may be held responsible for the actions of non-state actors either directly or secondarily since it has the ability to exert 'effective control' over them and/or 'a sufficiently close connection to the non-state actor to bear secondary responsibility for having failed to prevent them from committing their wrong'.[340] Therefore, the failure of the state to prevent violent crimes provides a basis for

[336] Doak (n 3) Ch. 2, 219.
[337] Saul (n 29) 584.
[338] Ibid.
[339] See Daniel W. Van Ness, 'Accountability' in Jenifer J. Llewellyn and Daniel Philpott, *Restorative Justice, Reconciliation, and Peacebuilding* (Oxford University Press 2014) 129.
[340] Ibid.

compensation for victims by the state.[341] A second rationale is that the state should bear social responsibility when 'actually producing or inducing crime in the first place. That is, it is claimed that the state helps produce a social environment that is conducive to crime and it therefore produces crime victims'.[342] A third rationale is based on the concept of social intervention, which considers violent crime against members of a community to be a social problem and, therefore, requires solidarity with victims. Moreover, where a state has assumed major control over criminal justice, although historically victims have no legal claim for state assistance, the state nevertheless has a social obligation to make amends.[343] While not all the above rationales are of equal weight in requiring the state to take on the duty to compensate victims of violent crime when such compensation has not been made by offenders, taken together they amount to a very strong case and can be said to put victims in a strong moral and legal position to have their right to reparations acknowledged by the state. However, taking the death of victims very seriously may imply more than financial compensation if it is, at least to some extent, to be addressed adequately by the state. Therefore, the best approach for a state is to fully respond to both the monetary and symbolic aspects of reparations.

The most notable steps in addressing the implications of violations of the right to life by promoting the right of victims to receive holistic reparations may be said to have been made by the jurisprudence of the IACtHR. The development of its jurisprudence is significant when compared to the practice of the HRC and the ECtHR, which generally tends to narrow the scope of reparation. The IACtHR has largely followed international law by requiring victims to be provided not only with monetary compensation for material and moral damages but also with a wide range of non-monetary measures. Such comprehensive reparations measures ordered by the Court may send the right message to offending states that the adoption of reparations programmes is essential for restoring trust and engendering hope for future right relationship in society. This approach of the Inter-American Court, as has been suggested, has the 'role [of] humanizing reparations in international HR law'.[344]

[341] Ibid. 130.
[342] Ibid.
[343] Ibid.
[344] Ichim (n 269) 20.

Chapter 5: The Status of the Rights of Victims in the Present Iraqi Legal System

5.1 Introduction

Previous chapters have discussed the moral and legal rights of victims to security, investigation, prosecution and punishment of violent crime by non-state actors, and reparation for these violations according to philosophical/ethical principles and international and regional standards. These discussions have established an arguable case for imposing positive obligations on states to secure these rights, even though how and how far they are established varies in form and practice from one human rights body to another. Moving on from these considerations about moral/philosophical and international obligations, this chapter will explore these obligations in the Iraqi legal system, both in theory and practice. It will address the following questions: what affects the ability of the Iraqi state to comply with these obligations? What needs reforming in the Iraqi state and its legal system and practice if these obligations are to be fulfilled? This will be done by firstly providing the background regarding the evolution of the criminal justice system in Iraq, and also by exploring how the failure of the transitional justice process post-2003 has led to the dysfunction of the criminal justice system, resulting in widespread violence and victimisation. It will also consider why, in the light of the current practical and political situation in Iraq, it is so difficult to envisage how such rights can be guaranteed in the day to day practice of its criminal justice system.

Fundamentally, this chapter asks how a well-functioning criminal justice system guaranteeing security, redress, and the rule of law can be said to exist in Iraq, which continues to suffer widespread violence,[1] in the context of the absence of accountability for the violations of the human rights of its citizens. Indeed, while the criminal justice system is a key pillar of stability and security, its complexity means it can only work correctly if several 'interdependent parameters are fulfilled and complement each other'.[2]

5.1.1 The Background to the Current Criminal Justice System

[1] See Alina Christova, 'Seven Years of EUJUST LEX: The Challenge of Rule of Law in Iraq' (2013) 9 *Journal of Contemporary European Research* 424, 425.
[2] Ibid.

Historically speaking, the criminal justice system in Iraq during the 20th century was mainly secular because its substantive and procedural criminal legal foundations are not directly derived from Islamic law or *Sharia*,[3] but modelled after the French legal system.[4] This model was introduced into the Ottoman Empire in the mid-1800s, and has since then continued to strongly influence the Iraqi judicial system and its substantive criminal laws and procedures.[5] From 1920 until today, the Iraqi legal system, including criminal law, reflects not only Ottoman but also Egyptian and Islamic law.[6] In addition, Iraqi criminal law, due to the British occupation in the 1920s, also 'bears vestiges' of English common law and *Sharia* law.[7] Iraq's original Criminal Code was in effect until early 1968, when it was superseded by the 1969 current Penal Code, based on the Baghdad Penal Code.[8]

At present, numerous legal documents, including the Iraqi Constitution (2005),[9] the Criminal Procedure Code (1971) and its amendments,[10] the Penal Code (1969) and its amendments,[11] the Judicature Act (1977) and the Public Prosecutor Law (1979), provide the legal basis of current Iraqi criminal justice.[12] Its main features stem from the fact that crime is seen to be committed merely against the state and society and, thus, the system is the cornerstone of order and stability, as well as a mechanism to punish those responsible for crime and deter future criminal acts. In addition, since 2003 the due process of protection of the rights of suspects, defendants and offenders is contained in various statutes which comply with international standards of human rights, the Constitution,[13] and substantive and procedural criminal law.[14] Thus, Iraq's criminal justice system has mainly focused on controlling criminal activities considered to have been committed against society as a whole, and also on guaranteeing due process for the

[3] *Sharia* in Islam literally means '"the road to the *watering* hole," the clear, right, or straight path to be followed. In Islam, it came to mean the divinely mandated path, the straight path of Islam, that Muslims were to follow, God's will or law'. See John L. Esposito, Islam: the Straight Path (Oxford University Press 1991) 79.
[4] See Michael J. Frank, 'Tring Times: The Prosecution of terrorists in the Central Criminal Court of Iraq' (2006) 18 *Florida Journal of International Law* 1, 27; Michael M. Farhank stated that the Iraqi criminal justice system followed 'a French civil law model'. Michael M. Farhank 'Reconstructing Justice' (2004) 27 *Los Angeles Lawyer* 45, 46.
[5] Frank (n 4) 29.
[6] Ibid. 30; the United States Department of State, Country Report on Human Rights Practices 2004-Iraq, 28 February 2005, <http://www.refworld.org/docid/4226d98932.html> accessed 20 September 2016; see M. Cherif Bassiouni and Michael Wahid Hanna, 'Ceding the High Ground: The Iraqi High Criminal Court Statuse and the Trial of Saddam Hussein' (2006-2008) 39 *Case Western Reserve Journal of International Law* 21, 84.
[7] Frank (n 4) 30.
[8] See Harvey H. Smith et al., Area Handbook for Iraq (U.S. Government Printing Office, Washington 1969) 357.
[9] Iraqi Constitution of 2005, <www.uniraq.org/documents/iraqi_constitution.pdf>.
[10] The Iraqi Criminal Procedure Code of 1971, <http://www1.umn.edu/humanrts/research/Egypt/Criminal%20Procedures.pdf>.
[11] The Iraqi Penal Code of 1969, <http://www.iraq-lg-law.org/en/webfm_send/1350>.
[12] Christova (n 1) 426.
[13] The current Iraqi Constitution embodies various 'principles, guarantees, rights and procedures which are considered basic standards in terms of international law requirements for a criminal justice system'. For further details, see Christova (n 1) 426; see Articles 14, 15, 19 paras (2, 5, 9, 10, 11, 13), 35 of the Iraqi Constitution (n 9).
[14] See Farhang (n 4) 46.

rights of offenders.[15] However, it is argued that it has not taken adequate account of the rights and interests of victims as third parties who have been seriously affected by criminal activities. Moreover, the term 'victim' has not been explicitly referred to in this system; instead the concept of the 'injured party' has been mainly used, causing an injured person to be considered merely as a civil plaintiff in criminal cases claiming compensation. This may partly be attributed to lawmakers being generally concerned with protecting suspects' and offenders' rights to fair treatment and fair trial, to the neglect of concern with the rights of victims. Conversely, it may be said that the Iraqi criminal justice system is mainly concerned with dealing with the crimes of a limited number of non-state actors, including crimes against the right to life. It has been incapable of dealing with the extremely large number of crimes against the right to life which have arisen, and continue to occur as a result of the social and political turmoil existing in Iraq since 2003, particularly because of ethno-sectarian divisions. It is accepted that many criminal justice systems in comparable states would have struggled to cope with the impact of a similar conflict situation.

5.1.2 The Deficiencies of the Transitional Justice Process Post-2003

In essence, it can be argued that the social and political turmoil, the incapacity of the criminal justice system and the neglect of the rights of victims results, in part, from the defects of the transitional justice process post-2003. This process failed to employ all the processes which a society needs to deal with widespread mistreatment, and enable accountability, justice and reconciliation.[16] The records show that the pre-2003 regime committed large-scale abuses against human rights and deliberately limited any protection of them.[17] As one commentator stated, there were a number of 'nightmarish violations of the vast majority of the human rights of the Iraqi population by the Ba'ath regime under […] Saddam Hussein', including numerous extra-judicial killings and torture, detention without due process, widespread disappearances, religious persecution of the Shi'a, and acts of genocide against the Kurds. [18]

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[15] For further details, see Christova (n 1) 431.

[16] See UN Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, S/2004/616, 23 August 2004, 4; the approach of transitional justice has two main features: 'restorative concepts of justice, […and] transitional, which refers to a major political transformation, such as regime change'. See Dana M. Hollywood, 'The Search for Post-Conflict Justice in Iraq: A Comparative Study of Transitional Justice Mechanisms and their Applicability to Post-Saddam Iraq' (2007) 33 *Brooklyn Journal of International Law* 60, 63-64. See also Chapter 3, pages 54-55.

[17] For further details, see Bassim Jameel Almusawi, 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 (PhD thesis, Bangor University 2014) 2-8.

[18] Karima Bennoune, 'Sovereignty vs. Suffering?: Re-Examining Sovereignty and Human Rights Through the Lens of Iraq' (2002) 13 *European Journal of International Law* 243, 249; it has been estimated that the Ba'ath regime was responsible for the death of more than 500,000 Iraqi citizens between 1968 to 2003, but the exact number is undocumented. See Bassiouni (n 6) Ch. 1, 330-331;

Such a long legacy of serious violations of the human rights of Iraqi citizens, specifically the right to life, requires that Iraqi society post-2003 should have had its own process of genuine transitional justice. This process should have considered Iraq's particular circumstances, namely decades of war, economic sanctions (1990-2003), and severe damage to its principles of peaceful co-existence, moral values, legal standards, culture, social fabric, tribal customs, religion and ethno-sectarian identities. The addressing of these particular circumstances would, it is argued, have helped Iraq heal the wounds of the previous horrific oppressive regime, towards establishing the rule of law and bringing about reconciliation.[19] According to many experts, the Collation Provisional Authority (CPA) of the occupying powers seriously failed to do this because it did not consider the existing and historical basis of Iraq's violent context when shaping a reconciliation plan. Rather, the occupying power ranked 'trials over truth, retribution over reconciliation, and corruption over transparency'.[20] Many Iraqi citizens became aware of this. It has been noted that:

> When dealing with past abuses, it is essential to combine approaches that […] seek the truth and deal with […] reparations. No single mechanism can achieve all the goals necessary for a society to hold people accountable for their crimes, re-establish the rule of law under a legitimate government, and prevent abuses from happening again. But instead of setting up a truth-seeking mechanism, the Americans disbanded the Iraqi army, pursued a program of de-Ba'athification, and established the Special Tribunal to hold Saddam Hussein and a handful of others accountable for crimes against humanity and other international crimes under international law.[21]

The chief of the International Centre for Transitional Justice, David Tolbert, has described the process of transition in Iraq-post 2003, both lustration and prosecutions, especially

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U.S. Department of State, Life under Saddam Hussain: Past Repression and Atrocities by Saddam Hussein's Regime, (Apr. 4, 2003), <http://2001-2009.state.gov/p/nea/rls/19675.htm> accessed 20 September 2016; It has been pointed out that 'the Sunni-Shi'a sectarian violence that now threatens to destroy Iraq has its roots in the Ba'ath party apparatus that allowed the Sunni minority to systematically persecute the Shi'a majority'. Hollywood (n 16) 106.

[19] A survey of the Iraqi population in 2003 by the International Centre for Transitional Justice (ICTJ) and the Human Rights Centre (HRC) at the University of California, Berkeley considered how Iraqi citizens would like to address the immense challenges of past human rights abuses. It examined the citizens' perception of how to repair justice and accountability, truth-seeking and remembrance, amnesty, vetting, reparations, and social reconstruction and reconciliation. For further details, see International Centre for Transitional Justice (ICTJ) and the Human Rights Centre of the University of Berkeley, Iraqi Voices: Attitudes toward Transitional Justice and Social Reconstruction, (2004) *International Centre for Transitional Justice* <https://www.ictj.org/publication/iraqi-voices-attitudes-toward-transitional-justice-and-social-reconstruction> accessed 20 April 2017.

[20] See, for instance, Sarkin and Sensibaugh (n 9) Ch. 1, 1073-1074; see the panel discussion about transitional justice conducted by a selection of researchers, experts and thinkers, (2013) 413 *the Arab Future Magazine 98,* 154-166 <http://www.caus.org.lb/Attachments/Transitional%20Justice.pdf> accessed 16 April 2017; Miranda Sissons and Abdulrazzaq Al-Saiedi, 'A Bitter Legacy: Lessons of De-Baathification in Iraq' (2013) *International Center for Transitional Justice* <https://www.ictj.org/sites/default/files/ICTJ-Report-Iraq-De-Baathification-2013-ENG.pdf> accessed 6 May 2017; Ali Mamouri, Transitional Justice fails in Iraq, (6 June 2014) Al-monitor <http://www.al-monitor.com/pulse/originals/2014/06/iraq-transitional-justice-failed.html> accessed 9 October 2017.

[21] Sarkin and Sensibaugh (n 9) Ch. 1, 1062; specifically, the failure of CPA to consult indigenous Iraqis and experts more widely in order 'to explore what Iraqis really needed from a transitional justice framework' gave rise to deep divisions in Iraqi society. For further details, see Ibid. 1060-1067, 1075-1076; even Hussein's execution in 2006 was marked by strong sectarian tensions which worried many Iraqis –Sunni and Shiites alike –who feared it would only increase violence. Moreover, the reparations programmes instituted in 2006 in accordance with the Martyrs Association Law and the Law of the Political Prisoners Association were passed without scrutiny by the relevant legal officials and were underfunded and ill-designed. See Eric Stover et al., 'Justice on hold: Accountability and Social Reconstruction in Iraq' (2008) 90 *International Review of the Red Cross* 5, 5-28.

the policy of De-Baathification of society, as a 'disaster'.[22] This latter policy has been criticised because 'by targeting membership rather than wrongdoing, the stage was set for a collectivization of guilt that had a sharp sectarian edge'.[23] What happened in Iraq, according to the Iraqi jurist Shaaban, did not meet the standards of transitional justice, either in context or performance. Indeed, several factors needed to have been considered, including: the historical sectarian tensions and mistrust between the previous oppressive state and society; the post-2003 collapse of the state; the demobilization of the armed and security forces; and, the flawed and misguided use of the De-Baathification policy. These factors meant that transitional justice was implemented as a tool of 'revenge' and 'exclusion' rather than as a means of seeking truth. No genuine process of accountability was established to heal wounds by providing justice and reparation for victims, build peace, create reconciliation, and reform Iraq's political, legal, judicial and security systems, to establish the rule of law and prevent a recurrence of violence.[24] Consequently, the CPA and its policies failed to meet the needs of Iraqi citizens; in fact, they only succeeded in exacerbating the state of violent unrest by causing further division and perpetuating the climate of violence.[25] A recent survey involving international legal and judicial participants working in Iraq since 2003 reinforced the argument that attempts to reform and establish an effective judicial system based on the rule of law have been unsuccessful. This is largely because participants lacked sufficient knowledge of Iraqi culture and customs, and the long-standing civil-law system on which the Iraqi criminal justice system is based.[26]

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[22] See the panel discussion about transitional justice conducted by a selection of researchers, experts and thinkers (n 20) 154; the new report of ICTJ, entitled 'A bitter Legacy: Lessons of De-Baathification in Iraq' was based on significant field research and interviews with the Higher National De-Baathification Commission (HNDC) established in 2003 by the Iraqi Interim Governing Council with the responsibility of leading the De-Baathification initiatives from 2003-2011; also reviews of the process of De-Baathification in accordance with the Accountability and Justice Law (AJL), which was a new De-Baathification law passed by the Iraqi Council of Representative in 2008. By this Law, the Higher Commission for Accountability and Justice (HCAJ) was established which absorbed most of the HNDC's structure and personnel. The new report clearly demonstrated that this process was 'to a large extent needlessly partisan, controversial, flawed, and ineffective' and that the HNDC and HCAJ only succeeded in heightening feelings of political exclusion, unfair and discrimination treatment against sectarian groups, mainly the Sunni one. For further details, see Sissons and Al-Saiedi (n 20).

[23] See Beth K. Dougherty, 'De-Ba`thification in Iraq: How Not to Pursue Transitional Justice' (2014) *Middle East Institute* < http://www.mei.edu/content/de-bathification-iraq-how-not-pursue-transitional-justice> accessed 10 May 2017.

[24] See the panel discussion about transitional justice conducted by a selection of researchers, experts and thinkers (n 20) 166.

[25] Sarkin and Sensibaugh (n 9) Ch. 1, 1075-1076; the panel discussion about transitional justice conducted by a selection of researchers, experts and thinkers (n 20) 154-166; it is important to note, however, that the Iraqi exiles who came to power after 2003 share responsibility with the CPA for this failure, especially with regard to de-Ba'athification policies which were driven by them. In addition, 'the decision to dissolve the Iraqi armed forces has inspired bitter controversy. Critics have argued that putting hundreds of thousands of potentially armed unemployed Iraqis on the streets—and removing the traditionally significant social prestige accorded to the Iraqi armed forces—contributed immeasurably to the creation of the insurgency that followed. Supporters have countered that the armed forces had already dissolved themselves'. Sissons and Al-Saiedi (n 20) 9-12.

[26] See David L. Shakes, Legal Anthropology on the Battlefield: Cultural Competence in U.S. Rule of Law Programs in Iraq (MSc thesis, University of Nevada, Reno 2015). This lack of understanding has also seriously impacted on attempts to establish an adequate post-2003 transition plan. For instance, 'De-Ba'athification violated the cultural aversion to collective guilt'; in addition, the establishment of a special criminal court (the Iraqi Special Tribunal) to try Saddam and his associates has been criticized by Bassiouni and Hanna because it 'was an ill-advised attempt to blend two distinct legal systems (American and Iraqi) into a single specialized institution'. Ibid 11; see Bassiouni and Hanna (n 6) 21, 24-27.

However, the deficient post-2003 transition in Iraq caused, among other things, the escalation of multifaceted acts of violence, which in turn created human rights abuses, including political, sectarian, terrorist and gender-based violence. These acts must be attributed to the breakdown of the previous Iraqi state's monopoly on violence, and the imposition of a divisive constitution and political system by the occupying powers and their allies. Among other pernicious factors was the historical tradition of violence arising from the cultural, tribal, and sectarian character of Iraqi society.[27] The collapse of the state's repressive monopoly on violence has only resulted in the dispersal of violence to a broad range of competing power blocs. Thus, different social and sectarian groups, including Shia, Sunni and Kurdish, relying on powerful religious, sectarian and triable identities, have through their militias engaged in violent competition for power and scarce resources.[28] Such violence is best understood as a means of seeking a political effect or of bringing about a political change by altering the balance of power between competing groups to further their own ends.[29] One of the main driving forces of this violence has been the rise to power of the Shia majority in political state-building, and the decline of the influence of the Arab Sunni minority; since the beginning of the post-2003 regime change from Sunni to Shia, this minority have felt a deep sense of alienation, loss and victimisation.[30] In addition, the targeting, disenfranchisement, marginalisation, detention and harassment, among other adverse actions,[31] of the Sunni population and its leaders, has resulted in increased violence in an attempt to overturn or weaken the legitimacy of the government. Moreover, the Sunnis consider the unfair application of the Anti-Terrorism Law of 2005, as well as the flawed handling of the de-Baathification policy by

[27] See Mieczysław P. Boduszyński, 'Iraq's Year of Rage' (2016) 27 *Journal of Democracy* 110, 122; Yasir Kuoti, 'Exclusion and Violence in Post-2003 Iraq' (2016) 69 *Journal of International Affairs* 19, 19-28; Saad N. Jawad, 'The Iraqi Constitution: Structural Flaws and Political Implications' LSE Middle East Centre Paper Series 1st November 2013, 1, 4-24; Talib Hussein Hafidh, 'The Political Violence in Iraq' (2009) *Journal of International studies* 95, 114-122; Ahmed Shukr Hamoud Al-Subaihi, 'The Public Policies of Peaceful Living in Iraq in the First Decade after 2003' (2017) 47 *The Journal of Political Science* 155, 155-188; Salma Talal Abdel Hamid, 'Political Corruption as a Cause of Sectarianism' (2015) 3 *Journal of the College of Law of Al-Nahrain University* 1, 15-26; Yassin Mohammed Hamad, 'The Negative Reflections of Political Quotas on the Institutional and Social Structure for the Democratic System in Iraq' (2015) 60 *Journal of International Studies* 21, 31-54.

[28] See David Robert Foster, Exploring Trends in the Targeting of Violence in Iraq Throughout the Lens of Conflict Theory: March 2003 to 2006 (PhD thesis, University of Maryland 2008) 2-3; Kuoti (n 27) 19-28; Harith Hasan Al-Qarawee, 'Iraq's Sectarian Crises: A Legacy of Exclusion' (2014) *Carnegie Middle East Center* 1, 3; Hafidh (n 27) 117; in addition, the collapse of the state's monopoly on violence and violence being shared between various power blocs in Iraq has blurred 'the boundaries between what can crudely be called "political" and "ordinary" crime… there is no simple distinction between…violence serving the organizational goals either of state agencies or non-state political actors and…violence for individual gratification'. Both have been experienced in Iraq. For further details, see Penny Green and Tony Ward, 'The Transformation of Violence in Iraq' (2009) *British Journal of Criminology* 1, 1-19.

[29] Some groups 'use voting and political manoeuvring to secure resources while others initiate violent attacks against the government or other groups that threaten their claim to power. The strategic use of violence is perceived by these groups to be an effective means to contest legitimacy'. Foster (n 28) 2-3.

[30] Fanar Haddad, 'Shia-Centric State Building and Sunni Rejection in Post-2003 Iraq' (2016) *Carnegie Endowment for International Peace* 1-6; Kuoti (n 27) 19.

[31] According to Renad Mansour, 'the blame for the Sunni Arab predicament and the cycles of disengagement in Iraq cannot be placed solely on the Shia-dominated post-2003 central government. Sunni Arab representatives have made strategic choices…that exacerbate their weakened position'. For further details, see Renad Mansour, The Sunni Predicament in Iraq (2016) *Carnegie Middle East Center* 3-20.

the Shia-dominated central government, especially during the rule of former Prime Minister Maliki between 2006-2014, has also led to increased violence for the same ends.[32] Legitimacy can play a key role in ensuring stability in which the political system and institutions of the state genuinely seek to build trust. Such trust is necessary to persuade Iraqi social and ethno-sectarian groups post-2003 that the exercise of authority in the new Iraq is meant only to serve their legitimate expectations of having their dignity and human rights ensured and of living in a secure environment free from fear, intimidation and violence. Legitimacy requires that following social norms, according to Foster, is important in order to 'gain power, and once in power [utilize] resources in a fashion in accordance with fairness and law'. Because legitimacy is about perspective, a group may be perceived as legitimate by the majority but not the minority, and whether this is so is an important factor in establishing if certain rival groups will cooperate. Legitimacy is also based on the controlling group effectively dominating other groups; a group perceived to be illegitimate will fail to gain public support, causing public confidence to fail and cracks to appear, which in turn leads to increased violence.[33]

Regrettably, in the early stages of transitional justice, the building of legitimacy in Iraq was, unsurprisingly, highly contested. This may be because the process was imposed by the CPA and its Iraqi allies without careful consideration of the will of the Iraqi people as to the re-establishment of socially accepted rules and norms capable of ensuring that they could live together peaceably. A constitution which considered this could have paved the way to the unification of the country, and the establishment of law and observation of human rights; moreover, it could have dissuaded ethno-sectarian groups from seeking power merely to achieve their own self interests.[34] According to Jawad:

> any constitution… ensure[s] the rights and liberties of the [citizens], [and] make[s] sure that the [state] will not encroach on them [in addition to] its other role… as the guarantor of the unity and sovereignty of the state… [; however] the US [reduced Iraqi] history …. and identity…to a

[32] See Boduszyński (n 27) 122; political violence in Iraq 'is distinctive in many ways, including bombing of public spaces, the use of car bombs, political assassinations, election violence, and the administration of punitive justice by non-state actors, among others. The motivation for violence has been to subvert the government, capture political power, and establish a new system of rule or even an Islamic State'. Kuoti (n 27) 19-28.

[33] Foster (n 28) 26-30.

[34] The Transitional Administrative Law (TAL), which was issued by the Coalition Provisional Authority (CPA) and approved by the Iraqi Governing Council in 2004 as the new transitional constitution in Iraq superseding the Iraqi constitution of 1970, was written and imposed by the occupying powers without the proper involvement of the people of Iraq. In addition, according to all international agreements, including the Hague and Geneva Conventions, no right is given to a foreign power to change the constitution and impose a new one on an occupied country. By implication, such an imposition by those cooperating with the occupier is also prohibited. Also, the TAL employed the divisive term 'sect' a number of times, such as in Articles 12 and 20, despite the fact that previous Iraqi constitutions had not used this term and it also being rejected by most Iraqi citizens. The use of the word 'sect' was welcomed only by those taking part in the political process; it has been used to make 'a strong argument for those demanding an expansion of the quota system'. See Jawad (n 27) 4-10; according to Jonathan Morrow, 'the TAL process, though it involved some senior Iraqi political figures, was notoriously, if unintentionally, hasty and secretive, and was heavily influenced by US political interests'. See Jonathan Morrow, Iraq's Constitutional Process II: an Opportunity Lost, 2005 *United States Institute of Peace* 5.

> collection of Shias, Sunnis, Kurds and other minorities…Therefore, the new constitution emphasised differences and divisive issues.[35]

These differences and divisions created by the current constitution were mainly attributed to the unrealistic deadline of only two months being imposed by the occupying powers for the preparation of the constitution. The occupying powers, it is argued, were more concerned with their own political agenda than with aiming to provide a successful and valid transition.[36] This may have resulted in the constitution's many shortcomings and the numerous problems which further deepened divisions.[37] In addition, the Sunni groups were side-lined in the establishment of the new Iraqi state as they were disproportionately represented in the formation of the transitional National Assembly responsible for appointing a committee to draft the constitution. In addition, many Sunnis were intimidated into resignation and/or assassinated because of their objections to the proposed draft.[38] Because of this, the constitution was seen by the Sunni population as unrepresentative,[39] leading them to reject it in the referendum of 2005. For example, in the two Sunni-dominated provinces of Salahadin and Anbar, the disapproval rate was as high as 82 and 97 percent respectively.[40] However, the draft constitution was still approved by 78% of voters, mainly Shia and Kurds.[41] When a constitution lacks the consensus of all parties in determining the nature of a state, it is highly unlikely to generate trust between state and citizens, be a social contract underpinning a well-functioning, organised, and stable society, or create a legitimate political authority.[42] Therefore, the way in which the constitution was created, written, and adopted meant that Sunni and other minorities rationalised violence against the government.[43] Furthermore,

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[35] Jawad (n 27) 4-5; see also Israa Alla Al-din Nouri, Ali Mohamed Alwan and Khader Abbas Atwan, 'The Dilemma of State Building in Iraq' (15 April 2017) Democratic Arabic Centre for Strategic, Political and Economic Studies <http://democraticac.de/?p=45610> accessed 14 August 2017; the constitution's drafters overlooked that 'the main purpose of any constitution is to serve as a covenant that stitches diverse communities into something resembling a unified state. Such documents… serve as important symbols worthy of reverence by disparate groups'. Zackary Elkins and Tom Ginsburg, 'The Iraqi Draft Constitution in Comparative Perspective', Centre for the Study of Democratic Governance, University of Illinois, no date <http://www.comparativeconstitutionsproject.org/files/The%20Iraqi%20Draft%20Constitution%20in%20Comparative%20Perspective.doc?6c8912 > accessed 24 July 2017.

[36] See Lakhdar Brahimi, 'State Building in Crises and Post-Conflict Countries' (2007) *7th Global Forum on Reinventing Government Building Trust in Government* 2, 8; Jawad (n 27) 5; Zaid Al-Ali, Iraq: Ten Years of Hubris and Incompetence, (22 March 2013) Open Democracy <https://www.opendemocracy.net/zaid-al-ali/iraq-ten-years-of-hubris-and-incompetence> accessed 10 September 2017.

[37] Although the TAL 'was understandably resisted by the Iraqi people because it reflected the will of the occupying power…[considering] the messy outcome of the constitutional process, the long-term interests of Iraq would have been served much better if the TAL had been retained until peace and security had returned to that unhappy land'. Brahimi (n 36).

[38] For further details, see Jawad (n 27) 10-11; Kuoti (n 27) 19-28; the committee was mainly dominated by Shia and Kurds, and was lacking in any constitutional law experts or representatives of civil society organisations (especially women's groups). Its discussions were held in secret and, thus, ignored public opinion. See Morrow (n 34) 3, 8.

[39] Lionel Beehner, Why Sunnis Don't Support Iraq's Constitution, (12 October, 2005) Council on Foreign Relations <https://www.cfr.org/backgrounder/why-sunnis-dont-support-iraqs-constitution> accessed 25 July 2017.

[40] See 'The Iraqi Commission Report' (2007) The Foreign Policy Centre, 29 < http://fpc.org.uk/fsblob/861.pdf> accessed 25 July 2017.

[41] Ibid.

[42] See Brahimi (n 36) 9.

[43] Kuoti (n 27); see also Al-Bayan Centre for Planning and Studies, National Reconciliation in Iraq: A Comparative Study, Al-Bayan Center Publications Series 2016, 24-25; it has been noted that Iraqis not only 'went to vote on a permanent constitution they had not seen, read, studied, debated, or drafted', but also strangely 'they voted on an incomplete draft'. See Jawad (n 27) 22.

the wording of many of the constitution's clauses is often problematic and, in practice, rather than unifying and stabilising the state and solving many of Iraq's problems, they have deepened divisions in society, weakened state authority, and paved the way for the escalation of violence and instability.[44]

The post-2003 arrangements were made to enable certain ethno-sectarian groups to control various branches of government in what is known as a *muhasasa* system.[45] The CPA advocated the ethno-sectarian *muhasasa* because it 'believed that stability would be served by an interim Governing Council that reflected the country's ethno-sectarian balance'.[46] However, it has been argued that 'the CPA and its allies were [...] faced with a choice: to emphasize unity over division [...] or to treat Iraqis as incapable of governing themselves democratically and to reinforce the divisions within the system of government. Sadly, the second option had been selected well before the 2003 invasion'.[47] According to John Agresto, who worked in Iraq as a senior adviser to the Iraqi Ministry of Higher Education and Scientific Research, the Ministry was focused on how to rebuild the education system; rather than the United States selecting qualified Iraqi representatives of the whole community to form a new regime, it followed a different process of selection. This process placed power in the hands of the loudest factions, and sharpened divisions between divided factions, rather than considering the wider interests of 'moderate and thoughtful' people.[48]

Unlike post-conflict power-sharing in states such as Lebanon, and Bosnia and Herzegovina, the *muhasasa* system was not explicitly referred to in the constitution; rather, it has become a de facto system in which the division of power was spread between the various ethno-sectarian groups. At present in Iraq, the President is a Kurd, the Prime Minister is a Shia, and the speaker of parliament is a Sunni.[49] In recent years, the *muhasasa* system has still had a detrimental impact in the sharing out of governmental

[44] In theory and practice, many clauses in the constitution lack of clarity and have caused problems, including the nature of the state and the extent of the federal system, the role of Islam, the relations between the central and regional governments, the identity of the state, the status of the armed forces, the problematic Article 140 concerning Kirkuk province, the allocation of natural resources, the De-Ba'thification law and anti-terrorism measures; particularly, the preamble to the constitution is seen to be 'unusually long and contains an emphasis on religious leadership that could not be included in the actual constitution. It refers to sectarian identities rather than a united Iraqi identity'. In addition, the constitution emphasises 'Islam as the state religion and the source of legislation. While this [in] itself is not a problem in a Muslim majority country, it potentially renders the rights offered in Articles 14 to 46 meaningless where the two contradict'. 'Ultimately, the constitution had little consensus or legitimacy across broad sections of the Iraqi society and the vague, contradictory and ethno-sectarian language has contributed to the political strife in the country'. See Al-Bayan Centre for Planning and Studies (n 43) 26; for further details, see Jawad (n 27) 12-22.
[45] See Boduszyñski (n 27) 114; Al-Qarawee (n 28) 5; Kuoti (n 27).
[46] Boduszyñski (n 27).
[47] See Tareq Y. Ismael and Jacqueline S. Ismael, Iraq in the Twenty-First Century: Regime Change and the Change and the Making of a Failed State (Routledge, 2015) 22-23.
[48] Ibid. 23.
[49] Boduszyñski (n 27) 114.

institutions, both national and local, among the various Iraqi ethno-sectarian groups; this has resulted in poor performance, including governmental, judicial and security bodies, and has been accompanied by unchecked, widespread political and administrative corruption.[50] As a result of this, disagreements and violence have unsurprisingly erupted among the ethno-sectarian blocs, causing terrible suffering to ordinary Iraqi citizens and violations of their human rights.[51] It has been suggested that 'Iraqis resent a practice that values membership in a particular group over merit and has led to the installation of incompetent and corrupt elites'; moreover, the *muhasasa* system encourages parties to organise around their identity, which deepens rifts and conflict. Because of the *muhasasa* and the party electoral system, it has become politically successful to use sectarianism as the basis on which to be elected, and many Iraqis view sectarianism as something the ruling political elites created to be able to maintain privilege and power.[52]

However, the ethno-sectarian division in Iraq pre-dates 2003 far beyond the policies of the previous oppressive regime.[53] Since the establishment of the Iraqi state in 1921, successive regimes have failed to address the longstanding mistrust between state and society at large; this has been combined with deep unresolved community social, sectarian, tribal, and cultural problems, which resulted in sectarian strife soon after the change of regime in 2003.[54] The predisposition to violence in the character of the Iraqi people can arguably be ascribed to imbalances and contradictions in their social system because of traditional inherited values, tribal nepotism, ethnic and religious loyalties and the cultural framework that forms their moral attitudes.[55] Iraqi culture is often perceived as violent, and the conduct and behaviour of individuals is arguably mainly influenced by affiliation with a tribe, which commands their loyalty and devotion to a religious and sectarian heritage. The latter has exploited historical events, mainly shaped by political

[50] Ibid.; Hamad (n 27) 24-54; specifically, the period following the election of first government in 2006 'saw the institutionalisation of the sectarian and political quota system' instead of a meritocracy. For further details, see Al-Bayan Center for Planning and Studies (n 43) 21-24.
[51] Kuoti (n 27).
[52] See Boduszyñski (n 27) 114; see also Al-Subaihi (n 27) 177; Abdel Hamid (n 27) 15-24; the Iraqi government post-2003, therefore, has developed along sectarian lines, instead of fulfilling its duty without bias. For instance, the division between the main sects can be seen in their attitudes following the elections, 'a poll conducted in Iraq in January of 2006 found that while two thirds of the Iraqi people believed that the December 2005 elections were fair and representative, 94% of Sunni's polled believed that the elections were not fair, and 92% said the new government was not legitimate'. See Foster (n 28) 44.
[53] Boduszyñski (n 27) 114.
[54] Al-Subaihi (n 27) 167. Because the Iraqi state was artificially created, 'there has been a miss-fit between "Sovereignty" and "Identity" of the state, the people within the boundaries of Iraq do not have a great sense of belonging to a single nation as Iraqis'. This has been attributed to the fact that the state 'was not given the chance or did not seize the opportunity to develop a modernizing strategy based on indigenous concepts of human dignity, legitimate authority, solidarity and other fundamental aspects of social and political organization'. See Mohammed Ali Bapir, 'Iraq: a Deeply Divided Polity and Challenges to Democracy-Building' (2010) 3 *Information, Society and Justice* 117, 118-124.
[55] Al-Subaihi (n 27); Fareed Jasim Hamoud Al-Qaisi, The Prevalence of Violence in Iraq: a Sociological Study and Critical Analysis of the Causes of Violence in Iraq (The National Centre of Legal Issues 2012) 80-94; Ali Al-Wardi, *Study on the Nature of Iraqi Society* (Baghdad 1965) 27-339.

conflicts, in order to justify violence, fostering a spirit of hostility and intolerance which created a suitable climate for the clash of the various components of Iraq post-2003.[56]

The role of the *muhasasa* system in encouraging ethno-sectarian sentiment and clashes, however, is apparent.[57] Some leaders of Islamic political groups, both Sunni and Shia, may have successfully fostered conflict, violence and extreme sectarian thoughts, thereby undermining the possibility of peaceful co-existence on the basis of tribalism and ethno-sectarianism in order to serve their political interests.[58] Accordingly, it is apparent that sectarian persons do not concern themselves with the moral and spiritual principles of their own sect but rather concern themselves only with solidarity and loyalty to their own sect, and enmity to other sects.[59] It is important to note, however, that the vast majority of Sunni and Shia have lived peaceably for up to 1,000 years, without breaking sectarian boundaries; social mixing and intermarriage between the sects which occurred in the twentieth and twenty-first-century are often claimed as evidence of the weakness of Iraqi sectarianism.[60] Peaceful co-existence, nevertheless, is not synonymous with tolerance which 'presupposes an absence of discrimination against minorities and respect for the points of view of others' and, for most of Iraqi history, tolerance has been in short supply.[61] According to Haddad, 'this does not necessitate a violent manifestation; rather the implication is that, without tolerance, sectarian cleavages are more easily politicised and utilised as offensive mobilisational tools'.[62]

From the above discussion, the question arises as to how far the deficiencies of the transition process have adversely affected the ability of the Iraqi state and its criminal justice system to comply with mainstream international norms, specifically with regard to the upholding of the rights of victims to redress and protection, as referred to earlier in the thesis. It can be argued (see Sections 3, 4 and 5), that the flawed post-2003 transition

[56] Al-Subaihi (n 27); Al-Qaisi (n 55) 93; in some tribal societies, like Iraq, where shame-oriented culture is a dominant motif, emphasis is placed on community, authority, honour, pride, religion and ethnicity; the moral code is built around respect for this culture rather than compliance with domestic law. Therefore, 'tensions occur not because laws have been broken but because someone has violated the proper ordering of relationships' which can cause deep anger and shame leading to kidnappings, sectarian cleansing and suicide bombings. For further details, see David A. Steele, 'Reconciliation Strategies in Iraq' (2008) The United States Institute of Peace, Special report, 1-20.
[57] See Boduszyñski (n 27) 114; Abdel Hamid (n 27) 15-26.
[58] See Al-Qaisi (n 55) 139.
[59] See Fanar Haddad, Sectarian Relations in Arab Iraq: Competing Mythologies of History, People and State (PhD thesis, the University of Exeter 2010) 35.
[60] See Fanar Haddad, 'Sectarian Relations in Arab Iraq: Contextualising the Civil War 2006-2007' (2013) 40 *British Journal of Middle Eastern Studies* 115, 118; in Iraqi modern history, incidents of serious sectarian strife brokeout only in the years 1508, 1623 and 1801. See Report by Iraqi Academics and the Norwegian Institute of International Affairs (NUPI), More than Shi ites and Sunnis (February 2009) 18–19; however, it is important to note that in the Middle Ages sectarian strife was common in various parts of what is today Iraq, See George Tarabishi, Hartaqat II [Heresies II] (Beirut: Dar al-Saqi, 2008) 15–24 cited by Haddad (n 60) 118.
[61] Haddad (n 60) 118.
[62] Ibid.

process has had (together with sectarian conflict and the impact of regime prior to 2003) a devastating impact on the proper functioning of the Iraqi state and its criminal justice system, and on attempts to re-establish the rule of laws which can be relied, to ensure stability, security, justice and adequate reparations. In addition, because of these deficiencies, no attention has been paid to the need to address the building of a new culture of awareness of how victimisation and the legitimate interests of victims and society at large must be fully taken account of if the objectives of transitional justice are to be achieved.

In practice, mainstream international norms have been regularly violated, especially those regarding the protection of the right to life, even though clear and strict provisions concerning crime and punishment, fair treatment and fair trial principles are stipulated in today's Iraqi criminal justice system, including the Iraqi constitution.[63] However, there is undoubtedly a gap between the Iraqi legal system and its actual implementation, since it can be said that implementation has not provided victims with effective legal mechanisms, for instance, to bring to criminal trial those responsible for gross HR violations committed during the war in 2003 and the subsequent occupation of the country.[64] It is also doubtful whether the suffering of the Iraqi people and damage to their HR by war and occupation will ever be recognised by the international community, even though 'if there are any people in this world that deserve the right to truth, justice and reparations and guarantee of non-recurrence, it's the Iraqi people'.[65] Citizens of Iraq have a legitimate expectation, especially because of widespread acts of violence contrary to their right to life, that the Iraqi state should fulfil its moral and legal obligations to protect this right. If it fails to do so, public debate should reveal the truth about its citizens' victimisation and consider why the measures provided by the state to protect them have proved inadequate. In addition, it should bring to justice those responsible for breaching the right to life and make adequate reparations.

[63] Article 19(2) of the current Iraqi Constitution of 2005 (n 9) states that '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'.

[64] The US forces and private contractors were granted complete immunity for any criminal actions, including criminal violations under the 1969 Iraqi Criminal Code, by Order 17 of the Coalition Provisional Authority (CPA), which governed the country until an interim government was formed. See M. Cherif Bassiouni, 'Legal Status of US Forces in Iraq from 2003-2008' (2010) 11 *Chicago Journal of International Law* 1, 8; in the course of the war followed by the years of occupation, it is estimated that 'over one million people have been killed, up to 5 million have been displaced, 4-5 million children have lost a parent, between one and two million women have become widows'. According to other sources, the number of missing people because of the war is estimated to be from 250,000 up to one million, among them over 90,000 children of displaced families. See United Nations, General assembly, Human Rights Council, *Joint written statement submitted by the Union of Arab Jurists, the International Organization for the Elimination of All Forms of Racial Discrimination. Truth, Justice and Reparations for Iraq* (9 September 2013) A/HRC/24/NGO/135.

[65] United Nations, General assembly, Human Rights Council (n 64).

This chapter will therefore examine the nature of such expectations by exploring the moral and legal obligations of the Iraqi state to meet these expectations appropriately. It will consider the signs that its determination and capacity to do so are increasing, and are likely to continue to increase, now that the worst manifestations of sectarian conflict in the state, due to the activities of Daesh (ISIS), have greatly diminished. It will further determine, in the light of previous discussion concerning the ethical and legal responsibilities of the state regarding the rights of victims, whether the Iraqi state is actually or beginning to fulfil these responsibilities, which are arguably a prerequisite for the establishment of lawful rule in the country, and for the legitimacy of the authority of the state over its citizens.

This chapter will argue that the failure of the Iraqi state to fulfil its positive duty of protecting its citizens against multifaceted acts of violence by non-state actors, and of providing procedural and substantive remedy, is due to complex reasons largely arising from the failure of the 2003-transition process, but also from the deficiencies of the criminal justice system and its practice, which have fallen short of international standards. It follows that future reforms need to be adopted to restore trust in the Iraqi state and its criminal justice system. Such reforms should include genuine coordinated efforts on the part of both the government and all sections of society to produce a new transitional justice system and measures of reconciliation. In doing so, this will permit various religious, ethnic and sectarian persons to live peacefully in a viable state based on legitimate social contract principles, and in which the rights of victims are properly addressed. It will be further contended that to create gradual change in the attitude of the Iraqi state and its criminal justice system towards the neglected rights of victims, a new culture must be built which observes international standards of human rights in both theory and practice. Chapter 6 will consider certain signs that the Iraqi state is incrementally moving in the direction of adhering to such standards in future.

5.2 The Right to Protection of the Right to Life in the Current Iraqi Legal System

This section asks whether Iraqi law acknowledges the state's obligations to protect the right to life of its citizens effectively against violent activities by non-state actors, and whether the Iraqi state and its legal system share the same values and norms of international and regional human rights law concerning this duty of protection (in the

post-conflict context). If not, the question arises as to whether such rights are merely empty rhetorical statements about the protection of the right to life, and thus need incremental upgrading to comply with the moral and legal norms for the protection of its citizens.

The main organ defining the rights and liberties of Iraqi citizens is the Iraqi constitution.[66] Concerning the obligations of the Iraqi state to protect the right to life of its citizens, Article 15 of the Iraqi 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.

It is important to note that this article does not seem to explicitly impose a positive duty on the Iraqi state to protect the right to life of its citizens against violent acts. It only states that every individual has the natural right to life and security as well as negatively prohibiting the violation of this right by state authorities, unless in accordance with the law. However, this negative obligation has been subjected to interpretation because, for instance, Article 6 (the right to life) of the ICCPR, Article 2 (the right to life) of the ECHR, and Article 4 (the right to life) of the IACHR, could be found to provide mainly negative obligations. These rights nevertheless have been interpreted to include positive obligations that were unintended by the drafters of these conventions. The Iraqi Federal Supreme Court,[67] according to Article 93 of the Iraqi Constitution, has jurisdiction over: 'overseeing the constitutionality of laws and regulations in effect'; interpreting the provisions of the Constitution; and, 'settling matters that arise from the application of the federal laws, decisions, regulations, instructions, and procedures issued by the federal authority';[68] and, guaranteeing individuals and others the direct right of appeal to the Court in any matters concerning them, as their decisions are final and binding for all authorities. In principle, the establishment of this Court, according to many Iraqi commentators, is considered a positive step and crucial to the guarantee of human rights

[66] Article 13(1) and (2) indicates that 'This Constitution is the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception. Second: No law that contradicts this Constitution shall be enacted. Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void'. Iraqi Constitution (n 9).

[67] This Constitutional Court was originally established under Article 44 of the Transitional Administrative Law and Law No. 30 of 2005. These remained in place until the current 2005 Constitution came into effect. The Court comprised nine members selected and appointed by the Higher Judicial Council from candidates nominated by the judicial councils of all provinces of Iraq. It is currently firmly established under Articles 92-94 of the 2005 Constitution. Article 92 (second) 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'.

[68] Article 1 of the Iraqi Constitution of 2005 states that 'The Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic, and this Constitution is a guarantor of the unity of Iraq'.

and freedoms as stipulated in the constitution against any infringement by state authorities or non-state actors. The Court also monitors, controls, regulates and legitimises the legal, judicial, political, economic and social relations within society; therefore, some of the Court's decisions in this regard have been considered to be important in creating a sound rule of law in Iraq.[69] Nevertheless, there is a practice of not bringing cases by individuals, victims and others before the Court to seek protection against any gross negligence, incompetence and corruption on the part of state authorities, and of making interpretations of the imprecise scope and nature of the protective obligation of the right to life and personal security contained in Article 15 in conjunction with Articles 2 and 14,[70] and the corresponding duties these give rise to. In addition to these, there are other tremendous challenges to the Court's independence and effectiveness, which renders the protective obligation more difficult to observe.[71] It has been claimed that the Court's role should be strengthened by ensuring its independence and giving it the right and duty to pursue constitutional oversight, irrespective of any complaints raised by one of the parties authorised in Article 93 of the Constitution. This is because the failure to uphold this duty has reflected negatively both on the protection of certain fundamental human rights, such as the right to life and physical integrity against any violations, and on the possible consideration of any required positive changes in the conduct of Iraqi institutions.[72] The

[69] For further details about the importance of the establishment of this Court and some of its provisions which laid down principles in various political, social and economic human rights cases, but not until now in cases concerning the right to protection of the right to life or personal security, see Baydaa Abd Al-Jawad and Dawlat Ahmad Abd Alla, 'The Role of the Federal Court in the Protection of Human Rights in Iraq' (2011) 13 *Rafidain of Law Journal* 368, 368-399; Intisar Hassan Abdullah, 'The Role of Federal Supreme Court in Iraq to Protect Rights and Freedoms' (2012) 21 *The International and Political Journal* 287, 287-306; Khudair Yassin Khudair, 'The Guarantees of human rights and how they can be developed and applied in Iraq' (2009) 7 *Journal of Kerbala University* 183, 188-193; the Court has ruled many provisions invalid when they have violated the constitutional rights and freedoms of Iraqi citizens. See, for instance, the Federal Supreme Court, Case No. 6/2010 of 3 March 2010, published in the High Judicial Council, the Judicial Bulletin (No. 17, the fourth year 2011, March and April) 11; the Federal Supreme Court, Case No. 43/2011 of 10 August 2011 published in the High Judicial Council, The Judicial Bulletin (No. 19, the fourth year 2011 July-August and September) 42; the Federal Supreme Court-Iraq-Baghdad, Case No. 40/2012 on 15-12013 promulgated at the official website of the Judiciary. In one case, for instance, the Court ruled some provisions on deprivation of liberty as invalid. See the Federal Supreme Court, Case No. 15/2011 on 22 February 2011 published in the High Judicial Council, The Judicial Bulletin (No. 17, fourth year 2011 March and April) 16; in another case, the Court stated that Article 37 of the Iraqi Constitution only granted the power of arrest to the judicial authority, ruling that some provisions stipulated in the Customs Act No. 23 of 1984 giving the Customs Officials the power of arrest are unconstitutional. The Federal Supreme Court, Case No. 15 /2011 on 22 February 2011 published in the High Judicial Council, the Judicial Bulletin (No. 17, fourth year 2011 March and April) 16.

[70] Article 2 of the Iraqi Constitution prohibits the enactment of any laws which may contradict principles of democracy and human rights and freedoms of individuals. Article 14 also states that 'Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, colour, religion, sect, belief or opinion, or economic or social status'.

[71] Appointments and the structure of the Court, as well as, political interference, have come under criticisms by Iraqi experts and commentators. See Abd Al-Jawad and Abd Alla (n 69); Salem Roudan Al-Moussawi, The Formation of the Federal Supreme Court in Iraq between the Constitution and the Law: Analytical and Critical Reading (2009) <http://www.ahewar.org/debat/show.art.asp?aid=158837> accessed 24 April 2017. They question the conditions, qualifications and the authority by which judges of the Court are appointed and, also, whether the experts in Islamic jurisprudence and other legal scholars involved in the establishment of the Court are 'fit to make these kinds of legal decisions and there are also questions around which sect's religious rules will be followed: Sunni or Shiite?'. This has been suggested to threaten 'the neutrality of the Court. The Court is supposed to work with civil laws that have been enacted for decades in Iraq. What would the clergy be doing here, if they don't know anything about these kinds of laws?'. In addition, many Iraqi politicians do not want the Court to have a pro-active role and final say in many controversial issues relating to political conflicts, such as the legal situation of various militias which have operated in Iraq since 2003. See Mustafa Habib, One Court to Rule Them All: Why Not All Iraqi Politicians Want Their Supreme Court to Work Properly (10.12.2015) < http://www.niqash.org/en/articles/politics/5179/> accessed 24 April 2017.

[72] Abd AlJawad and Abd Alla (n 69) 389-390.

state's negative role embodied in Article 15, therefore, may therefore be in contrast with recent developments in the field of HR which aim not only to protect individuals' lives from the abuse of power by the state, but also to ensure this right of protection by requiring the state to establish legitimate adequate measures to protect its citizens from criminal acts by private individuals. In other words, Iraq must interpret and ensure this right in the light of the convergence of the vertical and horizontal aspects of HR law, which enables individuals to rely directly for the protection of their right to life on both of these aspects.

Consequently, in the absence of an effective interpretation by the IFSC and a culture of access to justice essential to the reestablishment of the rule of law, of equality before the law and prevention of any future exercise of arbitrary power, the statement in Article 15 of the Iraqi Constitution may be seen as empty as it has not, in practice, made any adequate provision for the protection of citizens' lives amidst the horrific widespread violence in the country since 2003. This may point to the failure of the transitional process which was supposed to establish in Iraq clear, detailed and strict legitimate positive protective obligations and guarantees, as observed by some states[73] and adopted by the World Summit in 2005;[74] these should be understood, in Iraq's case, to protect the right to live in dignity and equality, the right to subsistence (freedom from want) and the right to be free from fear and physical violence. With this understanding, there would be no doubt as to the right to personal security, which would include the provision of positive protection of its citizens' right to life against acts of violence, either by state authorities or private individuals. In other words, this transitional plan was supposed to address the psychological impact of past victimisation 'to convince those who fear the future that their concerns have been adequately addressed and that there are mechanisms in place to ensure that they will be able to influence the future and take steps in the constitutional, legislative, and judicial framework if they are unsatisfied with the current state of affairs'.[75] Clearly, no state can provide absolute protection to citizens, ensuring that they

[73] For instance, in the South African Constitution (1996) and the Northern Irish Draft Bill of Human Rights, the right to security is 'expressed as a positive right and protects explicitly against threats to security or violence from non-state actors'. The former in Section 12 (1)(c) has established a specific right to be 'free from violence whether from public or private sources'. The latter also articulates the right to security as 'a self-standing preambular principle: everyone has the right to live free from violence, fear, oppression and intimidation, with differences to be resolved through exclusively democratic means without the use of threat or force'. This right to be protected against violence is also expressly grounded in the 'right to dignity and physical integrity' under section 6 of the Draft Bill. See Lazarus (n 16) Ch. 2, 14.

[74] A broader interpretation of the right to security, in accordance with the capabilities approach discussed in Chapter 2, has been adopted by the United Nations World Summit of 2005 and reaffirmed by the UN General Assembly. The Outcome Document of this Summit in Article 143 states 'We stress the right of people to live in freedom and dignity, free from poverty and despair. We recognize that all individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with equal opportunities to enjoy all their rights and fully develop their human potential. To this end, we commit ourselves to discussing and defining the notion of human security in the General Assembly'. See Lazarus (n 16) Ch. 2, 15. See Chapter 2, p 16.

[75] Sarkin and Sensibaugh (n 9) Ch. 1, 1036.

will not suffer violence at the hands of private actors, but states can establish effective systems to provide such protection.

However, since the correlative duties of protection, whether negative or positive, already exist along with the right to protection of the right to life, it may be claimed that, as the Iraqi state has taken upon itself, for the well-being of its society, the rights of individuals to protect themselves, it has the corresponding constitutional duty to establish criminal justice systems to protect them from any harm, including violence by non-state actors. This argued constitutional duty of protection implies that the Iraqi government is not only bound to refrain from interfering with any constitutional rights of its citizens (unless an exception applies), but must also assume a 'positive' role in providing for their fundamental needs, including the right to protection from violence.[76] Nevertheless, in practice it can be argued that the negative obligation under Article 15 requiring the state to refrain from taking citizens' lives without legal justification is at present not fully respected, and nor can victims rely on the same article to complain against the state authorities if they have failed to take reasonable preventive measures to protect them from violent acts by other individuals.[77] This lack of protection of citizens' lives, specifically against criminal acts by non-state actors, is clearly documented in the reports of many HR organisations. These state that Iraqi citizens suffer systematic violations of their right to life as the state authorities have failed to establish effective systems to prevent such violations.[78]

In fact, a clear assertion of the Iraqi authorities' positive obligation to protection appears in Article 7(2) of the Iraqi Constitution, which explicitly requires that the state shall 'undertake to combat terrorism in all its forms, and shall work to protect its territories from being a base, pathway, or field of terrorist activities'. Iraqi Anti-Terrorism Law[79]

[76] The Iraqi Constitution has clearly outlined that this positive obligation should be followed by the government with regard to the rights of Iraqis to work, social security, health care, and education. See Articles, 22, 30, 31, 34; 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 Interpretations?' (2006) 30 *Fordham International Law Journal* 126,129.

[77] A case at the Federal Supreme Court found that the Court was deficient in the protection of the right to life, since it had failed to confirm that death sentences passed by the Iraqi Central Criminal Court (CCCI) should be implemented by the executive authorities only when the formalities specified by the law had been completed. However, these sentences were implemented without presidential approval, in violation of Article 37(8) which states that the President has the power 'to ratify death sentences issued by the competent courts'. See Abd AlJawad and Abd Alla (n 69) 389-390.

[78] See the United Nations Assistance Mission for Iraq (UNAMI), Report on Human Rights in Iraq: January to June 2012 (UNAMI/OHCHR 2012); the United Nations Assistance Mission for Iraq (UNAMI), Report on the Protection of Civilians in the Armed Conflict in Iraq: 5 June to 5 July 2014 (UNAMI/OHCHR 2014); the United Nations Assistance Mission for Iraq (UNAMI), Report on the Protection of Civilians in the Armed Conflict in Iraq: 6 July to 10 September 2014 (UNAMI/OHCHR 2014). See also the recent report of the United States Department of State, *2016 Country Reports on Human Rights Practices -Iraq* (updated 29.03.2017) <https://www.state.gov/documents/organization/265710.pdf> accessed 25 April 2017.

[79] In 2005, Iraq initiated legislation to combat acts of terrorism, namely Anti-Terrorism Law Number (13) for the Year of 2005, <http://www.vertic.org/media/National%20Legislation/Iraq/IQ_Anti-Terrorism_Law.pdf >.

has widely defined such activities in Article 1 to include 'every criminal act committed by an individual or an organized group that targeted an individual or a group of individuals or groups or official or unofficial institutions and caused damage to public or private properties, with the aim to disturb the peace, stability, and national unity or to bring about horror and fear among people and to create chaos to achieve terrorist goals'. Therefore, the failure of the Iraqi authorities to adequately counter these activities violates their constitutional duty of protection. Notably, the majority of violent deaths in Iraq are attributed by the Iraqi authorities to the activities of non-state actors, specifically 'terrorist' groups. However, whether true or not, the fact remains that the Iraqi state is obliged to go beyond the obligation expressed in Article 7(2) to protect its citizens' right to life, by bringing perpetrators to justice and providing adequate reparations to victims, whatever the source of any acts of violence. Consequently, it can be argued that even if there are unanswered questions concerning the specific counter-measures the state should adopt to respond to violence, the duty of the Iraqi state to provide adequate security and protection to its citizens, and to investigate, prosecute and punish perpetrators of acts of violence is both morally and legally established, as discussed below.[80]

The Iraqi Constitution also emphasises that the Iraqi state must conform to, respect and implement its international obligations, including those principles relating to the protection of the right to life against criminal acts. In addition, no excuses are permitted for the state to neglect the fulfilling of these obligations. Article 8 states that the Iraqi government shall respect Iraq's international obligations.[81] Moreover, Article 44 of an earlier draft of the Constitution expressly provided that 'All individuals shall have the right to enjoy all the rights mentioned in the international treaties and agreements concerned with human rights that Iraq has ratified and that do not contradict the principles and provisions of this Constitution'.[82] This article, except for the last clause, is a narrower version of Article 23 of the Transitional Administrative Law (TAL), which was Iraq's

[80] See Chapter 5, pages 154-155, 159-160, 168-190 and 213-218. It should be noted that the 'positive' legal right to security could arguably be broadened, in addition to its current apparent emphasis on protection of a specific individual, or individuals, from foreseeable harm. While social contract principles provide a normative basis for arguing the state's responsibility to provide protection to the right to life of its citizens, or those who reside within its jurisdiction, from non-state violence and, thus, serve as a theoretical foundation for such a 'positive' right to security, the positive obligations imposed by the HR instruments on states to protect life and prevent injury from such violence could arguably provide a normative legal basis for such broad protection. See Turner (n 22) Ch. 2, 25, 75. See the discussion in Chapter 2, pages 11-14; see also the case of *The Tagayeva and Others v Russia* (n 248) Ch. 3, p 75-77; see also Chapter 3, pages 49-51.

[81] Article 8 of the Iraqi Constitution states that 'Iraq shall observe the principles of good neighborliness, adhere to the principle of non-interference in the internal affairs of other states, seek to settle disputes by peaceful means, establish relations on the basis of mutual interests and reciprocity, and respect its international obligations'; see Ashley S. Deeks and Matthew D. Burton, 'Iraq's Constitution: A Drafting History' (2007) 40 *Cornell International Law Journal* 1, 32-34.

[82] See Mattar (n 76) 126-127; Deeks and Burton (n 81) 35.

provisional constitution after the invasion of the country in 2003 until the validation of the current Iraqi Constitution of 2005.[83] Under this article, Iraqi people are guaranteed the 'rights that befit a free people possessed of their human dignity, including the rights stipulated in international treaties and agreements, other instruments of international law that Iraq has signed and to which it has acceded, and others that are deemed binding upon it, and in the law of nations'.[84] It is important, however, to note that '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 addition, the IFSC has not so far debated these issues.[85]

In order to ensure the rights to which Iraqi people are entitled in the constitution and in international standards of HR, including the right to protection of life, the Iraqi Council of Representatives enacted Law No. 53, in accordance with Article 102 of the constitution which established for the first time in 2008 an independent High Commission for Human Rights (HCHR).[86] In its first Annual Report of 2013 about the status of human rights in Iraq, the commission asserted that Iraqi authorities, legislative, executive and judicial, have an obligation to ensure that all reasonable measures are taken to protect the right to life of their citizens against acts of violence and, if they occur, to identify and prosecute those responsible.[87] This is in line with the commission's mandate in accordance with Law No. 53 to:

> Ensure the protection and promotion of respect for Human Rights in Iraq; Protect the rights and freedoms stipulated in the Constitution, international laws, treaties and conventions ratified by Iraq; [and to] strengthen, promote and develop human rights principles and culture.[88]

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[83] The Administration for the State of Iraq during the Transitional Period, 8 March 2004, at <http://www.refworld.org/docid/45263d612.html>. See Deeks and Burton (n 81) 35.
[84] Deeks and Burton (n 81).
[85] 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'. See Almusawi (n 17) 38, 83.
[86] For further details, see the Institute for International Law and Human Rights, Iraq's High Commission for Human Rights: Bylaws, Regulations, and Legal Framework, a Manual (1st edition 2012).
[87] Iraq's High Commission for Human Rights, First Comprehensive Annual Report about the Status of Human Rights in Iraq for the year 2013, issued from the Board of Commissioners in accordance with Article 4 (8) of Law No. 53 of 2008 (2014) 37.
[88] Institute for International Law and Human Rights (n 86) 7; the Iraq's High Commission for Human Rights has granted by Law No. 53 a broad mandate to cover many procedures, including:
(i) 'Receipt of complaints from individuals, groups and civil society organizations concerning violations prior and subsequent to the entry into force of the Act;
(ii) Conduct of preliminary investigations of human rights violations in the light of the information received;
(iii) Verification of the complaints received, and the conduct of preliminary investigations if the circumstances so require;
(iv) Taking action on human rights violations by referring them to the Department of Public Prosecutions so that it can institute legal proceedings and notify the Commission of the outcome'. See United Nations, Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant: Fifth periodic reports of States parties due in 2000 Iraq (CCPR/C/IRQ/5) 12 December 2013, 11; as noted by the Human Rights Committee, however, many difficulties face the Iraqi's High Commission to carry out its mandate, including 'lack of adequate resources and constraints in practice to effectively discharge certain mandated activities, such as visiting and inspecting places of deprivation of liberty'. The HRC states that 'The State party should adopt the measures necessary to ensure that the High Commission for Human Rights is able to carry out its mandate fully, effectively and

At international and regional level Iraq has ratified several treaties.[89] Among these are the ICCPR[90] which, as noted in Chapter 2, imposes a positive duty on states to protect the right to life of their citizens under Articles 6 and 2 of the Covenant.[91] Similarly, Iraq ratified the Arab Charter on Human Rights (ACHR) of May 22, 2004 which came into force on March 15, 2008. In Article 5 this charter stipulates that 'every human being has the inherent right to life' and 'this right shall be protected by law. No one shall be arbitrarily deprived of his life'.[92] In addition, it asserts that states party to the charter are obliged to 'ensure' that all individuals subject to their jurisdiction enjoy the rights and freedoms encompassed by the charter, including the right to life.[93] As the Iraqi state has ratified the above conventions, it must fulfil their imperatives and seek to prevent their violation, punish violators, and ensure that appropriate reparation.[94]

It should be noted, however, that the provisions of other international legal instruments such as the ECHR and the ACHR (which, as noted in Chapter 2, impose a positive obligation to protect the right to life),[95] are obviously not legally binding on the Iraqi state. Nevertheless, the Iraqi state may still have an obligation to comply with certain principles and normative provisions because HR law is not limited merely to those rights which a state has ratified by treaty,[96] but also includes certain rights and correlative obligations which have come to be part of customary international law. Therefore, these rights bind

independently, in conformity with the Paris Principles. It should ensure that the Commission has sufficient financial and human resources, that it is equally accessible to all persons throughout the State party's territory, and that all public authorities fully cooperate with it'. See paras 7 and 8 of the UN Human Rights Committee (HRC), Concluding observations on the fifth periodic report of Iraq, 6 November 2015, CCPR/CO/IRQ/5, <http://www.refworld.org/docid/5669387c4.html> accessed 20 September 2016.

[89] These Covenants include: the ICESCR (n 131) Ch. 2; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Signed 1969, ratified 1970, entered into force on 12 February 1970; International Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979) United Nations, Treaty Series, vol. 1249, p. 13 ; the Convention on the Rights of the Child (CRC), 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, acceded 1994, entered into force on 15 July 1994, including the Optional Protocols to the CRC7, Ratified by Law 23 of 2007; the International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, Ratified 23 November 2010; the UN Convention against Torture and the Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, Ratified in 2011, ratified in 2011.

[90] Iraq has been signed this Covenant in 1969, ratified by Law 193 of 1970, published in the Official Gazette, Issue 1926 of 7 October 1970, came into force on 23 March 1976.

[91] See the general discussion in Chapter 2 of the thesis, pages 26-30.

[92] League of Arab States, Arab Charter on Human Rights, May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), entered into force March 15, 2008.

[93] Ibid. Article 3; the Charter does not include a strong supervision mechanism which enables individuals whose HR have been violated to have their petitions heard. It has been suggested that this 'may indicate the fact that Arab states are not keen on having a judicial body capable of not only dealing with individual petitions but also rendering legally binding decisions'. See Dalia Vitkauskaite-Meurice, 'The Arab Charter on Human Rights: the Naissance of New Regional Human Rights System or a Challenge to the Universality of Human Rights?' (2010) 1 *Jurisprudence* 165, 175; state parties to this charter have only agreed to establish an Arab HR Committee, to which reports are to be submitted about the status of HR within their jurisdiction, in accordance with the requirements of Article 48. However, this Committee, at present, has received only four reports from state parties and Iraq was not among these. See Mohamed Y. Mattar, 'Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards' (2013) 26 *Harvard Human Rights journal* 91, 93.

[94] See the United Nations Assistance Mission for Iraq (UNAMI), 2010 Report on Human Rights in Iraq (UNAMI/OHCHR 2011).

[95] See the discussion in Chapter 2 of the thesis, pages 30-40.

[96] It is noted that the legal rights contained in these conventions are informed by the morality of HR and the idea that by virtue of being human, we have certain moral rights. These universal HR were agreed to be protected internationally by the ECHR and ACHR. The ECHR in its preamble clearly states that the convention aims to secure 'the universal and effective recognition and observance' of certain rights declared by the Universal Declaration of Human Rights. See Letsas (n 234) Ch. 2, 707.

any state, even those which are not party to certain treaties.[97] This is acknowledged by various Iraqi laws, such as Article 23 of the TAL[98] and Law No. 53.[99] Customary international law is considered an important foundation of HR law and counter-terrorism provisions, as it comprises,

> rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way. It results from a general and consistent practice of States followed out of a sense of legal obligation, so much so that it becomes custom. Customary international law must be derived from a clear consensus among States as exhibited both by widespread conduct and a discernible sense of obligation.[100]

For customary international law to be established, it is necessary for both objective and subjective elements to exist in principle; they should be derived from the general, continual and uniform practice of states accompanied by legal opinion (*opinio juris*) in the sense that they believe that such practice is obligatory under international law.[101] Legal obligations can follow from this process and, therefore, it 'rests on the implicit consent of states as they engage in, or acquiesce in, a particular practice'; it is sufficient for implicit consent to be 'general', and not 'universal'.[102] There are basic fundamental rules in customary international law based on *jus cogens*,[103] a principle deeply embedded in international law; as a result of this, a state cannot opt out of these fundamental rules via a convention or other means. Therefore, these rules 'are regarded as being peremptory in nature and […] non-derogable. The prohibitions against torture, slavery, genocide, racial discrimination and crimes against humanity are widely recognized as peremptory norms',[104] absolute in nature and universally accepted as fundamental principles of customary international law.[105] Some rules of customary international law can be

[97] For instance, 'many of the rights set out in the Universal Declaration of Human Rights, as well as some of the rights defined in the International Covenant on Civil and Political Rights, reflect norms of customary international law'. See United Nations, *Handbook on Criminal Justice Response to Terrorism* (n 134) Ch. 2, 19.
[98] See The Administration for the State of Iraq for the Transitional Period, 8 March 2004 (n 83).
[99] The Institute for International Law and Human Rights (n 86) 7.
[100] See Organization for Security and Cooperation in Europe (n 122) Ch. 2, 55.
[101] See Andrew Clapham and Mariano Garcia Rubio, 'The Obligations of States with Regard to Non-State Actors in the Context of the Right to Health' (2002) *Health and Human Rights Working Paper Series No 3*, 20; state practice should be understood to mean 'any act or statement from which views about customary law can be inferred; it includes physical acts, claims, declarations in *abstracto* (such as General Assembly resolutions), national law, national judgments and omissions', in addition to the treaties and decisions of international courts. See Tawhida Ahmed and Israel de Jesús Butler, 'The European Union and Human Rights: An International Law Perspective' (2006) 17 *The European Journal of International Law* 771, 778; 'normative statements contained in nonbinding texts [soft law] can generate a political impact equal at times to that of legally binding instruments and can give rise to customary international law through state practice'. Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 *The American Journal of International Law* 291, 292-293.
[102] See Maria Eriksson, Defining Rape: Emerging Obligations for States Under International Law? (Martinus Nijhoff Publishers 2011) 18.
[103] The *Jus cogens* concept refers to the existence of superior norms that override other norms and bind all states, even those who objected to them. It 'posits the existence of rules of international law that admit of no derogation and that can be amended only by a new general norm of international law of the same value' and it 'originated solely as a limitation on international freedom of contract'. For further details, see Shelton (n 101) 292, 297.
[104] United Nations, Handbook on Criminal Justice Response to Terrorism (n 134) Ch. 2, 19.
[105] Torture, for instance, 'is impermissible under any circumstances, including war, public emergency or terrorist threat. The prohibition is so strong and universally accepted that it is now a fundamental principle of customary international law. This means that even States which have not ratified any of the international treaties explicitly prohibiting torture are banned from using it against

established by international and regional conventions, including the ECHR and IACHR, and certain judgments of various tribunals and courts may be considered as practising these.[106] However, although these judgments serve as a means of interpretation, providing a 'law-determination' function, they do not create the rules. In other words, 'it is generally understood that decisions by, for example, the *ad hoc* tribunals [and courts] do not constitute state practice, since…[they] are not state organs, but a finding by an international tribunal [and court] of a customary rule constitutes persuasive evidence of such a fact. The decisions may also contribute to the emergence of customary rule by influencing state practice'.[107]

The doctrine of due diligence advocated by various HR bodies, and discussed in previous chapters,[108] obliges states to seek to prevent acts of violence, whether committed by state or private parties, and, should violence occur, to provide adequate procedural and substantive remedies. This application of the doctrine of due diligence represents 'a fairly new development within the concept of state obligations, enlarging the scope under which acts a state can be held responsible'.[109] The notions of positive obligation and due diligence overlap[110] and it is now considered that 'virtually all rights and freedoms require affirmative action on the part of the state, no less through the due diligence standard', especially with regard to the state's responsibility for acts of violence by non-state actors in the field of HR.[111] It has been particularly important in establishing state obligations regarding domestic violence, for which the state can be held responsible if it systematically fails to protect women.[112] An important second Special Rapporteur on Violence Against Women of 2006, entitled 'The Due Diligence Standard as a Tool for the Elimination of Violence Against Women', issued by Yakin Ertürk,[113] provides firm guidance on the use of the due diligence standard to judge whether state measures to address domestic violence and provide justice for victims are adequate.[114] Ertürk

anyone, anywhere'. See Association for the Prevention of Torture (APT) and the Center for Justice and International Law (CEJIL), *Torture in International Law, a guide to jurisprudence* (2008) 2.

[106] However, 'though the decisions may contribute to customary law, it is arguably asserted that they do not in themselves create binding rules of international law'. See Eriksson (n 102) 19.

[107] Ibid. 25.

[108] See Chaps 2, 3 and 4, pages 28, 34-35, 37-39, 64, 66-68 and 77-78.

[109] Eriksson (n 102) 200.

[110] However, 'positive obligation is a broader concept than due diligence in human rights, and entails a general duty on the part of states to undertake affirmative action'. Ibid. 201.

[111] Ibid. 202.

[112] Ibid.; for further details, see Houchins (n 188) Ch. 2, 6-13.

[113] Yakin Ertürk, Special Rapporteur on Violence against Women, its Causes and Consequences, Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women: The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, U.N. Econ. & Soc. Council, Comm'n on Human Rights U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006) (prepared by in accordance with Commission on Human Rights Resolution 2005/41).

[114] See Hasselbacher (n 188) Ch. 2, 198; Houchins (n 188) Ch. 2, 8-20; Eriksson (n 102) 202.

comprehensively surveyed international law, including many of the HR documents and case law, such as the jurisprudence of ECtHR and IACtHR, and stated that these provide evidence that there is 'a rule of customary international law that obliges States to prevent and respond to acts of violence against women with due diligence'.[115] Using the due diligence standard, Ertürk called for states to 'prevent, protect, prosecute and provide compensation and map out the parameters of responsibility for State and non-State actors alike in responding to violence'.[116] She concluded that the due diligence standard had reached so high a level of international consensus that it has become a rule of customary international law which should be universally recognised and applied.[117] This can be attributed partially to the innovative and creative interpretive approach of regional HR bodies, including the ECtHR and IACtHR.[118] Therefore, it may be argued that the general consensus is that no less than a minimum standard of due diligence is required in cases of domestic violence for the state to fulfil its positive obligations, has reached such a level as to become customary international law. It has even been claimed that Ertürk's statement 'can arguably be applied to all forms of gender-based violence, including honour-related violence'. [119]

Clearly, as discussed, the Iraqi state is subject to international legal norms, in particular those which impose positive obligations for due diligence standards to provide effective protection of the right to life of individuals against multifaceted acts of violence by non-state actors. This includes gender-based violence and violence resulting from terrorism, political sources, and criminal acts, regardless of whether these obligations are contained in customary international law or in the HR treaties to which Iraq is a party. Due diligence is also essential in holding the Iraqi authorities accountable where circumstances indicate that non-state actors, such as militia, insurgents and terrorists, have perpetrated acts of violence with the support or acquiescence of these authorities. In addition, it may be possible to attribute indirect responsibility to these authorities in cases were non-state

[115] Ertürk (n 113), para 29; see Hasselbacher (n 188) Ch. 2, 198-199; Houchins (n 188) Ch. 2, 8-20; Eriksson (n 102) 202; Jeni Klugman, 'Gender based violence and the law' *Background Paper for World Development Report 2017*, 13.
[116] The report in para 82 states that 'The due diligence obligation of protection requires States to ensure that women and girls who are victims or at risk of violence have access to justice as well as to health care and support services that respond to their immediate needs, protect against further harm and continue to address the ongoing consequences of violence for individual woman'. Ertürk (n 113); Hasselbacher (n 188) Ch. 2, 199-200.
[117] Hasselbacher (n 188) Ch. 2, 199.
[118] Two landmark decisions issued by the ECtHR demonstrate the acknowledgement and application of the emerging due diligence standard in the context of domestic violence. The Court relying on international materials and referring to Ertürk's report of 2006 on the due diligence standard, has quoted her conclusion that there is a rule of customary international law, which 'obliges States to prevent and respond to acts of violence against women with due diligence'. See cases of *Bevacqua v. Bulgaria* App no 71127/01 (ECHR, 12 June 2008), paras 52-53 and *Opuz v. Turkey* App no 33401/02 (ECHR, 9 June 2009), para 79; for further details, see Hasselbacher (n 188) Ch. 2, 200-215; see the discussions in Chapters 2 and 3 of the thesis, pages 32-36, 37-39 and 76-78.
[119] For further details, see Grans (n 154) Ch. 2, 705-706.

actors are responsible for perpetrating criminal acts, such as domestic violence, should the authorities have failed to discharge their positive obligations on due diligence. There has been a lack of a functional criminal justice system and institutions since 2003, as will be examined later,[120] and of an adequate response to the widespread violence, and an effective interpretation of the constitution's HR clauses by the IFSC. This is combined with the absence of any tradition for victims to bring cases before Iraqi courts which allege that state authorities have failed to fulfil positive obligations. With a full understanding of the complex and volatile situation in Iraq, these deficiencies could be gradually addressed by building a new culture in Iraq, as part of a comprehensive reformation programme. This would include a valid interpretation of the constitution's provisions for HR by the IFSC, and the establishment of adequate preventive measures and enforcement mechanisms to protect these rights, especially the right to life, against acts of violence. This could be combined with the promotion of a culture of proper access to justice and accountability, by tackling the impunity of both the Iraqi authorities and the perpetrators, and the establishment of adequate measures of reparation. Developing case law and the evolution of far-reaching jurisprudence on the part of ECtHR and IACtHR establishes certain norms and principles regarding these positive obligations which could partially help to promote this new culture, thus adding weight to the ICCPR's exposition of the obligations to be observed by the Iraqi state. By observing some of these norms, the Iraqi state can adopt behaviour which facilitates change in domestic HR policies, including national policy, laws and practices, and the mobilising of civil society to substantially improve the level of HR protection.

Clearly, the Iraqi authorities, in accordance with Article 2(2) of the ICCPR, are required to take positive steps to effectively implement the rights enshrined in the covenant, including the protection of the right to life.[121] This indicates that it is insufficient for the Iraqi state merely to claim that its constitution recognises the state's commitment to ensure the protection of the right to life as required by the covenant; it must also employ the principle of effectiveness. The principle of effectiveness is more than the positing of a mere theoretical concept of protection; it is achieved only by providing positive practical measures. Thus, there is no doubt that the Iraqi state cannot in any way claim to fulfil its duties of protection under the covenant by simply remaining passive or taking inadequate

[120] See pages 160-184, 192-203 and 208-211.
[121] See the discussion in Chapter 2, p 27.

measures of protection. This requires that Iraq establish both effective criminal law provisions and institutions capable of implementing them to provide protection for its citizens' right to life.

Admittedly, the legacy concerning respect for individuals' HR in Iraq, especially their liberties, has long been lacking under the previous oppressive regime and, at present, there are no good reasons to believe that such rights are fully guaranteed by the state authorities.[122] Although it is possible that they may be better protected under the post-2003 democratic regime, especially once ISIS is eradicated, the use of criminal law in the provision of this protection may weaken a primary function of the newly instituted HR norms in Iraq, which is to counterbalance any illegal, coercive state measures that interfere with its citizens' liberties. Therefore, it is better to avoid linking such a protective obligation with Iraqi criminal law and, instead, to rely on the concept of state sovereignty according to which the essential function of a state is to provide security for its citizens. However, the legitimacy of any criminal law practical measures taken by the Iraqi state would depend on whether these measures comply with the rule of law and obligations to respect HR. They must, therefore, be subject to the censure of Iraq's judicial system taking account of international and regional instruments of HR law.

The only preventive measure in current Iraqi criminal law to deter private individuals from violating the right to life is the threat of prosecution under the Iraqi Anti-Terrorism Law, and of capital punishment.[123] However, this is unlikely to adequately address the enormous number of current violations. The HRC has expressed deep concern in the light of information about the tendency of the Iraqi authorities and their judicial system to give a broad interpretation to the Iraqi Anti-Terrorism Law, using it to charge individuals with unsubstantiated offences in order to tackle the large number of acts of violence.[124] It asserted that, although the Iraqi state needs to adopt measures to counterattack these acts, it:

> should adopt the steps necessary to address the breadth of the definition of terrorism and to ensure that any existing or new counter-terrorism legislation, including the draft law before the

[122] There are many reports from sources other than the Iraqi government which include UN organisations and state agencies which hold that measures taken by the Iraqi authorities to counter criminal acts violate its international and domestic legal obligations. These reports have revealed that Iraqi authorities have consistently failed to respect and ensure the right of its citizens not to be subject to arbitrary detention, to be given the right to a fair trial and not be subjected to torture or ill treatment. See Huma Haider, 'Helpdesk Research Report: Formal justice in Iraq' (12.12. 2014) <http://www.gsdrc.org/docs/open/hdq1175> accessed 20 September 2016.
[123] See Article 406 (1) of the Iraqi Penal Code (n 11) and Article 4 of the Iraqi Anti-Terrorism Law of 2005 (n 79).
[124] See para 9 the UN Human Rights Committee (HRC), Concluding observations on the fifth periodic report of Iraq (n 88).

> legislature, is fully compliant with the Covenant. It should also ensure that measures taken to combat terrorism are fully compatible with its obligations under the Covenant.[125]

Another consideration is that, as Iraq has been a party to the covenant since 1971, it must, according to Article 40(2), submit periodic reports to the HRC on the measures it has implemented to give effect to covenant rights, and 'on the progress made in the enjoyment of those rights', including the right to life. However, the committee has only received four reports submitted before 2003.[126] Regrettably, for the ten year period 2003-2013, the current Iraqi regime has only submitted one report concerning the protection of HR.[127] This delay may have breached the duty to make regular reports, by which process the HRC hopes to 'induce states parties to adopt further measures to guarantee the effective enjoyment of the rights in law and practice'.[128] In this delayed report, the Iraqi authorities asserted that the 2005 constitution, in accordance with Article 2 of the covenant, in as much as it respects and ensures the rights within the covenant, is the main means of guaranteeing respect and protection of these rights in Iraq, via the emphasis it puts on the essential norms and principles of HR, particularly in part two, Articles 14-46, concerning rights and freedoms, such as the right to life, security and freedom (Article 15).[129]

Although this assertion reflects, in theory, the commitment of the Iraqi authorities to 'respect and ensure' the protection of the right to life, it can be argued that, in practice, they have grossly failed to do so. The appropriate measures of prevention, as the IACtHR asserted, should include all 'legal, political, administrative and cultural [means] that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts [and] may lead to punishment of those responsible and the obligation to [provide] for damages'.[130] On this basis, the Iraqi authorities appear largely to have failed to employ such measures.[131] Instead, they have been involved in splitting Iraqi

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[125] Ibid para 10.
[126] The Human Rights Committee has reviewed Iraqi reports in 1980, 1987, 1994 and 1997. Some of these reports are available at <http://en.alkarama.org/iraq/reports >.
[127] See United Nation, Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant: Fifth periodic reports of States parties due in 2000 Iraq (n 88).
[128] See Anja Seibert-Fohr 'Domestic Implementation of the International Covenant on Civil and Political Rights pursuant to its Article 2 para. 2' (2001) 5 *Max Planck Yearbook of the United Nation of Law* 399, 415.
[129] United Nations Human Rights Committee, Consideration of reports submitted by States parties under Article 40 of the Covenant: Fifth periodic reports of States parties due in 2000 Iraq (n 88) 12.
[130] See *Velasquez Rodriguez v Honduras* (1989) 28 ILM 291, paras 174-175. The HRC also asserted in its General Comment No.31 that Article 2 requires state parties to 'adopt legislative, judicial, administrative, educative and other appropriate measures' to fulfil their positive and negative obligations of protection. See Chapter 2, p 27.
[131] This is despite their claim that adequate legal, cultural and administrative steps have been taken to ensure that society lives in security, to promote the society's constitution, which has been deeply affected by criminal acts, and to make all their activities subject to the sovereignty of law and scrutiny of their independent judicial system. See United Nations Human Rights Committee, Consideration of reports submitted by States parties under Article 40 of the Covenant: Fifth periodic reports of States parties due in 2000 Iraq (n 88); it is important to note that Article 5 of the Iraqi Constitution states that 'The law is sovereign. The people are the source of authority and legitimacy'. In addition, Article 87 asserts that 'The judicial power is independent. The courts, in their various types and levels, shall assume this power and issue decisions in accordance with the law'. The Iraqi Constitution (n 9).

society and ignoring the value of promoting peaceful coexistence between diverse ethnic, religious and sectarian groups. This has weakened the legal and judicial system, creating a hostile environment for the right to life, promoting a culture of impunity, and exploiting the resources of Iraq, for those in power to achieve their own political, ethnic, and sectarian interests.[132] Therefore, it may be alleged that the authorities have culpably failed to observe their positive obligation in practice. Such a failure is evident in many serious examples, to be examined later, including widespread gender-based violence, enforced disappearance, persecution of minority communities, and a woeful security policy. There are also unlawful arrests, detentions and torture under the pretext of combatting counter-insurgency and terrorism, by employing fake bomb detection devices at security checkpoints, and in the fall of Mosul to ISIS, followed by ISIS massacres and humanitarian atrocities.

However, these allegations of culpable failure cannot be addressed at the international level since, although Iraq has ratified many UN international conventions, it has not yet acknowledged the competence of international bodies, including the Committee on Enforced Disappearances, the Committee Against Torture and the Committee on the Elimination of all Discrimination against Women, to exercise jurisdiction over various cases of acts of violence which Iraqi victims may have wanted to be brought before them. Specifically, Iraq has not signed the Optional Protocol of the ICCPR which would give individuals the right to appeal before the HRC in relation to the failure of the Iraqi authorities to take reasonable measures to protect their right to life. Iraqi authorities, nevertheless, may be said to have to comply with the requirements of the Committee, which obliges states to take all necessary preventive measures to protect the right to life of their citizens when they are aware that an imminent threat to their lives exists. This is because 'states parties' to the Covenant are referred to in general by the Committee in its General Comment on Article 6, and also in its decisions concerning victims' petitions, which require not only that the offending states comply with their positive obligations,

[132] Al-Qaisi (n 55) 50-51; Al-Ali has correctly noted that 'sectarians have not in themselves been an impediment to progress; rather they have been deliberately politicized by the country's most important actors, who sought to divert attention from their own performance in government'. Al-Ali (n 5) Ch. 1, 244; this is despite Article 2 para 4 of the Iraqi Anti-Terrorism Law (n 79) stating that the 'Use [of] violence or threat to stir up sectarian strife or civil war or sectarian infighting by arming citizens or by encouraging them to arm themselves and by incitement or funding' must be considered as an act of terrorism and, thus, punishable by death. For further details, see Salem Roudan Al-Moussawi, The Crime of Stirring Sectarian Strife: A Comparative Analysis (Sabah Library, 2015) 119-201; Dodge also suggested that 'the corruption eroding the Iraqi state from within is an integral part of a *muhasasa* system that has, in effect, privatised the Iraqi state. The system has allowed the Iraqi political elite to strip state assets for personal gain and to fund the parties they represent' and that 'the growth of both sectarianism and corruption are the responsibility of this elite, which has maintained its power since 2003'. Dodge (n 12) Ch. 1, 17.

but also that all other states fulfil them,[133] including Iraq. As Iraq is a member of ICCPR, it must comply with the HRC's requirement to take on the positive obligation to prevent violation of its citizens' right to life by other private individuals. Thus, even if the Iraqi state claims that its legal system does not include such a positive obligation, it is nevertheless legally bound to abide by the higher requirements of the HRC and, therefore, arguably it must conform to them, regardless of whether or not it allows its citizens to make complaints against it if should it fail to protect their right to life. It can be argued, therefore, that since the Iraqi authorities are aware that there is constant and serious endangerment of the lives of its citizens, including suicide bombers, car bombs, kidnapping and assassination operations, sectarian violence, and persecution of minority religious groups, they must take all reasonable precautionary measures according to due diligence, to fulfil their obligation of protection. The failure of the Iraqi authorities to do so may be said to violate their obligations under the ICCPR.

The state authorities have persistently attributed the difficulty of fulfilling these obligations in practice to the dire security situation in both Iraq and the surrounding regions, particularly the conflict in neighbouring Syria. This latter especially has greatly affected the capacity to protect the right to life of Iraqi citizens and, moreover, the rate of violence has risen since 2008, reaching its worst level in 2013.[134] However, arguably the Iraqi government cannot be entirely exonerated from failing to address the problems and threats arising from the security situation, which is partly due to its inability (so far) to build competent and functional institutions to deliver public services and tackle corruption. This has undermined both the mechanisms and processes in place to protect citizens from non-state actor violence, and the process of investigating crimes and revealing the truth about why and by whom they have been committed. The fragility of the Iraqi state and its criminal justice system can also be attributed to various other serious deficiencies, including the failure of the transitional process post-2003, which was followed by political unrest and violence, the reinforcement of sectarian and ethnic divisions in the government and society as whole, the rise of religious extremism and militia,[135] and the absence of complete control over its affairs because of the interference

[133] See the discussion in Chapter 2 of the thesis, pages 26-30.
[134] Al-Ali (n 5) Ch. 1, 187; see also Nouri, Alwan and Atwan (n 35); Elaheh Koolaee and Ziba Akbari, 'Fragile State in Iraq and Women Security' (2017) 4 *Contemporary Review of the Middle East* 1, 1-19; Khamis Dham Hamid, Transitional Justice: Comparative Study between South Africa and Iraq 236-249; Anna Louise Strachan, Factors Behind the Fall of Mosul to ISIL (Daesh) in 2014, (2017) K4D Helpdesk Report. Brighton, UK: Institute of Development Studies 3-4.
[135] Koolaee and Akbari (n 134); Hamid (n 134); Khader Abbas Atwan, Iraq's State-Building Dilemma, (17 April 2013) <https://www.azzaman.com/?p=31722> accessed 15 August 2017; Strachan (n 134) 1-6; Boduszyński (n 27) 120-123.

of many states seeking their own interests. However, the principal reason for the increase in the rate of violence was the numerous policy failures by the state. Since the state failed to punish acts of violence, this reignited the 'cycle of violence' and sense of 'marginalization and injustice of the state's brutal practices', as well as 'fann[ing] the flames of extremism'.[136]

This means that the state's policy, especially under Prime Minister al Maliki, has not only been responsible for creating a hostile environment, instability and endangering the right to life of individuals, and thus producing victims of crime, it has also contributed to the creation of criminal, insurgent, terrorist and extremist groups, including ISIS. This policy was exemplified mainly by the use of de-Ba'athification and sectarianism, especially against the Sunni population, to marginalise their role in political affairs, and employ excessive counter-terrorism measures against them based on Anti-Terrorism Law,[137] including widespread unlawful arrests, detention, torture, acts of enforced disappearance, and extra-judicial executions committed by government and pro-government Shia militias.[138] When ISIS assumed control of Mosul, Iraq's third-largest city, much of its population seemed to support ISIS, or were at least indifferent to it, in preference to 'Maliki's repressive and sectarian rule'.[139] Research suggests that a backlash and protest by a population against a state's policies is highly likely to occur, as in the case of Northern Ireland, when these policies, in response to violence, employ excessive brutality by security forces which violate human rights. Such a backlash often shifts support to violent actors, ultimately increasing the level of violence.[140]

[136] Al-Ali (n 5) Ch. 1, 187; see also Haitham Al-Mayahi, Terrorism, Sectarianism, Corruption and the Transition to Democracy in the Post-Saddam Hussein Era in Iraq (PhD thesis, Howard University 2016) 75-76; between 2011 and 2014, although sectarian policies have been introduced since 2003, these were arguably intensified by former Prime Minister al Maliki, who has been accused of escalating anti-Sunni sentiment by: removing political opponents using Article 4 of the anti-terrorism law and ramping up anti-Sunnism; escalating violence following the massacre of 38 unarmed Sunni protestors in Hawijan in 2013, a massacre which contributed to Sunni disillusionment and anger; disbanding the Sunni Awaking Councils established to tackle terrorist groups, creating a lack of Sunni-led forces to fight against ISIS and protect Sunni territory; and, using sectarian Shiia militias groups to supplement the armed forces, thus highlighting the government's 'sectarian exclusiveness'. For further details, see Strachan (n 134) 4-5; Tallha Abdulrazaq and Gareth Stansfield, 'The Enemy Within: ISIS and the Conquest of Mosul' (2016) 70 *The Middle East Journal* 525, 526-527; Ben Smith, Islamic State of Iraq and the Levant (ISIS) and the takeover of Mosul, (2014) London: House of Commons Library, 15; David Romano, 'Iraq's Descent into Civil War: A Constitutional Explanation' (2014) 68 *The Middle East Journal* 547, 552, 563; Andreas Krieg, ISIS' success in Iraq: A testimony to failed security sector reform, (2014) Centre for Security Governance, 1; Dylan O'Driscoll, The Future of Mosul: Before, during, and after the Liberation, (2016) Middle East Research Institute, 11-18.
[137] Strachan (n 134) 2-6; O'Driscoll (n 136); Hasan Mustafa, 'Examining the Causes of the Islamic State's Resurgence in Iraq' (2014) <https://hasanmustafas.wordpress.com/2014/07/05/examining-the-causes-of-the-islamic-states-resurgence-in-iraq/> accessed 15 August 2017.
[138] See Amnesty International, Absolute Impunity: Militia Rule in Iraq (2014) 24; Amnesty International, Iraq: Turning a Blind Eye: The Arming of the Popular Mobilization Units (2017) 5-7 < https://www.amnesty.org/download/Documents/MDE1453862017ENGLISH.PDF > accessed 13 March 2018.
[139] Boduszyński (n 27) 122.
[140] See Foster (n 28) 8-13.

It could be said that if Iraq signed the Optional Protocol of the ICCPR and observed its duty to regularly provide periodic reports to the HRC, this would put pressure on the Iraqi authorities to change their policy towards the causes of violence, improve their attitude in practice to the fulfilment of their positive obligations of protection, and create accountability should they fail to do so. Such pressure would be strengthened if a huge number of Iraqi victims were permitted to appeal before the Committee, alleging that the Iraqi authorities have failed to comply with their obligations under the covenant. It would also reverse the entrenched culture of Iraqi citizens, under which it is assumed that the behaviour of Iraqi authorities is untouchable and above the Iraqi judicial system, when the constitutional obligation of protection is not upheld.[141] At present, there is no effective domestic judicial mechanism to claim gross negligence by the authorities in fulfilling the duty of protection. Therefore, allowing victims to complain to the Committee after all domestic judicial complaints available in the Iraqi legal system had been exhausted (unless this proved to be impossible or would result in a severe threat to the complainants) would send a strong message that such claims must be effectively addressed in the Iraqi judicial system.

In principle, the conduct of Iraqi authorities and security and military forces is subject to the provisions of the Iraqi Penal Code and other penal codes.[142] For instance, Articles 322 to 341 of the Iraqi Penal Code requires the punishment of any public service individuals[143] if their conduct, whether intentional or not, violates their legal duties and also causes damage to individuals. These articles address various circumstances in which public officials breach their duties, wilfully or not, as prescribed in the laws, regulations, instructions and orders. These breaches include administrative and financial corruption as well as other multifaceted violations due to gross negligence in the performance of public office, abuse of power and serious breaches of public service.[144] Victims affected

[141] Under the pre-2003 Saddam regime, the Ministry of Justice and the courts were used as important instruments of oppression. See Williamson (n 2) Ch 1, 230; under Saddam, the Iraqi police were often 'brutal and corrupt and as a result were feared by the Iraqi public. For the Iraqi people, the police represented a ruthless repressive regime and could not be trusted'. Christova (n 1) 427.

[142] See the Iraqi Penal Code of 1969 (n 11); the Iraqi Internal Security Forces Penal Code No. 14 for the year 2008; the Iraqi Military Penal Law No. 19 for the year 2007.

[143] Article 19 (2) of the Iraqi Penal Code (n 11) defines a public service individual as 'any official, employee or worker who is entrusted with a public task in the service of the government or its official or semi-official agencies or agencies belonging to it or placed under its control.. This includes the Prime Minister, his deputies and ministers and the members of representative, administrative and municipal councils….'.

[144] For instance, Article 331 states that 'Any public official or agent who wilfully commits an act in breach of the duties of his office or refrains from executing the affairs of that office with intent to harm the welfare of an individual or to benefit one person at the expense of another or at the expense of the state is punishable by detention plus a fine or by one of those penalties'. In addition, Article 341 indicates that 'Any public official or agent who causes by a serious error on his part the infliction of grave damage on the property or interests of an authority for which he works or with which he is associated by virtue of his position or on another's property or interests that have been entrusted to him is punishable by detention if it is as a consequence of gross negligence in the performance of his duty or the abuse of his authority or a serious breach of the duties of his office'. For further details, See Hamza Hassan Khader al-Tai, Administrative Corruption in Public Office (MSc thesis, Arab Open Academy in Denmark 2010) 75-129; Ibrahim Hamid Kamel,

by official misconduct have the right to initiate a criminal complaint and no constitutional immunity would apply to prevent the victims from suing them. In addition, victims can rely on tort liability principles in Iraqi civil law to sue the authorities for damage from their failure to fulfil their duty of protection in accordance with due diligence.[145] In practice, it is important to note that until now there have been no criminal or civil cases brought by victims against the authorities on the grounds of the breach of their positive obligation, because this obligation is neither entrenched in the Iraqi legal system nor followed by the courts in practice. This raises the question as to the extent to which the HRC and other international bodies' norms with regard to positive obligations have any influence on the attitude of the Iraqi authorities.

If the HRC were to receive regular reports from the Iraqi authorities concerning the status of the protection of HR in Iraq, it would be enabled to monitor whether or not these authorities were complying with their positive duty to protect the right to life, and to suggest any modifications to their laws and practices to provide the protection required. In the latest report by Iraq in 2013, mentioned above, the Iraqi authorities asserted their 'belief in the effectiveness and usefulness of the human rights treaty mechanisms which are highly instrumental in furthering the international human rights protection system'.[146] This, in principle, may be said to reflect the belief of the Iraqi state that victims should be allowed to appeal before the committee. In discussing this report with the Permanent Representative of Iraq to the United Nations Office in Geneva, Mohammad Sabir Ismail, the committee urged Iraq to sign the First Optional Protocol and apply the provisions of the covenant in the Iraqi courts.[147] Sabir informed the committee that the signing by Iraq of the First Optional Protocol of the covenant would be considered by the inter-ministerial bodies, and that, 'as for the status of the Covenant in the Iraqi legal framework, according to the Law of Treaties No. 111 (1979), international treaties took precedence over national laws. All judges had to abide by the adopted international instrument. The national judge always feared an appeal of his decision, thus he scrutinized everything before issuing a

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The Crime of Gross Negligence in the Performance of Public Office (2008) 3-34 < http://www.nazaha.iq/search_web/moneycrime/1.pdf>.

[145] Articles 215, 219 of the Iraqi Civil Law No. 40 for the Year 1951.

[146] United Nations Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant: Fifth periodic reports of States parties due in 2000 Iraq (n 88) 3.

[147] After considering this fifth delayed Iraqi report, the Committee raised a list of concerns to be answered by the Iraqi authorities, including counter-terrorism measures in accordance with Anti-Terrorism Law No. 13 of 2005, the death penalty, the right to a fair trial, the independence of the judiciary and the use of torture particularly to gain confessions. See Human Rights Committee reviews the report of Iraq in 27 October 2015, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16658&LangID=E> accessed 20 September 2016.

sentence'.[148] In its concluding observations on the fifth delayed report of Iraq, the committee asserted that the state should be more energetic in trying to raise awareness of the covenant and how it might be applied in domestic law to guarantee the consideration of its provisions by the courts. Moreover, it should also look at the First Optional Protocol to the covenant which would facilitate an individual complaint process.[149]

Further, in the light of the report of the High Commissioner for Human Rights, which found evidence that ISIS[150] had committed war crimes, genocide and crimes against humanity, including widespread and systematic violations of the HR of numerous groups, including Christians, Shi'a, and Yezidi,[151] the committee asserted that everyone, especially ethnic or religiously vulnerable persons, should be protected from violence and HR abuse. Violations are required to be rigorously investigated by an independent authority, and perpetrators must be tried and adequately punished, with appropriate reparations given to victims.[152]

However, it cannot be ignored that the Iraqi state, as Sabir asserted, faces serious challenges providing protection and security to its citizens since 'terrorist acts being committed against Iraqi people were unprecedented in their cruelty and some […] amounted to genocide' and that ISIS 'was not an internal terrorist organization, but a transnational one. It was based on funding and smuggling networks'.[153] Therefore, because of such challenges, there can be no justification for imposing a disproportionate duty of protection on the Iraqi authorities alone. Nevertheless, such challenges should not be an excuse to justify the failure of government policy to fulfil their protective obligation regarding due diligence. The failure to observe due diligence standards of protection for citizens as stipulated by the HRC, the ECtHR, and the IACtHR is evidenced by many serious examples, and some will be examined next.

5.2.1 Sexual orientation and gender-based violence

[148] Ibid.; 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'. Unless the provisions of international treaties are codified in domestic law, courts are likely to be reluctant to directly apply those provisions in practice. See Almusawi (n 17) 39; this means that to bring the Iraqi legal system, both in theory and practice, into line with positive obligation doctrine, this doctrine needs to be explicitly included in this system if it is to be observed in the Iraqi courts.
[149] See para 6 of the UN Human Rights Committee (HRC), Concluding observations on the fifth periodic report of Iraq (n 88).
[150] ISIS considers itself to be a jihadist group and 'it claims religious authority over all Muslims across the world'. However, it is widely regarded as a 'terrorist organisation'. For further details, see Col. S.C. Dhiman, Islamic State of Iraq and Syria (ISIS) Reconciliation, Democracy and Terror (Neha Publishers & Distributors, 2015) 5-8.
[151] United Nations High Commissioner for Human Rights, *ISIL may have committed war crimes, crimes against humanity and genocide: UN report* (19 March, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15720&LangID=E> accessed 20 September 2016.
[152] See para 20 (a) and (c) of the Human Rights Committee (HRC), Concluding observation on the fifth periodic report of Iraq (n 88).
[153] Human Rights Committee reviews the report of Iraq in 27 October 2015 (n 147).

A recent report employing HR testimonials and interviews with advocates of Iraqi community-based LGBT persons regarding the protection of their HR indicates that they have been subject to constant discrimination and extreme violence, including acts of unlawful killing, torture, cruelty, and ill-treatment based merely on their real or perceived sexual orientation or gender identity. Since 2003, it has been claimed that this violent treatment occurred regularly and with impunity, and involved various segments of society, including 'civilians, militia members, religious leaders, police and security forces, government officials, healthcare workers and others'.[154] For example, many violent incidents were reported in 2009, 2012, and 2014 in Sadr City, areas of Baghdad, and other provinces, as a result of the targeting, intimidating, abducting and killing of many people under suspicion of being gay, 'emo' or on the basis of other sexual orientations. This was done with the support or acquiescence of Iraqi authorities, especially police and security forces. It has been suggested that such organised campaigns of violence by militia groups were incited by *fatwas* or other religious invectives of certain religious clerics.[155] The report concluded that 'the Iraqi government has an obligation to protect individuals from acts that violate these provisions of the ICCPR, whether committed by state actors or by private persons' and 'it must indiscriminately address such violations by exercising due diligence to prevent, punish, investigate, and provide redress for such acts'.[156] It has also stated that the 'government of Iraq has failed in its obligation under the ICCPR to take proper measures to give effect to the rights recognized therein, to ensure effective remedies in cases of violations, and to prevent systemic impunity'.[157]

[154] Iraqueer et al., Dying to be Free: LGBT Human Rights Violations in Iraq (2015) 1-12 <http://www.law.cuny.edu/academics/clinics/hrgj/publications/ICCPR-Iraq-Shadow-Report-LGBT-ENG> accessed 20 September 2016; see also The International Women's Human Rights (IWHR) et al., Living with Fear: Torture and Discrimination Committed against LGBT Persons in Iraq (2015) 1-12 <https://www.madre.org/sites/default/files/PDFs/Iraq%20LGBT%20Shadow%20Report%20to%20CAT%20FINAL.pdf> accessed 7 August 2017.

[155] Iraqueer et al. (n 154) 3-4; The International Women's Human Rights (IWHR) et al. (n 154) 3-4; Timothy Williams and Tareq Maher, 'Iraq's Newly Open Gays Face Scorn and Murder' (7 April, 2009) *New York Times* <www.nytimes.com/2009/04/08world/middleeast/08gay.html> accessed 7 August 2017; Green and Ward (n 28) 8.

[156] Iraqueer et al. (n 154) 3.

[157] In its 2013 delayed report to the HRC, 'the Government of Iraq states that the principles of equality and participation are enshrined in its Constitution. However, the only time the report makes reference to lesbians or gays is in defending the State's discrimination against them in protest and organizing activities. The Report fails to discuss or even acknowledge the LGBT population in Iraq beyond this open embrace of discrimination, which it justifies by referring to "the teachings of the Islamic sharia". The use of custom or religion to justify discrimination and other human rights abuses is not permitted under international human rights law. For example, this Committee found that the protections of the right to religious freedom in Article 18 of the ICCPR "may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience and religion." The Iraqi government may not rely on Shari'a or any other religious teachings or practice to justify discrimination under the ICCPR'. Ibid. 1, 11; the HRC has required that the Iraqi state 'adopt robust measures to effectively prevent acts of discrimination and violence against such persons and ensure that all acts of violence against them are effectively investigated; perpetrators brought to justice; and victims compensated. It should also collect comprehensive data on cases of violence against persons on the basis of their sexual orientation or gender identity'. See para 12 (c) of the UN Human Rights Committee (HRC), Concluding observations on the fifth periodic report of Iraq (n 88).

The fragility of the Iraqi state and its criminal justice system has been reported by many international organisations and NGOs to have specific and additional consequence as to its ability to fulfil its positive obligations to ensure the protection of women's human rights.[158] Since 2003, females have been subjected to a variety of systematic and widespread gender-based abuses, including abductions, killings for political, sectarian, or criminal reasons, domestic violence, enforced disappearances and displacements, honour killing, rape, and sexual slavery, by such armed groups, militia, members of law enforcement agencies, and their family and community.[159] There is a lack of comprehensive legislation, administrative, judicial, and educational systems in Iraq which would provide and promote the protection of all females and create a cultural awareness of the desirability and means of combatting gender-based violence, especially domestic violence.[160] In fact, the Iraqi Penal Code of 1969 in many articles actually reinforced the cultural attitude of widespread acceptance by society of domestic violence perpetrated with impunity.[161] For instance, when husbands resort to physical violence against their wives and children, as stated in Article 41 of the Penal Code, it is permissible 'within certain limits prescribed by law or by custom'; however, the same Article does not specify the legal criteria defining these limits to determine when they have been breached.[162] Domestic violence against women and girls within families has reportedly increased and is grossly under-reported in Iraq, with a prevalence of physical violence against women by husbands at around one in five according to one study, while another found that 56.4% of Iraqi men believe they have the right to beat their wife if she disobeys. Even where law enforcement does act, legal personnel may be harassed and threatened by victims' family members seeking to terminate legal proceedings'.[163] In addition, the Penal Code allows

[158] See United States Department of State, 2016 Country Reports on Human Rights Practices-Iraq (n 78) 47-51; United States Department of State, 2013 Country Reports on Human Rights Practices – Iraq <https://www.state.gov/documents/organization/220565.pdf> accessed 24 February 2018, 47-51 ; The United Nations Assistance Mission for Iraq (UNAMI), Report on the Protection of Civilians in the Armed Conflict in Iraq: 1 November 2015 – 30 September 2016; The United Nations Assistance Mission for Iraq (UNAMI), Report on the Protection of Civilians in the Armed Conflict in Iraq: 1 May – 31 October 2015; Koolaee And Akbari (n 134) 1-19.

[159] See United Nations High Commissioner for Refugees (UNHCR), Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Iraq (31 May 2012) 34.

[160] It has been reported that 'most violence against women and girls appears to be perpetrated with impunity. According to a number of reports, the main reason why victims of gender-based violence refrain from reporting sexual abuse and rape, forced marriage, domestic violence and female genital mutilation (FGM) is the fear of retaliation by the perpetrator or the family/community for tainting their "honour". Reports further indicate that women often fear that they would not receive protection from law enforcement agencies and courts, given that gender-based violence is often treated leniently while certain forms of violence, including domestic violence, trafficking and FGM are not criminalized by Iraqi law'. Ibid.

[161] See International Women's Human Rights (IWHR) et al., Women's Human Rights Violations in Iraq: in Response to the Fourth Periodic Report of the Republic of Iraq (August 31, 2015) 12; United States Department of State (USDS), 2016 Country Reports on Human Rights Practices –Iraq (n 78) 49; USDS, 2013 Country Reports on Human Rights Practices –Iraq (n 158) 47.

[162] UNHCR (n 159) 36; USDS, 2016 Country Reports on Human Rights Practices –Iraq (n 78) 49; USDS, 2013 Country Reports on Human Rights Practices –Iraq (n 158) 47; see Boshra Al Obeidi, 'Violence Against Women In the Community and in the Provisions of the Iraqi Penal Code No. 111 of 1969', 2-32 <www.gjpi.org/wp-content/uploads/1.doc> accessed 7 August 2017.

[163] IWHR (n 161) 13.

the punishment of rape with a maximum sentence of life imprisonment in circumstances where the victim has died; in other rape cases punishment may be dropped against perpetrators, even after sentencing, if they marry the raped victims, even if they are under the legal age of 18.[164] Marriage with a perpetrator, according to those advocating it, 'will restore the woman's honour, which, they say, has been tainted by rape or sexual assault, thereby avoiding a potential "honour killing" by her family or tribe'. This reasoning, however, fails to consider how marriage to a rapist may force the victim to experience further daily emotional, and possibly physical, trauma.[165] Rape victims do not usually report it to authorities or pursue legal remedies because of the 'social stigma and societal and often familial retribution against both the victim and perpetrator'.[166] Where women do decide to report sexual violence, they face harassment and abuse from Iraqi police and may even be accused of adultery or prostitution. More than 97% of women in one survey said that because of fear of damaging their reputation or the belief that Iraq's law enforcement agencies could or would not be able to address gender-based violence, they would were unwilling to report problems to police.[167] Furthermore, Article 409 of the Iraqi Penal Code may also be said to promote a culture of impunity regarding honour killings, which, according to many reports, remain a serious problem since punishments are a maximum of three years or even voided altogether on the grounds of 'honourable motives' if the accused is on trial for killing his wife or a female dependent because of the suspicion that the victim was committing adultery.[168] Indeed, there is no legal guidance on what constitutes 'honourable motives', which lends itself to extensive interpretation and exploitation in all areas of Iraq, and moreover 'honour crimes' are usually treated with impunity due to general social recognition, even by law enforcement officers.[169] An additional type of honour killing has also been imposed by armed groups rather than victims' families.[170] For instance, the United Nations Assistance Mission in Iraq (UNAMI) has received reports indicating that in Basra there have been multiple

[164] Ibid. 11. See Article 398 of the Iraqi Penal Code (n 11); USDS, 2016 Country Reports on Human Rights Practices –Iraq (n 78) 49.
[165] Despite the Iraqi Personal Status Law of 1959 requiring the consent of both parties to a marriage, observers have noted that 'fear of further reprisals and social stigma is said to be likely to coerce a woman or girl into a marriage with the abuser. Also in the case of abduction, including abduction with (attempted) rape, the punishment will be void in case the perpetrator marries the victim. As a result, …very few perpetrators of rape are known to have been convicted'. UNHCR (n 159) 36.
[166] International organisations and local NGOs have reported 'family-imposed movement restrictions, cultural norms, or stigmatization prohibited or discouraged female victims of sexual crimes from accessing psychosocial support services' and, further, health ministers in the Iraqi Kurdistan Region, especially in internally displaced camps 'were unwilling to treat sexual assault survivors due to cultural norms, and if they did give care, it was inadequate due to capacity limitations in the health-care sector'. Ibid. 49.
[167] IWHR (n 161) 12.
[168] See Articles 128(1), 130 and 409 of the Iraqi Penal Code (n 11); for further details, see UNHCR (n 159) 37-38; USDS, 2016 Country Reports on Human Rights Practices –Iraq (n 78) 52; Green and Ward (n 28) 4-6.
[169] UNHCR (n 159) 37.
[170] Green and Ward (n 28) 7.

'honour' crimes by militia, with police records detailing execution-type killings, reportedly for 'adultery or "un-Islamic conduct".[171]

Honour crime is specifically reported to be at a high level in the Iraqi Kurdistan Region (KRG) despite the passing of government legislation (No.8 of 2011) to address gender-based violence, including: physical, psychological and verbal abuse of girls and women; female genital mutilation; spousal rape and threats, and child abuse.[172] For instance, in 2013 HR advocates documented dozens of cases of abuse and killings of women by their male family members in the KRG.[173] Despite Article 29(4) of the Iraqi constitution explicitly forbidding 'all forms of violence and abuse in the family', the central government of Iraq has not enacted wide-ranging national regulation to deal with domestic violence, and it remains non-criminalised. This failure to avert, indict and guard victims from domestic violence means women remain vulnerable to domestic violence and acts of revenge.[174] The HRC, in its concluding observations on the delayed fifth periodic report by Iraq, expressed its concern at the lack of adequate legislation to combat violence against women.[175] It stated in paragraph 26 that all forms of violence against women should be eliminated by the Iraqi state, to be achieved by redoubling efforts in three main ways. First, it should facilitate the reporting, investigating and making of reparations for gender-based crimes, and the protection of victims. Secondly, it must urgently change legislation to ensure women are safeguarded against violence by repealing 'honourable motives' as a mitigating circumstance for murder, and preventing the exoneration of rapists who marry their victims, as well as guaranteeing that all types of violence against women become criminalised and receive adequate punishment. Third, the state must raise more awareness of the unacceptable and adverse consequences of violence against women, and of the resources and protection available to victims; it should also begin programmes for domestic violence offenders to modify their behaviour,

[171] UNAMI, Report on Human Rights in Iraq: 1 July to 31 December 2007 (UNAMI/OHCHR 2007), para 33; according to the Basra Security Committee, 79 women were killed by Basra militia or vigilantes in 2007 for 'violating Islamic teachings', 44 died in 'honour killings' and seven were killed for political reasons. Reports from ambulance drivers indicate the real numbers are much higher. In the first 11 months of 2008, '81 women in the city have been murdered for allegedly bringing shame on their families'. It is unclear how many of the killings were 'genuine' honour killings motivated by shame, how many were by militia or vigilantes, and how many of the latter were carried out in response to denunciations from relatives or neighbours. Ibid.

[172] Honour killings appear to be concealed as accidents or suicides, reported as suicide to ' avoid prosecution,' or as suicide because of the 'fear [of] being killed by their families'. The KRG has pledged to deal with 'honour killings' and other violence against women, but most cases go unpunished, or, in the rare instances of conviction, are leniently punished. See Ibid. 37; IWHR (n 161) 13.

[173] IWHR (n 161) 13.

[174] Ibid.; for further details, see Iraqi Organisations et al., Seeking Accountability and Demanding Change: A report on Women's Rights Violations in Iraq (2015). See the discussion in Chapters 2 and 3, pages 28-30, 32-36, 37-39, 67-68 and 76-78.

[175] The UNHRC, Concluding observations on the fifth periodic report of Iraq (n 88).

and develop training activities for state officers to help them react appropriately to all violence against women.[176]

The Committee on the Elimination of Discrimination against Women also asserted that the Iraqi state should adopt holistic measures to comply with due diligence to prevent, investigate, prosecute and punish violence against women and girls, by state or non-state actors.[177] This should be achieved by reforming the whole security sector to incorporate a gender-sensitive and gender-responsive perspective, and to establish systematic training programmes concerning respect for women's HR. In addition to enforcing the law, accountability mechanisms must be established to combat impunity and corruption, and the judiciary must be reformed to ensure it remains independent and impartial, and has integrity in the delivery of justice.[178]

In tackling widespread domestic violence, the Iraqi state adopted between 2013 and 2017 an Anti-Violence against Women Strategy and a National Strategy on the Advancement of Women in Iraq, respectively, which both demanded legislation on domestic violence. An Anti-Domestic Violence Law has been drafted but remains unratified by the parliament.[179] It could be argued that this draft law still considers domestic violence to be a private matter, subject to various social, religious, cultural, and tribal customs, and not a violation of HR requiring the state and criminal justice system to adopt measures to fulfil its positive obligations as required by international norms of HR. This argument can be supported by scrutinising the draft law, criticised by Human Rights Watch for not meeting the international standards required to adequately prevent and respond to domestic violence. Although one stated aim of the draft law is to prevent and limit the spread of domestic violence, which it has described as a 'crime', it has failed to: precisely define what constitutes domestic violence;[180] protect all victims of domestic violence;[181] and, set out penalties for crime(s) of domestic violence and additional penalties for

[176] Ibid.
[177] See the UN Committee on the Elimination of Discrimination against Women, Concluding observations on the combined fourth to sixth periodic reports of Iraq, U.N. Doc. CEDAW/C/IRQ/CO/4-6, March 10, 2014, para 10.
[178] Ibid.
[179] See Human Rights Watch, Domestic Violence in Iraq: Commentary on the Draft Anti-Domestic Violence Law in Iraq (March 2017) 1.
[180] The draft law defines domestic violence as 'any action, omission, or the threat to do so within the family, and the consequent material or moral damage', contrary to international standards. According to the 2012 UN Women's Handbook for Legislation on Violence Against Women, any legal definitions of domestic violence should include 'physical, sexual, psychological, and economic violence'. 'Coercive control' should also employed in any definition of psychological and economic violence. It 'includes a range of acts designed to make victim subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behavior'. See Ibid. 3.
[181] This is because the draft law defines domestic violence within the family and does not include 'those in intimate relationships but who are not married, and also excludes those formerly in intimate relationships such as divorced and separated couples'. Ibid. 4.

situations that aggravate the circumstances of the violence.[182] In addition, it has failed: to repeal all penal code provisions (including Articles 41, 398 and 409), which enshrined a culture of impunity;[183] to establish adequate measures to protect victims, punish perpetrators, and ensure access to proper redress for abused victims, since it prioritises reconciliation over the provision of protection and justice for them.[184] The prioritisation of reconciliation in cases of domestic violence raises serious concerns about the tremendous social and economic pressure it places on women to prioritise family unity over their own protection.[185] Mediation in all cases of violence against women and at all stages of legal proceedings should be forbidden as it prevents these cases from receiving proper scrutiny by the judicial authority. In promoting reconciliation as an alternative to justice, the draft law 'incorrectly presumes that both parties have equal bargaining power, reflect[ing] an assumption that both parties may be equally at fault for violence, and reduces accountability for the offender', thus, undermining protection for the victim of domestic violence.[186] In addition, although international standards place concrete duties on police, prosecutors, and other law enforcing or investigating officials dealing with cases of violence against women, the draft law, however, makes no mention of police officers and neither does it detail absolute duties for them when responding to cases of violence against women, except for the Department of Family Protection. This omission is key, since the police play a significant role and can help ascertain if a victim should pursue justice or not.[187]

Although the draft law gives the Department for Family Protection and the Higher Committee for Anti-Domestic Violence the task to propose programmes for the reduction and prevention of domestic violence, it has failed to determine which prevention measures should be included to adequately protect victims. Prevention of domestic violence 'should include measures such as awareness-raising activities; development of educational curricula on violence against women, women's human rights, and promotion of healthy

[182] Human Rights Watch noted that 'Article 20 of the draft law provides penalties for breach of protection orders [which consider among the most effective legal remedies available to complainants/survivors of violence against women], and Article 22 sets out that offenses in the law act as aggravating circumstances, but does not stipulate what they are'. Ibid. 4, 13.
[183] The UN Committee on the Elimination of Discrimination against Women in its concluding observations (n 177), para 18 (d), called on Iraq to 'review the draft law on domestic violence with a view to ensuring that penalties are imposed on perpetrators of violence against women and harmonize the Penal Code and the Code of Criminal Procedures accordingly'; see Human Rights Watch (n 179) 5.
[184] This is because the draft law indicates that one objectives is to 'work on family reconciliation to protect families and the society as a whole'. The draft law in Article 19 further states that 'the judge should refer the parties to the Department of Social Research for reconciliation, and where reconciliation fails, the court shall take legal action. It also provides that legal procedures to prosecute the perpetrator are to stop once reconciliation has been reached'. Human Rights Watch (n 179) 7.
[185] See Human Rights Watch, Iraq: Strengthen Domestic Violence Bill (19 March 2017) <https://www.hrw.org/news/2017/03/19/iraq-strengthen-domestic-violence-bill> accessed 14 August 2017.
[186] Ibid.
[187] For further details, see Human Rights Watch (n 179) 8-11.

relationships; and sensitizing the media regarding domestic violence';[188] however, none of these measures have been specified in the draft law.

5.2.2 Enforced Disappearance and Violence against Minority Communities

The phenomenon of enforced disappearance is another ugly facet of the widespread violence in Iraq post-2003. The government is unwilling to acknowledge that it still happens, as it is considered to be a past problem and, also because it has partial responsibility for the sheer scale and systematic practice of disappearances and abductions conducted both by its security forces and affiliated militias. This, combined with arbitrary arrests, torture and extrajudicial executions, has been found to contribute effectively to the increase in disappearances.[189] Due to the continuing crises of the security situation, comprehensive statistics about the number of missing persons is lacking. However, a study conducted by the International Commission on Missing Persons (ICMP) estimated that between 250,000 to over one million persons have disappeared in Iraq.[190] Following serious sectarian violence between 2006 and 2008, the International Committee of the Red Cross reported that 'some 20,000 bodies were deposited at the Medico-Legal Institute in Baghdad, less than half of whom have been identified. Unclaimed bodies were buried in various cemeteries around the city'.[191] Working closely with Iraqi non-governmental organisations and HR bodies regarding enforced disappearances, and having reviewed thousands of cases, the Geneva International Centre for Justice (GICJ) observed that some victims were taken by police, security forces, and uniformed militia; their families lack information about the charges

[188] Ibid. 23.

[189] See Geneva International Centre for Justice (GICJ), Iraq: Enforced disappearance: A Widespread Challenge, Shadow report submitted to the UN Committee on Enforced disappearances in the light of reviewing Iraq's report in 9th session 7 to 18 September 2015, 5; Dirk Adriaensens, Always Someone's Mother or Father, Always Someone's Child: The Missing Persons of Iraq (17 December 2010) <http://truth-out.org/archive/component/k2/item/93422:always-someones-mother-or-father-always-someones-child-the-missing-persons-of-iraq> accessed 8 August 2017.

[190] Geneva International Centre for Justice (GICJ) (n 189).

[191] See The Magazine of the International Red Cross and Red Crescent Movement, The Missing: a hidden Tragedy <http://www.redcross.int/en/mag/magazine2008_1/4-9.html> accessed 24 February 2018; sectarian violence escalated to an horrific extent in Iraq, and following the bombing of one of the holy Shia places in 22 February, 2006, 'mixed areas, particularly in the capital, exploded into an orgy of sectarian violence that continued until relative calm was restored in mid-2007. While there were many factors contributing to the grisly death toll in Iraq, it was surely no mere coincidence that following the […] bombing, civilian deaths steadily rose to reach an astonishing high of 3,159 deaths in July 2006'. According to Haddad, 'the sharp deterioration from the 'default setting' of sectarian coexistence [between Shia and Sunni] to the exception of sectarian violence was unlike anything experienced in living Iraqi memory. In effect, the impossible had happened: sectarian identity, in and of itself, rather than, for example, affiliation to a political grouping associated with a particular sect, became the cause and target of unbridled violence.'. He noted that examples of hostile sectarian public utterances by sectarian groups, including 'the songs, poems, speeches and other public displays of sectarian fervour.... show the terrible price that people pay when sectarian difference is politicised and mobilised into sectarian violence'. See Haddad (n 60) 115-117.

or place of detention. Indeed, many of the arrested have been found dead and tortured, while the fate of others remains undetermined.[192]

The GICJ noted that although in Section 1, Article 9(b) the Iraqi Constitution of 2005 prohibits the existence of any militia 'outside the framework of the armed forces', militias have widely flourished in Iraq. Illegal pro-government militia operate 'in total impunity' and 'continue to perpetrate human rights abuses and violations of international law'.[193] The GICJ has observed that oftentimes the militias and army cannot be distinguished as some are part of the armed forces. However, even militia outside the armed forces have not been made subject to the law by the government, and therefore the issue with the militia is that both types are conducting HR abuses.[194]

The GICJ has also asserted that there are more than 50 militias in Iraq with the authority of arrest, detention, torture, and summary execution. In 2014, the pro-government militia 'Al Hashd Al Shaabi' (Popular Mobilisation Units or PMU), a combination of mainly Shia volunteers, was established by a religious fatwa and government order in June 2014 with the intention of removing ISIS from western Iraq.[195] This militia is reportedly responsible for horrific crimes against people in ISIS controlled areas, and has systematically destroyed entire villages with the agenda of widespread sectarian cleansing.[196] Amnesty International has documented crimes by PMU militia in and around Baghdad and in other provinces, and noted that since June 2014 PMU militias have executed extrajudicial or unlawful killings, and tortured and kidnapped thousands of victims, some of whom were later found fatally shot. Thousands more are remain missing following their abduction.[197] In a 2014 report, the same organisation asserted that

[192] GICJ (n 189) 7; the UN Human Rights Report of 16 January 2007 stated that 'the situation is notably grave in Baghdad where unidentified bodies killed execution-style are found in large number daily. Victims' families are all too often reluctant to claim the bodies from the six Medico-Legal Institutes (MLIs) around the country for fear of reprisals. The deceased's families are required to obtain permission from the police station which brought the body to the MLI, but many are too afraid and believe that police officers could be responsible for the disappearances and killings'. Ibid.
[193] Ibid. 14-15.
[194] Ibid.
[195] Ibid. 15; Amnesty International observes that the current Iraqi Prime Minister, Haider Al-Abadi, 'officially ordered that the PMU militias be designated as part of the Iraqi armed forces in February 2016, and they are now in theory subject to military law. In November 2016, Parliament incorporated the Prime Minister's order into law and specified that the Prime Minister, as Commander-in- Chief of the Armed Forces, has the sole authority over the deployment of PMU militias'. These changes, however, 'remained largely cosmetic, and in reality PMU militias often act outside of the state's command and control structures'. See Amnesty International, Iraq: Turning a Blind Eye (n 138) 5; this designation has been criticised because 'this law makes major sectarian conflict in Iraq almost inevitable by effectively disenfranchising Sunnis and other communities opposed to Iranian dominance'. This has given an excuse for others to call 'for the creation of an equivalent Sunni force, which would be another step toward division of the state down sectarian lines. By making the army and political institutions so disproportionately dependent on a particular sectarian entity beholden to a foreign state, history may come to judge Nov. 26, 2016, as being the date when the last opportunity for salvaging the project of a unified Iraq was cast overboard'. See Baria Alamuddin, The Dangers of Legitimizing 'Al-Hashd Al-Shaabi' (28 November 2016) *Arab News* <http://www.arabnews.com/node/1016496/columns> accessed 2 December 2016.
[196] GICJ (n 189).
[197] For further details, see Amnesty International, Iraq: Turning a Blind Eye (n 138) 4, 15-21.

Shia militias enjoy absolute impunity, and that central government is largely to blame for permitting them to operate outside the law. Their existence is thus both the cause and result of the increasing lack of security and stability, and prohibits any chance of an effective, accountable security and armed forces which can protect the whole population, enforce the law equably, and implement a fair justice system which sustains equality before the law and other human rights.[198]

The Iraqi legal system is considered entirely unable to address these ongoing abhorrent crimes, because it does not precisely define or clearly criminalise enforced disappearances, as required by the International Convention for the Protection of All Persons from Enforced Disappearance, and international law.[199] In its review of the 2014 report submitted by Iraq, the Committee of Enforced Disappearances (CED) noted the shortcomings in the Iraqi legal system, the inadequate performance by some authorities, and the incomplete compliance with its obligations under the convention. The CED therefore demanded that the Iraqi state takes all measures necessary to ensure that enforced disappearance becomes part of domestic law as an offence in itself (Article 2 of the convention), and also that it be considered a crime against humanity criminalised in line with Article 5.[200] The committee further noted the lack of accurate information on persons subjected to enforced disappearance, which it feels is necessary to devise appropriate public policies to prevent, investigate, punish and eliminate such crimes, and to guarantee the right to know the truth about the disappearance and receive reparation for it.[201] It further expressed concern at not receiving information about the number of cases of enforced disappearance allegedly perpetrated in Iraq since 2003 by state bodies or militias acting with the authorisation, support or acquiescence of state officials; nor

[198] Amnesty International, Absolute Impunity: Militia Rule in Iraq (n 138) 24.
[199] See the Centre for Victims of Torture (CVT), Enforced Disappearances: Ambiguity Haunts the Families of Iraq's Missing (2016) 2; GICJ (n 189) 7; Yahya Al Kubaisi, When Enforced Disappearance is the Subject of Collective Collusion (18 May 2017) <http://www.alquds.co.uk/?p=720691> accessed 10 August 2017; the crime of abduction in general is punishable under Articles 421, 422, 423 and 424 of the Iraqi Penal Code. Article 421, for instance, states that 'Any person who seizes, detains or deprives a person of his liberty in any way without an order from a competent authority in circumstances other than those described in the laws and regulations to that effect is punishable by detention'. Although various punishments under these Articles have been established, up to the death penalty or life imprisonment if the abducted victim has died, these punishments are insufficient to deter this crime, especially where it is against women. Under Article 427, the perpetrator can be exonerated from punishment if he marries the kidnapped woman. For further details, see Obeid Abdullah Abd, The Crime of Kidnapping between Sharia and Law (2012) 7 *Journal of Kirkuk University Humanity Studies* 1, 17-19.
[200] The Committee has noted that Article 12 of the Iraqi Supreme Criminal Tribunal Act No. 10 criminalises enforced disappearance as a crime against humanity only in relation to offences committed between 1968 and 2003. See paras 13 and 14 of the United Nations, Committee on Enforced Disappearances, concluding observations on the report submitted by Iraq under Article 29(1) of the Convention, 13 October 2015, CED/C/IRQ/CO/1.
[201] Ibid., paras 11 and 12.

was information received about whether investigations were conducted and, if there were, their outcomes or sentences.[202]

Because of the apparent lack of political will, there is no proper governmental framework to deal with any enforced disappearances occurring since 2003. Although several laws have been passed in recent years, these do not address all the aspects of disappearances.[203] Furthermore, all court cases in recent years occurred before 2003.[204]

The ethnic and religious minorities in Iraq have been widely targeted in recent years due to the lack of the protection by the state. For instance, like other Iraqis, the small minority of Christians (3 per cent of the population) used to live peacefully, but since 2003 they have been targeted with violence and terrorism because of their religion and vulnerability. Criminals are aware that such groups are unable to defend themselves and that no one protected them.[205] During the severe sectarian violence from 2006 to 2008, Christians no longer felt secure and many fled because they had no 'tribal connections to rely on' and realised that 'they were far more vulnerable to attack'.[206] In September 2008, specifically in Mosul, there were many threats, murders, and bombings against Christians,[207] resulting in the displacement of approximately 2,000 families. Following these, a committee of high-ranking officers was established to investigate and determine whether any security leaders had failed in their duties.[208] The findings of this committee's unpublished report asserted that security officers had not protected Christians and ignored threats to them. Regardless, the same military unit had remained accountable for safeguarding the area for more than four years, and, although certain officers were blamed, they were not made answerable. To compound this, the committee stated that the operational command of Ninewa lacked clear procedures for security crises and its officials had no clear idea of the situation in the area that it was meant to control. Moreover, the activities of the province's security forces were not coordinated with the governor, leading to more crime and displaced Christians.[209]

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[202] Ibid., para 19.
[203] GICJ (n 189) 8.
[204] Ibid.; see also GICJ, GICJ's Submission on Iraq, Reports submitted to the 35th session of the UN Human Rights Council (June 2017) 3.
[205] Al-Ali (n 5) Ch. 1, 185; for further details, see Shack Hanish, 'Christians, Yazidis and Mandaeans: A survival Issue' (2009) 18 *Digest of Middle East Studies* 1, 1-9.
[206] Al-Ali (n 5) Ch. 1.
[207] Ibid. 186.
[208] Ibid.
[209] Ibid.; there are many reasons behind the failure of security forces to ensure order, and curb the violence of terrorists/criminals; these are, in addition to the complex political situation in Iraq, the lack of a healthy civil society and the interference in Iraqi affairs by its neighbours for their own selfish interests. Some of these reasons relate to prevalent sectarianism and corruption in the security

The report's findings and urgent recommendation to replace the military unit and pursue the criminals responsible for intimidating the Christian community made no difference to the upholding of the rights of this community to be protected by the state and, thus, attacks against it continued to occur in the following years.[210]

Similarly, the Yazidi community and others have also been vulnerable to attacks. For instance, on 14 August 2007, in the deadliest single suicide attack since 2003, 500 people were killed when four suicide bombers detonated four trucks loaded with explosives devices.[211] In particular, systematic and serious HR violations, including mass executions, abductions, and persecution of various Iraqi ethnic and religious communities have increased significantly in the territory and cities, including Mosul, which has been occupied by ISIS. According to the UN High Commission for Human Rights, these violations amount to war crimes, genocide, and crimes against humanity.[212]

5.2.3 Ineffective Security Policies

Since 2003, Iraq has faced unprecedented and terrifying violence, including car and suicide bombings targeting public markets, residential neighbourhoods, and governmental offices; this has resulted in tens of thousands of civilians being killed and wounded. The usual security measures adopted to prevent such atrocities have been to surround these places and the main entrance to cities with concrete barriers and security checkpoints, and to deploy thousands of troops on the streets.[213] The authorities are thus aware of the high risk that civilians will be targeted by terrorists and, thus, inefficiency, negligence or collusion on the part of security measures may be said to violate the state's positive obligation to protect the right to life of its citizens with due diligence. However, the Iraqi security services have been criticised for largely failing to identify imminent

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forces, making them unable to adequately perform their public duties. In addition, Iraqi citizens lack trust in these forces as their conduct is not based on the rule of law and on meeting the legitimate interests of citizens; rather, they employ various militia and pursue social and political agendas to suit their own interests. Moreover, they lack communication and cooperation with citizens to encourage them to inform about crimes without fear. Overall, there is weakness in vocational training, in material, technology, and intelligence gathering. See Al-Qaisi (n 55) 194-196; Jasim Mohamad, Iraq lives in an Inverted Equation, (26 December 2012) <http://aldiyarlondon.com/2012-08-09-12-38-36/7188-2012-12-26-21-41-41> accessed 14 August 2017; Nouri, Alwan and Atwan (n 35).

[210] In October 2010, several gunmen attacked a church in Baghdad during mass, killing over forty Christians and wounding many others as security forces stormed the church to free dozens of hostages. BBC News, Baghdad Church Hostage Drama ends in Bloodbath (1 November 2010) <www.bbc.co.uk/news/world-middle-east-11463544> accessed 14 August 2017.

[211] Hanish (n 205) 10; the United Nations Assistance Mission for Iraq (UNAMI), Report Human Rights Report: 1 July to 31 December 2007 (n 171), para 40.

[212] See the Report of the Office of the UNHCR on HR in Iraq in light of abuses committed by ISIL and associated groups in 13 March 2015, para 76-78; UNAMI, A Call for Accountability and Protection: Yezidi Survivors of Atrocities Committed by ISIL, (UNAMI/OHCHR August 2016) 1-20.

[213] According to security sources, 'There are around 250 fixed checkpoints in Baghdad and a similar number of smaller or mobile ones. This number reaches around 1,000 checkpoints during major security crises or religious occasions […] Other provinces have fewer checkpoints.' Mushreq Abbas, Iraqi checkpoints provide little security (5 November, 2013) *Almonitor* <http://www.al-monitor.com/pulse/originals/2013/11/iraq-baghdad-checkpoints-ineffective-security.html> accessed 18 August 2017.

bomb attacks and, thereby, the inspection checkpoints and entry points to Iraq's cities have failed. Moreover, after these bombings, the security services failed to restore order to the ensuing chaos.[214] Ironically, the Iraqi security authorities have not hesitated to say that the targeting of civilians 'is proof that terrorist forces have failed to reach vital targets', causing anger and frustration among the civilian population.[215]

The failure of security forces to protect citizens against bomb attacks should not only be related to preventive measures at check points and other places, but should be placed in a wider context since the crises in the entire Iraqi political, judicial, social and security systems share responsibility. While it is true that many governments would find such a security situation very challenging, the hundreds of terrorist bomb attacks against civilians have occurred for various reasons, including political competition,[216] collusion, corruption, absence of accountability, sectarian strife, a weak intelligence system, and a lack of professionalism and coordination between security forces.[217]

Al-Ali suggested that 'the government has made a mess of a security policy: first by deploying faulty equipment to protect its citizens, and secondly by creating unnecessary security risks through its own terrible practices'.[218] He further asserts that 'corruption is so widespread that it even impacts on citizens' security, to the extent that security forces

[214] Mushreq Abbas, Car Bombings Continue in Iraq While Evidence Remains Scarce, (20 May 2013) <http://www.al-monitor.com/pulse/originals/2013/05/iraq-attacks-continue-lack-evidence.html> accessed 21 August 2017; this is not to deny the sacrifices and heroic acts of the Iraqi security forces which face attacks and assassination in preventing some of the bombings from reaching civilian targets. Abbas (n 213).

[215] Mustafa Al-Kadhimi, Daily Suicide Bombings Keep Iraqis in State of Shock (25 September 2013) <http://www.al-monitor.com/pulse/originals/2013/09/iraq-violence-official-neglect.html> accessed 24 February 2018.

[216] The targeting of the civilian population, especially by car and suicide bombings, has often been used by governments or their opponents with the intention of sending a political message, especially at election times. The collapse of security is taken as 'an opportunity to break the back of political opponents, and that progress on the security level is a means by which parties can be harmed or even destroyed'. In other words, 'competing factions consider any progress on the security, political, or service levels to be an electoral card that must be exploited in Iraq.'. See Mustafa Al-Kadhimi, Iraq Plays Politics with Security as Elections Approach (14 October 2013) < http://www.al-monitor.com/pulse/originals/2013/10/security-as-electoral-bargaining-chip-in-iraq.html> accessed 18 August 2017.

[217] Mustafa Al-Kadhimi, Iraq's Security Services in Crisis, (31 July 2013) *Almonitor* <http://www.al-monitor.com/pulse/originals/2013/07/iraq-security-apparatus-struggle.html> accessed 14 August 2017; Mustafa Al-Kadhimi, Iraq Struggles to Combat Evolving Terrorist Threat, (31 January 2016) < http://www.al-monitor.com/pulse/originals/2016/01/iraq-islamic-state-new-pattern-attack-suicide-fighting-.html> accessed 21 August 2017; Iraqi News Network, Zubaidi: Corruption and Singularity in the management of the Security File behind the Bombings in Baghdad, (20 March 2013) <http://aliraqnews.com/> accessed 21 August 2017; Abbas (n 213); Mohamad (n 209).

[218] Al-Ali suggests that the failure of the Iraqi government to protect human rights, especially among detainees, 'has always increased the security risk: people who are picked up and tortured by security forces are more likely to engage in criminal activities than if their constitutional rights are maintained and the rule of law is respected'. Al-Ali (n 5) Ch. 1, 181; the Iraqi legislature has failed to protect citizens under Article 15 of the Iraqi Constitution because it has not abolished National Safety Law No.1, 2004, issued by the Iraqi Interim Government which gives wide powers to arrest and detain citizens, and search their homes in the interest of security without determining who can be arrested and detained. Although this law of 2004 contradicts Article 61 of Iraqi Constitution of 2005, the executive authorities continue to practise it. For further details, see Israa Mohammed Ali Salim and Hiba Abduljabbar Salman, 'Guarantees of Detainees' (2015) 7 *UOB Journal of Law Sciences* 51, 59-91.

are obliged to use a useless piece of plastic to protect themselves and the country from car bombs'.[219]

This assertion is strongly supported when the case of the bomb detection device, known as Advanced Detection Equipment (ADE) 651, is considered. The Iraqi government spent approximately US $85m on this device, for general use at security checkpoints as a key defence against car bombs.[220] However, thousands of Iraqi people have been killed and injured in recent years due to the complete ineffectiveness of ADE 651, manufactured by an irresponsible British company (ATSC Limited) founded by Jim McCormick.[221] The scandal of the ineffectiveness of this device led to a joint BBC and Cambridge University investigation in 2010, in which the device's technology was investigated by testing cards provided by the supplier.[222] The investigation found that the cards had no effective means of detecting a specific type of explosive, or any digital or electronic information, and thus ADE 651 was not fit for purpose. Following this, it was concluded that the device was a fake, a finding also reached in other investigations, including by the US military.[223]

After the BBC investigation, UK law enforcement banned ADE 651,[224] and criminal prosecutions were conducted both in Iraq and the UK.[225] General Al-Jabiri, who was head of the counter-explosives department at Iraq's Ministry of the Interior and responsible for purchasing the device, was jailed for four years in 2012 on the grounds that the devices were overpriced and based on false technology.[226] James McCormick and six others were

[219] Al-Ali also pointed out that 'the government has become skilled at exploiting constitutional, legal and institutional gaps to avoid any form of accountability. Also, senior officials have grown accustomed to manipulating whatever investigative bodies exist, in order to threaten their political rivals'. Al-Ali (n 5)Ch. 1, 190; according to many reports from various domestic officials, international and non-governmental organisations and commentators, corruption is considered one of the most serious problems in the public administration system, including the political arena, security forces, judicial system and public services. Corruption has 'paved the way to a downward spiral, leading to a circle of violence and deeply-rooted 'societal malfunctions' that are now bursting out in the national scene, doing no good to anyone involved'. For instance, the Ministry of Defence alone was accused in 2005 of stealing over $1bn and by 2012 $4.2bn were stolen in a single arms deal, discovered by the Commission of Integrity. In addition, according to official reports about the military 'there are as many as 30,000 ghost soldiers, along with the corrupt officers that are stealing money representing salaries'. For further details about the large scale of corruption in various Iraqi administrative sectors, see Cosmina Ioana Craciunescu, 'Iraqi Public Administrative Issues: Corruption' (2017) 5 *Review Pub Administration Manag* 1, 1-3; United Nations Office on Drugs and Crime (UNODC) et al., Corruption and Integrity Challenges in the Public Sector of Iraq: An Evidence-Based Study (UNODC 2013) 5-145; The GAN Business Anti-Corruption Portal, Iraqi Corruption Report (June 2017) 1-11 <http://docraptor.com/docs>.

[220] See Caroline Hawley and Meirion Jones 'Export ban for useless "bomb detectors"' (*BBC Newsnight*, 22 January 2010) <http://news.bbc.co.uk/1/hi/programmes/newsnight/8471187.stm> accessed 8 September 2015; Al-Ali (n 5) Ch. 1, 1.

[221] Even though each device cost just a few dollars to manufacture, one of them was sold to Iraq, specifically to the Ministry of Justice, for $50,000 US. Al-Ali (n 5) Ch. 1, 2.

[222] Ibid.

[223] Ibid. 3.

[224] Hawley and Jones (n 220).

[225] Al-Ali (n 5) Ch. 1, 3.

[226] According to a senior official, 'investigation revealed that Jabiri recommended that Iraq sign five contracts to supply security forces with the detectors for between 23,548.37 pounds and 34,702.86 pounds each though the real cost of the devices is no more than 61.97 pounds'. Suadad al-Salhy, 'Iraq Police Official Charged in Bomb Device Scandal' (17 Feb 2011), <http://uk.reuters.com/article/2011/02/17/uk-iraq-britain-explosives-idUKTRE71G3H120110217> accessed 20 September 2016; Al-Ali (n 5) Ch. 1, 3; the Iraqi court which specializes in integrity examinations and economic crimes has issued two new judgments in August 2015 against Jabiri for his essential role in making two agreements concerning the explosive detection devices. It sentenced

charged by the UK Crown Prosecution Service in 2012.[227] Investigations revealed that ADE 651 had been modelled on failed golf ball detectors on sale in the US,[228] and McCormick was jailed for ten years in 2013 had several properties and a yacht confiscated.[229] The judge remarked that the sale of these hopeless devices for vast profit had substantially contributed to 'causing death and injury to innocent individuals', and that McCormick's 'culpability as a fraudster ha[d] to be placed in the highest category'.[230]

Incredibly, despite these developments being widely known and concerning the people of Iraq, the Iraqi government did not stop using this ineffective device at security checkpoints at this point. Clearly, the government should have opened an immediate, thorough, and independent investigation as to how the deal for ADE 651 was concluded without scientific scrutiny, and senior officials who made the deal should have been brought before the courts. Instead, the government attempted to mislead the public by stating that the devices had been partially effective, and blamed security forces for not following instructions on their use. At a press conference in 2013, Nouri Al-Maliki (president 2006-2014), who was at that time responsible for securities issues as the head of both the Ministries of Defence and Interior,[231] stated that three separate committees had looked into the issue. He continued to blame the soldiers, and stated that while some of the devices were effective, only those in 'the court case […] were fake. As for the devices that are real, their problem is that using them correctly requires experience.'[232]

This statement was undoubtedly an attempt to conceal both the ineffectiveness of the device, and that there was corruption in the deal between the Iraqi government and ATSC Limited. However, at the same time, 'car bombs continued to rip apart the lives of the people that the government pretended to protect with a piece of plastic that was worse than useless' and not one senior official took responsibility for the corrupt deal.[233] For instance, in July 2016 the worst single terrorist attack since 2003 occurred, which was the deadly bombing by ISIS in Karada, Baghdad (home of mainly Shia Muslims), killing over 250 people. An explosives-packed vehicle was detonated just after midnight, when the

him to one year in prison on both counts to be served consequently. This sentence is based on Article 331 of the Iraqi Penal Code No. 111 of 1969 (n 11).

[227] 'Six charged with fraud offences relating to substance detection devices' *Crown Prosecution Service* (12 July 2012) cited by Al-Ali (n 5) Ch. 1, 3.

[228] Al-Ali (n 5) Ch. 1, 3.

[229] Ibid.

[230] *R v. James McCormick*, Sentencing remarks of his honour Judge Hone QC (2 May 2013) <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/r-v-mccormack-sentencing-remarks-20130502> accessed 20 September 2016.

[231] Al-Ali (n 5) Ch. 1, 4.

[232] Ibid.

[233] Ibid. 5.

area was busy with families shopping for Ramadan celebrations.[234] Unconfirmed reports claimed that the vehicle used in the attack had passed through security checkpoints equipped with fake bomb detectors.[235] As a consequence, there were widespread protests by citizens expressing their anger and dissatisfaction with security measures, especially at the checkpoint protecting Karada. They demanded that officials be held accountable, including the head of the Karada district. The prime minister at the time of writing, Haider Al-Abadi, then banned these fake devices from security checkpoints countrywide, dismissed various security officials in Karada, and subjected them to investigation, and also began an investigation at the Interior Ministry concerning the 'corrupt deals' regarding ADE 651. Despite this, ADE 651 was, according to one police officer in Baghdad, still in use following the Prime Minister's order.[236]

The example of ADE 651, therefore, indicates that the Iraqi government bears a heavy responsibility for the deaths and injuries of citizens led to believe that their government would take all reasonable measures with due diligence to protect them from bomb explosions and, specifically, that such an ineffective device would protect them from death or injury. The state's appropriate scientific experts had a duty, for the safety of its citizens, to test the effectiveness of ADE 651 before purchasing it. Although under Article 61(2) of the Iraqi Constitution, the Iraqi Council of Representatives has a duty to monitor the performance of the executive authority jointly and individually, including the prime minister and his ministers before the council,[237] it has failed to take serious action against government incompetence and corruption in this case, and has failed to use its right of withdrawing confidence in a particular minister or in the whole council of ministers. This failure by the council can be attributed to invested political interests and lack of concern

[234] See Lizzie Dearden, 'Baghdad attack: Death toll from Isis bombing rises to 250 in deadliest explosion to hit Iraq capital since 2003' The Independent (6 July 2016) <http://www.independent.co.uk/news/world/middle-east/baghdad-bombing-attack-latest-news-isis-islamic-state-death-toll-shopping-centre-ramadan-shia-a7122196.html> accessed 20 September 2016; Samuel Osborne, 'Iraqi PM tells police to stop using fake bomb detectors after Isis Baghdad attack' (4 July 2016) The Independent <http://www.independent.co.uk/news/world/middle-east/iraqi-pm-tells-police-to-stop-using-fake-bomb-detectors-after-isis-baghdad-attack-a7119201.html> accessed 20 September 2016.

[235] Dearden (n 234); the Parliamentary Commission established to examine the circumstances surrounding this explosion concluded that the car bomb had travelled 80 km and passed through two security checkpoints before entering the Karada district. See Abbas al-Shalah, the parliamentary Commission of Inquiry in the Bombing of Karada: We handed the Recommendations and did not know where it went (3 July 2017) <http://aenanews.com/?p=77807> accessed 18 August 2017.

[236] Dearden (n 234); see Iraqi Studies Unit, Terrorism in Iraq between Security Breach and Complicity (4 September 2016) <http://rawabetcenter.com/archives/31701> accessed 11 August 2017; Ali Mamouri, Baghdad Bombing Ignites Demand for Better Security in Iraq (13 July 2016) <http://www.al-monitor.com/pulse/en/originals/2016/07/iraq-karrada-security-baghdad.html> accessed 18 August 2017.

[237] One main reason for the reluctance of the Iraqi Council of Representatives to oversee the government and hold it to account is the consensual democracy or power sharing system (*muhasasa* system), which has seriously undermined the Council's constitutional duty under Article 61. For further details, see Ammar Saadoon Salman Albadray and Kamarulnizam Abdulla, 'Iraqi Parliamentary Institution: Power Sharing in Iraq Parliament' (2014) 47 *Al-Mostansiriyah Journal for Arab and International Studies*, 36, 36-49; Raed Shehab Ahmed, 'The Supervisory Role of the Iraqi Parliament On Government Performance' (2013) 1 *Journal of the Iraqi University* 389, 389-408.

for providing protection and justice for Iraqis. Nevertheless, the decision of the current prime minister in relation to this device indicates that a change of stance may be gradually occurring.

5.2.4 The Fall of Mosul City and the Speicher Massacre

A further example of the serious failure of the Iraqi authorities to provide protection of right to life is evident in the seizure of Mosul by ISIS in June 2014, and the subsequent seizure of cities near Baghdad, including Anbar. The collapse of the Iraqi security and military forces has been attributed to widespread corruption.[238] The damage inflicted on these and other Iraqi institutions by corruption is partly due to the *muhasasa* system, which, as noted earlier, required the governments of national unity formed in 2005, 2006 and 2010 to fulfil sectarian and ethnic quotas.[239] In addition, the strength of these forces was broken by the previous prime minister, Nouri al-Maliki, who used these institutions for what has been perceived as his own narrow political interests, instead of building a capable and strong army and security institutions to provide protection to the country and its citizens.[240] It has been further asserted that 'the incompetence of the Iraqi security forces, the ineptitude of its counter-insurgency doctrine and massive morale and desertion problems have all contributed greatly to the ISIS' resurgence in Iraq. The lacklustre and dismal performance of the Iraqi army may perhaps be the [largest factor in] allowing the ISIS to seize such vast swathes of territory'.[241] The seizure of Mosul and other cities resulted in serious brutal and barbaric acts against civilian Iraqis. According to reports by the UNAMI, hundreds of thousands of Iraqis fled their cities, and thousands were subject to killing, injury, torture and servitude, among them Christians, Yazidi, Faili Kurds, Kaka'e Sabaeans, and Shabak and Shi'a groups, as well as Sunnis who opposed ISIS.[242]

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[238] See Strachan (n 134) 3-4; Boduszyński (n 27) 120-123. According to Transparency International's Corruption Perceptions Index 2013 and 2014, in a survey of 177 countries and territories, Iraq was in 171st and 170st places. See Transparency International's Corruption Perceptions Index 2013 and 2014,<http://www.ey.com/Publication/vwLUAssets/EY-Transparency-International-Corruption-Perceptions-Index-2013/$FILE/EY-Transparency-International-Corruption-Perceptions-Index-2013> and <http://www.ey.com/Publication/vwLUAssets/EY-transparency-international-corruption-perceptions-index-2014/$FILE/EY-transparency-international-corruption-perceptions-index-2014> accessed 20 September 2016. See also Al-Bayan Center for Planning and Studies (n 43) 22.

[239] Boduszyński (n 27); for further details about the great financial and administrative corruption encouraged by the *muhasasa* system and its negative effect on confronting criminal or terrorist acts and the establishment of a sound system of accountability in Iraq, see Mohammed Ghali Rahi, 'Financial and Administrative Corruption in Iraq and ways to Treat' (2009*)* 2 *Journal of Kufa Legal and Political Science* 196, 209-219.

[240] See Dodge (n 12) Ch. 1, 12-13; Strachan (n 134) 2-6; Al-Mayahi (n 136) 76-77; Maliki has been accused by western powers of 'running an aggressively pro-Shia administration that helped to fuel the rise of the Sunni militant group Islamic State'. Tom Coghlan, 'Protests force Iraq to tackle corruption', *The Times* (12 August 2015) <http://www.thetimes.co.uk/tto/news/world/middleeast/iraq/article4524274.ece > accessed 27 September 2016; Mustafa (n 133).

[241] Mustafa (n 137).

[242] See UNAMI, Report on the Protection of Civilians in the Armed Conflict in Iraq: 11 December 2014-30 April 2015 (UNAMI/OHCHR 2015); UNAMI, Report on the Protection of Civilians in the Armed Conflict in Iraq: 5 June to 5 July 2014 (n 78); UNAMI, Report on the Protection of Civilians in the Armed Conflict in Iraq: 6 July to 10 September 2014 (n 78); Report of the Office of the UNHCHR (n 212). In particular, the Yazidi community and other religious minorities were brutally targeted by ISIS in August 2014 in and around the Sinjar region. As a result 'more than 736,000 fled their homes in Nineveh province, most to the semi-

For instance, in June 2014, reports from many sources, including ISIS itself, revealed that ISIS had brutally slaughtered approximately 1,700 unarmed soldiers and students of the Air Force College in the Speicher Base in Tikrit.[243] According to one survivor's account, the camp was in chaos because soldiers were aware of the collapse of the army in Mosul and the advance of ISIS towards Tikrit and other cities.[244] He said that approximately 3,000 soldiers 'decided to flee' wearing civilian clothes since they were left alone in the Camp by their officers.[245] After they had walked a few miles away, they were captured by 50 ISIS militants who took them to the palace grounds in Tikrit, and 'over the next three days, the militants carried out wave after wave of killings around the palace and elsewhere in Tikrit'.[246] As a consequence, dozens of angry families of missing soldiers have protested and still protest in many cities in southern and central Iraq. They require the state authorities to reveal the fate of their sons, the truth about what happened to them, and that justice be granted. Although the Iraqi Council of Representatives appointed a parliamentary committee to investigate the Speicher atrocity, its final report of March 2015[247] failed to meet the requirements of the victims' family members. This report gave the reasons contributing to these massacres, including the collapse of the morale of the armed forces after the fall of Mosul, which had a negative impact on the soldiers at Tikrit. In addition, this negative impact was compounded by financial and administrative corruption in the security and armed forces, the negligence and incompetence of their units, and the hostility towards them in the region caused, in part, by illegal activities against the local populations.[248] Although the report concluded that there was joint responsibility, stretching from the highest commanders to the lower officers of the above forces for the failure to prevent such massacres,[249] no criminal or political action has ever been taken by the Iraqi parliament or public prosecutor in response.

In the same vein, the Iraqi parliamentary committee constituted to reveal the reasons and persons responsible for the fall of Mosul in 2014 issued its final unpublicised report in

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autonomous region of Iraqi Kurdistan. ISIS fighters executed hundreds of male Yezidi civilians and then abducted their relatives ….and carried out systematic rape and other sexual violence against Yezidi women and girls'. See Human Rights Watch, Iraq: ISIS Escapees Describe Systematic Rape: Yezidi Survivors in Need of Urgent Care (14 April 2015).

[243] See Heather Saul 'Isis mass execution: Soldier describes surviving brutal Tikrit massacre by playing dead' *The Independent* (07 April 2015) <http://www.independent.co.uk/news/world/middle-east/isis-mass-execution-soldier-describes-surviving-brutal-tikrit-massacre-by-playing-dead-10159320.html > accessed 20 September 2016.

[244] Tim Arango, 'Escaping Death in Northern Iraq: Video Feature' *The New York Times* (03 September 2014) <http://www.nytimes.com/2014/09/04/world/middleeast/surviving-isis-massacre-iraq-video.html?_r=0 > accessed 20 September 2016.

[245] Ibid.

[246] Ibid.

[247] The report can be found in Arabic at <http://ar.parliament.iq/Attachments/spaykat-10-3.pdf >.

[248] Ibid.

[249] Ibid.

July 2015. It accused the Prime Minister Nouri al-Maliki, and dozens of top political and military officials, of negligence, corruption, conspiracy and incompetence, which allowed ISIS to seize control of Mosul, and recommended that all those named in the report be tried before a judicial body.[250] The report found that despite repeated warnings from intelligence sources that ISIS was planning to seize the city, the top army officer for Mosul, Mahdi Ghrawi, was on vacation and his units 'had less than a third of the soldiers they were supposed to have on the day of the battle'.[251] The report said that the 'armed forces lacked effective command and control, with multiple competing decision-making centres' and, that 'senior commanders who made "grave" mistakes during the assault were appointed for political reasons rather than for their experience'.[252] According to the report, the fall of Mosul 'was an event that surprised the world. But those who were informed about the security situation in the province realised this was going to happen eventually'.[253] The report also accused Maliki of not having an accurate 'picture of the threat to Mosul because he chose commanders who engaged in corruption and failed to hold them accountable'.[254] In his response to these charges, Maliki wrote on Facebook that 'what happened in Mosul was a conspiracy planned in Ankara, then the conspiracy moved to Irbil', and that 'there is no value in the […committee's] result, which was dominated by political differences and was not objective'.[255] Maliki has admitted, however, that the 'political class, including me, should not have any role in drawing the map of the political process in Iraq in future, because it has grossly failed' to govern the country.[256] The Speaker of Parliament said in his statement on receiving this report that 'no-one is above the law and accountability to the people' and that 'the judiciary will punish perpetrators and delinquents'.[257] Although the findings of the report were approved by the Iraqi Council of Representatives and it was referred to the judiciary for

[250] Ahmed Rasheed and Stephen Kalin, 'Iraqi panel finds Maliki, others responsible for fall of Mosul' (16 Aug 2015), <http://www.reuters.com/article/2015/08/16/us-mideast-crisis-iraq-mosul-idUSKCN0QL0F420150816> accessed 20 September 2016.

[251] According to the parliamentary report, 'there was ample warning' that the 'Islamic State began destroying bridges and blocking supply routes to the city six months before the attack. Iraqi officials ignored numerous intelligence reports specifying that a major assault was being planned for the beginning of June'. Loveday Morris, 'Mosul Commander was on Vacation despite warning of Attack, Report says' *The Washington Post* (27 August 2015) <https://www.washingtonpost.com/world/middle_east/mosul-commander-was-on-vacation-despite-warnings-of-attack-report-says/2015/08/27/c6e39a46-4a9d-11e5-9f53-d1e3ddfd0cda_story.html> accessed 20 September 2016.

[252] Ibid.

[253] Tom Porter, 'Mosul Military Commander 'on Vacation' as ISIS prepared to Seize City', *International Business Times* (28 August 2015) <http://www.ibtimes.co.uk/mosul-military-commander-vacation-isis-planned-seize-city-1517490> accessed 20 September 2016.

[254] Rasheed and Kalin (n 250).

[255] Middle East 'Islamic State: Maliki dismisses 'worthless' Mosul report' (18 August 2015), <http://www.bbc.co.uk/news/world-middle-east-33973648> accessed 20 September 2016.

[256] See the interview of Maliki on the Afaq TV channel which belongs to him in 30/3/ 2015, <http://afaq.tv/news/read/4545>.

[257] Rasheed and Kalin (n 250).

action to be taken against those responsible for the fall of Mosul, to date no judicial action has been taken.[258]

5.2.5 Summary Remarks

Many articles on the Iraqi Constitution set out, though not explicitly, the legal basis for imposing a positive obligation on the Iraqi state, not just to take preventive measures to protect its citizens' right to life from its own illegal actions, but also to address the infringement of this right by private parties. In addition, Iraq has an obligation under international standards to secure and protect its citizens' right to life against violent crimes by non-state actors. These international standards place a positive obligation on the Iraqi state to guarantee the protection of the HR to life both vertically and horizontally. However, it seems reasonable in light of serious widespread violations of the right to life post 2003, to claim that the above mentioned examples, and awareness of the daily life experienced by many Iraqi citizens and victims, indicate that this guarantee has not been respected. In spite of the fact that the Iraqi authorities knew or should have known that a real and immediate risk to the life of their citizens existed, they failed to take appropriate measures in accordance with the due diligence principle to prevent the activities of criminal, terrorists and militias. In other words, these criminal activities by private parties against individuals could likely have been prevented if the authorities had taken their duty of protection seriously. Instead, they have greatly contributed to criminal activities by adopting a policy marked by gross negligence, corruption, incompetence, unlawful security and sectarian policies, unwillingness and/or powerlessness to establish effective preventive measures, whether legislative, judicial, administrative, social or cultural, to promote the protection of the HR of Iraqis. Consequently, the authorities must bear direct responsibility for failing to fulfil their moral, constitutional and international duty of protection.

Thus, it is argued that the legitimate expectations of the Iraqi citizens that the state authorities are obliged to protect their right to life, both ethically and legally, have not been met and, therefore, the legitimacy of the authorities over their citizens is likely to be deficient, for which they must be accountable. This is supported by the recent frequent

[258] Saif Hameed, 'Iraqi Parliament refers Mosul Report to Prosecutor, Abadi', <http://www.reuters.com/article/2015/08/17/us-mideast-crisis-iraq-mosul-idUSKCN0QM0PX20150817 > accessed 20 September 2016; the model of consensual democracy in Iraq which was established in order to accommodate social divisions has, in fact, resulted in conflict. It persists because all those involved in the political process benefit from this sharing model. It, thus, resists the establishment of a parliamentary opposition which would enable the government to be called to account. See Shakir A. Fadhil, 'The Absence of Parliamentary Opposition and the Problematic of Consensual Democracy in Iraq' (2013) 2 *Journal of Legal and Political Science* 1, 15-33.

demonstrations by Iraqis in southern and central Iraq, and Baghdad, against the serious lack of public service, including security, and the corruption in all state authorities.[259] Such demonstrations indicate, in part, that trust in the Iraqi state and its criminal justice system to provide protection has been undermined. In addition, the demonstrations also may be a positive sign of the willingness of people and civil society organisations to play a role in overcoming the ethno-sectarian divisions exacerbated by government policy, and to impress on the government that corruption and impunity must be tackled. This would then facilitate the emergence of a new culture of awareness in the hope of changing the attitude of the government and mobilising a healthy civil society. A survey in 2016 of the opinions of Iraqis who protested in 2015 and 2016 against the *muhasasa* system, corruption and the lack of basic fundamental services, especially security, showed that 95 percent of the protestors consider Iraqi politicians to have been 'very responsible' for creating divisions and hindering reconciliation, and ISIS was accused of being 'very responsible' for fomenting sectarian division by more than 89 percent of them.[260] The majority of Iraqi citizens consider the sectarian quotas to be directly responsible for the poor performance of Iraqi institutions and that the most important step that could be taken to foster political reconciliation would be to end the quota system.[261] This may be said to indicate that the ethno-sectarian system of government tends to undermine the efficacy of the government's function and affects the interaction between the architecture of the Iraqi governance order and its legitimacy. There is a growing belief among ordinary citizens that the formal state of Iraq is illegitimate; they do not trust their institutions, including parliament, the judiciary, the executive, and the political parties.[262]

Genuine reforms, therefore, need to be established to overcome the consequences of the failure of the 2003 transition, which resulted in placing the political system in constant crisis, leading to the emergence of political unrest and violence, lack of peace in society and many conflicts arising from the multiplicity of loyalties, values and affiliations.[263] The language of dialogue and tolerance has disappeared and been replaced by the language of intolerance and extremism; the phenomenon of political and social disintegration has paralysed and weakened the state, resulting in violence or even civil

[259] See Harith al-Hasan, Social Protest in Iraq and Reality of the Internal Shia Dispute (Al Jazeera Centre for Studies 2015) <http://studies.aljazeera.net/en/reports/2015/08/20158307585163273.html> accessed 20 September 2016; Phebe Marr, The Modern History of Iraq (4th ed, Hachette UK, 2017).
[260] See Greenberg Quinlan Rosberg Research, 'A Challenging Path Toward Reconciliation: December 2015 – January 2016 Survey Findings (2016); Boduszyñski (n 27) 115.
[261] Ibid.
[262] Boduszyñski (n 27) 122.
[263] Nouri, Alwan and Atwan (n 35); Atwan (n 135); Hamid (n 134) 236-249.

war.[264] This crisis in the political system has blocked effective strategies for the reconstruction of a viable Iraq. The politicising, sectarian, and ethnic divisions and the platform for quotas have hindered the rebuilding of a well-functioning Iraqi state and created serious consequences for its efficiency, as well as threatening it with stalemate and calcification. As a result, successive Iraqi authorities have been both fragile and lacking in efficiency.[265]

Because of this, it cannot be said at present that Iraq possesses a system of upholding HR in which the Iraqi state and its institutions feel bound by the will of their citizens' expectations, their constitution, and international HR norms, to fulfil its positive obligation of providing protection against violence from non-state actors. At best, citizens can only acquire certain human benefits from the state and its institutions, but not on the specific basis of HR. In a fragile country and conflict-torn society where unprecedented and multifaceted violence occurs, especially by illegitimate militias and ISIS, the value of life is meaningless and violent deaths have been reduced to mere statistics. Given the absence of the rule of law and an effective judicial system, combined with mistrust in state institutions and deep ethno-sectarian divisions, it is necessary to be decide what ought to be done to restore stability, order, peaceable coexistence, and tolerance, as well as prevent the recurrence of violence and emphasise that the primary reason for the existence of the state is to protect its citizens. This is to say that it may be necessary to consider how to reform, on moral, philosophical and political principles, Iraq's flawed social contract as contained in the current constitution, which only compounds divisions and differences rather than creating consensus and unity, as part of a genuine and inclusive transitional justice programme, to address large scale violence and victimisation since 2003, and repair damage to the norms and values of peaceable coexistence. Changing the hearts and minds of Iraqi citizens, as will be noted later,[266] towards peace, stability and reconciliation depends, to a large extent, on the possibility of improving the legitimacy and accountability of state authority, which has the responsibility for adopting the above programme in the hope that a new relationship of trust between various ethnic, religious, and sectarian groups will gradually emerge and that the repeated failures of the Iraqi state to ensure the protection of its citizens' HR, especially the right to life, will be overcome. In addition, the Iraqi legal system and its practice must conform to the

[264] Nouri, Alwan and Atwan (n 35).
[265] Ibid.
[266] See Chapter 6, pages 243-262.

requirements of international and regional human rights instruments demanding the guarantee of the right to security of innocent citizens, both positively and negatively, by creating institutions capable of doing this. This requires the law-making bodies and criminal courts to take compelling, concrete measures to strengthen the domestic protection for those at risk of losing their lives by criminal acts, as well as subjecting any failure by state authorities to accountability for not observing due diligence. Admittedly, it cannot be denied that the above discussed adverse factors which have undermined public faith in the Iraqi legal system make it likely that any future demands for positive obligations to be observed will also not be heeded. However, there is some hope that the Iraqi government may gradually accept the positive obligations in question, though such acceptance is unlikely, at present, to be anything other than partial and incremental, following the gradual improvement of the security situation due to the recent major successes of the Iraqi army in regaining territory from ISIS, especially the liberation of Mosul city. Once ISIS has been completely ousted from Iraq, the horrendous experiences which the Iraqi people have suffered may give rise to a renewed appetite for reconciliation and peace.

Although Prime Minister Abadi, who came to power on a platform of reconciliation and the tackling of corruption and sectarianism, has faced serious challenges at all levels, he has, nevertheless, successfully defeated ISIS and driven them out of many parts of Iraq, thus restoring some confidence in the government among various sections of society, including Sunnis, Shias and other ethnic and religious communities. He has had success in promoting his own vision of state consolidation with his focus on rebuilding the security sector.[267] If these successes are consolidated by the adoption of comprehensive reformation measures, gradual improvement of legitimacy and relations of trust between citizens and government may be re-established, and the state may begin to honour its positives duties towards its citizens.

5.3 The Victims' Right to Justice in the Iraqi Criminal Justice System

Alongside the lack of protection, vast numbers of Iraqi victims are denied justice in their state's criminal justice system, but there remains a question as to how far the Iraqi state is morally and legally bound to meet victims' expectations, and instil confidence that

[267] See Renad Mansour, 'Iraq After the Fall of ISIS: The Struggle for the State' (2017) Chatham House, The Royal Institute of International Affairs, 16, 23; Al-Bayan Centre for Planning and Studies (n 43) 29, 35.

justice can be fulfilled, as demanded by general ethical principles and the international and regional HR laws referred to in Chapter 3. In other words, the question is whether Iraq possesses a criminal justice system capable of: (1) fulfilling its positive procedural obligation to conduct thorough and impartial investigations into the loss of life by any of its citizens; (2) clarifying the circumstances surrounding the occurrence of such violations; (3) giving reasons for the failure of the state to take adequate preventive measures to protect the right to life of its citizens; and, (4) identifying, prosecuting and punishing those responsible for these violations.

Since 2003, considerable efforts have been made by military and civilian agencies, including experts in criminal justice and the rule of law from the Iraq under the CPA, to establish a functioning and fair criminal justice system. This system needed to be capable of restoring the trust and confidence of Iraqi citizens as a system which would not be used in unlawful persecution, as under the previous regime.[268] These efforts have resulted in the CPA making significant changes to the Iraqi criminal justice system, both legal and structural.[269] Legal alterations to the Iraqi Penal Code (1969) and the Criminal Procedures Code (1971) have strengthened law enforcement and brought these codes into line with international HR values by removing unjust sections and adding fundamental due process protection for defendants.[270] The establishment of the Iraqi Central Criminal Court (CCCI) by the CPA in accordance with the CPA Order No. 13[271] is one of the most important structural changes to the Iraqi judicial system,[272] proposed as essential for 'promoting the development of a judicial system in Iraq that warrants the trust, confidence and respect of the Iraqi people'.[273] According to Farhang, the 'decision to create a national criminal court was intended to guarantee a forum in which the most serious crimes –those involving threats to public order and safety –could be tried quickly and effectively, in a forum that could also serve as a model for other Iraqi criminal courts'.[274]

In this sense, the Court, in accordance with Article 18(1-2) of Order No. 13, has been given nationwide criminal jurisdiction, including investigative and trial jurisdiction over

[268] See Farhang (n 4) 46.
[269] Ibid.; Almusawi (n 17) 33, 43-65.
[270] For further details, see Farhang (n 4) 46.
[271] Ibid.; see CPA Order No. 13 of 2004, published in the Official Gazette issue 3983 of 17 June 2004; Frank (n 4) 11; Dan. Warnock, 'The Iraqi Criminal Justice System, an Introduction' (2010) 39 *Denver Journal of International Law and Policy* 1, 2; Almusawi (n 17) 60.
[272] The traditional Iraqi courts are as follows: a Federal Supreme Court, a Court of Cassation, Courts of Appeals, local courts, juvenile courts and a separate court system in the Kurdish region. See Frank (n 4) 11; Warnock (n 271) 2.
[273] CPA Order No. 13 (n 271).
[274] Farhang (n 4) 49.

all criminal acts and, specifically, the mandate to focus on cases of terrorism, organised crime, governmental corruption, and other serious crimes.[275] Like other Iraqi investigative and trial criminal courts, the Court should implement Iraqi substantive and procedural criminal law and, in particular, for all criminal acts should apply the Iraqi Criminal Procedure Code (ICPC)[276] relating to arrest, detention, investigation, prosecution and punishment.[277]

To determine the adequacy of the Iraqi criminal justice system, it is important, in the light of the large increase in violations of the right to life in Iraq and the alleged deficiency and corruption of state institutions, to understand how the duties of investigation, prosecution and punishment in criminal cases have performed, both in theory and practice, within the civil-law criminal justice system. The ICPC requires that in response to the discovery or report of a crime, an initial investigation must take place involving all the necessary agencies of the government, especially the police and judicial investigators and investigative judges.[278] When the police arrest a suspect or an individual presses for charges to be made for the crime, a criminal case is initiated in Iraqi law.[279] According to Article 1(a) of the Code, a complaint in criminal cases can be brought by the injured party, his representative, or a government official of the judicial system. It states that:

> Criminal proceedings are initiated by [a] 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 [of] the crime […]. 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.[280]

Such a complaint, according to Article 9(a) of the ICPC, 'should include the claim for criminal justice which is a petition that penal measures be taken against the perpetrator of the offense and for the penalty to be imposed on him'.[281] In determining criminal

[275] Frank (n 4) 12; Warnock (n 271) 2-3.
[276] The ICPC (n 10); Almusawi (n 17) 60.
[277] Sections 4 and 18 of Coalition Provisional Authority Order No. 13 (n 271); Warnock (n 271) 3.
[278] The ICPC identified in Articles 39 and 51 those responsible for initiating criminal investigations. For further details, see Warnock (n 271) 10, 12-14; it should be noted that the police are one three criminal investigation authorities alongside judicial investigators and investigating judges. The police 'not only have the powers to collect evidence about alleged and discovered offences; they are also empowered to investigate cases. When a crime is reported they are empowered to investigate cases at initial stage of proceedings before bringing a person under investigation before an investigating judge'. This has been criticised because investigation is considered under Iraqi law to belong to the judicial authority which has led to malpractice. See Almusawi (n 17) 97-98; Christova (n 1) 428, remarks that 'the actual work regarding the investigation is carried out by judicial investigators in [conjunction with] the investigative judge. The judicial investigators supervise the work of police investigators and, thus, closely collaborate with the police regarding […] the crime scene, […] evidence, questioning witnesses [etc.]. After closing the investigation, the judicial investigators prepare a report for the investigative judge, who takes the decision on the further steps to be followed regarding the case at hand'.
[279] Warnock (n 271) 10.
[280] The ICPC (n 10); for further details, see Warnock (n 271) 10-11; under the Iraqi Criminal Procedure Code '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. These witnesses may be exposed to legal liability if they do not report their knowledge of the offence to the authorities'. See Almusawi (n 17) 91-94.
[281] Warnock (n 271).

liability, the inquisitorial approach is employed in the Iraqi civil-law criminal justice system.[282] An investigative judge leads the enquiry,[283] questions suspects, victims and witnesses, collects evidence prior to trial, and submits findings to the trial-judge, which are 'conclusive and are only re-opened at the trial at the trial-judge's discretion'.[284] In doing so, the investigative judge possesses wide-ranging authority over the inquiry, its structure and testimony, the witnesses, and public access.[285] If the judge is satisfied that sufficient evidence has been gathered to support that an alleged crime has been committed, a decision on referral, '*ihala*', for trial will be made.[286] Therefore, it can be said, as one commentator asserted, that the investigative judge is the foundation of the Iraqi criminal justice system, as a neutral authority whose task is to impartially locate all available evidence.[287]

In contrast with the wide authority granted to investigative judges, Iraqi public prosecutors are given narrow powers and cannot make independent decisions in the investigative and trial stages.[288] In the investigative stage, public prosecutors are subordinate in the investigation and supervise the work of police and judicial investigators, but can if required challenge the decisions of the judicial investigators and subject them to judicial review.[289] Even at the trial stage, the role of the public prosecutors is limited as they are not 'dedicated to ensuring the conviction and punishment of the defendants',[290] but merely concerned with reviewing the completeness of the case file and providing recommendations to the judges trying the case; thus, it seems their job is very much administrative in nature.[291] Beyond this limited role, because of their duty to ensure

[282] Frank (n 4) 29.
[283] Under Articles 57 and 64 of the ICPC, 'the investigative judge is provided with significant discretion under the inquisitorial system as to how to administer investigations, including who may be allowed to attend any hearings and how to direct questions'. See Bassiouni and Hanna (n 6) 85.
[284] It has been noted that in the Anglo-American adversarial system, 'the role of the prosecutor includes many of the functions performed by an investigative judge' in traditional civil law. Ibid. 84-85. Bassiouni and Hanna (n 6) 84-85.
[285] Warnock (n 271) 15.
[286] Christova (n 1) 428; Articles 47, 58, 69 and 130 of the ICPC determines the steps for the investigating judges. 'The investigating judge hears the accused, the allegation of the complainant and the testimony of the witness or witnesses, and examines the experts' reports. If there is insufficient evidence to send the accused to trial, the judge releases the accused person. 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'. See Almusawi (n 17) 94.
[287] See Michael A. Newton, 'The Iraqi Special Tribunal: A Human Rights Perspective' (2005) 38 *Cornell International Law Journal* 863, 892; according to Bassiouni and Hanna, 'The investigative judge is seen as representing the interests of justice, and is neither a partisan in the proceedings nor an umpire who referees the sparring of adversaries, namely, the prosecution and defense. Thus, the assumption is that the investigative judge will pursue all questions concerning the truth of the matter without partiality, bias, or prejudice'. Bassiouni and Hanna (n 6) 86.
[288] Christopher J. Costantini, 'Criminal Procedure under the Iraqi Code of Criminal Procedure' (2011) 41 *Cumberland Law Review* 533, 541-542; the public prosecutor in his/her responsibility of serving the interests of justice and acting as a guardian of society, has to present a complaint against the perpetrator whenever a crime has been committed. It is for him/her to decide whether or not to submit this compliant. In addition, under Article 7 of the Iraqi Public Prosecutor Law No. 159 of 1979, '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'. See Almusawi (n 17) 104.
[289] See Article 2, 5 of the Iraqi Public Prosecutor Law (n 288); Christova (n 1) 428.
[290] Frank (n 4) 53.
[291] Warnock (n 271) 4.

justice throughout the criminal justice system, the prosecutors are charged with wide and varied responsibilities,[292] including 'the supervision of the legality of the proceedings, filing means of redress, inspecting detention centres and submitting related reports'.[293]

Where a criminal case is considered serious, such as murder, both because the nature of the offence and the punishment assigned to it by the law it will be referred by the investigative judge to a trial before a panel of three judges,[294] such as in the CCCI and the felony courts. All questions of law and facts are decided by these judges, who then reach a verdict.[295] According to Article 213(a) of the Criminal Procedure Code, the judges' verdict is based on their satisfaction with evidence given during the inquiry or hearing. This evidence includes 'admissions reports, witness statements, written records of an interrogation, other official discoveries, reports of experts and technicians, background information and other legally established evidence'.[296] In addition, all statements made during the trial, including those made by a victim who was dying, may be deemed essential evidence.[297] However, such trials employing the inquisitorial approach do not emphasise oral evidence or cross-examination by counsel, and the trial is largely a public summary of written evidence compiled by the investigating magistrate.[298]

Where trial judges are satisfied on the basis of evidence that perpetrators have committed murder, the defendants will be officially charged with these crimes,[299] tried, and, if a verdict of guilty is reached,[300] may be sentenced to death.[301] This punishment is inevitable

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[292] Ibid. 9.

[293] Christova (n 1); Articles 4, 7(1-2), 28(1) of the Iraqi Public Prosecutors Law (n 288) imposes another set of responsibilities on the public prosecutors, including to:
• 'Review and opine on proposed judicial actions (1) transferring a case to trial, (2) ordering collection of body fluids, hair samples, or fingerprints, and (3) attaching property of a fugitive or accused;
• Oversee cases originating by action of a criminal complainant;
• Inspect detention centers;
• Review all death penalty cases before submission to the Court of Cassation; and
• Attend investigative hearings as well as trials, cross-examine, and advise the judges on the disposition of a case'. See Warnock (n 271) 9.

[294] Christova (n 1) 428; according to Article 167 of the ICPC, 'The trial begins with the summoning of the defendant and other parties and the formal identification of the defendant. A decree of transfer is then issued. The court hears the testimony of the complainant and the statements of the civil plaintiff, then sees the evidence and orders the reading of the reports, investigations and other documents. The statements of the defendants are then heard, along with the petitions of the complainants, civil plaintiff, civil prosecutor and public prosecutor'. See Warnock (n 271) 43.

[295] Frank (n 4) 52.

[296] Warnock (n 271) 50.

[297] Ibid.; see Article 216 of the ICPC (n 10).

[298] Bassiouni and Hanna (n 6) 86.

[299] It is important to note that 'In Iraqi courts, it is not until after the trial judge has taken and considered all evidence, that the trial judge officially determines what crime, if any, the defendant actually committed'. Warnock (n 271) 47-48; see Articles, 187, 203 of the ICPC (n 10).

[300] See Article 182(a) of the ICPC (n 10); Warnock (n 271) 52.

[301] Under Article 244(d) 'If the court issues a death sentence, it must explain to the person given the sentence that his case papers will be sent automatically to the Court of Cassation for review. He may also appeal against the ruling at the Court of Cassation within 30 days, starting from the day after the ruling has been issued'; Warnock (n 271) 52; Article 12 of the Judicial Organization Law No. 160 of 1979 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'.

in accordance with Article 406(1) of the Iraqi Penal Code.[302] In addition, Article 4 of the Iraqi Anti-Terrorism Law imposes the death penalty on those convicted of committing terrorist acts, including against citizens' right to life, and also 'anyone who […] incites, plans, finances, or assists terrorists to commit the crimes stated in this law shall face the same penalty as the main perpetrator'.[303]

Lawmakers consider this punishment essential for justice and society's stability, since it deters vengeance and crimes against the right to life in future. From the perspective of Iraqi citizens, especially victims, because of the daily mass killings of innocent people, provision of this retributive punishment in its own right against perpetrators is the only criterion used to measure that the Iraqi authorities and their criminal justice system comply with their moral, legal and constitutional duty of providing justice. This is because it may currently be said that deterrence has lost force, since some perpetrators, such as extremists, militias, terrorists and insurgent groups, commit atrocities against Iraqi innocent people without fear of punishment. In addition, within Iraqi society, tribal, ethnic and sectarian affiliations are deeply entrenched, and so failure to provide retributive justice by the Iraqi authorities, for whatever reason, such as unwillingness or inability to do so, may lead to serious acts of vengeance. Therefore, victims have a legitimate expectation that the above procedural obligations of investigation, prosecution and punishment be guaranteed in the Iraqi criminal justice system, not merely notionally but also practice in order that retributive justice be granted to them.

However, even if the Iraqi authorities fulfilled these legal procedural obligations, they would not provide victims with the right to adequate remedies for the consequences of the crimes committed against them. Instead, crimes are still seen as committed mainly against the state and society and, therefore, the main reason behind any fulfilment by the state authorities of their procedural obligations is to ensure respect for law, order and stability, and prevent future crimes. Victims are considered under Article 58 of the ICPC only as a source of information and as witnesses in the investigative and trial stages and, thereby, it seems that they have been ignored in the Iraqi criminal justice system as persons who have suffered harm from the crimes. As noted by one Iraqi academic, despite the high scale of victimisation in Iraq, victims have been given little attention, not only

[302] Article 406(1) of the Iraqi Penal Code of 1969 (n 11) has laid down the various circumstances in which perpetrators may face the death penalty.
[303] The Iraqi Anti-Terrorism Law of 2005 (n 79).

in the criminal justice system and victims' service programmes, but also in the domestic academic literature. He states that building a new awareness culture and an accommodation of the urgent need to uphold the rights of victims should be the core interest of criminal law-makers, academic institutions, social sectors, and NGOs to address the rights of victims as acknowledged by international legal norms (see previous chapters of the thesis) and, thus, restore the balance between their rights and those afforded to offenders in Iraqi law.[304] It is argued that the Iraqi state has a positive obligation to provide victims of violent crimes with effective remedies in accordance with international HR norms.[305] This requires that the Iraqi authorities should consider victims' rights as directly affected persons who deserve to know the truth surrounding the circumstances of the violations against them and, who also need justice and fair treatment throughout criminal proceedings. In fulfilment of these requirements, the authorities need to apply the due diligence doctrine in all stages of the criminal process, especially in the investigative stage, since it is crucial to the process of revealing all the facts leading to the identification of those responsible for the violations, irrespective of whether or not they are officials of the state, to prosecute and punish them.

In practice, however, it can be argued that the state authorities and their criminal justice system have failed to fulfil the positive duty of investigation, prosecution and punishment and, thereby, have failed to uphold the rights of victims to truth and justice. In addition, victims have not been treated fairly, had their dignity respected, or voices adequately heard in the criminal proceedings. This means that trust in the legitimacy of the Iraqi judicial process has been questioned, not only because of the aforementioned reasons, but also because it has failed to restore victims' sense that retributive justice has been accomplished. This failure may be attributed mainly to numerous serious problems and challenges facing the Iraqi criminal justice system, which have prevented the establishment of a functional judicial system based on the rule of law and compliance with international HR norms, particularly regarding the recognition of the rights of victims.

5.3.1 Problems and Challenges Facing the Iraqi Criminal Justice System

[304] See Mohammed Abdul Mohsen Saadoun, 'Protect the Rights of Victims of Crime in Iraqi Law' (2015) 22 *Journal of Kufa Legal and Political Science* 209, 209-225.

[305] However, while certain international standards regarding criminal investigation can be identified, the argument accepts that now, in the post-conflict situation in Iraq, full adherence to these standards cannot yet be expected, given the raft of practical limitations that Iraq may face in this period. In addition, these international standards have themselves some limitations. See the discussion in Chapter 3, pages 59-84 and 85-87.

Challenges to the Iraqi criminal justice system (ICJS) arise from the intolerable amount of violence, lack of judicial independence and judges, and a lack of protection for them. However, there is also the problem of the defective nature of the ICJS and the role of judges within it, the flawed ideology of the investigative process, and the widespread corruption and impunity of the Iraqi authorities overall. Some of these problems were detected by international legal and judicial professional experts working closely on programmes with Iraqi legal and judicial bodies following 2003, in an attempt to improve the ICJS and the rule of law in Iraq.[306]

Initially, criticisms have been made of the literal traditions of Iraqi civil law which have contributed in making the Iraqi judicial system 'uncreative' and 'mechanistic'.[307] This indicates, as Frank correctly noted, that 'aspects of the civil-law bureaucracy inhibit transparent judicial proceedings and make corruption more difficult to detect' but, also, that Iraqi judges 'display a trait common in bureaucrats from totalitarian countries: lack of initiative'.[308] The dysfunctionality of the judicial system caused by the dominance of bureaucracy and the failure of initiative among the vast majority of the Iraqi judges cannot, however, be separated from the overall 'political fractiousness and inefficiency among Iraqi institutions'.[309] The latter may be said to have played a crucial role in weakening the entire system of the judicial process and its ability to reassure Iraqi victims that violations against the right to life will be thoroughly and impartially investigated, prosecuted, and punished. Moreover, the investigative process has its own serious problems because of the lack of sufficient mechanisms to collect evidence and establish the facts, and the traditional bad practice in applying these mechanisms.

During many judicial investigations, personal testimony is preferred to forensic and other non-testimony evidence.[310] However, as Warnock correctly noted, 'the primacy of testimony is firmly entrenched. […] So compelling is the preference for witness testimony that, while the rules regarding physical evidence are minimal or hardly referenced in the Code, the details regarding calling of witnesses are extensive'.[311]

[306] See Christova (n 1) 429-432; Warnock (n 271) 52; Frank (n 4) 52.
[307] Costantini (n 288) 535; Frank (n 4) 21; in the traditions of the civil-law system, 'the judge is assigned a comparatively minor, inglorious role as a mere operator of a machine designed and built by scholars and legislators' and, therefore, it 'correspondingly devalues the use of judicial precedent favored in the common law tradition'. Costantini (n 288) 535.
[308] Frank (n 4) 21, 28.
[309] Costantini (n 288) 535.
[310] Shakes (n 26) 37-38.
[311] Warnock (n 271) 17, 19.

The social position of witnesses is also considered by Iraqi judges to be an important factor in determining their credibility.[312] This reliance on social position is considered irrelevant and unreliable in other western judicial systems, specifically the Anglo-American system, which mainly assesses the facts through physical and scientific evidence.[313] In addition, in acquiring evidence in criminal cases, including those of terrorism, the Iraqi courts rely on secret informants or confessions. The Human Rights Watch observed that, in many cases brought before the CCCI, no forensic evidence was presented and, therefore, reliance for prosecution and conviction has mainly been placed on secret informants' statements and interrogation.[314] The ICPC empowers investigative judges hearing specific serious crimes, including those against national security and terrorism, to consider evidence from secret informants.[315] To address the severe security challenges of recent years, mass arrests of individuals for alleged crimes have become a common measure of judicial practice,[316] and can be executed merely on information provided by secret informants against individuals.[317] Verification of this information has been lacking in the ICJS in recent years, and international and national HR reports have noted that the judiciary has frequently failed to verify information received from secret informants.[318]

Over-reliance on secret informant testimony has been criticised because of the lack of proper judicial verification of such secret information, many of whom are alleged criminals who have suffered months or years of pre-trial detention.[319] Worse still, reliance on secret informants, as observed by Warnock in one Iraqi trial, has resulted in an accused being convicted of terrorist acts and condemned to death on the testimony of one or two anonymous witnesses.[320] Reliance on secret informants has been considered to contradict

[312] According to Shakes, 'More than one Iraqi judge told me that fingerprints were not as important as knowing the social background and history of the witnesses'. Shakes (n 26) 37-38.
[313] Ibid. 37.
[314] Joseph Logan, The Quality of Justice, Failings of Iraq's Central Criminal Court (Human Rights Watch 2008) 18.
[315] Article 47(2) of the Iraqi Procedure Code (n 10) states that "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". Costantini (n 288) 548; Almusawi (n 17) 149.
[316] See the Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Rights Report (Baghdad, 2010) 77; Almusawi (n 17) 149.
[317] Almusawi (n 17).
[318] Ibid.; Logan, (n 314) 30; see also UNAMI Reports, Reports of the Iraqi Ministry of Human Rights, such as the Annual Reports of the Iraqi Ministry of Human Rights, the Conditions of Prisons and Detention Centres, Human Right Report (Baghdad, 2008) 87; and other international NGOs, including Amnesty International reports between 2004 and 2013, such as Amnesty International, *Iraq: A Decade of Abuses* (Index: MDE 14/001/2013, March 2013) 46.
[319] Logan (n 314) 21; it has been reported that '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'. Amnesty International, New Order Same Abuses: Unlawful Detentions and Torture in Iraq (September 2010) Index: MDE 14/006/2010, 19.
[320] Warnock (n 271) 53-54.

the provision of due process and fairness as laid down in the Iraqi Constitution.[321] In the same vein, although the Iraqi Constitution and the Iraqi Criminal Procedure Code prohibit the use of torture and ill-treatment to obtain confessions,[322] the courts in practice often rely on them to gain convictions, especially in cases against individuals under Iraqi Anti-Terrorism Law.

This has been used to accuse and condemn thousands of people of 'vague offences',[323] even when the accused have claimed they were tortured to extract a confession.[324] These illegal practices in collecting evidence, reportedly combined with a 'lack of due process and fair trials, long periods of pre-trial detention without judicial review, lack of ability to pursue a meaningful defence or to challenge evidence, abuse in detention, [and] torture'

[321] Logan (n 314) 21; Article 19(5) and (6) of the Iraqi Constitution states that 'The accused is innocent until proven guilty in a fair legal trial' and that 'Every person shall have the right to be treated with justice in judicial and administrative proceedings'. See Costantini (n 288) 549; although Articles 47-49 of the Iraqi Procedure Code strictly regulate how informants and their information of crimes should be dealt with by the police, large numbers of secret informants have been accused of malicious lies, fraud and deceit against innocent people for various reasons, such as ethno-sectarian, tribal and vengeful political motives. Between 2003-2008, secret and dubious information reached a very high level, and resulted in an increased number of investigative military, police and security force bodies, which usually issued arrest orders based on this inaccurate information and detained without good reason those alleged to be responsible for criminal or terrorist acts. Miscarriages of justice have occurred as a result, and have contributed to widespread insecurity and disorder in society. Furthermore, those found innocent after several years of illegal imprisonment have been given no right to an official apology, restoration of their dignity, integrity and social position destroyed by false accusations and rightful compensation for moral and material damages. For further details, see Adnan Sdjan Al-Hassan, The Responsibility of the State to Compensate Victims of Miscarriages of Justice (Egypt Murtaza Foundation of Iraqi books, 2011) 17-29; see also Ammar Abbas Husseini and Zain El Abidine Awad Kazem, 'Alternative Legal System for Secret Informants' (2014) 4 *Al Muthana Journal of Administrative & Economic Science* 225, 243, 256; Sabah Mesbah Mahmoud, 'The Legal Nature of Criminal informant in the Iraqi Penal Code' (2012) 14 *Journal of the College of Law, Al-Nahrain University* 62, 62-92.

[322] Article 37, Section 3 of the Iraqi Constitution of 2005 states that 'All forms of psychological and physical torture and inhumane treatment are prohibited. Any confession made under force, threat, or torture shall not be relied on, and the victim shall have the right to seek compensation for material and moral damages incurred in accordance with the law'. In addition, Article 127 of the Iraqi Procedure Code 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'. See Warnock (n 271) 37; under Article 333 of the Iraqi Penal Code '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'. The Iraqi Penal and Procedure Codes, in the opinion of one Iraqi academic, do not recognise that torture is a crime against the right of individuals to be free from any physical or psychological harm. Also, under Articles 218 and 213 of the Procedure Code, there are two different approaches dealing with it. While Article 218 considers that any confession obtained by torture is illegal, Article 213 allows penal courts to rely on confessions extracted by torture if they can be confirmed by any other evidence, or even convict a suspect solely on a coerced confession. For the deficiency of the ICJS and recommendations to deal with the crime of torture, see Wasfi Hashim Abdul Karim, 'Torture in Iraqi Penal Code' (2015) 193, 216-253 <http://www.iasj.net/iasj?func=fulltext&aId=44547> accessed 9 November 2016.

[323] For further details, see Almusawi (n 17) 248-258; the GICJ noted in its recent report that 'Since 2014, Iraq has stepped up its use of torture, to "combat terrorism." This has empowered state authorities (militia, police units, security forces, intelligence services and the army) to conduct torture practices […] to extract information from detainees and obtain "confessions." […].These coerced statements or confessions continue to be relied upon by Iraqi Courts to convict defendants on trial for serious charges, where often, the result is the death sentence'. The GICJ, GICJ's Submission on Iraq (n 204) 3; confessions of accused persons are much relied upon as a basis for conviction. See the Iraqi Court of Cassation, Case No. 505, General Commission on 24/5/2010 in which the Court decided, as long as a confession by the defendant includes sufficient detail, a conviction can be based on this confession, even if the admission has been obtained by invalid means and then retracted. See also the cases brought before the Central Criminal Court, Baghdad, Second Branch, Case No. 891 of 2009; Criminal Court, Baghdad, Third Branch, Case No. 2082 of 2012; Central Criminal Court, Baghdad, Second Branch, Case number 1479 of 2012, Branch 2 ruled on 3 December 2012. These cases have been referred to by Amnesty International, Iraq: A Decade of Abuses (n 318) 37, 55, 56; see Almusawi (n 17) 99, 259-260.

[324] See the report of Norway: Landinfo – Country of Origin Information Centre, Iraq, Rule of Law in the Security and Legal system (8 May 2014) <http://www.refworld.org/docid/5385bad94.html> accessed 20 September 2016; Logan (n 314) 19; Almusawi (n 17) 251-253. According to the UNAMI, '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 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'. UNAMI, Human Rights Report: 2011 (Baghdad, May 2012)16, 18.

reveal that the legal provisions of the ICJS are not being adhered to in practice,[325] leading to many miscarriages of justice.[326] In contradiction to obligations under international law and HR norms, which require the right to be free from torture and other forms of ill-treatment to be absolute, no matter what the conditions and circumstances may be and even in a time of emergency, the Iraqi authorities justify resort to such abuse by claiming that they do so because of rising civil disorder, including terrorism and organised crime.[327] The HRC has expressed its deep concern regarding the widespread allegations of miscarriages of justice in Iraq and has urged the Iraqi authorities not to rely on confessions attained in violation of Article 7 of the Covenant; further, should defendants allege that their statement was made under torture or ill-treatment, then this should be adequately investigated. It is also down to the prosecution to prove that the confession was made willingly.[328] Most deserving of attention is any allegation which has led to the imposition of the death sentence following a confession given under duress or torture, or other standards of Article 14 of the Covenant.[329] The Human Rights Committee also said that if the state persists in the death penalty, the state should take all measures, not excluding legislation, to guarantee that the death penalty is only for the most serious crimes (within the meaning of Article 6(2) of the Covenant). Moreover, it argued that the death penalty should never be mandatory, and that a pardon or sentence commutation should always be possible, notwithstanding the crime. The state ought also to ensure that, if imposed, the death penalty is never enacted in violation of the Covenant or fair trial procedures.[330]

Similarly, the Committee Against Torture (CAT) observed in 2014 that it was concerned about coerced confessions being reportedly widely practised by the ICJS, and stated that adequate steps must be taken to ensure that confessions obtained by coercion are not admissible, except for when employed against a person accused of obtaining a confession

[325] Christova (n 1) 431; see the GICJ, GICJ's Submission on Iraq (n 204) 5.
[326] Almusawi (n 17); the GICJ, Iraq: Torture & Ill Treatment, Shadow report submitted by to the 55th session of the United Nations Committee Against Torture, from 27 July to 14 August 2015, 7-20; the practice of the Iraqi courts which were reported by UNAMI's experts in 2013 indicate, in some instances, that '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 had been obtained through dures'. UNAMI, Human Rights Report (June 2013) 12.
[327] Almusawi (n 17) 252; see Human Rights Watch, The New Iraq? Torture and ill-treatment of detainees in Iraqi custody (January 2005); however, it has been noted by the Amnesty International that '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'. See Amnesty International, New Order Same Abuses: Unlawful Detentions and Torture in Iraq (n 319) 16.
[328] See para 30 (c) of the UN Human Rights Committee (HRC), Concluding observations on the fifth periodic report of Iraq (n 88).
[329] Ibid., para 27; according to Almusawi, 'it may be argued here that if the law imposes the death penalty, the court should not be blamed for imposing that sentence. […] even if the death penalty is enacted in Iraq law, the judges must ensure fair trials and they cannot absolve themselves of responsibility […there is criticism regarding a lack of due process and the widespread use of invalid evidence to obtain convictions at trial. In particular, trials often rely on confessions to determine guilt even if they may have been extracted by invalid means during pre-trial interrogations'. Almusawi (n 17) 61.
[330] The UN Human Rights Committee (HRC), Concluding observations on the fifth periodic report of Iraq (n 88), para 28.

through torture. Moreover, if it is alleged that a statement was obtained via torture, the burden of the proof lies with the prosecution and courts. The state must also train law enforcement officers, judges, and lawyers to detect and investigate such confessions, and act against judges who do not react appropriately to claims of torture when made during judicial proceedings.[331]

Despite the positive steps of engaging international and local organisations, and spending vast sums on training security forces and those working within the ICJS to bring their conduct within HR norms, and reduce illegal practices leading to miscarriages of justice, these steps have thus far been in vain.[332] These illegal practices against both the accused and defendants have caused acts of violence to flourish, since those subject to these practices 'are more likely to engage in criminal activity than if their constitutional rights have been maintained and the rule of law is respected'.[333] They also create deep feelings of disrespect for and distrust in the entire ICJS amongst citizens. It seems, as Human Rights Watch asserted, that the ICJS is 'plagued with arbitrariness and opacity', and indeed the governments of the US and UK have not held their troops to account for abuses while in detention, or for extra judicial killings in Iraq, and this may have emboldened the current government excuse similar abuses, failures in law and order, and lack of accountability.[334]

Part of the problem of the widespread lack of respect for, and trust in, this system may lie in the powerlessness of Iraqi public prosecutors to actively oversee the integrity of the whole criminal process (from the time of arrest, through the collection of evidence, to the trial) to ensure better protection of defendants' rights[335] and the rights of victims to reveal the truth and provide justice. At present, the role of public prosecutors, particularly in the protection of defendants' rights, has been described as 'worse than useless', and

[331] The Committee also expressed its concerned about 'the wide range of offences for which the death penalty is imposed, as well as the high execution rates in the State party. It is further concerned about the failure to fully respect and protect international and constitutional guarantees of due process and fair trial standards in death penalty cases'. It stated that 'The State party should ensure that if the death penalty is imposed it is only for the most serious crimes and in compliance with international norms. It should consider taking measures for an immediate moratorium on executions and a commutation of sentences'. See United Nation, Committee Against Torture, Concluding Observations on the Initial Report of Iraq, August 2015, U.N. Doc. CAT/C/IRQ/CO/1, paras 20, 22.
[332] Al-Ali (n 5) Ch. 1, 182.
[333] Ibid.
[334] Human Rights Watch, *Iraq: A Broken Justice System: Ten Years after Invasion, Opponents Punished, Trial Rights Ignored* (2013), <https://www.hrw.org/news/2013/01/31/iraq-broken-justice-system> accessed 20 September 2016; see also GICJ, Iraq: Torture & Ill Treatment (n 326) 7-20.
[335] Al-Ali (n 5) Ch. 1, 182.

prosecutors never raise any objections, even when the evidence of abusive practices is overwhelming.[336]

The enforcement mechanism for punishing abuses of HR through the criminal process has grossly failed, as political and legal obstacles have prevented abusers from being sued in Iraqi courts since 2003.[337] Since 2011, the main legal obstacle to the prosecution of government officials for these abuses should have been removed as Article 136(b) of the ICPC officially deleted the clause that 'the transfer of the accused for trial in an offense committed during performance of an official duty, or as a consequence of performance of this duty is possible only with permission of the minister responsible'. [338] Despite this, abusive practices have routinely continued to occur with impunity within the ICJS.[339] Such impunity has resulted in many politicians and senior state officials taking part in murder, torture, and incitement to violence, supporting terrorist groups, militias and organised gangs, and stealing public funds without fear of justice, as they enjoy political, partisan, and sectarian protection.[340]

A problem clearly arises when such a corrupt system decides the fate of defendants, since 'to a significant extent, one's determination of justice is based in large part on whether one finds justice in doing right by society (i.e., punishing the guilty despite any corruption or misconduct by the government investigators)'.[341] This problem may govern the whole

[336] Ibid. 183; however, despite the complex and volatile political and security situation in Iraq post-2003, public prosecutors have attempted to examine the legality of the judgments of the criminal courts, in particular those of the Iraqi Central Criminal Court (CCCI) in cases of terrorism. For instance, the public prosecutor petitioned the Federal Court of Cassation to overturn the judgment of the CCCI in 24/11/ 2008 to impose the death penalty on the defendant for participating in many terrorist acts in Baghdad, because of the untrustworthiness of the secret informants used and the forced confession obtained while in prison. After considering all the relevant evidence, the Court decided on 29/01/2010 that the evidence against the defendant was inadequate and, thus, the decision of the CCCI was incorrect and illegal. Despite the importance of this new decision, miscarriages of justice have arguably characterised much of the ICJS. See Al-Hassan (n 321) 26-29; further relevant judicial decisions can be found in Salman Obaid Abdullah, Selected Judicial Decisions of the Federal Cassation Court, Criminal Division, Parts 2-4 and 8 (*The Encyclopaedia of Iraqi Laws*, 2009, 2010, 2015).

[337] See Logan (n 314) 19-20; considering the difficulty of gathering evidence against officials alleged to be involved in abuses, unless death or the loss of a limb is involved, blame cannot be established. Therefore, investigation and prosecution of abuses involving torture or ill treatment are rare and accountability only acknowledged in a few cases where victims have died or lost limbs. For instance, in the 2008 case of Kata, who died in custody, it took more than a year to receive a response after Amnesty International wrote to the Iraqi Ministry of Justice, calling for an impartial investigation to establish the reasons for his death. Amnesty International learned that his death resulted from torture by officials in the course of interrogation. However, the officials who were investigated were released under amnesty law. See Amnesty International, *A Decade of Abuses* (n 318) 62; Almusawi (n 17) 271-272; this situation is further exacerbated by the fact that rare successful prosecutions end in lenient or reduced punishment which is insufficient to meet the severity of the abuses committed. Amnesty International, New Order Same Abuses: Unlawful Detentions and Torture in Iraq (n 319) 19.

[338] For further details, see Costantini (n 288) 564-567.

[339] For further details about the lack of accountability and the culture of impunity for officials who violate human rights in Iraq, see Almusawi (n 17) 271-275; the Human Rights Watch, for instance, documented in its 105th report, "No One is Safe': Abuses of Women in Iraq's Criminal Justice System" (6 February 2014) a widespread abuse of the rights of women in detention. It noted that 'Iraqi authorities are detaining thousands of Iraqi women illegally and subjecting many to torture and ill-treatment, including the threat of sexual abuse. Iraq's weak judiciary, plagued by corruption, frequently bases convictions on coerced confessions, and trial proceedings fall far short of international standards. Many women were detained for months or even years without charge before seeing a judge'. Human Rights Watch, *Iraq: Security Forces Abusing Women in Detention: Torture Allegations Underscore Urgent Need for Criminal Justice Reform* (6 February 2014).

[340] Jameel Ouda, 'The phenomenon of impunity and its social impacts: Iraq an example' (2013) *Aafaq Centre for Research & Studies* < http://aafaqcenter.com/index.php/post/1833 > accessed 20 September 2016.

[341] Warnock (n 271) 2.

process of the ICJS, and highlights the uncertainty as to whether true justice is being pursued, as government officials are not accountable for any personal abuses, miscarriages of justice, or corruption. However, it is important to note that any effort to call this government to account for its failure to observe true justice will be in vain unless the false ideology governing the rule of law in Iraq changes radically both in theory and practice. This is because law in Iraq, as in other Muslim Middle Eastern countries, appears to be different in both conception and application from that of Western democratic states and HR bodies. It has been correctly observed that the key aspect of rule of law theory in a liberal state is to ensure an individual's liberties against arbitrary state power and powerful individuals. This is sensible in Western societies, or those where the individual is the basis of society, as such persons can form professional or political associations or parties against the state. However, in societies where tribal structures and traditions are key, and the state is a league of particular tribes, it is more difficult to establish an effective rule of law. Therefore, the creation in Middle East Muslim countries of the rule of law system is debatable, given that that there are 'different conceptual constructs than […] in Western liberal democracy, particularly […] the concept of law'.[342]

This is to say that the false ideology on which the rule of law is based in these Middle Eastern countries, including Iraq, bolsters the power of the state and stresses the obligations and duties of its citizens to the detriment of their individual rights. In contrast, the Western legal tradition holds 'the state accountable to its citizens, based on rights of the individual',[343] and it is on this basis that the state can be called to account for any breaches of these rights.[344] Article 5 of the Iraqi Constitution states that 'the law is sovereign' and 'the people are the source of authority and legitimacy', but the Iraqi authorities frequently act against the law and, thus, abuse and negate the authority and

[342] The way religion has influenced the judicial system in Iraq-post 2003 is indicated by a well-respected Iraqi judge, who stated that 'the purpose of law and government was to create an environment in which Iraqi citizens could be good Muslims'. See Shakes (n 26) 33-34, 36; according to the GICJ, 'there has been a total destruction of the notion of justice. The rule of law has now been replaced by a state of anarchy and sectarian violence'. GICJ, GICJ's Submission on Iraq (n 204) 4.

[343] Shakes (n 26) 34; however, it must 'be recognized that ROL capacity building cannot be conducted in an operational vacuum. Some degree of security must exist for technical advisors to focus on a State's compliance with its own laws, building a functional court system, protecting the due process rights of pre-trial detainees and the many other ROL capacity-building missions'. See Richard Pregent, 'Rule of Law Capacity Building in Iraq' (2010) 86 *International Law Studies* 323, 324.

[344] The power of tribes and militias has grown since the fall of the Iraqi state in 2003 as the new weak ethno-sectarian state authorities allow them a degree of power and authority to maintain order and security, and settle various civil, commercial and criminal disputes by their own tribal customary law. This has resulted in tribes, through their militias, taking the law and justice into their own hands, imposing penalties and determining blood money by establishing a de facto judicial autonomy. See Oumayma Omar, 'Iraqi tribes take law and justice into their own hands' (22 Jan 2016) *The Arab Weekly* <http://www.thearabweekly.com/?id=3486> accessed 13 November 2016.

legitimacy given to them by their citizens by violating their own constitution and HR norms.

It may be said, therefore, that when endemic abuse occurs in the ICJS in the collection of evidence in murder cases, without the requirement of accountability on its part, it cannot be expected that this system can gain the respect and trust of Iraqi citizens, and guarantee the rights of defendants. In addition, it would not be able to conduct a thorough and impartial investigation into these cases and expose those responsible. In the absence of effective mechanisms to collect material and scientific evidence in Iraqi criminal proceedings compatible with the requirements of the Iraqi Constitution, the Criminal Procedure Code and HR norms, the rights of both defendants and victims are violated. This is because the restoration of a sense of true justice to Iraqi victims requires the existence of a thorough and impartial investigative process, leading to the facts of murder cases without prejudice, bias or ambiguity, so that those actually responsible are prosecuted and punished. The HRC has required that 'all serious human rights violations are independently, promptly and thoroughly investigated; that perpetrators are brought to justice and adequately sanctioned as soon as feasible; and that victims receive full reparation' from the Iraqi authorities.[345]

Given the vital role of the investigative judges in Iraq's criminal inquisitorial method of revealing the facts and perpetrators, it can be said that their failure to observe due diligence in dealing with multiple murder cases by relying on ineffective, illegal mechanisms has resulted in most of these cases being recorded as by persons unknown and they have, therefore, gone unpunished.[346] Since 2003, Iraqi civilians have been subjected to extreme acts of violence against their right to life without thorough and impartial investigation, in accordance with due diligence, to prosecute and punish those responsible. Some groups who have committed such acts have links with influential political, judicial, and sectarian forces in Iraq, and have provided them with cover.[347] For instance, credible allegations of serious HR violations have been made since 2014 against the PMU militias during the conflict against ISIS, including extrajudicial executions and other unlawful killings, torture, enforced disappearances, and abductions in many Sunni

[345] See para 20 (a) of the UN HRC, Concluding observations on the fifth periodic report of Iraq (n 88).
[346] For instance, see the report of Iraqueer et al., (n 154) 8, which indicates that state authorities, specifically security forces 'through their unwillingness to investigate or pursue even the most open of perpetrators… encourage anti-LGBT human rights violations including torture and killings'.
[347] See Ouda (n 340); USDS, 2016 Country Reports on Human Rights Practices –Iraq (n 78); GICJ, GICJ's Submission on Iraq (n 204) 4.

areas. Moreover, although the Iraqi government announced investigations, there are still no published findings or any information on bringing members of PMU militias to justice.[348] Amnesty International noted that, in one incident, despite announcements of investigations by Prime Minister Abadi into the killings of at least 56 Sunnis in Barwana allegedly by the PMU and security forces in 2015, 'no findings have been made public and no member of the PMU or security forces has been held to account'.[349] Regarding these credible allegations of serious HR violations by PMU militias and Iraqi security forces, Amnesty International has asserted that the state should conduct independent and thorough investigations into HR violations, including enforced killings and disappearances, and, where guilt is established, there must be adequate punishment, 'without recourse to the death penalty', and reparations for victims. Moreover, 'the scale and gravity of war crimes and other human rights violations committed by militias' must be publicly acknowledged, so that all 'crimes under international law will be prosecuted, regardless of rank and affiliation'.[350]

The UNAMI also stated that in the light of serious violations of HR by ISIS 'ensuring accountability for these crimes and violations will be paramount if the Government is to ensure justice for the victims and is to restore trust between communities. It is also important to send a clear message that crimes such as these will not go unpunished'.[351] Still, this clear message seems to be lacking as Iraqi authorities have grossly failed to fulfil their positive procedural obligations and, instead, have tried to conceal their unwillingness, showing a degree of incompetence, corruption and gross negligence which

[348] See Amnesty International, Iraq: Turning a Blind Eye (n 138) 5.

[349] Ibid. 17; in addressing violations of HR during the conflict against ISIS, Prime Minster Abadi stated in September 2016 that 'Those who have committed crimes, they have to be punished. But we have to be very careful in bringing the law. We have to follow the rule of law. .. And I think we have been managing well in the areas which have been liberated. There are excesses, which are unacceptable to us. And we are prepared, and we have the resolve to stamp them out. And we are doing this exactly'. However, Amnesty International asserted that it 'is not aware of any members of the PMU who have been prosecuted or convicted for HR violations. Amnesty International's requests to the Iraqi authorities for information on whether any members of the PMU had been charged or tried for HR violations since 2014 – most recently in a memorandum addressed to the Prime Minister on 21 September 2016 – have gone unanswered'. Ibid. 12-13.

[350] Ibid. 40; the IHCHR is supposed to address complaints of HR violations in Iraq, but 'is ineffectual and insufficiently utilized in the documentation and investigation of disappearances'. See the Centre for Victims of Torture (CVT), Enforced Disappearances: Ambiguity Haunts the Families of Iraq's Missing (n 199) 4; the Committee of Enforced Disappearances (CoED) has also stated that 'All cases of enforced disappearance perpetrated in any territory under its jurisdiction are investigated thoroughly, impartially and without delay by an independent body, even if there has been no formal complaint'. It also criticised Article 40 of the Iraqi Penal Code, which stipulates that public officials are not guilty of crime if they are implementing orders from a superior which they are obliged or feel obliged to obey. This criticism is because these orders may have potential implications on the 'implementation of the obligation to bring to justice all those involved in the perpetration of enforced disappearances'. The CoED required the state to 'take the legislative measures necessary to ensure that domestic legislation specifically provides for: (a) the criminal responsibility of superiors in accordance with Article 6(1)(b) of the Convention; and (b) the prohibition of invoking superior orders or instructions to justify an offence of enforced disappearance in accordance with Article 6(2) of the Convention'. See paras 20 (a), 26 and 27 of the United Nations, Committee on Enforced Disappearances, Concluding observations on the report submitted by Iraq (n 200).

[351] See UNAMI, Report on the Protection of Civilians in the Armed Conflict in Iraq: 11 December 2014 – 30 April 2015 (n 242); Amnesty International and other organisations have also documented brutal crimes, including war crimes and crimes against humanity, committed by ISIS since 2014 against various social, ethnic and religious communities in territories under its control. Amnesty International, Iraq: Turning a Blind Eye (n 138).

has led to most crimes against HR, especially the right to life, going unpunished. This is despite their claim that although there are many security challenges facing Iraq, they have taken all measures needed to bring perpetrators to justice.[352] Specifically, in most cases of terrorist attacks using car and suicide bombings, which have continually devastated the country since 2003, evidence remains scarce.[353] The usual response of the state authorities to criticisms of failures with security measures, and to prevent such attacks in accordance with due diligence, is to establish inquiries about these attacks, often without any effective outcome. Any details of attacks revealed by the authorities have generally been descriptive, merely explaining the circumstances of the attacks, the general reasons behind them, and the materials used, rather than providing precise information about perpetrators, whether any have been brought to justice, and if there was negligence by the security services.[354] Brig. Gen. Talib Khalil, the Interior Ministry's Director-General of Criminal Evidence, has asserted that the process of gathering evidence is extremely effective in uncovering violent crimes.[355] This assertion, however, does not reflect reality. As Al-Shalah noted, it would be expected that the Iraqi Interior Ministry's Criminal Evidence Directorate (CED) would control the scene on arrival to collect essential forensic evidence, but instead 'chaos and frantic activity usually prevail', so that evidence which might prevent further terrorist attacks and lead to prosecution is lost before the CED even arrives.[356]

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[352] See Human Rights Committee reviews the report of Iraq in 27 October 2015 (n 147).
[353] Abbas (n 213).
[354] For instance, a Parliamentary Commission was established to investigate the reasons behind the deadly terrorist attack on the Karada district in 2016 by ISIS, and whether there was any collusion or negligence on the part of security forces. It concluded that security flaws and negligence contributed to the attack, combined with the chaos and inefficiency of measures employed to deal with such attacks. These include:
- The authorities received several warning messages, but circulated only one message.
- Large numbers of human resources personal working in the field of intelligence lacked the qualifications to do so.
- Those in senior positions did not have sufficient experience.
- The car bomb travelled 80 km and passed through two security checkpoints before entering the Karrada district.
- Ammonium nitrate, aluminium c4 and calcium carbide were responsible for the suffocation of those who were caught in the blast.
- Fire hoses were leaking, causing the water to seep away and evaporate quickly.
- There were not enough ambulances to transport the injured to hospitals. See Al-Shalah (n 235). However, a government investigation several months after the explosion was said to be equivocal and, according to the families of the Karada explosion's victims, a proper, thorough government investigation was never conducted. See Dima Gharbawi Shaibani, 'I went back to Baghdad a year after the Karada bombing' 3 Jul 2017 <http://www.aljazeera.com/blogs/middleeast/2017/07/baghdad-year-karada-bombing-170703140441465.html> accessed 24 Feb 2018; Mortada Al-Khateeb, International Investigation for Baghdad-Karradah explosion, 2016 <https://www.change.org/p/un-international-investigation-for-baghdad-karradah-explosion> accessed 4 Feb 2018. Corruption and suspicions of collusion and distortion of facts have also been raised regarding the establishment of the facts. For further details, see Hadeel Al-Sarraf, the Full Story of the Explosion of Karrada: Courrption and Suspicions of Collusion and Distortion of the Facts, 10 July 2016 <http://elsada.net/13875/> accessed 24 Feb 2018. As discussed in Chapter 3, p.63 and pp.82-4, sometimes the effectiveness of the investigations process to establish the facts could be undermined by the existence of collusion, as the case of Pat Finucane demonstrated in the Report of the Pat Finucane Review. In this context, given the scarce and unreliable information revealed in the investigations process about some acts of violence by non-state actors in Iraq, in particular the Karada district case, the alleged HR violations by the PMU, enforced disappearances, and the Speicher case, it can be argued that the potential collusions in such investigations cannot be excluded, among others factors, from contributing to the failure to establish the truth. See also the discussion on pp.230-231.
[355] Al-Shalah (n 235).
[356] Ibid.

Similarly, investigation into enforced disappearances seems to be non-existent because of the unwillingness of the government even to acknowledge disappearances. However, the GICJ has observed that enforced disappearances in Iraq have not decreased, and that there is credible information showing that there are more than '420 secret detention facilities in Iraq, and [that] between 2-5 June 2016, at least 643 men and boys disappeared from Saqlawiya, Iraq, in the aftermath of the "liberation campaign" allegedly intended to retake the city of Fallujah from ISIS'. Moreover, by May 2017, no further information about the investigation into these disappeared persons had been released by the government, which, according to the GICJ, means that 'there must be an urgent and proper investigation into every person reported missing in Iraq.[357]

Even when criminals responsible for HR violations have been convicted and punished, justice for victims has been denied and/or undermined. For instance, the Iraqi authorities are guilty of gross negligence due to failing to prevent mass escapes of these criminals from prisons, and indeed these persons will probably commit further violent acts in future. In one incident, 'hundreds of convicts, including senior members of al Qaeda, broke out of Iraq's Abu Ghraib jail as comrades launched a military-style assault to free them'.[358] According to official government sources, around there are around 500 escapees, most of whom were 'convicted senior members of al Qaeda and had received death sentences'.[359] The freeing of criminals from prison has usually been conducted by armed groups colluding with prison officials and security guards.[360] In addition, justice has also been denied to victims when authorities have introduced general amnesty or special pardon legislation because of internal political or external pressure to release prisoners.[361] For instance, General Amnesty Law No. 19 of 2008 resulted in the immediate release of criminals, senior corrupt ministers, and administrators and the suspension of legal proceedings against them.[362] Thousands of prisoners were released by a special pardon of

[357] GICJ, GICJ's Submission on Iraq (n 204) 3.
[358] Kareem Raheem and Ziad al-Sinjary, Al Qaeda militants flee Iraq jail in violent mass break-out (23 July 2013), <http://www.reuters.com/article/us-iraq-violence-idUSBRE96L0RM20130722> accessed 20 September 2016.
[359] Ibid.
[360] See Ouda (n 340).
[361] Adam Center, Mechanisms to Prevent Impunity, 08-06-2017 < https://annabaa.org/arabic/rights/11342 > accessed 3 March 2018.
[362] Ibid; the General Amnesty Law No. 19 of 2008 was published in the Official Gazette, issue 3938, 17th March 2008; the regulations of this law, like other general amnesty laws, are subject to the Iraqi Criminal Code (Articles 150-153) and the Criminal Procedures Code (Articles 300, 301, 304, 305). see Dhiy Abd Alla, 'Amnesty as a Cause of the Expiration of the Criminal Case in the Iraqi Criminal Procedure Code' (2011) 2 *Risalat al-huquq Journal* 20, 20-38; this Amnesty Law came into force on 27th February 2008 as part of the reconciliation plan aimed at pardoning accused and convicted persons, including those in Iraqi prisons or detention centres of the occupying powers. 80% of those detained were Sunnis. See Angeline Lewis, The Coalition Provisional Authority in Iraq, 2004-2008: Transitioning from Administrative Internment to Criminal Justice-Based Detention Operations, in Gregory Rose and Bruce Oswald, *Detention of Non-State Actors Engaged in Hostilities: The Future Law* (BRILL, 2016) 131; it has been noted further that 'Government and political leaders from all parties in Iraq have granted amnesties even to people who have committed violations of human rights many times', especially those accused of torturing and ill-treating detained persons. Almusawi (n 17) 257, 288; Musings

2013 following pressure from demonstrations in various parts of Iraq.[363] These different *de facto* or *de jure* practices of impunity are contrary to the Iraqi state's obligations under HR norms which require adequate remedy to victims and are in themselves a violation of HR.

Iraq's divided society has suffered since 2003 from a lack of security, social and political upheaval, widespread mistrust, and numerous atrocities, including ongoing armed conflict and indiscriminate violence, specifically sectarian, in addition to wide scale miscarriages of justice, and this means that the demand for retributive justice is neither always achievable or the single best solution. Therefore, to address such upheaval and atrocities gradually, and encourage tolerance and reform alongside gradual improvement in the dire security situation, especially as territory is regained from ISIS, the Iraqi Parliament has recently approved a new Amnesty Law, No. 27 of 2016.[364] Article 1 states that individuals convicted for crimes punishable by death, or who are the subject of other penalties which have deprived them of their liberty since 2003 are eligible to apply for amnesty, without being absolved from their civil or disciplinary liability. Article 2 also states that these provisions shall apply to all accused persons, whether or not legal action has been taken against them, and whether cases are at the investigation or trial stages; excepted from these provisions are those who have committed or been convicted of 13 types of crimes listed in Article 4 of this law, such as 'acts of terror resulting in death or permanent disability, human trafficking, rape, money laundering and embezzlement and theft of state funds'.[365] The investigating judges and competent courts must apply the provisions of this law within thirty days for cases brought before them and if a person has been considered ineligible for amnesty, they can appeal within 30 days to the Federal Court of Cassation in respect of felonies and Court of Appeal with regard to lesser crimes.[366] In addition, those convicted of crimes excluded by Article (4) of this law, including those convicted under Article 4 of the Anti-Terrorism Law, who claim that their confessions were made under duress or that legal action was taken against them based on

on Iraq, Iraq's Amnesty Law (27 July 2008) <http://musingsoniraq.blogspot.co.uk/2008/07/iraqs-amnesty-law.html> accessed 30 August 2017.

[363] Ouda (n 340).

[364] According to a political commentator, the law was demanded by Sunni Muslim politicians as part of a political settlement process allowing the current Prime Minister, Haider al-Abadi, to form a government in 2014, and that 'its delay was largely related to the crisis in confidence between the political components and the influence of foreign parties on Iraq's political and legislative institutions'. See Al-Monitor, Iraqi Parliament Approves Controversial Amnesty Law, 30 August 2016 <http://www.al-monitor.com/pulse/en/originals/2016/08/general-amnesty-law-terrorism-national-reconciliation-iraq.html> accessed 6 July 2017.

[365] The full details of this Law can be found at <http://www.moj.gov.iq/view.2608/>; see also Al-Monitor, Iraqi Parliament Approves Controversial Amnesty Law (n 364).

[366] Article 7 of the Iraqi Amnesty Law.

the statements of a secret informant, can request that their cases are reviewed objectively or apply for retrial by judicial commission.[367]

However, political and legal objections have been made to the Iraqi Amnesty Law because of the possibility of pardoning of terrorists, dangerous criminals and corrupt officials, which could lead to further social and security upheaval.[368] Some groups of MPs planned to appeal against the law before the IFSC on the grounds it is a 'gift for terrorists and members of [ISIS], and a betrayal of the blood of the martyrs and victims', and would allow the release of ISIS muftis who passed fatwas on behalf of ISIS.[369] One MP claimed that many amendments had been made to the Amnesty Law to ensure that those released would not pose a threat to society, and especially to prevent terrorists from exploiting this law.[370] He further adds:

> while the predominantly Shiite National Alliance tried its best to prevent the release of convicted terrorists, legislators from the all-Sunni Iraqi Forces Coalition had sought to expand the law to include people convicted under Article 4 of the Anti-Terrorism Law, as they believe innocent people, mainly Sunnis, were wrongly prosecuted under the act for political reasons during the two terms of Prime Minister Nouri Al-Maliki. In the version of the law that ultimately passed, individuals serving Article 4 sentences can apply for amnesty as long as their alleged crime did not result in someone's death or disability.[371]

The original draft of the law submitted by the current Prime Minister, Haider Al-Abadi, includes only eight articles and, according to one legal expert, these 'should have covered specific issues', before parliament added another eight controversial articles without any consultation with the government.[372] It has been said that some of these controversial articles 'are very dangerous' and could lead to unwarranted 'retrials for all those convicted of criminal offences, terrorist acts, rape, robbery and theft'.[373] For instance, there has been criticism of the statement in Article 4, paragraph 2 that any terrorist whose crimes did not result in the death or permanent disability of victims could be pardoned.[374] In addition, there is the question of what happens to those accused or convicted under Iraqi Anti-Terrorism law for encouraging sectarian strife or civil war by arming citizens, or encouraging or funding these. It is possible that they could be pardoned because their illegitimate attitudes have not directly caused death or disability. Also, while the original

[367] Ibid. Article 9(1) and (2).
[368] Mustafa Habib, Get out of Jail Free: Iraq's New Amnesty Law so Full of Loopholes, Terrorists Could be Freed, 5 October 2016 <http://www.niqash.org/en/articles/politics/5371/> accessed 6 July 2017.
[369] Al-Monitor, Iraqi Parliament Approves Controversial Amnesty Law (n 364).
[370] Ibid.
[371] Ibid.
[372] Habib (n 368).
[373] Ibid.; see also Abdul Qadir Al-qaisi, A major Legislative Setback and Chaos in the Amnesty Law, 4 October 2016 <http://newsabah.com/newspaper/97650> accessed 7 July 2017.
[374] Habib (n 368).

draft excluded those convicted of kidnapping from seeking a pardon, pardons are now possible if their crimes did not result in the death or permanent disability of a victim under Article 4, paragraph 6.[375] Al-Abadi has criticised these amendments and complained that 'a few days ago security forces found kidnapped children during a raid. Under the amended amnesty law, those kidnappers could be released,'[376] despite the probability that they intended to sell the children for their human organs, and it is unknown whether they had committed other crimes, as they would not be prepared to confess because of the amnesty.[377] Indeed, Al-Abadi stated his belief that 'parliamentarians had introduced criminal elements to the new legislation'.[378] Further, Article 4, paragraph 10 of the law paves the way for the accused, and those convicted of stealing state funds or engaging in administrative or financial corruption, to be pardoned if they pay back what they have stolen. This clearly makes it problematic for those Iraqi politicians who are attempting to fight political corruption, by adding to the difficulty when those accused of corruption are senior officials who may try to reduce the amounts they are alleged to have stolen. Moreover, anyone who falsified documents to gain state employment or financial privilege may also be pardoned according to Article 4, paragraph 10 of the law, although this was not so in the original draft.[379]

Under Article 6 of the law, where prisoners convicted of terrorist or criminal offences have served one third of their sentences, they can apply for amnesty by requesting to 'buy' their way out of the remainder of their sentence; this would require them to pay IQD 10,000 (around US $7.50) for each remaining day, which would not be difficult for wealthy convicts.[380] One MP stated that, by receiving these payments, it would seem that thieves and terrorists are contributing to state funds.[381] Concerns can also be raised that by giving those in the judiciary and the Ministries of Justice and the Interior the authority to decide whether to accept 'buy outs' of the sentences of prisoners might make them susceptible to bribery.[382] In a positive step, a special judicial committee was set up in accordance with Articles 7 and 9 of the law to decide whether those convicted of terrorist or criminal acts should be granted a re-trial to ensure that no miscarriage of justice

[375] Ibid.
[376] Ibid.
[377] The Baghdad Post, The Amendments of the Iraqi Parliament on the Amnesty Law Provoke Controversy, 1 September 2016 <http://www.thebaghdadpost.com/ar/story/2016> accessed 7 July 2017.
[378] Habib (n 368).
[379] Ibid.
[380] Ibid.
[381] Ibid.
[382] Ibid.

occurred. However, there is a danger that members of the committee may be subject to political pressure or even have their lives threatened if their decisions do not serve the interests of the various parties involved in judicial litigation.[383] Furthermore, victims or their families are required under Article 3 of this law to consent to pardoning prisoners, and this may place them in danger or under pressure should they refuse, as prisoners may have contacts outside jail who could threaten them.[384]

The above criticisms and concerns raise serious questions about whether this law will be capable of being part of a national reconciliation plan to bring lasting peace and stability to Iraq. Indeed, it may be that this Amnesty Law, as it stands, cannot contribute to reconciliation in society; this is because like previous amnesty laws,[385] it is merely politically motivated to satisfy certain political parties, without considering whether there is the social climate for the acceptance of this law as regards to any terms of apology and forgiveness. In addition, its application might further undermine the rule of law and encourage impunity for perpetrators since it appears to impair justice and, thus, weaken the observance of the Iraqi state's obligations to punish HR violations.[386] However, even if these lawmakers genuinely aimed to restore social and political calm, they should have recognised that many post-2003 violent crimes were politically motivated and part of the power struggle between various political forces and others, especially since the state itself

[383] Ibid.
[384] Ibid.
[385] See Samer Moayed Abdu Latif, 'Amnesty Law: A Study of Political Motives and Dimensions' (2012) <http://law.uokerbala.edu.iq/images/nationalize/seminars1.pdf> accessed 7 July 2017.
[386] See Nasser Omran, The Legal Implications of the Application of the General Amnesty Law No. 27 of 2016, 14 December 2016 <http://www.iraqja.iq/view.3582/> accessed 7 July 2017; Mohammed Al-khafaji, The Review and Observations about Amnesty Law, 25 September 2016 <http://yesiraq.com/?=714927> accessed 7 July 2017. Following the above criticisms, especially with regard to the crimes of terrorism and kidnapping, the Iraqi Parliament has recently approved the Law of the First Amendment of the General Amnesty Law. The law was legislated 'due to the seriousness of terrorist crimes and crimes of kidnapping people on society, especially after June 10, 2014 and in order not to provide the opportunity for perpetrators to escape punishment and not to encourage others to commit such crimes and for the purpose of increasing the amount of fine on the replacement of the penalty or the measure'. See 'President Masum Ratifies "the Law of the First Amendment of the General Amnesty Law"', 04 November 2017 <https://www.presidency.iq/EN/Details.aspx?id=454> accessed 29 1 March 2018. The Law has adopted the date 06/10/2014 as the basis of determining the effects of the crime of terrorism. A crime was excluded from amnesty when it occurred after the said date, but was covered by the law if it occurred before the said date, if the perpetration of the crime did not result in killing or permanent disability. In addition, the crime of kidnapping was absolutely excluded from the Amnesty Law. For further details, see Nasser Omran, A reading in the First Amendment of the General Amnesty Law No. 27 of 2016, 27 September 2017 <https://www.iraqfsc.iq/news.3922/> accessed 1 March 2018. It has been noted by the Human Rights Watch that under the General Amnesty Law, ISIS members convicted in Iraqi courts [….] 'may be entitled to release. The law offers amnesty to those who can demonstrate they joined ISIS or another extremist group against their will and did not commit any serious offense before August 2016. According to the Justice Ministry, by February 2017, authorities had released 756 convicts under the Amnesty Law, but it is unclear whether judges are consistently applying this law and the percentage of those convicted for ISIS affiliation among the released'. See Human Rights Watch, World Report 2018 – Iraq, 18 January 2018 <http://www.refworld.org/docid/5a61ee64a.html>accessed 1 March 2018. However, in the opinion of a senior counterterrorism judge in Nineveh 'those who supported ISIS even with basic functions like cooking, were as culpable as ISIS fighters, and that he had no interest in defendant claims that they joined ISIS against their will. [....] He refused to apply the amnesty law because he thought no one who provided any support to ISIS deserved an amnesty'. Human Rights Watch, Flawed Justice: Accountability for ISIS Crimes in Iraq, 5 December 2017 < https://www.hrw.org/report/2017/12/05/flawed-justice/accountability-isis-crimes-iraq > accessed 26 March 2018.

was active in the conflict.[387] Indeed, this law does not make a clear distinction between politically motivated crimes and other crimes, showing an absence of political vision and will to address political violence.[388] Due to the lack of a clear definition of terrorism, the interpretation of Articles 2 and 3 of the Anti-Terrorism Law by those holding political power is very broad and includes many violent offences under the term 'terrorist acts' or 'crimes of state security'. This enables officials dealing with various political actors or armed militias that were carrying out acts of violence to refer to them as 'out of law' rather than 'terrorists'.[389] Addressing the political violence in this law is necessary as a part of confidence-building in any proposed undertaking of transitional justice or national reconciliation after ISIS is defeated; this will send a positive message to conflicting political parties that they need to change their attitude in future.[390]

The Amnesty Law gives no consideration to any necessity to heal the wounds of victims and society in order to reconcile past atrocities, for instance, by obliging those subject to this law to disclose the truth and offer apologies as a precondition of being freed or granted immunity from prosecution. This approach has been followed by some states, such as South Africa, which granted limited and conditional amnesty in exchange for testimony and disclosure of the truth about past HR violations as a prerequisite of national reconciliation.[391] Limited amnesties may help draw as complete a picture as possible about violations, as, without some promise of amnesty, perpetrators are unlikely to testify. However, critics maintain that such amnesties encourage a culture of impunity, sacrifice and justice, and may also 'run counter to a state's obligations to punish human rights violations under international treaties'.[392] The *South African Truth and Reconciliation Commission* (SATRC), in response to such criticisms, stated that the amnesty was essential to the success of revealing all possible truth about past atrocities, of which the main sources of information were perpetrators.[393] Moreover, the commission further highlighted that if justice is only seen as punitive, the advantages of restorative justice for victims regarding 'correcting imbalances, [and] restoring broken relationships' are missed.[394]

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[387] See Yahya Al Kubaisi, The amnesty Law and the Crisis of the Iraqi State, 18 August 2016 <http://www.alquds.co.uk/?p=583274> accessed 12 July 2017.
[388] Ibid.
[389] Ibid.
[390] Ibid.
[391] See Hollywood (n 16) 74; Hendy (n 340) Ch. 3, 538-542.
[392] Hollywood (n 16) 74-75.
[393] Ibid. 65.
[394] Ibid. 75.

Even though the Iraqi Amnesty Law places certain limitations and conditions in the interest of revealing the truth, the law alone cannot bring positive change unless it is part of a genuine and holistic post-conflict transitional justice plan in which certain prerequisite conditions, including legal, judicial, administrative, institutional, social, and cultural reforms are adopted.[395] If these conditions are even partially accomplished, a positive psychological atmosphere of political and societal initiatives devoted to fact-finding, acknowledgement of wrong doing, apology, forgiveness, and a culture of remembrance would gradually emerge, leading to healed memories. If this occurs, then trust may be rebuilt, relationships restored, and future violence avoided.[396] Such a positive psychological atmosphere requires, amongst other things, as discussed later,[397] serious consideration as to whether the establishment of a truth and reconciliation commission system would be appropriate to address the violence committed since 2003,[398] particularly that by ISIS, and any alleged abuses by security forces and pro-government militias because of the inadequate enforcement of procedural standards of justice during the period of internal armed conflict in parts of the country since 2014.[399]

Justice is necessary for all victims, especially of ISIS, to enable them to rebuild their lives. This, as a recent report of UNMAI and the UN Human Rights Office emphasised, is particularly essential for victims of ISIS's sexual violence.[400] The report asserted that the Iraqi government must ensure that the thousands of women and girls, in particular from the Yezidi and other minority communities who survived rape and sexual assault under ISIS, receive care, protection and justice.[401] Under domestic law and international HR law, the Iraqi state has an obligation to ensure that all these victims can access justice and

[395] Omran (n 386).
[396] Ibid.
[397] See Chapter 6, pages 253-257.
[398] It has been suggested that 'the formation of a body in Iraq similar to the Committee of Truth and Reconciliation, which was established in 1990 in South Africa, for example, is noteworthy. This Committee addressed the needs of the victims of the Apartheid regime by recognition and remedies instead of revenge and punishment. It convinced the perpetuators of the crimes to admit and apologize for their deeds. The new constitution of 1996 guaranteed the rights of black majorities and safeguarded that of white Afrikaners'. See Othman Ali, National Reconciliation in Iraq: Opportunities and Challenges, 24 February 2017 <http://thenewturkey.org/national-reconciliation-in-iraq-opportunities-and-challenges/> accessed 11 July 2017. Further discussion of this will take place in the next Chapter, pages 258-262.
[399] The parties involved in this non-international armed conflict, ISIS, Iraqi security forces, and pro-government forces, are 'required to comply with international humanitarian law, especially common Article 3 to the Geneva Conventions and rules of customary international law applicable to non-international armed conflict'. These parties are further required 'to refrain from direct attacks against civilians, and respect the key principles of international humanitarian law, including the prohibition of indiscriminate attacks; the obligation to respect the principle of proportionality; and the obligation to take all feasible precautions to protect the civilian population against the effects of attacks. The parties are also required to ensure special protection for women and children'. However, the Iraqi state remains fully bound by international HR law and the application of international humanitarian law, irrespective of the ongoing armed conflict. See UNAMI, Promotion and Protection of Rights of Victims of Sexual Violence Captured by ISIL/or in Areas Controlled by ISIL in Iraq (UNAMI/OHCHR) 22 August 2017, paras 18 and 19.
[400] For further details, see Ibid.
[401] UN Human Rights Office of the High Commission, Justice essential to help Iraqi Victims of ISIL's Sexual Violence Rebuild Lives – UN report <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21986&LangID=E> accessed 30 August 2017.

reparations,[402] including the prosecution of perpetrators in accordance with the law, due process and fair trial standards, guaranteeing a gender-sensitive manner which will not 'perpetuate victimization or […] "revictimise" women and girls subjected to such crimes'.[403]

The report, however, noted that the ICJS largely fails to ensure the appropriate protection of victims due, in part, to the inadequacy of Iraq's laws to criminalise perpetrators of sexual and domestic violence against women and, thus, these laws would impede the prosecution of ISIS for such crimes.[404] To facilitate access to justice and ensure the care and protection of victims in legal and judicial proceedings, significant legislative and institutional changes will be needed.[405]

At present, the struggle for a procedural remedy of justice for ISIS victims, where possible, seems far from achievable with continued flawed trials falling short of international standards. For instance, 36 men were executed on 21 August 2016 for their part in the Speicher massacre, in which approximately 1,700 unarmed soldiers and cadets were killed by ISIS in June 2014, as referred to earlier.[406] The 36 men were convicted and found guilty in a trial that lasted only a few hours, using a conviction mainly based on confessions; it was thus defective because of 'breaches of the right to a fair trial, including the court's failure to adequately investigate the defendants' allegations that their pre-trial "confessions" were extracted under torture'.[407] This execution followed public and political pressure to hang all 'terrorists' after the suicide bombing in Karada in 2016, for which ISIS claimed responsibility.[408] Such flawed trials and executions further undermine trust in the ICJS and fail to heal the wounds suffered by ISIS victims. According to Human Rights Watch, the Speicher massacre was a very grave crime and, if the accused had been given a fair trial, this would have been an important indication of Iraq's commitment to reform its justice system. The uncovering of the events at Camp Speicher is owed to the victims' families and, indeed, to all Iraqis.[409] It further states that,

[402] See UNAMI, Promotion and Protection of Rights of Victims of Sexual Violence (n 399), para 33.
[403] Ibid., para 34.
[404] Ibid., para 23, 35.
[405] Ibid., para 35.
[406] See Belkis Wille, Executions in Iraq Not Real Justice for Speicher Massacre: Fair Trials Needed to Restore Faith in Justice System, Human Rights Watch, 23 August 2016 <https://www.hrw.org/news/2016/08/23/executions-iraq-not-real-justice-speicher-massacre> accessed 4 July 2017; the Amnesty International Report 2016/2017: The State's of the World's Human Rights: Iraq, Amnesty International Ltd 2017, 199.
[407] The Amnesty International Report 2016/2017 (n 406).
[408] Ibid.
[409] Human Rights Watch, Iraq: Set Aside Verdict in Massacre of Cadets Iraq: Set Aside Verdict in Massacre of Cadets, 16 July 2016 <https://www.hrw.org/news/2015/07/16/iraq-set-aside-verdict-massacre-cadets> accessed 4 July 2017.

to make ISIS perpetrators accountable and help heal their victims, as well as generate faith in the ICJS, it is imperative that trials are fair.[410]

It may further be said that victims of crime who belong to poor, marginalised sectors of society, and other vulnerable groups, cannot access legal remedies as they often have no knowledge of such remedies or their entitlement to help from the judicial authority, lawyers or NGOs.[411] These obstacles explain why there are so few complaints by victims and, consequently, why many do not avail themselves of their right to remedy.[412] As a Rule of Law officer with the United Nations Development Programme (UNDP) observed, 'one of the biggest obstacles to protecting human rights in Iraq is that citizens, particularly the most vulnerable groups, are not aware of how to fully obtain their rights and protections afforded by Iraqi law'.[413] To strengthen how victims' access justice, 'a new legal help desk in Baghdad's Rusafa Courthouse was inaugurated […] to provide free legal services to indigent Iraqi citizens as part of a larger effort to strengthen the administration of and citizens' access to justice in the country'.[414] This help desk seeks to 'build a culture of rights' by relying on 'community activism' to see that citizens know about their rights and that any claims 'are resolved more efficiently'.[415] According to the Iraqi Chief Justice, such efforts should improve the state of HR in Iraq.[416] However, although this is a positive step, it may be considered a small local gesture, and what is actually needed is an extensive programme to help victims' access justice across Iraq.

Likewise, the Iraqi inquisitorial system has thus far not provided fair treatment for victims concerning their right to be fully informed about cases, or have perpetrators brought to justice and punished in fair trials. In the example of the Speicher massacre, the Central Criminal Court's spokesperson, Abd al-Sattar al-Bir-Qadar, declared that while 28 defendants were convicted, 604 suspects remained unaccounted for.[417] Even for the 28

[410] Wille (n 406).
[411] See Ouda (n 340).
[412] Ibid.
[413] See United Nations Development Programme (UNDP), *New Help Desk in Baghdad's Oldest Court Provides Free Legal Assistance to Women and Most Vulnerable* (03-11-2013) <http://www.us.undp.org/content/washington/en/home/partnerships_initiatives/us-undp-partnership-success-stories/democratic-governance--iraq---new-help-desk-in-baghdad-s-oldest-.html> accessed 20 September 2016.
[414] Ibid.
[415] Ibid.
[416] Ibid.
[417] Human Rights Watch, Iraq: Set Aside Verdict in Massacre of Cadets Iraq: Set Aside Verdict in Massacre of Cadets (n 409).

individuals executed, the criminal proceedings lacked detail, including the role each defendant played, and who they killed or helped to kill.[418]

It is important for all Iraqi victims to have clear and fully detailed answers to such questions, and to know that the judicial process and its outcome are fair. Thus, enhancement of trust in the morality and legitimacy of the ICJS depends on implementing retributive justice and victims perceiving that they have been treated fairly throughout. Although the Iraqi Constitution in Article 19, paragraph 6, asserts that 'every person shall have the right to be treated with justice in judicial and administrative proceedings', the nature and extent of this right has not been fully addressed by the IFSC. This is because there is no tradition of cases brought by victims or others alleging unfair treatment in criminal proceedings. It can be argued that unless this issue is brought to light by academic researchers, NGOs, civil society activists, and the media, in order to build a new tradition, there is no possibility that the rights of victims to fair treatment in criminal proceedings will be officially acknowledged. In principle, although the ICPC grants victims some concession to participate in criminal procedures,[419] this concession, as noted by Jasim and Saadoun, does not fully follow the evolution of the concept of victims' rights.[420] The Iraqi state must conform to mainstream HR norms regarding the participatory rights of victims and, therefore, its criminal justice system must acknowledge them, at least in principle. However, it is doubtful whether these rights will ever be recognised in Iraq, as in practice this system may be said to be incapable of changing its ideology of considering crimes only as offences against society as a whole; this is despite hundred thousands of Iraqi citizens having lost their lives or being injured by violence. In addition, the fragility of the process of criminal investigation and the widespread existence of impunity makes this system incapable of respecting victims' rights.

[418] Human Rights Watch stated that 'without a fair trial that provides a full and proper accounting, it is impossible for Iraqi officials to credibly claim that their justice system has established who was responsible for the crime'. Ibid.

[419] In principle, victims of crimes 'may attend the initial investigation. He or she may make observations on testimony by witnesses and ask for a witness to be questioned again or other witnesses to be questioned. Moreover, he or she may request the appointment of an expert, such as a forensic expert in torture cases. However, the victim has no right to challenge the decision of the investigating judge not to open an investigation or to close the case file. During the trial, the complainant and civil plaintiff have the right to discuss the testimony through the Court, ask questions and request clarifications to establish the facts'. The Redress Trust, Reparation for Torture in Iraq in the Context of Transitional Justice: Ensuring Justice for Victims and Preventing Future Violations, Discussion Paper (2004) 11; see Articles 57(a), 63 (b), 69(a) and 168(b) of the Iraqi Criminal Procedure Code (n 10); for further details, see Mohammed Ali Salem Jasim and Mohamed Abdel Mohsen Saadoun, 'Protect the Rights of Victims of Crime in the Primary Stage of Investigation' (2015) 4 *UOB Journal of Law Science* 67, 83-97.

[420] Jasim and Saadoun (n 419); see also The Redress Trust (n 419). See the discussion in Chapter 3, pages 57-59. According to Human Rights Watch 'While victims' communities in Iraq have been calling for justice, and trials in Iraq generally allow for victim and witness participation, authorities have made no efforts to solicit victims' participation in the trials, including to attend trials, appear as witnesses, share their testimonies, or submit questions to suspects'. Human Rights Watch, Flawed Justice (n 386).

It is important to note, however, that many other reasons have combined with this fragility to undermine the rights of victims to the truth and have their perpetrators brought to justice in accordance with international legal norms of HR. The fragile ICJS has not been able to cope with the high level of acts of violence, insurgency and terrorism which have had 'a hazardous effect on the functioning of the entire system' in accordance with HR norms and the rule of law;[421] this is because it has usually, until recent times, only had to deal with ordinary, day-to-day crimes. In addition, there has been a recent considerable shortage of judges, which has caused increasing delays in the investigation and adjudication of cases.[422] Further, threats, intimidation, and violent attacks against the police, judges and others working in the judicial system also cause delays.[423] These attacks have been by insurgents, terrorists, and various militias, probably working with the knowledge of the Iraqi authorities. Similarly, because of security concerns about acts of violence, it is common practice for investigative judges to work from their chambers rather than attend crime scenes to gather evidence.[424] This is contrary to the Criminal Procedure Code which imposes on them a duty to immediately attend scenes of crimes to question any witnesses, for instance.[425] Moreover, the entire ICJS has suffered from widespread political interference to gain impunity for corrupt state authorities,[426] including security forces and sometimes judges.[427] This interference may also have tended to cover the authorities' unwillingness and gross negligence to conduct thorough and impartial investigation into acts of violence, and to prosecute and punish perpetrators.

This political interference has undermined the independence of the judicial system set up in accordance with the Iraqi Constitution, which clearly affirms that 'no power shall have the right to interfere in the judiciary and the affairs of the justice'.[428] According to one

[421] Christova (n 1) 429-430.
[422] Ibid. 431; for instance, according to one Iraqi lawyer 'an investigating judge may have responsibility over areas with one million people. He claimed that there are 25 judges in Karkh, one of the two jurisdiction areas of Baghdad'. In his opinion, 'more judges are needed all over Iraq. As it is now, the judges only have time to read summaries of the preliminary investigation reports. A judge may not even have time to read them at all. The judges simply have too much work and that influences the rule of law negatively'. See Norway: Landinfo – Country of Origin Information Centre, *Iraq: Rule of Law in the Security and Legal system* (n 324) 12-13.
[423] Christova (n 1) 430; for instance, 'between June 2003 and July 2009 143 Iraqi lives were lost in judicial assassinations, including 47 judges, 6 judicial family members, and 99 judicial employees'. In addition, 'countless other judicial families have suffered kidnappings'. See Shakes (n 26) 3.
[424] Costantini (n 288) 545.
[425] Ibid.
[426] See Christova (n 1) 431; Yahya Al Kubaisi, Iraq: the Judiciary is not Reliable, (3 August 2017) <http://www.alquds.co.uk/?p=76478> accessed 31 August 2017; according to the GICJ 'The judicial system has become highly vulnerable to political pressure. Many judges are now controlled by the government, either by fear, by threats, or by bribes [rendering] true democracy impossible, as it has fostered a situation where biased judges have allowed government leaders and officials to become above the law. This exploitation of the judiciary has resulted in the right to a fair trial being gravely violated'. GICJ, GICJ's Submission on Iraq (n 204) 5.
[427] Norway: Landinfo – Country of Origin Information Centre, *Iraq: Rule of Law in the Security and Legal system* (n 324) 5.
[428] See Articles 87, 88 and 89 of the Iraqi Constitution (n 9); also Article 2 of the Judicial Organisation Law (n 301) which states that 'Judicature is independent and no rule other than Law thereon'; for instance, it has been observed that 'since 2010, this independence has been eroded through manipulations by Maliki and by rulings of the FSC [the Federal Supreme Court] and HJC [Higher Judicial

commentator, the courts' role requires 'sufficient independence, impartiality and capacity to discharge that function' and 'these challenges are coupled with a broader range of legal, political and practical obstacles facing victims in bringing human rights actions in a climate of excessive secrecy and securitization, specifically in the counter-terrorism field'.[429] The HRC has clearly noted the lack of independence of the ICJS and has stated that the state should 'ensure the full independence and impartiality of the judiciary in practice' making it able to operate without 'pressure or interference'. Moreover, judges, lawyers and court officials require 'effective protection' from 'intimidation, threats and/or attacks'.[430] It seems, however, that 'the government of Iraq […] is busy protecting itself, and everything else is secondary'.[431] Nevertheless, these secondary matters, such as the fulfilment of the procedural obligations of investigation, prosecution and punishment as required by HR norms, are crucial from the perspective of Iraqi citizens, specifically victims, if their government and the ICJS can be said to have any legitimate authority.

5.3.2 Summary Remarks

It seems reasonable to claim that the consequences of large scale violence against the HR of Iraq's citizens, especially the right to life, should be healed by providing effective procedural remedies of investigation, prosecution and punishment, as required by general ethical principles and the HR norms. It is essential to substantiate any claim by Iraqi authorities and the ICJS, in order for them to have legitimacy over their citizens. The Iraqi authorities' gross failure to comply with this is a result of the ICJS suffering from various adverse factors, including political, legal and judicial problems arising from widespread corruption, impunity and incompetence on their part. Specifically, the failure of the Iraqi judiciary to comply with international standards and HR norms of arrest, indictment and investigation, as well as its failure to comply with fair trial standards, may be decisive in the widespread phenomenon of arbitrary detention and charges, unsubstantiated investigations, systematic torture of accused, and the acceptance of false confessions; this has robbed the accused of forming a real and rational defence, and quick judgments are

Council]. Especially the ruling in January 2011, that placed all of Iraq's independent bodies under the supervision of the cabinet stand out as a milestone towards executive encroachment'. See Norway: Landinfo – Country of Origin Information Centre, *Iraq: Rule of Law in the Security and Legal system* (n 324) 11; according to Al Kubaisi, the Iraqi judiciary has been, and continues to be, a decisive factor in exacerbating the political crisis, rather than being a judge of it. This judiciary has been systematically used to impose unilateral power, through the decisions of the Federal Supreme Court, which undermine the provisions of the Iraqi Constitution itself by issuing decisions 'on demand'. Al Kubaisi (n 426).

[429] See Duffy (n 82) Ch. 2, 849.

[430] See para 36 of the UN Human Rights Committee (HRC), Concluding observations on the fifth periodic report (n 88).

[431] Norway: Landinfo – Country of Origin Information Centre, *Iraq: Rule of Law in the Security and Legal system* (n 324) 13.

made which seem to have been prepared.[432] It comes as no surprise, therefore, that these authorities have some unwillingness or inability to provide adequate remedies, notably uncovering the facts of acts of violence. Indeed, it seems that they have frequently blocked the ICJS by actually hiding facts to protect themselves. In such cases, victims may be said to have felt deprived of their legitimate expectation of the protection of their right to life, and remedies for its violation, which have been sacrificed in the political, ethnic and sectarianism interests of authorities acting without accountability. Victims feel isolated having to face the consequences of acts of violence alone, and have despaired of hearing the truth about the circumstances of these acts, and of those responsible being brought to justice. In order to create a sound legal basis for the rule of law in the ICJS in respect of the rights of victims, in principle it is important for Iraqi citizens, specifically victims of crime, to be part of both internal and external pressure by various non-governmental and civil organisations, in addition to HR instruments. These will compel the state to bring its criminal justice system up to standard and then fully implement it in practice to fulfil the requirements of general ethical principles and HR bodies. It follows that whoever has been directly or indirectly involved in the commission of crimes against the right to life of Iraqi citizens must be brought to justice through the above pressures on the state to create a legitimate criminal judicial body and process based on the rule of law. This will ensure an impartial, thorough and effective investigative process capable of revealing beyond reasonable doubt the facts about these crimes, and to convict and punish those responsible. Further, changing the rooted false ideology regarding the concept of the rule of law in Iraq is essential; state authorities must be held to account when they fail to observe the rights of victims. It is necessary that victims should not be treated merely as witnesses and providers of information in the criminal process if they are to be guaranteed their true rights. In turn, this should strengthen the rights of victims throughout the criminal investigation process by 'incorporating generally recognised international standards, such as the right to participate in criminal justice proceedings, the right to challenge decisions of the investigation, prosecution and the court and the right to notification and pursuance of other legal remedies'.[433] In the light of the extremely serious problems and contradictions being faced at all levels, it should be acknowledged that these legitimate objectives will only be achieved gradually. This requires comprehensive reforms as part of the transitional justice process, in the hope of: rebuilding trust between

[432] Al Kubaisi (n 426).
[433] The Redress Trust (n 419) 26.

various communities and the state; repairing the moral relationship of living together peaceably; and, strengthening the legitimacy and trustworthiness of the authority of the state. In doing so, there will be robust domestic institutions, such as an upright executive, an independent legislature and prosecution system genuinely governed by the rule of law in the interests of its citizens' HR. This authority must be subject to accountability if it fails the due diligence principle, which requires that justice be administered in accordance with the expectations of victims. Therefore, only if this authority fulfils the above requirements can it claim to have legitimacy in the sphere of HR.

5.4 The Right to Redress under Iraqi Law

Large-scale acts of violence against the HR of Iraqi citizens, in particular the right to life, have had an horrendous impact on the victims. The Iraqi authorities, as noted above, have contributed to this and other various upheavals and divisions in Iraqi society. Moreover, it is argued that both the authorities and wider Iraqi society have let victims suffer the impact of physical, material and moral damage in isolation, with no adequate remedy. For these reasons, victims feel they lack recognition of their sufferings, that there is no condemnation of what has happened to them, that no sincere apologies have been made, and there has been no opportunity to restore their humanity and dignity; thus, they cannot trust that what happened to them will not be repeated. In fact, the Iraqi state only grants victims of acts of violence the right to meagre monetary compensation for specific damages, and gestures of reparation are inadequate.[434] The following sections will clarify how victims' rights to redress have been granted by the Iraqi legal system since 2003.

5.4.1 Tort Liability under Iraqi Civil Law

Initially, before 2003, compensation for crimes against the right to life of Iraqi citizens had to be provided solely by the perpetrators in accordance with Iraqi criminal and civil law. Thus, the state has no subsidiary role should compensation not be available from the perpetrators, either because they have not been apprehended or they are insolvent. Criminal complaints are not limited to the seeking of criminal justice by the imposition of punitive actions against perpetrators; they also encompass claims for civil redress.[435]

[434] See the Iraqi Compensation Law No. 20, 2009 Concerning Reparation for Damage Caused by Military Operations, Military Errors and Terrorist Atrocities.

[435] Article 9(a) of the ICPC states that 'the written complaint includes the claim for civil justice as long as the complainant does not declare otherwise'; Warnock (n 271) 11; compensation for the damages from crimes in the context of criminal proceedings has not been defined in Iraqi substantive or criminal procedure legislation, but it has been defined by some Iraqi commentators as compensation for an act that causes harm to a legitimate right or interest of an injured party. See Abd Al-Amir Al-Aqily and Salim Harba, Explanation of the Code of Criminal Procedure (part 2, first edition, Legal Library, Baghdad 2008) 45; Aziz Kazem Jabr,

This is to say that the Iraqi legal system links the claim for prosecution with private tort liability, as 'crimes are essentially torts where the state sues on behalf of the victim (and society at large)'.[436] Therefore, according to Article 10 of the ICPC, victims can bring a civil case against perpetrators for moral and material damages suffered in any offence against their rights,[437] including the right to life. Compensation for these damages, particularly those resulting from violations of the right to life, was explicitly included in the Iraqi Civil Law of 1951 and still applies. Although this law has no provision for the inviolability of the human right to life, it does incorporate many articles concerning the rights of damaged persons to compensation for physical injuries and their consequences in accordance with tort liability principles.[438]

Article 202 of this law states that 'every act […] injurious to persons such as murder, wounding, assault, or any other kind of inflicting of injury entails payment of damages by the perpetrator'.[439] Although the wording of this article expresses the need to compensate victims for many kinds of damage, such as physical, moral and material damage, many commentators have doubted whether the objective aspect of the damage of death (loss of life) itself was included.[440] They consider that the injured party who died following the incident has suffered only moral and material damage. Moral damage, as provided for in Article 205 of Iraqi Civil Law indicates, in general, that the right to compensation for moral injury should also be covered and, in particular, any attack on the freedom, reputation, honour, or social status of victims makes the perpetrator liable for compensation.[441] It is important to note, however, that this article does not explicitly refer to compensation for physical and psychological harm to victims unlawfully deprived of their right to life.[442] In addition, the article inhibits the transfer of compensation for moral damage to third parties, which requires the value of such compensation to be determined

Correlative Damage and its Compensation in Tort Lability: Comparative Study (PhD thesis, University of Baghdad 1990) 17; also, compensation is perceived as the redressing of the harm done to HR by unlawful activity which has created various damages. See Hasson Obeid Hajij, 'Compensation in Criminal Cases' (2014) 1 *Journal of Kufa Legal and Political Science* 7, 16. The Iraqi judiciary has also defined compensation as 'a civil penalty for liability which would either mitigate or eliminate the harms'. See the decision of the Iraqi Court of Cassation No. 25/first/1979 in 16/02/1980. Ibrahim Al-Mashahdi, Al-Mukhtar, Selected Cases under the Jurisdiction of the Court of Cassation (4th edition, Al-zaman Press, Baghdad 2000) 122.

[436] Warnock (n 271) 10-11; see also Hajij (n 435) 17.

[437] See the ICPC (n 10); Hajij (n 435).

[438] See Al-Anaibi (n 16) Ch. 4, 32.

[439] The Iraqi Civil Law (n 145); Al-Anaibi (n 16) Ch. 4, 32; Dan E. Stigall, 'Iraqi Civil Law: Its Sources, Substance and Sundering' (2007) 16 *Journal of Transitional Law& Policy* 1, 42.

[440] See Abdul Majeed Al-Hakeem et al., In their Summary of the Obligation Theory in Iraqi Civil Law: Part 1, the Sources of Obligation (Ministry of Higher Education in Iraq, 1980) 249; Sheriff (n 10) Ch. 2, 359-379; Jabr (n 435) 58-60; Basem Mohammad Rushdi, Monetary Damage Resulting from Physical Injury (MSc, University of Baghdad 1989) 116-126; Nasser Mohammad Jamil, The Moral Damage and the Right of Transfer Compensation for it: Comparative Study (PhD thesis, University of Mosul 2002) 170; Hajij (n 435); Al-Anaibi (n 16) Ch. 4, 33.

[441] See, for instance, Jamil (n 440) 183; Hajij (n 435) 20; Al-Anaibi (n 16) Ch. 4, 74.

[442] Al-Anaibi (n 16) Ch. 4.

pursuant to an agreement or final judgment.[443] It follows that where victims having the right to compensation for such damage have died before agreeing the amount of compensation, or where there is no final judgment determining the amount of compensation, victims' right to claim damage does not pass to their heirs.[444] This position may have led to a significant weakening of the transference of the right to compensation for moral damage. Indeed, the legislature seems intent on narrowing compensation for such damage, as reflected in the practices of the courts.[445] This is despite the fact that justice requires that no man-made legal obstacles should affect the right of the heirs to claim for the physical and mental pain suffered by the deceased before death.[446] Victims have the right to compensation for such pain, beginning from the actual time of the assault until death, no matter how short. In addition, it is a denial of justice only to recognise the right to compensation for victims who remain alive and can claim and obtain a final decision through the judiciary, or can reach agreement with the responsible parties, as this deprives victims who lost their lives of compensation on the grounds of lack of agreement or final judicial decision. This is in contrast to the practices of HR bodies which, as discussed in Chapter 4, hold that the heirs of victims should be allowed to claim for the pain suffered by their deceased relative, otherwise the perpetrator would evade responsibility for the moral damage inflicted.[447]

Victims may also suffer various material damages, such as medical expenses, loss of earnings and funeral expenses, for which compensation is required (Article 207 of the Iraqi Civil Law).[448] The courts in Iraq generally compensate for these damages[449] commensurate with the damage and loss sustained by victims, provided that such damage and loss is the direct result of unlawful acts against the right to life of individuals.[450] For

[443] See para 3 of Article 205 of the Iraqi Civil Law (n 145); Stigall (n 439) 42; Hajij (n 435).
[444] Sheriff (n 10) Ch. 2, 154; Al-Anaibi (n 16) Ch. 4, 74.
[445] See Sadun Al-Ameri, Compensation for Damage in Tort Liability (Legal Research Centre, Ministry of Justice 1981) 123; Munther Al-Fadl, The General Theory of Obligations: Sources of Obligation: Comparative Study (Part 1, without mentioning the place of publication 1991) 365; Akram Fadel Said Kassir, 'The Basis of Civil Liability for Physical Injury and the Determination of Compensation Arising from It: A Comparative Historical Study between Islamic Jurisprudence, Latin Jurisprudence and Iraqi Law', without year, *Journal Legislation and Judiciary* <www.tqmag.net/body.asp?field=news_arabic&id=838> accessed 5 September 2017. The Court of Cassation in its decision, No. 80/82 in 19/07/1982, published in the Collection of Judgments, Number 3, 1982, 57, stated that 'moral compensation does not transfer to the third party unless the amount of compensation has been determined either by agreement or final judgment'. Also, see its decision No. 2/the first expanded body/87 in 30/08/1987, published in the Judiciary Magazine, Number 4, 1987, 225.
[446] Al-Anaibi (n 16) Ch. 4, 75.
[447] Ibid.
[448] For further details, see Ibid. 63-71; Sheriff (n 10) Ch. 2, 132-159.
[449] See, for instance, the decision of the Iraqi Court of Cassation No. 581/ M1/ 1978 in 25/7/1978 which states that 'compensation for monetary damage includes what the injured has incurred of damage and lose of earnings as a result of the commission of an unlawful act'; see also its decision No. 360/ civil 1/ 1979 in 10/05/1979, published in the Judicial Proceedings, Ministry of Justice (first edition, June 1979); see Kassir (n 445).
[450] Stigall (n 439) 42; however, it has been noted that, despite large scale physical injuries since 2003, few judicial decisions have compensated in practice for this for many reasons, including the length of the proceedings, the low amount of compensation awarded to the victims, the high cost of litigation and procedures associated with it, the lack of awareness of the value and importance of the

instance, the Iraqi Court of Cassation stated that the heirs of the deceased can make an independent claim in the competent court to require material compensation which their deceased relatives deserved because such compensation is part of the estate.[451] Iraqi Civil Law has also obliged the perpetrator, in accordance with Article 203, 'to pay compensation to dependants of the victim who have been deprived of sustenance on account of the murder or death' and irrespective of whether such dependants are heirs.[452] However, it is worth noting that this article does not give the right to compensation for material damage unconditionally to dependants of the deceased, but requires that they should have no other sources of dependency. This is, where dependency is available from other sources, they are not to be compensated by the perpetrator for such damage.[453] Indeed, the Iraqi Court of Cassation tends to reduce the liability of the person responsible for the bodily injury whenever possible, and does not oblige them to compensate for damage caused to the victim's family, including missed opportunities to grow, study, obtain work, or earn money.[454] In one decision, the Court ruled that as the plaintiffs of the deceased victim were not his/her dependents, the plaintiffs were not entitled to material compensation and study expenses, because, according to Article (203), they lacked dependency.[455] This has been criticised on the grounds that the availability of dependency from other sources should not justify the denial of compensation for such damage.[456] In addition, compensation under Article 205 of the Iraqi Civil Law 'may be awarded to spouses and immediate relatives of the family of the victim resulting from moral injury' caused by the death of the victim.[457]

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physical integrity of human beings, and the weakening of legal provisions regarding civil liability, arising from fatal and non-fatal bodily injuries. For further details, see Kassir (n 445).

[451] See the Iraqi Court of Cassation's decision No. 2595/ Administrative 1/ 1985 in 23/9/1985; Al-Anaibi (n 16) Ch. 4, 148; Kassir (n 445).

[452] Al-Ameri (n 445) 131; Al-Anaibi (n 16) Ch. 4, 138.

[453] Hajij (n 435) 18; Kassir (n 445).

[454] See Kassir (n 445).

[455] See the decision of the Court of Cassation No. 303 / Civil First / 1978 in 11/5/1978 cited by Al-Ameri (n 445) 22; the Court also ruled that if the deceased victim is a boy under the age of 12, no financial compensation should be given for his death on the grounds of lack of dependency. The compensation shall be limited to the damage sustained without the potential damage. The decision of the Court of Cassation No. 77 / Civil First / 1975 in 21/5/1978; Ibrahim Al-Mashahdi, Judicial Principles in the Jurisdiction of the Court of Cassation (Legal Research Centre, Baghdad: Ministry of Justice, 1988) 280.

[456] It has been claimed that it is unjustifiable for the Iraqi judiciary not to compensate for the material damage on the grounds that the dependency must be realised upon death. Kassir (n 445); the decisions of the Court of Cassation are still ambivalent about awarding compensation for material damage and about which victims are entitled to claim, despite the explicit text of Article 203 referring to the necessity of invoking dependency in order to award such compensation and determine who deserves compensation for such damage. For further details, see Rushdi (n 440) 150-155; Al-Anaibi (n 16) Ch. 4, 139; Kassir (n 445).

[457] Stigall (n 439) 42; in this regard, the Court of Cassation ruled that as it is recognised that the loss of the plaintiff's husband had caused her pain and grief, she was entitled to compensation under Article 205. See its decision No. 362/ M1/1978 in 12/7/1978, published in the Collection of Judgments, Number 3, 1978; For further details, see Al-Anaibi (n 16) Ch. 4, 139-144; see also its recent decision No. 243 in 31/08/2009 available at <http://thejusticenews.com/> accessed 6 September 2017; however, the Iraqi judiciary has been hesitant to grant compensation for moral damages, especially for compensation to young children for the moral damage resulting from the death of their father or mother. In some cases, for instance, the Court of Cassation awarded such compensation for them on the grounds that they feel pain or sadness due to the death of their relatives. See the decisions of the Court of Cassation No. 223 /Civil First /1979 and No. 1060 / Civil First/ 1979 in 21/10/1979 referred to by Al-Fadl (n 445) 71; however, in other decisions,

The Iraqi courts' jurisprudence, especially when victims have been illegally deprived of their right to life, has generally not recognised the death of victims as a damage in itself and, thereby, rejected compensation for it.[458] In the opinion of the Court of Cassation, the compensation of heirs for the death of a deceased relative is based on the dependency they have personally been deprived of and not on the basis that they have received the right, as legal heirs, to compensation for the death of the deceased.[459] It seems that the Court mixes up the damage of death as an independent damage for which victims deserve to be compensated,[460] and the rights of their dependants to be compensated for their own financial loss. According to a judge of this Court, as the idea of compensation for the objective aspect of the damage of death (loss of life) is controversial among jurists, and whatever their views may be, the Iraqi judiciary does not require compensation for such damage at present.[461]

Iraqi Civil Law also includes general provisions for victims to sue the Iraqi authorities for damages, if the authorities have failed to observe due diligence while fulfilling their public duties, including the provision of protection and adequate procedurals remedy. In addition to the general principle of the tort liability in Iraqi Civil Law, which requires that any person causing damage to others is obliged to pay compensation, Article 219 of the same law stipulates in paragraphs 1 and 2 that 'government, municipalities and other institutions that provide a public service […] are responsible for the damage caused by their employees, if the damage arises from a breach of their obligations while carrying out their duties. The employer can be exonerated of the responsibility if he proves that he has taken all necessary precautionary measures to prevent the occurrence of damage or that the damage would have occurred even if he had taken these measures'.[462]

According to this Article, for the agencies of the Iraqi state to be held responsible for damages to victims from acts of violence by non-state actors, there must be an error on the part of their employees in the course of their duties, such as negligence, lack of due

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the Court denied such compensation. See, for instance, its decision No. 456/ D /84083 in 29/4/1984 referred to by Al-Fadl (n 445) 70-71; see Kassir (n 445).

[458] See Kassir (n 445); Al-Anaibi (n 16) Ch. 4, 46.

[459] See its decisions No. 691 / III civil / 1971 in 5/7/1971; No. 30/ Public Body/ 1971 in 6/11/1971; Al-Anaibi (n 16) Ch. 4, 38.

[460] See the discussion in Chapter 4, pages 105-108.

[461] See Ibrahim Al-Mashahdi, 'Evolution of Judicial Trends in Iraq on Moral Compensation', (2001) *Journal of Legal Studies*, 89; Al-Anaibi (n 16) Ch. 4, 46; Jabr (n 435) 66; in the opinion of one commentator, the basis of civil liability which governs bodily injury in the Iraqi Civil Code is inadequate to address the large scale of acts of violence against the bodily integrity and the right to life, especially since 2003. For further details, see Kassir (n 445).

[462] The Iraqi Civil Law (n 145); Article 215 para 2 of this law also states that 'Public officials, however, are not responsible for damage done by their acts [which caused injuries to a third parties] when ordered by superiors to perform them. In such circumstances, it is incumbent on the public official to establish that he believed the act he performed was lawful and that his belief was reasonable'. See Stigall (n 439) 43.

diligence and/or illegal acts; there must also be a causal relationship between the damages and the employee error.[463] That is, in the absence of such an error and causal relationship, victims have no grounds to sue according to the tort liability system. It is important to note that the responsibility of any state agency for the illegal activities of their employees is based on assuming that there has been an error, on the part of an agency, in monitoring and guiding employees over which it should have actual authority as they perform their duties. Therefore, victims only need to prove this subordinate relationship between an agency and its employees.[464] This assumed error by an agency applies even when the employee responsible for the wrongdoing and, thus, the damage to the victim, cannot be identified. For instance, the Court of Cassation has ruled that the government must bear responsibility for the death of one individual shot by police, even if the identity of the officer who fired the fatal bullet is unknown.[465] Therefore, an agency must refute the assumed error if it is to absolve itself from any responsibility.[466]

If a government agency is alleged to have failed to provide protection, whether this failure is on the part of its employees or the agency itself, it may try to refute this. An agency may claim in accordance with Article 219 (2) that it has taken all reasonable steps to prevent criminal acts affecting the right to life of its citizens, or claim that the damage would still have occurred despite them having been taken, and that it should, therefore, be cleared of any allegations of failure. In addition, such alleged failure can be dismissed if an agency can prove that it neither knew nor ought to have known of the existence of a real threat to an individual's life. Nevertheless, as noted above, there are several serious examples of alleged culpable failure by Iraqi government agencies to protect the right to life of its citizens and provide adequate procedurals remedies once acts against the right to life have occurred; it may be said, in the light of HR norms, that these agencies were aware of real threat to the lives of their citizens and seriously failed to respond. Moreover, they have failed in their duties to act with due care to investigate, prosecute and punish perpetrators adequately. Therefore, they can be accused of violating their duty of protection and failure to provide adequate procedural remedies in accordance with HR norms and Iraqi tort liability (Article 219); hence, victims, in accordance with Article 219,

[463] For further details, see Al-Hakeem et al. (n 440) 259-267; Burke Faris Hussein, 'The Tort Liability of Provincial and Local Councils: An Analytical Study into Iraq Legislations' (2014) 16 *Journal of the College of Law /Al-Nahrain University* 139, 154-160.
[464] Al-Hakeem et al. (n 440) 259-267; Abbas Ali Mohammed Al-Husseini, Civil Responsibility of the Journalist (PhD thesis, University of Baghdad 2003) 98.
[465] See Amin Al-Rubaie, Research about the Responsibility of the State for the Actions of its Employees (2013) <http://ameenlawyer.blogspot.com/2013/11/blog-post.html > accessed 22 September 2016.
[466] Al-Hakeem et al. (n 440).

can bring cases claiming that state agencies should compensate them for damages, because these agencies have failed to observe due diligence in their public duties.

However, it seems doubtful that the Iraqi tort liability system can enable victims to obtain compensation for damages caused by private individuals, on the basis of failure by government agencies to observe due care in the performance of their duties.[467] This may be because Iraqi agencies have traditionally been held responsible by the courts for compensation for damages only when caused by illegal acts or a failure to act by their own employees.[468] Because of a false deep-rooted ideology which places the bolstering of the power of the Iraqi state above the legitimate HR of its citizens, it seems that duties such as the prevention of crimes, and the investigation, prosecution and punishment of perpetrators, are still considered only as a means to ensuring stability, order and respect for its coercive power. Thus, the implementation of these duties is subject only to its own absolute discretion. In addition, the *muhasasa* system is used to ensure that a government of national unity is formed on sectarian and ethnic grounds, but is also partly responsible for high ranking officials seeing their public duty as a means to gain privilege, authority, and immunity, and not as serving the public interest.[469] Therefore, compensation claims for the failure of the Iraqi authorities to protect against violence by non-state actors, and employ an adequate procedural remedy afterwards, have never been made before the Iraqi courts as they are considered to be outside the limited remit of the traditional tort liability system. Indeed, victims cannot make solid cases against authorities on these grounds under tort liability because these positive obligations are not embedded in Iraqi legal and judicial systems; thus, it is doubtful that victims can be adequately heard and granted compensation by the Iraqi courts.

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[467] Courts in Iraq currently do not hear compensation cases against the state, especially with regard to terrorism, as Law No.20 of 2009 involves the establishment of commissions in each Iraqi province to receive claims of compensation. See the decision of the Court of Cassation No. 567/public body/ 2009 in 24/ 05/2010, published in the Journal of Judicial Publications, Supreme Judicial Council, No.1 (2011). For further details, see Ali Katea Hajem, 'How far the Government Commitment to Compensating the Victims of Terrorism in accordance with Law No.20 of 2009' (2013) 1 *Ahl Al-Bait Journal* 111, 111-122.

[468] See Ali Katea Hajem, 'Compensation of the Moral Damage as a Result of Military Mistakes: a Study of the Amended Law 20/2009' (2014) 1 *Ahl Al-Bait Journal* 452, 456; for instance, in the case concerning the death of a daughter by landmine explosion, the Iraqi Court of Cassation ruled that the Ministry of Finance, rather than the former Ministry of Defence (responsible for landmines before being dissolved in 2003, when its assets reverted to,the Ministry of Finance) should compensate the daughter's mother for moral damage because it failed to take adequate measures to remove landmines and, thus, prevent them from being a danger to individuals. The Iraqi Court of Cassation's decision No. 1336/1398/Appeal/ 2010 in 26/10/2010. See Othman Salman Ghailan Al-Aboudi, State Responsibility for Compensation for Military Damages, *Journal of Legislation and Judiciary* <http://www.tqmag.net/body.asp?field=news_arabic&id=2083&page_namper=p5> accessed 6 September 2017; see also its decision No. 2664/Appeal Body/2013 in 25/11/2013 at <http://www.tqmag.net/body.asp?field=news_arabic&id=2214&page_namper=p_no2> accessed 6 September 2017.

[469] According to Dodge, 'the corruption eroding the Iraqi state from within is an integral part of a *muhasasa* system that has, in effect, privatised the Iraqi state. The system has allowed the Iraqi political elite to strip state assets for personal gain and to fund the parties they represent'. Dodge (n 12) Ch. 1, 17.

Although the Iraqi state and its institutions are required under HR norms to comply with these positive obligations and, consequently, all alleged violations should be adequately heard by the Iraqi courts, the courts only apply Iraq's own legislation, especially regarding criminal and civil liability, and do not adhere in practice to these norms. The Iraqi state claims that these norms (specifically those in treaties to which Iraq is a party, such as the ICCPR) have legal superiority over Iraqi domestic laws and that all judges have to abide by them or face an appeal against their decision;[470] however, in reality this is untrue. According to the Iraqi Constitution, these norms should have 'the same legal force as the Iraqi laws'[471] but in practice Iraqi judges only adhere to domestic laws without 'applying the provisions contained in the international conventions ratified by Iraq'. [472] Incorporating provisions such as the positive obligations of protection and remedy into the Iraqi tort liability and criminal justice system, as well as guaranteeing their application by the courts, is essential if the rights of victims to redress are to be strengthened. This would provide victims with a rational basis and suitable mechanisms to sue the Iraqi authorities for their failure to fulfil these positive obligations. Although the strengthening of the rights of victims to sue authorities is urgently needed to establish accountability for the damages suffered by victims, the application of tort litigation may not always be possible as acts of violence have often been against poor, marginalised and vulnerable social groups who probably cannot afford to go to court. Even if it is possible for some victims, the complicated procedures are lengthy and stressful and likely to result in secondary victimisation.[473]

5.4.2 The Role of the Iraqi State in Creating Redress for Victims

[470] This claim is made by the Permanent Representative of Iraq to the United Nations Office at Geneva in the course of reviewing the report of Iraq by the Human Rights Committee in 27 October 2015 (n 147).
[471] See Geneva International Centre for Justice (GICJ) (n 189) 8; Iraqi HCHR Report about Implementation of the International Convention (Protection of All persons from Enforced Disappearance) in August 2015, 2 < http://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/IRQ/INT_CED_NHS_IRQ_21392_E.pdf > accessed 8 September 2017.
[472] Geneva International Centre for Justice (GICJ) (n 189); the Iraqi HCHR also pointed out that 'the national judge in Iraq, particularly in the criminal courts, adhere literally by Iraqi criminal law provisions and does not consider the other provisions contained in international conventions ratified by Iraq'. Iraqi HCHR Report about Implementation of the International Convention (Protection of All persons from Enforced Disappearance) (n 471); according to one commentator, 'the Iraqi legal tradition with regard to the relationship between international treaties and the national law stands as a stark anomaly… 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, "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"'. See Almusawi (n 17) 39; for further details about the reluctant of courts in Iraq to apply international law norms, see Haider Ala Hamoudi, International Law and Iraqi Courts, in Edda Kristjánsdóttir et al. (eds.), International Law in Domestic Courts: Rule of Law Reform in Post-Conflict States (Intersentia, 2012) 111-113.
[473] See Chapter 4, p 96.

Although monetary compensation alone, as noted in Chapter 4,[474] insufficiently addresses the horrific impact of mass violations of HR, especially the right to life, such as that suffered by Iraqi victims post-2003, financial compensation is difficult or impossible under Iraqi tort liability. This may be because of the lack of functional institutions based on the rule of law, the lack of effective legal and judicial mechanisms for victims to sue state authorities for their failure to protect and provide justice with due diligence, or the impunity enjoyed by many perpetrators; nevertheless, whichever is the case, victims have little chance of compensation. When the types of violence in Iraq are considered (gender-based violence, suicide bombers, car bombs, assassinations, enforced disappearances, and ethno-sectarian violence –often motivated by the desire to achieve political, sectarian and ethnic interests), it is no surprise that those responsible, such as illegal militias, insurgents, and terrorist groups, are difficult to identify and sue, as they enjoy political, sectarian and ethnic protection. Even when identification is possible, victims fear revenge should they bring complaints. In cases where acts of violence are purely criminal, in terms of taking advantage of widespread chaos and disorder, and the perpetrators are identified and apprehended, such individuals are often insolvent and so unable to compensate victims. As a result, it becomes impossible for many victims and their families to receive compensation for their injuries and, therefore, the Iraqi state finds itself under pressure to respond to the extensive social upheaval caused by violence and bear responsibility for providing the compensation required.[475]

In this sense, the Iraqi policymakers have passed specific orders and legislation covering compensation for certain crimes to restore social equilibrium. In 2004, Ministerial Order No. 10 was issued to compensate those killed or injured in terrorist acts, irrespective of whether they were employees in public services or ordinary citizens.[476] Although this order seems to acknowledge, for the first time, the need for the Iraqi state to compensate

[474] See pages 106-113, 120-121 and 137-129.
[475] It is less clear whether non-state armed groups in the recent conflict in Iraq, including ISIS and other militias operating under the umbrella of the Popular Mobilization Forces (PMF) or outside of it, should be responsible for providing reparations to victims of their violations, or whether this role should be left for the Iraqi state. Moreover 'it is not always feasible or desirable to compel armed groups to provide reparations. […] in the aftermath of a conflict […] they may not have the resources or political will to pay reparations. Governments may also refuse to deal directly with armed groups by including them in the reparations process, as doing so could impart those groups with a degree of legitimacy. [It is therefore] unrealistic to expect that ISIS will play a direct role in granting reparations to its victims […] However, one avenue to explore is whether assets confiscated from the group or its members could be used to fund a reparations effort implemented by the Iraqi government or the international community. On the other hand, militias active on the anti-ISIS side may continue to exist after the conflict and some enjoy a higher degree of legitimacy [with] the Iraqi government. These groups might be engaged in the reparations process [and held] accountable for violations […] Appropriate reparations […] should not be limited to compensation […] but could also include […] public apologies'. See Clara Sandoval and Miriam Puttick, Reparations for the Victims of Conflict in Iraq: Lessons learned from comparative practice, Ceasefire Centre for Civilian Rights and Minority Rights Group International, November 2017, 23-24 <http://minorityrights.org/wp-content/uploads/2017/11/Reparations-in-Iraq-Ceasefire-November-2017.pdf> accessed 24 November 2017.
[476] See Imad Fadel Rakab, 'Obligation of the State for Compensation for the Crimes of Terrorism in the Iraqi Legislation' (2010) 1 *Journal of Human Sciences* 363, 375-378.

families of deceased victims, it has been criticised for several reasons. Firstly, although it has required compensation for death or bodily injury by terrorist crimes, it has not awarded compensation for the monetary and moral damage caused by these, nor has it required that compensation be made for other acts of violence. Secondly, the Ministry of Finance has limited compensation payable to relatives and the amount paid has been meagre, covering only damage by terrorist acts committed after 1/6/2004. Finally, the procedures by which families of the deceased can obtain compensation are complex.[477]

Compensation of victims has also become a constitutional duty, as Article 132 paragraphs 2 and 3 of the Iraqi Constitution requires the state to guarantee compensation for families of those killed or injured by terrorist acts, and the regulation of this compensation is done by law.[478] As a result, Iraq-initiated Law No. 20 of 2009 supersedes Order No. 10, in order to create redress for those affected by military operations and errors, as well as terrorist activities.[479] The purpose of Law 20, according to its first article, is to provide redress for any person harmed by military operations or terrorist activities from 2003 onwards, after determining the gravity of damage and need for compensation, and how this is to be claimed. Compensation should cover both the dead and the missing due to military or terrorist operations,[480] as well as 'total or partial disability, injuries that require temporary treatment, property damage and damage affecting work or study'.[481] For such compensation to be provided to victims, the law requires the formation of a central committee in Baghdad and subcommittees in various provinces.[482] They receive applications from victims or their legal representatives to estimate the value of the compensation, and submit these to the Ministry of Finance for payment.[483] In cases of death, the law clearly states that no more than 60 days should elapse before the compensation is paid to the relatives of the deceased, which include, parents, sons, daughters, siblings, husbands or wives.[484] These relatives should receive a monthly payment and land if they have none.[485] It is important to note that this law is a safety net in cases where victims cannot obtain compensation from other sources, and it clearly states that victims may not combine the compensation stipulated in this law with

[477] Rakab (n 476).
[478] The Iraqi Constitution of 2005 (n 9).
[479] The Iraqi Compensation Law (n 434).
[480] Ibid. Article 2 (1).
[481] See Assyrian International News Agency, 'Iraq to Compensate Victims of Terrorism', Military Operations (2009), <http://www.aina.org/news/20091004144057.htm > accessed 22 September 2016.
[482] Articles 3-7 of this law (n 219).
[483] Ibid.
[484] Articles 6 (h) and 10.
[485] Articles 12 and 13.

compensation for the same damages given in accordance with other laws; where victims have been compensated under other laws in an amount lower than this law requires, the difference between the two should be rectified.[486] Although this law, as suggested by Al-Qaisi, has established the legal right for victims to obtain redress for damages rather than compensation merely being given as a grant,[487] both this law and its implementation have been widely criticised.

5.4.2.1 Criticisms of Law No. 20 of 2009 and its Practice

It has been suggested that compensation under this law is symbolic and insufficient for the gravity and impact of the damage, especially from terrorist acts.[488] For instance, according to aid experts, although widows can claim compensation 'for a spouse killed by terrorism', 'this allowance is insufficient –especially for widows in rural areas who usually have more children, less education and fewer employment opportunities'.[489] In addition, 'because of governmental institutions' lack of capacity, limited reach to many areas outside of Iraq's cities, overly-complicated application processes, and sometimes because of corruption, many widows and other welfare recipients do not receive their allowances'.[490] Long procedures and waiting times for such allowances causes stress, desperation and anxiety for the families of the deceased. For instance, it took years for the mother of a child almost killed by shooting to receive compensation.[491] She said, 'my only child was shot multiple times in 2004 when she was only nine years old, and we did not receive compensation until 2014 – ten years after she was shot and suffered 80 percent paralysis'.[492] Moreover, the law sets the financial compensation for relatives of deceased

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[486] Article 8.

[487] See Hanan Mohammad Al-Qaisi, 'The Basis of the State's Responsibility for the Damage Caused by Military and Terrorist Operations in Iraq: Study in Law No. 20 for the Year 2009' (2012) *Journal of Judicial and Political Science* 142, 142-159; see also Bokan Abdullah, Compensation for Victims of Terrorism in accordance with Law No. 20 of 2009, <http://bokanabdulla.blogspot.co.uk/2015/06/20-2009.html> accessed 22 September 2016.

[488] According to Article 9 of this law, the financial compensation for employees of the armed forces, internal security and other security services has been set as follows: '5 million dinars for death [Approximately 2450 pounds]. 5 million dinars for incapacitation (defined as 75%-100%). 2.5 to 4.5 million dinars for incapacitation (50%-74%). 2 million dinars for incapacitation (less than 50%). For all others, the compensation is set as follows: 3.75 million dinars for death [Approximately £1875], 3.75 million dinars for incapacitation (defined as 75%-100%). 2 to 3 million dinars for incapacitation (50%-74%). 1.75 million dinars for incapacitation (less than 50%)'. See Assyrian International News Agency (AINA) (n 481).

[489] Agency for Technical Cooperation and Development *et.al*, *Fallen off the Agenda? More and Better Aid Needed for Iraq Recovery* (2010) 11 <http://www.internal-displacement.org/assets/library/Middle-East/Iraq/pdf/Iraq-more-and-better-aid-needed-jul-2010> accessed 22 September 2016.

[490] Ibid.

[491] Maymouna Al-Basil, Iraq's Terror Victims Face Neglect over Compensation Claims (2015), <http://www.alaraby.co.uk/english/features/2015/11/5/iraqs-terror-victims-face-neglect-over-compensation-claims> accessed 22 September 2016.

[492] Ibid.; these extensive delays are partly due to the slowness of the Ministry of Finance to implement the law in mid-2011, and even then claims averaged two years to complete. In addition, the claim process is quite onerous, involving complex documentation which is very costly for victims to gather. Moreover, the ongoing security situation made it harder to obtain supporting documents, and initially victims had to submit claims in the area where the incident occurred, even if they lived elsewhere. With the advance of ISIS in 2014, this made matters worse and the subcommittees in Kirkuk, Ninewa, Anbar, and Salahuddin governorates suspended their work entirely for a period. See Sandoval and Puttick (n 475)19-20.

armed forces, internal security and other security services personnel at a different level to that granted to relatives of deceased civilian victims.[493] According to a spokesman for the central government's victim compensation committee, 'the families of the deceased and missing who belong to the military or security forces will receive a grant of around 5 million Iraqi dinars [$4,300], while the families of civilians will receive around $3,200 in compensation. Meanwhile, both types of families will receive a monthly salary of around $300'.[494] The former of these grants is based on arbitrary discretion in a clear violation of the standard by which damage caused by the unlawful violation of the right to life ought to be measured. This should be a single objective standard applying to everyone because all people are equal, and so estimated compensation should not differ. As a member of the Iraqi High Commission for Human Rights stated, such a law allocating unequable financial compensation to civilian victims of terrorism is 'insulting' to victims.[495] This does not in any way diminish the rights of the Iraqi security forces to be compensated for higher amounts, not on the grounds of loss of life alone, but because their loss of life has occurred while performing their duty of protecting the state and its citizens.

It may be said that this law and its practice does not take into account redress for victims for every form of violence which has occurred in Iraq. Rather, it has arbitrarily limited such redress only to victims of certain military and terrorist acts, without precisely defining what particular acts are included. For instance, according to the Geneva International Centre for Justice (GICJ), the 'missing' referred to in this Law is a very vague concept and the 'GICJ wonders how this could apply to the enforced disappearances, especially when there is no law that criminalizes these practices. Furthermore, there is no measure taken in order to prevent enforced disappearances'.[496]

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[493] See Article 9 of this law (n 434).

[494] Omar Al-Shaher, Iraq Payes $300 Million to Terror Victims, 17 April 2013, <http://www.al-monitor.com/pulse/en/originals/2013/04/iraq-terrorism-compensation-victims.html> accessed 22 September 2016; the committees established in Iraqi provinces cannot provide adequate compensation to the victims/ relatives when they estimate the compensation. These committees pay lump sums for those affected by injury, disability and death as determined by law and, also, fixed monthly salary without considering their financial and social circumstances. In addition, the law does not address compensation for moral damage. Therefore, the judiciary should play a role in considering requests for compensation to be more equitable for redressing victims. See Hajem (n 467) 133-139; Hajem (n 468) 481-483.

[495] Al-Basil (n 491).

[496] GICJ (n 189) 8; see also the Centre for Victims of Torture (CVT), Enforced Disappearances: Ambiguity Haunts the Families of Iraq's Missing (n 199) 3-4; For example, 'the focus of Law 20 clearly excludes major types of violations that have been central features of the conflict [with ISIS]. For example, victims of [enforced disappearance], sexual violence, children recruited into forced military service, and those suffering from psychological trauma have no recourse to remedies under Law 20. Also missing from the law is a collective approach to reparations for those who have been victimized on the basis of their group belonging, as is the case for many of Iraq's ethnic and religious minorities'. Moreover, 'the Law 20 framework is clearly insufficient on its own to cover violations committed by all [armed] actors'. For further details, see Sandoval and Puttick (n 475) 23-24.

Victims of enforced disappearance, according to the GICJ, do not have any legal privileges in the area of reparation, compensation or rehabilitation under the compensation system in this law.[497] This is despite the Iraqi state's claim that 'this mechanism is an important way for victims and their families to obtain redress for any injury they suffered as a result of activities including abductions and enforced disappearances carried out by armed groups, terrorist bands and criminal organizations'. [498] The GICJ has noted that 'there are a lot of obstacles in the implementation of this law, from the very slow procedures to corruption and the influence of religious figures or political parties on the way, and to whom, the compensation should be paid'.[499] The Iraqi High Commission of Human Rights (HCHR) has criticised the Iraqi legal system because victims of enforced disappearances have no right to reparations, including compensation, rehabilitation, restoration of dignity, or guarantees of non-repetition.[500] General provisions for compensation place no financial obligation on the state because it considers that this should only be made by perpetrators. The HCHR demands the adoption of legal provisions for reparations consistent with the seriousness of the crime, in line with HR norms, and especially with the demands of the Convention, to which Iraq is party, regarding enforced disappearances.[501] The Committee of Enforced Disappearances (CED) also noted that the comprehensive reparations required by the Convention under Article 24 are not included in Iraqi domestic law.[502]

The Iraqi state has also failed to provide redress for other vulnerable groups of victims of acts of violence, especially gender-based violence in its legal system or in Law No. 20 of 2009. For instance, according to one report:

> the Government of Iraq has failed in its obligation under the ICCPR to take proper measures to protect and promote women's human rights, to ensure effective remedies in cases of violations,

[497] GICJ (n 189); see also Hassoun Obeid Hajij and Mazen Khalaf Nasser, 'Compensation for Crime of Enforced Disappearance: Comparative Study' (2015) 36 *The Islamic College University Journal* 37, 51-61.
[498] See United Nations, Committee on Enforced Disappearances, Consideration of Reports Submitted by States Parties under Article 29, Paragraph 1, of the Convention: Reports of States parties due in 2012, Iraq, 26 June 2014 (CED/C/IRQ/1) 9.
[499] GICJ (n 189) 8.
[500] See Iraqi HCHR Report about Implementation of the International Convention (Protection of All persons from Enforced Disappearance) (n 471) 6.
[501] Ibid.
[502] The Committee stated that the Iraqi state should 'guarantee that any person who has suffered harm as a direct result of an enforced disappearance obtains reparation in accordance with Article 24(5) of the Convention and prompt, fair and adequate compensation, even if no criminal proceedings have been brought against the potential perpetrators or the latter have not been identified. In this respect, the State party should establish a comprehensive system of reparation that is fully in line with Article 24(4-5) of the Convention and other relevant international standards and guarantee that any measures taken in respect of the rights of victims are gender sensitive and take into account the special situation of children affected by enforced disappearances'. See paras 31 and 32 of the Committee on Enforced Disappearances, Concluding observations on the report submitted by Iraq Committee of Enforced Disappearances (n 200).

> and to prevent systemic impunity. While all Iraqis face daily insecurity due to terrorism and civil strife, women and girls experience additional and specific abuse because of their gender.[503]

In this sense, the HRC has expressed deep concerns regarding these reports, and required the Iraqi state to ensure that all cases of violence against women 'are promptly and thoroughly investigated, that perpetrators are brought to justice, and that victims have access to full reparation and means of protection'.[504] Similarly, the UN Committee Against Torture (CAT) stated that the state should ensure that victims of such violence 'obtain redress, including fair and adequate compensation'.[505]

It can even be argued that the meagre compensation provided in accordance with this Law merely for terror victims is given not with the intention of comprehensively rectifying the injustice suffered by the victims, but to give the misleading impression that justice has been served in order to quell legitimate anger and protests that the authorities have seriously failed to fulfil their positive obligations of protection and provision of retributive justice. The Iraqi state, according to official information, paid more than $300 million to victims of terrorist acts from 2011 to 2013 as compensation for damages caused.[506] Payment may be acceptable to some victims as the best that can be obtained in the light of the severely unsettled civil and political situation in Iraq, and could imply that they consider it to be an acknowledgment of wrong, even when the Iraqi authorities have not acknowledged responsibility. However, payment alone may be considered by other victims to be insufficient. For instance, in the Speicher case, no corrupt and incompetent politician or military official has so far accepted responsibility or been held to account for gross failure to prevent the barbaric killing of approximately 1,700 individuals by ISIS. In addition, the legitimate and regular demands of families to know the truth about what happened to their loved ones, achieve justice for them, bring about acknowledgment of

[503] Iraqi Organisations et al., Seeking Accountability and Demanding Change: A report on Women's Rights Violations In Iraq (n 174) 1; see also the report of Iraqueer et al., Dying to be Free: LGBT Human Rights Violations in Iraq (n 154).
[504] See para 26 (a) the UN HRC, Concluding observations on the fifth periodic report of Iraq (n 88); as large parts of areas under the control of ISIS have been retaken by the Iraqi security forces, the UNAMI urged the state 'to consider what steps need to be taken to ensure the protection, recovery, reintegration and redress for the thousands of women and girls who have been subjected to rape and other forms of sexual violence including physical and psychological violence'. See UNAMI, Promotion and Protection of Rights of Victims of Sexual Violence (n 399), para 13.
[505] United Nations, Committee Against Torture, Concluding Observations on the Initial Report of Iraq (n 331), para 24. Also, the Committee has noted that although the Iraqi state asserted that its legal system provides victims with civil remedies in cases of torture and ill treatment, it 'did not provide information on reparation and compensation measures ordered by the courts or other State bodies and actually provided to victims of torture or their families since the entry into force of the Convention in the State party'. The Committee stated that 'the State party should immediately take legal and other measures to ensure that all victims of torture and ill-treatment are identified, obtain redress and have an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible'. Ibid., para 31.
[506] Al-Shaher (494); for further details about various claims for compensation which processed by the Central Committee and subcommittees between 2011-2016, see Sandoval and Puttick (n 475) 19.

wrong, and receive a sincere apology, have always been disregarded by the state authorities.[507]

Although some families are poor and barely earn enough to have a decent standard of living, they do not consider payment and privileges provided by the government to compensate for lack of news about the fate of their relatives or as addressing their other legitimate demands.[508] From their perspective, the severe injustice they suffered cannot be satisfied by mere monetary compensation and other inadequate gestures of reparation granted by this law, especially with no sincere intention by the state and society at large to accept responsibility for wrong or adequately redress it.[509] This attitude may have created a growing belief that compensation provided in accordance with the Law of 2009 is insufficient to adequately address the psychological pain suffered by these families, and that the receipt of monetary compensation is a betrayal of their relatives.

The brutal murders in the Speicher case and other incidents are closely linked to the ethno-sectarian violence dominant in Iraq post-2003, caused by hatred which has likely been encouraged by state authorities, politicians and various militias and extremist groups.[510] This has resulted in the families of the deceased experiencing strong feelings of anger, neglect, insult and isolation on the part of both the state and society at large.[511] The Speicher massacre has 'left significant psychological scars within society, notably the belief that what happened is sectarian liquidation which greatly affects coexistence within society'.[512] The psychological impact, the constant threat to peaceful coexistence and the breakdown of the mutual accountability of shared ideals of living in peace brought about by ethno-sectarian divisions remain unaddressed by society, like the psychological

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[507] Salam Maki, The Government and the Rights of the Families of the Speicher Massacre, <http://www.newsabah.com/wp/newspaper/26323 > accessed 22 September 2016.
[508] Ibid.
[509] Ibid; it has been noted that this Law 'is heavily focused on compensation. While compensation has many merits, it is not always the most appropriate form of reparations for some types of violations. For example, victims suffering from physical and mental health issues as a result of serious violations should have access to rehabilitation, which in turn requires access to adequate health services for a prolonged period of time. In such a context, paying compensation for such services would not necessarily allow victims to deal in the best way possible with the harm suffered. Similarly, redressing wrongs committed against entire groups might entail other measures in addition to compensation, such as satisfaction (including truth-recovery and memorials) and guarantees of non-repetition'. See Sandoval and Puttick (n 475) 23.
[510] Maki (n 507); a recent bombing attack on the Karada district, Baghdad, resulting from sectarian divisions and claimed by ISIS, approximately 300 civilians were killed and another 200 were injured. 'Many of the victims were women and children who were inside a multi-storey shopping centre and dozens burned to death or suffocated'; 'Many people were left angry at the government's failure to protect them after the devastating bombing blaming the lack of security through checkpoints that allowed the explosives to make their way into neighbourhoods'. See Maryse Farag, The Price of War Heart-breaking image of a badly burned girl who survived an ISIS suicide attack captures the agony of Iraq, (14th July 2016) *The Sun* <https://www.thesun.co.uk/living/1447331/this-heartbreaking-image-of-a-badly-burned-girl-who-survived-an-isis-suicide-bomb-attack-captures-the-agony-of-iraq-torn-by-war/>accessed 20 September 2016.
[511] Maki (n 507).
[512] Wassim Bassim, IS Massacre Leaves Families of Victims Stunned, 28 August 2014, <http://www.al-monitor.com/pulse/originals/2014/08/iraq-saladin-spiker-base-massacre-islamic-state.html > accessed 22 September 2016.

suffering of the families of the deceased.[513] Society has largely ignored and neglected the psychological pain of these families, and not even expressed solidarity by participating in frequent protests to demand disclosure concerning the fate of relatives and the lack of truth and justice for them; nor has society acknowledged its part in accepting responsibility to help heal the deep wounds of these families.[514] It seems, according to one commentator, that both the state authorities and society are responsible for a massive secondary victimisation of the victims of the Speicher massacre because they have failed to address their legitimate expectations of adequate remedy.[515]

However, recent campaigns led by more than 55 Iraqi civil society organisations, lawmakers and popular media figures sought to collect a million signatures to demand that the state authorities reveal the truth behind the Speicher massacre.[516] This may be considered a positive indication of the emergence of collective pressure by society on state authorities to change their attitude towards the Speicher and other cases. However, until recently, as claimed by the mother of a victim, investigations by government commissions to reveal the truth and fate of the victims have been fruitless.[517] She claims that for three years relatives of victims tried to discover the fate of their loved one, even though they went to Tikrit and the surrounding area where the massacre took place.[518] She criticised the judicial and prosecuting authorities for not addressing the families' sufferings and not passing any information about the investigation and the steps taken to achieve justice. In her opinion, information about the massacre had concealed, including the involvement of tribal leaders who had not condemned the massacre or offered to help find victims' bodies.[519] She also claimed that no senior officers of the Ministries of the Interior and Defence, nor any political figures, had been held accountable, largely because of political collusion to provide justice for these young victims of treachery. Despite this, she said that victims' families would not be silent or forget the slaughter of their loved

[513] Maki (n 507).
[514] Ibid.
[515] Ibid.
[516] See Middle East Monitor, Speicher Massacre Truth Campaign Attracts 1mn Signatures (22 August 2017) <https://www.middleeastmonitor.com/20170622-speicher-massacre-truth-campaign-attracts-1mn-signatures/> accessed 9 September 2017.
[517] Independent Press Agency, Organisations and Activists Launch the one Million Signatures Campaign to Uncover the Truth (21 June 2017) <https://www.mustaqila.com/2017/06/> accessed 9 September 2017.
[518] Ibid.; despite three years passing, the Iraqi criminal investigation teams were still searching for Speicher victims and, recently, 550 bodies had been recovered from a mass grave in Tikrit in the presence of victims' families. See Euronews, Victims of Speicher Massacre: More Remains and Tears do Not Dry, 06/08/2017 <http://arabic.euronews.com/2017/08/06/more-remains-found-in-tikrit-mass-grave> accessed 25 Feb 2018.
[519] Independent Press Agency (n 517).

one, but would continue to seek the truth and bring justice those involved, whether terrorists, leaders, politicians or tribal sheikhs.[520]

Similarly, the denial of the right to truth in cases of enforced disappearance has been routinely ignored by the state authorities since 2003. To comprehend the distress of the family of a disappeared person and shed light on such large scale events, the Centre of Victims of Torture (CVT) conducted interviews with family members of the disappeared.[521] These interviews revealed the exacerbated suffering of family members because of the kidnapping of their loved one, and the lack of action by state authorities and the community:

> their neighbors could hear their screams, but no one did anything to help. At this time period, they describe how everything changed and they couldn't tell who was an enemy and who was a friend, compounding the feeling that there's no protection and that there is no appreciation for human life. These feelings of helplessness, isolation and degradation from the authorities and from their own community can exacerbate the emotional and psychological problems related to the loss, thus increasing the suffering related to disappearances.[522]

Because of the strength of the militias, some of the interviewers pointed out the powerlessness and inability of the local authorities to investigate disappearances. Other interviewers referred to collusion between Iraqi authorities and the perpetrating militias. As a result, members of families of disappeared persons still suffer and have been denied their right to truth.[523] As noted earlier in the practice of HR bodies, such denial may amount to cruel, inhumane treatment or torture of the families of the disappeared.[524] It seems that the Iraqi authorities and legal system, as noted by Iraqi HCHR, have so far been unwilling to address such dreadful disappearances and continued to ignore their positive obligation under HR norms and international law to adequately redress the suffering of the families of the disappeared.[525]

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[520] Ibid.
[521] For further details, see the Centre for Victims of Torture (CVT), Enforced Disappearances: Ambiguity Haunts the Families of Iraq's Missing (n 199) 4-8.
[522] Ibid. 4.
[523] Ibid.
[524] See the discussion in Chapter 4, pages 116-118, 122-123 and 127-130.
[525] The Iraqi HCHR pointed out that many obstacles face the Iraqi state in practically adhering to its positive obligation with regard to enforced disappearance, including 'the multiplicity of authorities and security agencies legally authorized to implement the orders of arrest and detention of persons accordingly, leading to the difficulty of ascertaining the fate of detained persons and to know their whereabouts or any information relating to them'. See the Iraqi HCHR Report about Implementation of the International Convention (Protection of All persons from Enforced Disappearance) (n 471) 1-6; it has been suggested that 'to properly address enforced disappearance, Iraq should not only enact legislation criminalizing the practice and specifying penalties for perpetrators, but also recognize the right of victims and their families to reparation, irrespective of whether or not the victim has been declared dead. Moreover, the government should take measures to uphold relatives' right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation, and the fate of the disappeared person'. Sandoval and Puttick (n 475) 24.

In an attempt to begin to address the horrific impact of violence on victims and the deficiencies of the compensation system and its practices, the Iraqi Council of Representatives recently approved the First Amendment Law (No. 57, 2015) of the Iraqi Compensation Law, 2009.[526] This requires that the state adopt programmes providing care, facilities and assistance to victims of terrorist operations, including kidnapping and disappearances, in the various legal, economic, social, financial, health, educational and cultural fields.[527] To achieve this, a new department should be established in the 'Martyrs Institution' which was founded mainly to take care of victims of the pre-2003 regime.[528] In addition, although the level of monetary compensation has not been increased, civilian victims of terrorist operations will now be provided with the same amount as state employees.[529] Moreover, the amendment states that access by relatives to rights under this law, such as monetary compensation, a monthly payment, and other symbolic gestures, does not preclude their right other rights provided by criminal and civil liability or other laws.[530] This means that the state must take responsibility for ensuring these rights, irrespective of whether or not victims may have other rights from other sources. Furthermore, the wives and children of those killed as a result of terrorist operations must be given a house, apartment or piece of residential land, irrespective of whether or not they already own one, and this must be expedited.[531] Regrettably, this attempt to address the great psychological and material impact suffered by the victims of various acts of violence seems far from adequately understood by the Iraqi authorities, or sufficiently responded to. Even more, in the light of the recent economic crisis in Iraq, 'victims of terror and violence complain of neglect and unfair procedures viewed as attempting to discourage victims from claiming compensation'[532] and, thus, this already inadequate attempt to improve the compensation system is highly likely to fail.

[526] See of the First Amendment Law (No. 57, 2015) of Iraqi Compensation Law No. 20, 2009 Concerning Reparation for Damage Caused by Military Operations, Military Errors and Terrorist Operations, 21/11/2015; see Sandoval and Puttick (n 475) 18.
[527] Article 1 (2) of the First Amendment Law (n 526).
[528] Article 1 (3); after this 2015 amendment and, partly, in an effort to speed up the process of granting reparations, 'some changes have been made to the institutional structure, through which claims are received'. In addition, 'important, and controversial, institutional change introduced by the 2015 law is that responsibility for delivering reparations to martyrs and their families has been transferred to Martyrs' Foundation. This change has stirred political tensions [...] As a result of the 2015 amendment, the process of granting reparations to victims has met with further delays. […] [R]econstituting the Central Committee and the subcommittees according to the new membership structure specified in the law took several months. When interviewed in March 2017, the director of the division in the Martyrs' Foundation responsible for compensating victims covered by Law 20 stated that his office had not been allocated a budget from the central government and they did not even have the necessary furnishings to conduct their work. Moreover, at the time of writing, the Ministry of Finance had not issued the directives required to begin the process of compensation for cases of martyrdom, injury, loss, and kidnapping. Consequently, cases of property damage are the only area of compensation in which the 2015 amendment has been implemented'. See Sandoval and Puttick (n 475) 21.
[529] Article 8 (1) of the First Amendment Law (n 526).
[530] Article 12 (7).
[531] Article 13 (1).
[532] Al-Basil (n 491); in addition, according to the Former Chair, Central Compensation Committee, Baghdad, 'the system cannot deal with the Da'esh [ISIS] crisis. It was created for something else: for bombings here and there, or a military strike. Law 20 is good but

5.4.3 Summary Remarks

It is reasonable to conclude that the Iraqi state and its ineffective legal system, which have failed to observe their positive obligations to protect their citizens from acts of violence by non-state actors, do not subsequently provide them with a procedural remedy of justice when such acts have occurred. The horrendous implications of their victimisation are also compounded because they are left to suffer the physical, psychological and material consequences of the failure by the state and society to provide them with an adequate substantive remedy. Because of the involvement of various political parties, government officials, militias, terrorists and extremist groups largely motivated by sectarian-ethnic differences in the commission of acts of violence in Iraq, victims are unable to rely on their ineffective criminal and civil liabilities and judicial systems to act against the perpetrators of these acts. Perpetrators largely enjoy impunity due to sectarian and ethnic governmental protection, so that even should they be apprehended and brought to trial, there is no guarantee that true justice would be done and victims compensated.

Victims may also fear revenge if they make complaints against perpetrators and may suffer stress arising from long and complex judicial procedures and from the uncertainty of the outcome. In addition, some victims cannot afford the judicial route. To respond to the sheer scale of victimisation in Iraq, the state has attempted to bear the responsibility of providing redress to the families of the deceased by adopting a compensation system. HR norms and philosophical and ethical principles place a positive obligation on the Iraqi state to provide adequate reparation measures as a remedy for all victims of acts of violence, whatever their nature, specifically, in respect of the violation of the right to life. However, the compensation system adopted by the state, and, in particular, the Compensation Law No. 20, 2009, seems to have utterly failed to meet such an obligation. As noted above, although this law established legal rights to redress for victims, it has largely limited its scope to mere meagre monetary compensation and other inadequate gestures for certain groups of victims of terrorism. In addition, practices show that victims' claims for compensation under this law have been seriously impeded by bureaucratic procedures, as well as the negligence and corruption of state authorities. Victims have also been denied the possibility of availing themselves of the mechanism existing at international level to bring complaints against the state authorities before various HR

the implementation mechanism does not have the capacity to deal with the challenges that we now face: thousands killed, thousands kidnapped, the scale of property destruction'. Sandoval and Puttick (n 475) 22.

bodies, such as HRC, about the inadequacy of this law and other measures in the criminal and civil liability system to provide adequate redress for the damages and suffering endured, since these authorities have not, until now, ratified the Optional Protocols of various treaties to which Iraq is a party.

To heal, to some extent, the great injustice and humiliation suffered by Iraqi victims and their families since 2003 and address the serious implications of such widespread acts of violence and victimisation, the Iraqi state must adopt a genuine and inclusive transitional justice programme in which accountability, truth recovery, reparations, legislative and institutional reform and reconciliation will be vital for any future stability and peaceful coexistence. This should include, in the first place, as noted in Chapter 4,[533] symbolic reparation measures to provide satisfaction by revealing the truth about the circumstances of these violent actions, the perpetrators of them, and the fate of so many victims, especially those who suffered enforced disappearance. Further steps would involve repairing the psychological and physical damage done to the victims and their families, official acknowledgment and condemnation of the wrong done, apologising for the atrocities and crimes committed against them, and the commemoration of the victims. This commemoration should honour the victims and their families and remind future generations of the atrocities in the hope that similar crimes will not be repeated. Moreover, monetary compensation should be provided to families of deceased victims for the objective aspect of the damage of death (loss of life) and the material and moral damage resulting from it.

It is equally important that these measures of symbolic and material reparations should not be limited merely to redress for past and current atrocities. Rather, a strong message should be sent out to victims, wrongdoers and society as a whole acknowledging the reality of such atrocities and the need to heal them, paving the way to restoring confidence, trust and hope, which have been seriously damaged not only by these atrocities, but also by the wilful indifference of corrupt and ethno-sectarian authorities. In this context, there is a need to tackle the roots of the current violence and the vulnerability of victims by genuinely engaging in serious discussions to address the shortcoming and flaws of the 2003-transtion and its implications, in the hope of conducting institutional reforms and the re-establishment of the rule of law. Trust in the Iraqi state and between communities

[533] See pages 106-113 and 128-129.

themselves needs to be restored; ethno-sectarian divisions need to be bridged; religious and sectarian extremism should be curbed; official corruption and impunity needs eradication; and moral relations guaranteeing the peaceful co-existence in society of each citizen, whatever his/her religious, ethnic or sectarian background, should be repaired. It is argued that national identity and citizenship need to be strengthened to ensure that every citizen possesses equal HR. Thus, clear, respectful and secular norms of accountability must be restored to overcome the political, social, ethnic and sectarian divisions created by the state authorities and exacerbated by illegitimate militias, and criminal and terrorist groups. Lessons also need to be learned from past and current violence and it must be ensured that such violence will not be repeated in future. This may be considered crucial for any future shared norms of moral, civil and political accountability in the interaction between Iraqi citizens. However, the question of how some of the above can be achieved, in practice, and in particular how the state and society can reconcile the violence and victimisation, is complex and multidimensional. The future prospects and difficulties of establishing inclusive transitional justice processes will be discussed in the next chapter as a part of the conclusions overview.

As will be discussed further in Chapter 6, one method –but not in isolation –of seeking incrementally to address the failings of the Iraqi state would be for Iraqi citizens themselves to take 'substantive steps' to 'establish a healthy civil society reflecting social contract principles'. Such steps, it will be argued, can and should be taken with the support of governmental bodies, and other authorities. This will obviously be a very lengthy task but at present the security situation is gradually improving, especially as territory held by ISIS steadily diminishes. There are indications in this chapter, as discussed, which support the notion that the Iraqi government in the post-ISIS situation may gradually accept the positive obligations in question, while awareness of these may gradually have an impact on citizens' expectations of government. Thus, a degree of implementation of such obligations may gradually have an impact in building trust and improving relations between citizens and government. It will therefore be argued that the application of positive obligations to protect the right to life will not simply introduce another raft of unfulfilled norms into the legal order. This theme will also form a central part of Chapter 6.

Chapter 6: Overall Conclusions

This thesis examined the status of the HR of victims, and was prompted by the continuous and widespread indiscriminate violence perpetrated by non-state actors in Iraq, especially following the controversial occupation in 2003 by the United States and its allies. However, it was also inspired by the recent and ongoing atrocities by ISIS, which have caused so much injury and death. It has specifically addressed how far the Iraqi state and its legislation have met the legitimate expectations of its citizens; in other words, it has been argued that the state should protect HR, especially the right to life of citizens, in theory and practice, against violence by non-state actors. Furthermore, it has been argued that the state should, as an aspect of satisfying the demands of that right, investigate the crimes, prosecute and punish offenders, and make reparation to victims. To this end, the thesis has examined the state's positive obligations in accordance with philosophical, ethical, international and regional HR principles, and cases of the violation of HR brought before various HR bodies, in particular the HRC, ECtHR and IACtHR. It argued,[1] however, that identifying such positive obligations does not imply that their acceptance in Iraq is likely to be anything other than partial and incremental.

These ethical principles, and in particular social contract theory, have underpinned contemporary discussion about the right to security and the legal framework required for the state to adequately protect its citizens' right to life. It is by mutual agreement that individuals form a state, to whose authority they submit themselves, and to which they delegate many of their rights; in return, the state accepts a monopoly of force intended to protect both them and their rights. To be valid, this contract must entail free consent, reciprocity, and moral obligation. Social contract theory embedded in the cultural norms of a state is essential to the establishment of the legitimate rights of individuals to security, justice, and compensation. It follows that any moral negligence, unwillingness, or culpable failure to ensure these rights is a breach by the state of its social contract with its citizens, as is any unjust or excessive coercion by the state itself against them. In such circumstances, in principle, citizens should have the right to hold the state to account and, if necessary, even replace the government.

[1] See Chapter 5, p 185.

Although social contract theory is open to criticism (see Chapter 2),[2] it does have compensatory strengths. It provides a firm criterion on which to decide what ought to be done to move from the absence of the rule of law towards an adequate judicial system which upholds the rule of law to maintain stability and peace. General acceptance of the validity of social contract theory, along with the concepts of fragility, political settlement, and legitimacy, often appears to be able to play a role.[3] This is especially so in the case of Iraq, which has experienced serious conflict between various ethnic, religious, and sectarian groups. In such a fragile state, where political policy is disordered and legitimacy is weak, public authorities cannot fulfil basic public duties, including the protection of their citizens and, hence, state and society cease to be bound by their mutual obligations.[4] Conflict can arise and public authorities may lose their monopoly on legitimate violence if the state and society cannot renegotiate their social contract, and so it is the lack of acceptance of a social contract which underpins this fragility.[5] In addition, 'an inclusive political settlement is one where the social contract is robust and legitimate' and, thus, such a settlement may include the social contract in the 'participatory constitution-making, transitional justice, and affirmative action measures to redress past patterns of social exclusion and inequality, thereby to promote social cohesion'.[6] Accordingly, the social contract's aims are arguably compatible with some objectives of transitional justice. In other words, the two theories are not mutually exclusive.

However, where a state lacks a legitimate social contract because of flaws in its constitution, as in Iraq, it is nevertheless possible to discern some tentative signs,[7] of acceptance that it is obliged to obey basic ethical principles. In general, states enforce law and order in society by prohibiting and preventing citizens from resorting to violence rather than to the law in their relationships, to protect against the violation of their right to life by punishing anyone who has violated it. Instead, the state shoulders these duties by enshrining norms of mutual accountability in its criminal justice system, which are to be respected by its citizens. This reciprocity means the state has a moral responsibility to fulfil its own duties adequately and provide compensation if it fails to do so. Therefore, the rights of individuals to have their right to life protected, have perpetrators brought to

[2] See pages 19-23.
[3] See United Nations Development Programme, Engaged Societies, Responsive States: The Social Contract in Situations of Conflict and Fragility (n 58) Ch. 3, 11.
[4] Ibid.
[5] Ibid.
[6] Ibid.
[7] See Chapter 5, pages 184-185.

justice if this right is violated, and be compensated, are fundamental requirements of social contract theory and ethical principles; all criminal justice systems, it is argued, should conform to them. This ideal has not been upheld in Iraq, but there are signs post-ISIS that it is gradually moving.

Recent developments in international and regional HR conventions, particularly under the jurisdiction of the HRC, ECtHR and IACtHR, demonstrate that states have a positive obligation to take, with due diligence, preventive measures to protect its citizens' HR, especially the right to life, from its own illegal actions, and it should also protect them from infringement by others. In addition, effective procedures and substantive measures of remedy must be established to investigate, prosecute and punish those responsible for breaching the right to life; adequate reparation also needs to be provided by the state and its criminal justice system if an individual's right to life has been violated under the conventions, irrespective of whether or not this violation is by state officials. To fulfil these positive obligations adequately, the state should employ the principle of effectiveness in its criminal justice system by providing legitimate law enforcement mechanisms to prevent criminal acts of violence against the right to life from being committed. Should any such acts have occurred, states must then establish and truthfully reveal their circumstances, and provide reasons for its failure to prevent them. They must also punish perpetrators and provide adequate reparation, both symbolic and monetary. The key to compliance with these obligations, as established by various cases brought before the HRC, ECtHR and IACtHR, lies in the existence of robust domestic institutions, namely, a responsible executive, an independent legislature, an impartial and effective prosecution system, and a healthy civil society.

Iraq is a member of various conventions such as the ICCPR, and its criminal justice system is under the jurisdiction of the HRC and other bodies; it is thus required to obey customary international law, including due diligence. This has reached so high a level of international acceptance, at least in domestic violence cases, that it is acknowledged by various HR bodies such as the ECtHR and the IACtHR. Therefore, Iraq has a positive obligation to protect its citizens' right to life from widespread, indiscriminate acts of violence and provide procedural and substantive remedies when this right is violated. As noted above, since 2003, serious attempts have been made by various international and domestic legal and judicial experts and organisations to help Iraq reform its criminal justice and judicial systems, train its security forces, re-educate judges and other

administrators of these systems, establish the rule of law, and ensure the HR of Iraqi citizens. Stringent positive and negative obligations required by HR norms have been set, especially the protection of the right to life, and provision of justice and reparation, at the core of the Iraqi Constitution,[8] to establish an effective mechanism to enforce them in practice. In addition, the creation of common ground and a healthy civic atmosphere has attempted to establish a peaceful, political democratic situation, in which whoever exercises authority is subject to the rule of law, and those who negligently or intentionally fail to uphold the interests and HR of Iraqis must be accountable. It is hoped that this will prevent the atrocities of the pre-2003 regime being repeated, and that their HR are respected and ensured in future. In practice, however, these attempts have largely been in vain. Nevertheless, post-ISIS there are gradual signs that Iraq may is beginning to implement a positive obligation, as recognised by the ICCPR, to protect the right to life of citizens even against non-state actors.

6.1 What Has Gone Wrong in Iraq and Who Should be Blamed?

It is important to understand the problems in the Iraqi state and blame those responsible for seriously undermining the establishment of functional state departments based on the rule of law, effective criminal justice, and the judicial systems capable of ensuring the rights of victims. This is crucial to the restoration of trust and the hope for better recognition of these rights, and the adoption of shared norms of mutual accountability so severely damaged by acts of violence. The existence of indiscriminate violence and the suffering of Iraqi citizens since 2003, and even the atrocities and prolonged instability of the state before this, has been attributed to the improvised and artificial manner in which Iraq was established by external powers.[9] It is argued that this artificial creation is unviable and bound to suffer from violence because it was constituted without gaining the loyalty of the population,[10] whose consent and interests were not considered. Despite belonging to diverse ethno-sectarian backgrounds, Iraqis were forced to live together and have thus continued their 'long history of antagonism and hatred'.[11]

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[8] See Chapter 5, pages 145-150, 211-212 and 224.

[9] See Peter W. Galbraith, The End of Iraq: How American Incompetence Created a War Without End (Simon and Schuster, 2007) 7; Jochen Hippler, Nation-Building by Occupation? –The Case of Iraq <http://www.jochenhippler.de/html/iraq_-_nation-building_by_occupation.html> accessed 16 October 2017; see also Leslie H. Gelb, The Three-State Solution, 25 Nov, 2003, The New York Times <http://www.nytimes.com/2003/11/25/opinion/the-three-state-solution.html> accessed 16 October 2017; Al-Ali (n 5) Ch. 1, 243-244; Dodge (n 12) Ch. 1, 9.

[10] Gelb (n 9); Dodge (n 12) Ch. 1. These commentators argue in favour of 'a radical model of decentralization or for splitting the country into three separate Entities'. Bouillon (n 14) Ch. 1, 283.

[11] Al-Ali (n 5) Ch. 1, 243-244; see also Fadel Abbas Mahmoudawi, 'The Role of Peaceful Coexistence in achieving National Unity' (2016) *The International and Political Journal* 83, 83-84; Mona Hamdi Hikmat, 'The concept of Peaceful Coexistence and its Obstacles in Iraq' (2016) *Journal of Political Sciences* 335, 339-343.

However, this argument has been deemed 'facile' because it does not accord with the facts, and nor does it address real problems in Iraq, since it diverts attention to disputed conceptions about ancient history.[12] According to academic studies, even before the establishment of Iraq, most local populations within its territories 'were aware of belonging to a single cultural and political entity'.[13] In addition, despite the way Iraq was created, 'the problem was not that the concept and entity of the state remained alien to Iraqi society, or that a common Iraqi identity did not exist or grow'.[14] There were also few recorded incidents of sectarian violence,[15] and, even so, the current violence in Iraq cannot be attributed solely to Iraq being an artificial construct.[16] Indeed, many states in similar circumstances as Iraq are stable despite their citizens being of diverse cultural, ethnic, and religious backgrounds,[17] and some have even more severe divisions than Iraq but have overcome them in the interests of peace and development.[18] For example, South Africa has become a successful democracy, establishing clear and strict rules of government and benefitting from sound leadership.[19] The only way that the Iraqi state's establishment is relevant is how 'it affects Iraqis' current sense of belonging' and, thus, there is 'nothing to prevent the inhabitants of the country from living together peacefully',[20] if they have the will.

Consequently, the causes of the current serious problems facing Iraq lie elsewhere, particularly in the lack of well-functioning criminal justice and judicial systems independent of the executive, which can effectively uphold the rights of victims and call to account anyone who breaches the shared norms of living in peace, irrespective of their religious, cultural, or ethno-sectarian backgrounds. It has been suggested that a serious analysis should examine how the state has been governed since 2003.[21] Dodge suggested that rather than laying blame on the manner in which Iraq was created, and the power of pre-state religious identities, we should focus on how Iraq has been weakened since 2003, and how it might be reformed in the future.[22] However, in laying blame, we should also consider other factors, including 'greed, incompetence, corruption, personal ambitions,

[12] Al-Ali (n 5) Ch. 1; Hikmat (n 11).
[13] Al-Ali (n 5) Ch. 1; see also Kamal A. Hassan, 'Peaceful Coexistence in Iraq Approaches & Guarantees' (2014) 3 *Journal of College of Law for Legal and Political Sciences* 357, 368-371.
[14] Bouillon (n 14) Ch. 1, 283; Hikmat (n 11) 339-340.
[15] Haddad (n 60) Ch. 5, 118.
[16] Hikmat (n 11) 339-340; Al-Bayan Center for Planning and Studies (n 43) Ch. 5, 37.
[17] Al-Bayan Center for Planning and Studies (n 43) Ch. 5, 34-36.
[18] Ibid.
[19] Ibid.
[20] Al-Ali (n 5) Ch. 1, 244.
[21] Ibid.; Hikmat (n 11) 344-346; Mansour (n 267) Ch. 5, 4-8.
[22] Dodge (n 12) Ch. 1, 10.

[and] foreign interference' as 'sectarian divisions have not in themselves been an impediment to progress; rather they have been deliberately politicised [in an attempt] to divert […] attention from […] performance in the government'.[23] However, while it must be acknowledged that political competition between Shiites and Sunnis in Iraq is over the right to rule rather religion, the above suggestion ignores how religion can be embraced as a primary mark of identity, leading to increased divisions and violence, 'even when the actual conflict [between them] has little or nothing to do with issues of faith'.[24] Nevertheless, Haddad suggested that the inability of Iraqi regimes to establish a state which embraces both Sunnis and Shias is based on the state's 'narrative' and not 'the basics of sectarian relations'. That is, it is the former and not the latter which 'prevent[s] state nationalism from incorporating both sectarian nationalisms'.[25]

Moreover, three demographically wide-ranging surveys of national public opinion between 2013 and 2015, found that, while ethnic and sectarian conflict is often thought to be caused by traditional group rivalries, it is, rather, bad governance which has created the lack of stability in Iraq. That is, the marginalised rely less on violence and their particular sectarian group when they feel the government is 'responsive, accountable, and fair'. The survey also concluded that the growth of ISIS in Iraq was due less to sectarianism than problems of governance, and that while 'the two reinforce each other,

[23] Al-Ali (n 5) Ch. 1, 244. The claim of the Iraqi government, in its report submitted to the Committee on Enforced Disappearances in July 2014, that the existence of violence in the country resulting, to some extent, from the activities of religious and ethnic groups working against the interests of the state is not 'representative of the real situation and its legal implication'. According to the Geneva International Centre for Justice (GICJ), 'In Iraq, there is no fight between ethnic or religious groups. What we find is a complex situation of internal conflicts due to the climate of insecurity and violence created by the government itself by its practice of allowing injustices and committing human rights violations. This internal situation is becoming particularly worrying because of the participation of the militias'. Geneva International Centre for Justice (GICJ) (n 189) Ch. 5, 15-16.

[24] See Steele (n 56) Ch. 5, 5.

[25] Haddad (n 59) Ch. 5, 49; Fanar Haddad, in his doctorate thesis on sectarianism, claims that sectarian affiliations should be considered as group identities rather than political or religious factions. 'Sectarian identity has often been viewed by Iraqis as a problem in and of itself. That the subject has been regarded as taboo for most of modern Iraqi history has prevented an open debate on the subject hence its polarised characterisation. Those who subscribe to membership of a sect or a faith will have to engage in acts of physical and verbal enunciations that validate and assert that identity – in the religious context this may arise out of divinely ordained obligations. This makes the desire of successive Iraqi regimes to ignore the sectarian divide especially problematic as these are identities that are difficult to conceal. Without an acceptance of their existence and without accepting and allowing for the assertion of these identities (in ritual for example) sectarian antagonism becomes all but inevitable. What is required is recognition and acceptance of strong and varied sectarian identities as legitimate building blocks of Iraqi identity and nationalism'. He also asserts that 'Ethnic and confessional plurality in Iraq is not, in itself, a challenge to the Iraqi nation state or Iraqi nationalism; rather, it is the failure of the state to transcend these divisions that has complicated what should be secondary identities. Ironically, it can be argued that the state's insistence on ignoring ethnic and confessional divisions and its search for uniformity are one of the main complicating factors of sectarian relations in Iraq'. Haddad (n 59) Ch. 5, 39, 42, 276-281. According to Haddad, 'when members of a community feel their identity is threatened, they will increasingly act in accordance with that identity's points of reference rather than their own individualistic ones or wider forms of identification, such as national identity'. See Haddad (n 60) Ch. 5, 134. He asserts that "the extreme escalation of the sectarian tensions, turning into violence, in post-Saddam Hussein Iraq were not the inevitable result or conclusion of the sectarian divide Iraq have experienced since its very foundations were lain. Nor was it representative of the relationship between the groups, because for more than 1000 years, the "...Sunnis and Shias have, by and large, coexisted peacefully but without breaking down sectarian boundaries". Rather, the sectarian tensions that in 2006-7 culminated in violence, that by many observers have been described as a civil war, were the outcome of socio-political developments and sectarian identities that increasingly were expressed and understood in opposition to the 'other' ". See Ahmad Wesal Zaman, Henning Møller Christensen and Tobias Lund Sørensen, Iraqi Reconciliation: How the Ethno-Religious Groups Perceptions of Justice have Affected Reconciliation (Thesis, Roskilde University Digital Archive 2015) 26 <http://rudar.ruc.dk/handle/1800/18394 > accessed 2 December 2016.

sectarianism is more often an outcome of bad politics'. The survey exemplified this by describing how the replacement of Prime Minister Nouri Al-Maliki in 2014, with the more conciliatory Shia politician Haider Al-Abadi, resulted in reduced popularity for insurgents among Sunnis.[26]

Some analysts have argued that Iraqi citizens are to blame for the poor performance of their elected representatives since 2005, and the resulting serious problems. They assert that if the whole society cannot 'produce a better crop of politicians, then it has only itself to blame'.[27] However, whether or not the selection of political representatives is based on reasonable grounds such as competence, eligibility and integrity, if a genuine, stringent and effective legal and judicial system based on the rule of law had been created, it would have guarded against illegal, inadequate or corrupt conduct by these representatives, since they would have been held accountable. Nevertheless, it cannot be denied that in the absence of a wholesome civil society in Iraq able to assert itself sufficiently to bring about a trusted and legitimate political system and leadership, there is no prospect of change. Blaming citizens also signals to those currently in power that they can ignore and violate the rights of Iraqi citizens with impunity. In the absence of safeguards and a wholesome civil society, it is unsurprising that the principles of HR stipulated by the Iraqi Constitution and criminal justice system since 2003 are merely empty rhetoric, peddling illusions about the actual rights of Iraqi citizens.

In Chapter 5, the study of these rights and their correlative positive obligations showed that complex factors have played a central role in paralysing the Iraqi state and its criminal justice system. These factors mainly arose from the failure of the 2003 transition, which was implemented as a tool of 'revenge' and 'exclusion', and resulted in a flawed constitution and divisive ethno-sectarian system, fuelling the political conflict and widespread corruption, insurgency, terrorism, armed militias and extremism. In addition, the criminal justice system and its implementation fail to comply with international standards, as the rights of victims have been ignored, despite remarkable recent developments by international bodies to require states to acknowledge the rights of victims of crime, both in theory and practice. Iraq has struggled with multiple institutional and legislative problems which have greatly limited its ability to respond with due

[26] K. Proctor, and B. Tesfaye, Investing in Iraq's Peace: How Good Governance Can Diminish Support for Violent Extremism, Mercy Corps, December 2015, 13 <https://www.mercycorps.org/sites/default/files/Investing%20in%20Iraqs%20Peace_Final%20Report.pdf> accessed 3 October 2017.
[27] Al-Ali (n 5) Ch. 1, 12.

diligence to the widespread acts of violence by non-state actors, including gender-based violence, enforced disappearance, torture, and violence by terrorists and armed militias. This has fostered a climate of impunity and allowed the repetition of violence.

6.2 The Future Prospects and Difficulties of Establishing an Inclusive Transitional Justice Process

Following the defeat and expulsion of ISIS from areas in west Iraq, an unprecedented window of opportunity has opened to enable progress towards transitional justice and national reconciliation. This opportunity has been enhanced by the unity that emerged during the fight against ISIS and has been uniquely led by the real concerns of citizens throughout the country.[28] Although the defeat of ISIS may formally end hostilities, this alone is insufficient to overcome the entrenched bitterness, grievances and mutual fears of different communities as a result of the prolonged and violent nature of conflicts in Iraq. In societies transitioning from violence, war, oppression and HR violations, there are various mechanisms of transitional justice, including judicial proceedings, the prosecution of perpetrators, and reliance on truth commissions as a non-judicial means of establishing a record of wrongdoing and acknowledgement of violations. The reformation of oppressive institutions and establishment of reparations for victims have become 'central ingredients in the "menu" of reforms recommended by international organisations, donor agencies and outside experts'.[29] These have seen reconciliation as a requirement for lasting peace in divided communities, assuming that when political settlement has been reached from the top-down, there is a bottom-up process to handle unresolved issues of the conflict and prevent the recurrence of violence. As a precondition for building peace and such a settlement, therefore, state institutions and communities need to reconcile the past.[30] Achieving sustainable peace and reconciliation, and breaking the cycle of violence and revenge in Iraq needs to be balanced with the urgent need to heal the wounds of victims and communities affected by these conflicts. This can be

[28] UNDP, Support for Integrated Reconciliation Programme: Project Summary (12 March 2017) <http://www.iq.undp.org/content/iraq/en/home/operations/projects/democratic_governance/reconciliation.html> accessed 18 September 2017.
[29] Martina Fischer, Transitional Justice and Reconciliation: Theory and Practice, in B. Austin, M. Fischer and H.J. Giessmann (eds.), *Advancing Conflict Transformation: the Berghof Handbook II* (Barbara Budrich Publishers, 2011) 406.
[30] Ibid. The concept of reconciliation lacks a clear definition as there are slightly different understandings about the level at which reconciliation should occur, what exactly needs to be done during reconciliation, and what would be considered a 'successful' outcome. Despite this variability, 'the process of reconciliation might be defined as the act of creating or rebuilding friendship and harmony between rival sides after the resolution of a conflict, or transforming the relations between rival sides from hostility and resentment to friendly and harmonies relations, a long-term endeavour that will require former enemies to form new relations of peaceful coexistence based on mutual trust and acceptance, cooperation and consideration of each other's needs'. See Nevin T. Aiken, Identity, Reconciliation and Transitional Justice: Overcoming Intractability in Divided Societies (Routledge, 2013) 18.

achieved via accountability and redress, but will also depend on whether comprehensive policies and mechanisms can be established to penetrate the social fabric and ensure the involvement of all or most of society.[31] This complicated and challenging goal requires the adoption of a hybrid approach through coordinated society wide efforts; this means the institutions, elites and policy makers as well as communities and their leaders. This means that neither the top-down nor bottom-up approach alone can achieve such a goal.[32] Considering that previous reconciliation attempts since 2003 failed for many reasons and launched only empty slogans, often targeted at specific elites, this served to weaken civic participation. In addition, as the relationship between reconciliation and the demand for accountability and transitional justice has been seriously neglected, reconciliation has not received the attention it requires.[33] The goals of reconciliation employing a hybrid approach can be defined as follows:

> 1) Social learning that develops mutual trust among former enemies that replaces past feelings of threat, fear, suspicion or hostile perceptions.
> 2) Creating a shared identity that members of all different communities can identify with. This does not mean existing identities are ignored or eliminated but merely the creation of a collective identity and sense of mutual interest that bridges the communal identities it encompasses.
> 3) Changing the antagonistic societal beliefs enemies hold about one another that reinforce the sense of enmity. Leaving such beliefs unaddressed risks delegitimising the reconciliation process and perpetuating justifications for violence.
> 4) Social learning that renders violence and violent action illegitimate and violence being perceived as "unthinkable". The creation of a secure environment as well as legitimate means of resolving conflicts peacefully is vital towards this goal.
> 5) Addressing structural and material sources of inequality and deprivation in regards to rights and resources and creating a sense of equality.[34]

Achieving these goals through the adoption of an inclusive transitional justice process requires addressing a number of the aforementioned endemic issues, especially concerns about deficiencies in protection, justice, and redress in the ICJS. Some of these endemic issues will be considered now.

6.2.1 Endemic Suspicion, Mistrust and the Breakdown of Relationships among Ethnic, Sectarian and Religious Communities

[31] See the Al-Bayan Centre for Planning and Studies (n 43) Ch. 5, 33; Steele (n 56) Ch. 5, 1-20.
[32] The Al-Bayan Centre for Planning and Studies (n 43) Ch. 5; for further details, see Zainab Mohammed Saleh, 'Transitional Justice and National Reconciliation and their Mechanisms of Application in Iraqi Society' (2014) 6 *Larq Journal for Philosophy, Linguistics and Social* 157, 157-167.
[33] UNDP, Support for Integrated Reconciliation Programme: Project Summary (n 28); Yousef Anad Zamile and Zainab Mohammed Saleh, 'Transitional Justice and National Reconciliation: An Anthropological Cultural Reading' (2016) 21 *Larq Journal for Philosophy, Linguistics and Social* 226, 239-241; therefore, strategies need to include reconciliation efforts, at national and local level in the social and political domains. Such efforts require three elements: healing the suffering of victims and restoring trust to rebuild the state and create a peaceful society; educating people with the skills necessary to achieve this; making changes in state and society to promote peace among the diverse groups. Those of different identities have often been in conflict and this must be addressed to build appropriate relationships. They need to be educated to engage in dialogue to resolve their differences and, thus, contribute to peaceful co-existence. Entered into with good will, it can clarify misconceptions and build trust. Steele (n 56) Ch. 5, 11-12.
[34] Al-Bayan Centre for Planning and Studies (n 43) Ch. 5, 33-34; see also Aiken (n 30) 19-23.

Society in Iraq has been traumatised by conflict and violence since 2003, in addition to that of the oppressive regime before it. To move forward, the long history of conflict, tension and mistrust in Iraq's many communities must be confronted,[35] but this involves dealing with controversial socially sensitive and divisive issues. Nevertheless, when accounts of those who have suffered remain untold, this can cause 'feelings of communal resentment and victimisation to linger, rendering peace unsustainable in the long term. In addition, the opportunity to record and confront history gives victims of violence an opportunity to remove the stigmatisation of victimhood and have a degree of closure'.[36]

Reconciliation programmes adopted in South Africa are a feasible model, and have already been used as a guideline for some post-2003 policies in Iraq.[37] The function of the Truth and Reconciliation Commission of South Africa was not primarily aimed at dispensing punishment, but was rather to 'correct […] imbalances, [and] restor[e…] broken relationships – with healing, harmony and reconciliation'.[38] Significant power and resources were given to this Commission at government level to receive and investigate the accounts of victims, irrespective of gender, race, class, religion or association. As noted earlier, the perpetrators of crimes were encouraged by the Commission to testify in return for limited and proportional amnesty.[39] Moreover, to determine the broad patterns of exclusion, HR violations and key facets of violence, public institutional hearings were conducted which focused on the legal, media, health, business and labour sectors.[40] At grass roots, community and religious leaders supported these efforts to reconcile the past; for instance, Nelson Mandela and Archbishop Desmond Tutu 'utilised both Christian and traditional African values such as *ubuntu* to highlight reconciliation, confession and forgiveness'.[41]

The above model, in many respects, could be applied to the situation in Iraq. Reconciliation policies could be implemented in both top-down and bottom-up approaches. The current Iraqi Prime Minster, Haider Abadi, came to power in 2014 on a platform of reconciliation and the curbing of corruption and sectarian policies which were perceived to have led to the ISIS occupation of parts of Iraq. He received broad support from various sections of Iraqi society, including Iraq's leading Shia religious leader,

[35] Saleh (n 32) 172-173; Al-Bayan Centre for Planning and Studies (n 43) Ch. 5, 34.
[36] Al-Bayan Centre for Planning and Studies (n 43) Ch. 5; see also Aiken (n 30) 195-197.
[37] Al-Bayan Centre for Planning and Studies (n 43) Ch. 5, 34-35.
[38] Aiken (n 30) 68; Hollywood (n 16) Ch. 5, 75.
[39] Aiken (n 30) 69; Al-Bayan Centre for Planning and Studies (n 43) Ch. 5, 35.
[40] Aiken (n 30) 70-71; Al-Bayan Centre for Planning and Studies (n 43) Ch. 5.
[41] *Ubuntu* means 'Humaneness'; it is 'a philosophy that envisions crime as a threat primarily to the interconnected web of relationships that bind all individuals together in a harmonious society'. Al-Bayan Centre for Planning and Studies (n 43) Ch. 5, 35.

Ayatollah Ali Al-Sistani, and a cross-section of the Shia and Sunni communities.[42] His efforts to tackle corruption and sectarianism and to strengthen the authority of the state, especially following the widespread demonstrations in 2015, faced significant challenges from the loyalists of various parliamentary political parties, who decelerated these reforms and even reversed them, claiming them to be unconstitutional.[43] However, it may be said that Abadi has latterly had some success in restoring confidence in his government by promoting his own vision of state consolidation, because of his focus on rebuilding the security sector, subjecting the PMU to control, and successfully driving ISIS from many parts of Iraq.[44] In addition, a National Reconciliation Committee was established in 2016 to advise the Prime Minister on reconciliation in Iraq,[45] and his reconciliatory policy appears to be a shift in attitude from the Al-Maliki era and the military, making the Iraqi government more willing to implement policies of reconciliation effectively.[46] Such policies may aid the creation of a climate in which positive HR obligations will be more successfully accorded realisation in practice.

This policy shift has created the acceptance that a political settlement alone is insufficient and, thus, it is necessary to adopt a bottom-up approach for reconciliation policies to succeed. Iraq's rich tribal, ethnic and religious texture should be seen as an opportunity for reconciliation rather than as a challenge; community leaders can enhance the legitimacy of reconciliatory policies and widen the audience for them if they are able to adopt the idea of *AlWihda Al-Wataniyya* (national unity).[47] It is especially important for the promotion of reconciliation that moderate voices and favourable attitudes of community leaders should prevail. For instance, Ayatollah Al-Sistani has consistently condemned sectarianism and galvanised cross-sectarian and cross-religious support.[48] It is encouraging that some reconciliation initiatives have recently occurred at grass roots,

[42] Ibid. 29, 35; Proctor and Tesfaye (n 26) 26.
[43] According to Zaid Al-Ali, "all Iraqi politicians and members of parliament claim to be in favor of reform … but of course they all engage in corruption. They'll all vote in favor, but when it comes to implementing the plan, they're going to put up obstacles. And that's not new, that's something that's been happening for the past 10 years". Priyanka Boghani, Is Abadi's "Good Faith" Enough to Reform Iraq? 13 August 2015, <http://www.pbs.org/wgbh/frontline/article/is-abadis-good-faith-enough-to-reform-iraq/> accessed 22 September 2016; it has also been suggested that 'Political parties do not believe in any reform, as they are part of the system of corruption in the state. Any backing of reforms by the parties is only a formality, while they refuse any changes or curtailment of their privileges for the benefit of the people'. King Faisal Centre for Research and Islamic Studies, the Civil Protest Movement in Iraq Post July 31, 2015: Formation Mechanisms and Future Scenarios (October 2015) 13; many criticisms have been made by Al-Ali about the plan of the current Iraqi Prime Minister, Abadi, to reform the Iraqi Constitution, the political process and the judicial system. Zaid Al-Ali, ARTICLE: Premature excitement about Iraq's new government reforms, 15 August 2015, <http://zaidalali.com/2015/08/article-premature-excitement-about-iraqs-new-government-reforms/> accessed 22 September 2016.
[44] See Mansour (n 267) Ch. 5, 16, 23; it has been asserted that one positive sign for future Iraqi reconciliation and the establishment of mutual trust and cooperation across Iraq's communities is that a group of Sunni tribes and Christian fighters have joined the predominantly Shia Hashd al-Shaabi (PMU) to fight ISIS. See Al-Bayan Centre for Planning and Studies (n 43) Ch. 5, 37.
[45] PAX and Impunity Watch, Iraq Alert V: Breaking the Cycle of Division: Justice for all Iraqis, (4 July 2017), 2 <http://www.iraqicivilsociety.org/wp-content/uploads/2017/07/Iraq-Alert-PAX-and-IW-July-2017.pdf> accessed 5 October 2017.
[46] Al-Bayan Centre for Planning and Studies (n 43) 35.
[47] Ibid.
[48] Ibid.

supported by the government and civil society. For instance, after the liberation of Mosul in 2017, a national reconciliatory campaign called 'Hala Bekom' (You Are Welcome) was launched by young activists from different provinces of the middle and south of Iraq, aiming to unite young people from Mosul and Iraq's southern and middle provinces in a spirit of reconciliation.[49] 100 young Sunni men who lived under the occupation of ISIS were hosted by young Shia Iraqis to reflect on their shared heritage and national identity. One campaign coordinator opined that it was necessary to restore the confidence of the young people of Mosul to refute the prevailing notion that other provinces viewed them with suspicion and mistrust because of ISIS's control of their city.[50] In the presence of Mosul residents and tribes who sacrificed their children in the battles to liberate Mosul, these 100 young Sunni people told of their suffering under ISIS. They also expressed their concerns about the poisonous and hateful sectarian thoughts propagated by ISIS against the Shia population, designed to lead them to believe that Shias hate Sunnis and want to take revenge.[51] They expressed their gratitude and condolences to the families who had lost loved ones in the fight to liberate their city from ISIS. The proficiency of the security forces, especially the Counter-Terrorism Service as a model of multi-ethnic and cross-sectarian nationalism, in the liberation of Mosul and the support and cooperation which they received from the population, may have helped the public regain some trust.[52] This also sends a reassuring message to the community that they are now more willing to change their previous sectarian and oppressive behaviour, having learned the hard way about protecting citizens, irrespective of their background. Such gestures of reconciliation show the resilience of Iraqi society and its ability to heal rifts which terrorism, extremism and sectarianism have wrought.[53] Continuing dialogue and humanitarian communication between Sunnis, Shias and other ethnic and religious groups at grass roots level, with the support of the Iraqi government and other institutions, enables them to express and acknowledge sufferings, fears, injustice, humiliation, victimisation, and other grievous experiences in recent years, as well as give reassurance for the future. All this is necessary

[49] See Alhurra, Hala Beekm. Mosul Taste the Generosity of the South, 27 Apr 2017, <https://www.alhurra.com/a/iraq-hala-bykum-mosul-/360031.html> accessed 5 October 2017; see Reconciliation Initiatives on <https://www.youtube.com/watch?v=ggPYla9IRqE> accessed 5 October 2017.
[50] Ibid.
[51] Ibid.
[52] See Michael Knights and Alex Mello, The Best Thing America Built In Iraq: Iraq's Counter-Terrorism Service and the Long War Against Militancy, 19 July 2017 <https://warontherocks.com/2017/07/the-best-thing-america-built-in-iraq-iraqs-counter-terrorism-service-and-the-long-war-against-militancy/> accessed 6 October 2017; Shelly Culbertson and Linda Robinson, Making Victory Count after Defeating ISIS: Stabilizations Challenges in Mosul and Beyond, 2017, RAND Corporation, 59.
[53] See Zaid Al-Ali, Post-ISIL Iraq: Breaking the Cycle of Violence: Failure to Prosecute Perpetrators of Extrajudicial Killings in Iraq could be Dangerous, 21 July 2017, Aljazeera <http://www.aljazeera.com/indepth/opinion/2017/07/post-isil-iraq-breaking-cycle-violence-170720115227375.html> accessed 6 October 2017.

to rebuild trust and create peaceful coexistence.[54] If there is no effective mourning process concerning victimhood and the acceptance of loss, which 'encompasses religious ritual as well as empathetic understanding, traumatized individuals and communities cannot prevent their understandable hurt and anger from developing into revenge and counter-aggression'.[55] In the fragile state of Iraq post-2003, restorative justice[56] has been neglected.[57] To remedy this post-ISIS, promoting restorative justice programming alongside the rule of law will be of vital importance. For instance, by using interethnic/intersectarian working groups which have grown out of various training workshops, restorative justice programmes can be developed.[58] The expression of fear and acceptance of loss by these working groups 'can provide a natural starting point in the identification of specific justice concerns'.[59] Since restorative justice also requires attention to the needs of all parties trying to resolve their differences and identify their obligations, the acknowledgment of these mutual needs and responsibility for wrongdoing can help disparate groups discover common and/or compatible justice concerns, as well as provide the impetus towards corrective measures.[60]

A comprehensive policy which integrates communities through cooperative interaction needs to be built upon the initial successes of forgiveness and reconciliation. Without efforts to integrate communities torn apart by sectarian conflict through dialogue and

[54] Moving towards reconciliation in the context of widespread violence in Iraq requires careful consideration and understanding of many complex factors, such as the nature of past traumas, victimisation, stereotyping, shame-oriented culture, tribal customs, and the values of Islamic religion, in order to break the pattern of revenge, and victimisation and transform relationships. Depending on the interpretation of these factors by the adversarial groups, each can play a positive or negative role in reconciliation, which includes mourning, the confrontation of fears, the identifying of genuine needs, the acknowledgment of responsibility, the necessity of seeking retributive and restorative justice, and the willingness to forgive. For instance, although past traumas make victims fear that what they have endured will happen again, if reconciliation is to occur, people must not be controlled by victimhood. However, it can be observed that in Arab culture there is an unwillingness to confront and acknowledge fears because this would appear to demonstrate weakness and shame. Considering that people in the midst of conflict are 'legitimately afraid of many things: threats to personal safety, social transformation, economic crisis, political manipulation, and so forth. Iraqi Sunnis fear Iranian influence over Shiite political parties running the government as well as attacks by Shiite militias and Iraqi police. Shiites fear loss of long-awaited political power as well as attacks by Sunni insurgents. Kurds fear loss of autonomy and potential independence. All groups fear foreign control, indigenous threats to security, and the loss of dignity and honor'. For further details, see Steele (n 56) Ch. 5, 1-20.

[55] Ibid. 7-8.

[56] Restorative justice as defined by Howard Zehr is 'a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.' Howard Zehr. The Little Book of Restorative Justice (Good Books, 2002) 37.

[57] Although exposure and retributive justice are very important for the maintenance of a stable society, they represent only the negative side of justice. For a positive vision of the right relationships between all elements of society, a fully adequate understanding of these requires consideration of the norms and values on which they are founded. In the case of Iraq, 'development of these norms involves creative interaction between ancient tribal customs, Islamic understandings of law, and Western democratic ideals. The understanding of justice in Iraqi society is influenced by the shame-oriented culture of the society's tribal roots. In such cultures, the moral code is built around respect for, and duty toward, others rather than compliance with abstract laws. Mutual obligations become far more important than individual rights. Greater emphasis is placed on conformity to one's primary group than on punishment. In Iraq today, however, the infractions both within and between tribes and religious communities are extremely serious, thus significantly escalating the punitive response and turning what, in more stable times, might have been an emphasis on restorative justice into a very intractable version of retributive justice, one that relies on the law of vendetta rather than law based on inalienable rights. At the same time, the fundamentally communal understanding of justice, especially if it were infused with a broad conception of hospitality, might provide a basis for reconstructing an Iraqi adaptation of restorative justice'. Steele (n 56) Ch. 5, 11-12.

[58] Ibid. 12.

[59] Ibid.

[60] Ibid.

positive contact, as in Northern Ireland, negative perceptions and stereotypes cannot be sufficiently dispelled when inter-community relations remain 'superficially courteous'. This is because, even though they are in close contact, they remain isolated. In such an environment, feelings of suspicion and animosity fester and are often expressed in 'forms of low-intensity sectarian violence such as vandalism, fighting and property damage'.[61] Education from an early age and positive contact are considered the most effective ways to ensure the achievement of integration and positive cross-communal perceptions.[62] Iraqi society may be able to rebuild trust and cooperation across its communities if policies are fine-tuned to its specific circumstances and applied to the national education curriculum, with the support of community leaders taking part in less formal and more grass roots-oriented programmes. To provide a strong foundation for the future, such programmes are vital for social cohesion throughout Iraq, not merely in cities with mixed populations.[63]

The international community can also play a positive role in promoting reconciliation initiatives at local and national levels in Iraq, especially in mixed areas divided by ethnic, sectarian and religious conflict.[64] For instance, to facilitate reconciliation and social cohesion, the UNDP has established a three part nationwide programme as follows: 'a national mass media campaign to educate the public on the benefits and urgency of reconciliation; the provision of funding to civil society groups to organise local community gatherings to discuss local divisions and how to overcome them; and a national memory project designed to collect accounts of atrocities and abuses'.[65] A future transitional justice effort could also be served by these and might become part of a national reconciliation agreement. For instance, the South African passage from apartheid to full democracy has benefited from these instruments.[66]

However, in a society like Iraq, one can assume that society can only move forward and adequately begin the process of reconciliation necessary to the construction of a peaceful

[61] Aiken (n 30) 76-77; Al-Bayan Centre for Planning and Studies (n 43) Ch. 5, 36.
[62] Al-Bayan Centre for Planning and Studies (n 43) Ch. 5.
[63] Ibid.
[64] Reconciliation efforts have been initiated by the United States. One of the most notable successes was the brokered reconciliation between Shia and Sunni residents in Tikrit in Salah al-Din Province, where up to 1,700 Shia air force cadets were massacred by ISIS fighters. This reconciliation has been attributed to the work of the US Institute of Peace (USIP) and local NGO Sana. Coordinating their work with the UN and the Iraqi government, the USIP had teams of local Iraqis, experienced in conflict resolution and who had worked in other hot spots. In addition, the new programmes addressing the trauma suffered by Iraqis were also considered by the US embassy, since the extreme brutality they had suffered was considered to be a major impediment to security and stability at community level. For further details, see Culbertson and Robinson (n 52) 60-63.
[65] Ibid. 61.
[66] Ibid.

and stable post-conflict society if past and present atrocities are openly acknowledged and addressed. Ensuring accountability, justice, truth-seeking and redress for victims is also an important part of future successful transitional justice and reconciliation initiatives in Iraq. To this end, it has been suggested that the transitional justice process in Iraq needs to have 'clear goals, proper planning, sufficient means, the support of strong and unbiased authorities, and a scrupulous assessment of the situation on the ground of the crimes allegedly committed and of victims' needs'.[67] Consulting the population, particularly those involved in and affected by the recent violence, about their needs, fears and goals, and by collecting and evaluating their opinions and involving them in the whole process of transitional justice, is the first step in giving victims and affected communities the opportunity to be heard; this will provide the process with greater legitimacy in achieving its aims.[68] It is crucial that, in order to formulate legitimate and meaningful strategies for transitional justice, local attitudes and social reconstruction need to be carefully considered.[69] Properly managed, these strategies would be very likely to help to avoid division and future resentment; also, any dissatisfaction or distrust which may arise among the population because of the previous failed transitional justice processes, as noted earlier in the case of Iraq, needs to be recognised and acknowledged.[70] The failure of the transitional justice process post-2003 highlights the need to avoid its divisive approach and positively adopt the above strategies in any new process of transitional justice post-ISIS, to follow what Iraqis want and expect. This would also provide a sound foundation on which to build Iraq as a united state following years of division and conflict.[71]

In order to realistically pursue the objectives of transitional justice, a combination of judicial and non-judicial mechanisms need to be considered by the Iraqi government.[72] Judicially, the investigation and prosecution of violations of HR and humanitarian law should be included, as a large section of the population may be calling for amnesties. In

[67] The Institute for International Law and Human Rights et al., Crossroads: The Future of Iraq's Minorities after ISIS, (2017) 27.
[68] Ibid.; Zamile and Saleh (n 33) 241.
[69] The Institute for International Law and Human Rights et al. (n 67) 28; International Centre for Transitional Justice (ICTJ) and the Human Rights Centre of the University of Berkeley, Iraqi Voices: Attitudes Toward Transitional Justice and Social Reconstruction (n 19) Ch. 5, 7.
[70] By looking at recent examples of national consultation linked to transitional justice, the Truth and Reconciliation Commission was established in Nepal after the civil war (1996 to 2006); the ongoing peace process between the Colombian government and the armed opposition Revolutionary Armed Forces of Colombia; the transitional justice in Sri Lanka undertaken by the new government after the general election of 2015, they could provide some useful elements about the challenges of such a process. Building on these examples, both positive and negative, a process of transitional justice 'is likely to yield more concrete results and engender more public support if it is preceded by broad consultations with affected communities'. See the Institute for International Law and Human Rights et al. (n 67) 28.
[71] Ibid. 29.
[72] Ibid. 30; Dylan O'Driscoll and Dave van Zoonen, The Hashd Al-Shaabi and Iraq: Subnationalism and the State, (2017) Middle East Research Institute, 35; Zamile and Saleh (n 33) 242-243; Saleh (n 32) 157-167.

this way, steps could be taken towards ensuring that Iraq's legal obligations are met while also meeting the needs of the people.[73] This is important as the rule of law and the accountability of violators and justice may be undermined if soft and overly optimistic solutions are adopted.[74] It has been noticed that international and national discussion about accountability in Iraq has mainly focused on ISIS crimes, neglecting abuses and crimes by other perpetrators.[75] This neglect has been attributed to a lack of political will by the Iraq government.[76] Considering Iraq's recent dealings with the legacy of the Ba'athist regime, it is apparent that selective or victors' justice is divisive, and counters efforts to bring peace and reconciliation, which could lead to further conflict.[77] It has been suggested that any inclusive transitional justice needs to address all or most serious crimes, abuses and distrust, irrespective of the background of the perpetrators and victims. It should prioritise victims' and affected communities' participation in the shaping of policy and their voices should be heard,[78] thus upholding the rights of victims to be included in truth-seeking, reparations, guarantees of non-repetition and other measures.[79]

However, Iraqi and international strategies in focusing on reconciliation as part of stabilisation have so far neglected other aspects of justice.[80] It seems that between

[73] The Institute for International Law and Human Rights et al. (n 67) 29.

[74] It has been suggested that 'Iraqis should be asked whether they trust their own judicial system enough to carry out impartial investigations and prosecutions of the most serious crimes. The need to survey the opinions of the Iraqi people is paramount, especially since any effort towards transitional justice should avoid imposing 'special' tribunals without first assessing their perceived legitimacy among the population. The opinions of Iraqi jurists and judges, regardless of their affiliation or their belonging to a particular community, should be surveyed to avoid past mistakes and contribute towards the legitimacy of future criminal proceedings'. Ibid.

[75] PAX and Impunity Watch (n 45) 1-3; it has been noted that 'there is disagreement over the scope of what crimes should be addressed: Some states argue that only ISIS crimes should be prosecuted; legal experts respond by noting that choosing one group as perpetrators is problematic and in many respects not in conformity with international humanitarian and criminal law'. See the Institute for International Law and Human Rights et al. (n 67).

[76] PAX and Impunity Watch (n 45). To date, the prosecution and accountability initiatives in Iraq indicate the unwillingness of the Iraqi government to request assistance from the international community. 'International support is further complicated by Iraqi enforcement of the death penalty and a reluctance to allow all sides of the conflict to be prosecuted, including for violations or crimes allegedly committed by government or pro-government forces. There is no real legislative framework to domestically prosecute violations of international humanitarian and criminal law'. The Institute for International Law and Human Rights et al. (n 67) 29.

[77] See PAX and Impunity Watch (n 45) 1; The Institute for International Law and Human Rights et al. (n 67) 28; O'Driscoll and van Zoonen (n 72) 35.

[78] PAX and Impunity Watch (n 45) 1-4.

[79] Ibid. It has also been suggested that 'as Iraq seeks to close the chapter on nearly four years of destructive conflict with ISIS, it is vital that measures be put in place to help individuals and, by extension, Iraqi society as a whole, to recover from the atrocities that have taken place. While this transition will require a range of concurrent interventions, reparations should be a central part of the equation. Not only do reparations have intrinsic moral value, but they are enshrined in international legal obligations to which Iraq is party'. In addition, 'in order to be effective, any post-conflict reparations scheme in Iraq needs to cover violations by all parties to the conflict. Otherwise, the process could be seen as one-sided and could risk inflaming tensions and perpetuating divisions. This issue is particularly challenging given the multiple and diverse armed actors that have participated in violations during the most recent phase of conflict. These include ISIS and other armed opposition groups, the Iraqi Security Forces, the Peshmerga, militias operating under the banner of the PMF, members of the US-led coalition and other foreign states […] It is important to note that, in order to deliver the maximum benefits to victims, reparations should not be implemented in isolation from other transitional justice measures. Reparations would be less effective if provided to victims without recognition of responsibility, full investigation of the violations suffered and disclosure of the truth about what happened. Properly conceived, reparations can also enhance other policy interventions, such as humanitarian assistance and development projects, which are particularly important in contexts of poverty and deprivation to ensure that victims can take full advantage of reparations. Therefore, creating dialogue between relevant stakeholders responsible for such interventions is crucial in Iraq to ensure that points of potential cooperation and synergy are soon identified. With careful planning, a jointly implemented, comprehensive transitional justice and reconstruction process would enable the recognition of victims, build trust in state institutions, and foster reconciliation and democratization'. Sandoval and Puttick (n 475) Ch. 5, 23, 27.

[80] Reconciliation initiatives at national and local levels, with the support of international and regional actors, have fallen short of including the voices of victims and affected local communities in their deliberation. For further details, see PAX and Impunity Watch (n 45) 2.

stabilisation and justice initiatives there is little coordination or dialogue, and that reconciliation programmes do not include measures which address the rights of victims. It is understandable that there is reluctance to include justice measures in reconciliation plans due to the post-2003 justice policies, which were perceived by many Iraqi citizens as victors' justice, creating winners and losers.[81] Nevertheless, where massive crimes are not properly addressed and access by victims to adequate remedies or redress is neglected, it is argued that no reconciliation is possible in Iraq.[82] In addition, a narrow approach of only investigating or prosecuting crimes has been adopted, often only addressing the abuses of one party to the conflict, namely ISIS.[83] For instance, the Iraqi authorities are currently assembling evidence about the crimes committed by ISIS, and a recent justice initiative by Iraq's Supreme Judicial Council declared that a 'special judicial body to investigate the terrorist crimes committed against Yezidis' will be established.[84] Also, in addition to documentation and truth-seeking, some civil society actors have sought accountability for the crimes of ISIS against various minority groups.[85] Although these seem to be positive signs of progress in the right direction, it is crucial to learn from the

[81] PAX and Impunity Watch (n 45) 4; O'Driscoll and van Zoonen (n 72) 35-36.
[82] PAX and Impunity Watch (n 45).
[83] Ibid. In addition, the UN Security Council resolution 2379 issued in September 2017 asked the Secretary General to establish an independent investigative team to support domestic prosecution of ISIS crimes in Iraq. However, 'the resolution's most obvious flaw is that it is limited in mandate to acts committed by ISIS, despite the fact that other parties to the conflict, including Iraqi and Kurdish forces, government-allied militias, and the US-led coalition, are all responsible for their fair share of violations. Moreover, while the emphasis on criminal accountability is justifiable given the severity of violations committed, it is questionable whether it is enough to prompt the type of reconciliation and healing desperately needed in Iraq'. See Miriam Puttick, The Illusion of Justice: When Will Reparations be Served to Iraq's Victims? 9 Nov. 2017, <http://www.ipsnews.net/2017/11/illusion-justice-will-reparations-served-iraqs-victims/> accessed 28 November 2017. It has also pointed out that the resolution 'misses an historical opportunity for comprehensive justice, where all possible international crimes would be impartially assessed, setting a strong foundation for restorative justice. Given the crucial need to build trust among all ethnic and religious groups in Iraq, any accountability effort must necessarily address the grievances of all groups affected by human rights violations and atrocity crimes'. see UNHR, Office of High Commission, End of visit statement of the Special Rapporteur on extrajudicial, summary or arbitrary executions on her visit to Iraq, 24 November 2017, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22452&LangID=E> accessed 29 November 2017.
[84] Rudo, Yezidis Cautiously welcome Iraq Court Tasked with Prosecuting ISIS, 12 June 2017 <http://www.rudaw.net/english/middleeast/iraq/12062017> accessed 10 October; the KRG of Iraq has also established in September 2014 a High Committee for the Identification of Genocide Crimes, which include a Commission of Investigation and Gathering Evidence. 'The Commission, headed by an investigative Judge, has documented a multitude of ISIL crimes committed against all religious minorities, including mass-killings, disappearances, rape and enslavement, the use of child soldiers, forced displacement, etc. They have done so by interviewing dozens of survivors, victims and witnesses; excavating mass graves; exhuming bodies; undertaking sound forensic work, etc. From this they have been able to identify a range of perpetrators'. See UNHR, Office of High Commission, End of Visit statement. (n 83).
[85] PAX and Impunity Watch (n 45) 3. With regard to the provision of justice to the victims of the last three years conflict, two intersecting yet distinct mechanisms and processes have been highlighted: 'the formal investigations into individual responsibilities and the trials of perpetrators (criminal justice approach), and the documentation of all crimes committed, including those amounting to crimes against humanity and genocide (also referred to as a Truth Commission approach). Both should be predicated on the active and safe participation of witnesses and victims, their recognition, and acknowledgement of the harm and suffering that they have endured. With regard to the former objective, no doubt investigation and prosecution of the multiple and large-scale violations of the last three years is a complex task. However, if these challenges are not met and accountability is limited to the crimes of ISIS and CT [Anti-Terrorism Law] trials, or is not ensured at all, this will result in widespread impunity. The consequences for Iraq's future peace and stability will have serious adverse repercussions indeed. As highlighted by experiences with post-conflict transitional justice, 'if formal institutional mechanisms are not able to deliver results at the scale cases call for, other forms of intervention can provide recognition to victims and promote social integration.' An option will be to initiate a proactive documentation of violations, based on the safe participation of victims. The government, with the support of international actors and civil society, could take steps to establish a documentation/ truth-seeking process to collect testimonies and evidence. This process may or may not include the preparation of case files so that formal investigations could proceed at a later date, and formal accountability delivered'. See UNHR, Office of High Commission, End of Visit statement (n 83).

mistakes of recent justice initiatives, such as the case of the Camp Speicher massacre. The trial for this crime of 36 alleged ISIS perpetrators sentenced to execution not only fell short of the international standards for a fair trial, but also failed to give the families of the victims adequate space or the information necessary to participate meaningfully in the proceedings and, thus, they did not receive an effective remedy and vindication.[86] Most of these justice-related initiatives lacked the necessary communication strategies, as they have paid little attention to the participation or even the consultation of victims, affected communities and local civil society; instead, they seem to employ standardised solutions which do not properly address local situations.[87]

To move forward and avoid reinforcing the growing divisions within Iraqi society, past mistakes of transitional justice need to be avoided when creating a possible new transitional justice process.[88] Accordingly, this process must not be perceived to be selective, and must address the history of HR abuses from both past and current conflict. The needs of victims in terms of their rights and participation in the process of achieving justice must also be addressed in order for wounds to heal. Finally, transitional justice must also be 'Iraqi-made, led and driven.'[89]

Based on this, transitional justice needs to consider how the processes of reconciliation can be used to complement retributive justice rather than undermine it.[90] Non-judicial mechanisms, such as truth commissions, if employed alongside judicial ones, may make

[86] PAX and Impunity Watch (n 45) 3, 5. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Agnes Callamard, has recently urged the government of Iraq to ensure that 'the military defeat of ISIL [or ISIS] translates into a victory for accountability and an end to impunity'. She further states that 'as military threats from ISIL recede, the country has now entered a transitional phase which is both complex and fragile, presenting the opportunity to break with the past [...] There is a risk that old tensions arise where these have not been mended, and that grievances that were set aside for the duration of the conflict may return'. While she welcomes the government's commitment to ensure that the possible crimes against humanity be investigated in order to bring justice for victims, she pointed out that 'hasty judgment and execution of ISIL members for acts of 'terrorism' is a disservice to the country' […] 'The people of Iraq, the victims and survivors of the conflict, deserve a legal framework and a judicial response that properly reflect the nature of the crimes committed, which are on a par with atrocity crimes investigated and tried in other parts of the world. Such a role cannot be performed by a counter-terrorism law' […] 'A new Iraq requires the confidence of all communities. That will be achieved only if all allegations, [including illegal deprivations of life] are thoroughly investigated, victims' voices are heard and perpetrators are promptly brought to justice. It also demands prompt reparations and remedies for the victims'. See UN Iraq, Iraq: Full justice for all sides is key to lasting peace, says UN expert after official visit, 27 November 2017,< http://www.uniraq.com/index.php?option=com_k2&view=item&id=7753:iraq-full-justice-for-all-sides-is-key-to-lasting-peace,-says-un-expert-after-official-visit&Itemid=605&lang=en > accessed 29 November 2017.

[87] In Iraq, needs and fears vary from area to area, and for groups of victims and affected communities, distinctive solutions are required which go beyond prosecution. For instance, 'while removing some perpetrators from areas where violations have been committed through convictions and imprisonment, criminal prosecutions alone cannot create the necessary conditions to ensure safe return for those displaced by the conflict'. See the Institute for International Law and Human Rights (IILHR) et al. (n 67) 27, 29; in addition, 'the prominence of prosecutions in initiatives aimed at dealing with crimes committed against Yezidis risks repeating the mistake of the past by neglecting to integrate the broader needs of victims and affected communities [such as] […] the excavation of mass graves on Mount Sinjar and identification of human remains […] or policies to deal with sexual and gender-based violence and abuse'. PAX and Impunity Watch (n 45) 5.

[88] PAX and Impunity Watch (n 45) 6.

[89] Ibid.

[90] IILHR et al. (n 587) 30; transitional justice post-ISIS Iraq is a recent example of the ongoing series literature debates as to which institutional strategies might best achieve the goals of justice and reconciliation in transitional societies, specifically the truth versus justice and peace versus justice debates. See Aiken (n 30) 23-26; Fischer (29) 409-410; Hollywood (n 16) Ch. 5, 67-75.

a significant contribution to the process of achieving accountability, as in South Africa.[91] Crimes can be uncovered by a truth commission working with a domestic court or international convenors, and provide the necessary transition from a chaotic, post-conflict situation, with, after consultation, possible helpful legal mechanisms.[92] For serious crimes, evidence can be collected and filtered by the commission and then referred to a higher court. The lack of a prior agreement or willingness of each body to cooperate, as in Sierra Leone, makes the path of accountability more difficult to follow.[93] In its filtering or investigative role, the truth commission must have robust standards for dealing with evidence, including witness testimonies and forensic evidence, to guarantee that later court cases are not prejudiced by poor procedures.[94]

Truth commissions as a primary example of non-judicial restorative mechanisms could perhaps contribute to the rebuilding of society, even though there is no consensus about their long-term political and social implications, whether positive or negative.[95] Their impact may be in promoting reconciliation and counteracting cultures of denial by providing acknowledgement of suffering and contributing to healing.[96] When truth is revealed by public and official authorities, redress for victims, individual and social healing and reconciliation may be achieved.[97] Truth-seeking and truth-telling mechanisms are especially needed in divided communities after conflicts between ethnic and religious groups, as in the case of Iraq; this is because these communities, although living next to each other, continue to maintain their distinct identities, encouraged by extremists 'eager to tie responsibility for past crimes and HR violations to their ethnic or religious adversaries'.[98] A truth commission is considered to be a means of counteracting this by seeking to 'engage and confront all of society in a painful national dialogue, with serious soul-searching, and an attempt to look at the ills within society that make abuses possible'.[99] The potential usefulness of a truth commission can go beyond this by

[91] IILHR et al. (n 67); No Peace Without Justice (NPWJ), Closing the Gap: The Role of Non-Judicial Mechanisms in Addressing Impunity (NPWJ, 2010); it has also asserted that an effective way to complement judicial mechanisms which address other post-conflict justice needs, including truth, reparation and reconciliation, is to consider the path of bringing victims and offenders together on a voluntary basis through truth commissions. In addition, 'local, informal tribal solutions may contribute to striking a balance between justice and reconciliation by offering an acceptable mechanism through which to process large numbers of alleged perpetrators', such as Gacaca Tribunals in Rwanda. See O'Driscoll and van Zoonen (n 72) 36.
[92] IILHR et al. (n 67).
[93] Ibid.; No Peace Without Justice (NPWJ) (n 91) 158-161.
[94] IILHR et al. (n 67).
[95] Ibid; see also Eric Brahm, 'Uncovering the truth: Examining Truth Commission Success and Impact', (2007) 8 *International Studies Perspectives* 16, 17-19.
[96] Fischer (n 29) 410.
[97] Ibid.
[98] Ibid.
[99] See Neil J. Kritz, Policy Implications of Empirical Research on Transitional Justice, in Hugo van der Merwe, Victoria Baxter and Audrey R. Chapman (eds.), *Assessing the Impact of Transitional Justice. Challenges for Empirical Research* (Washington DC: USIP, 2009) 18.

deterring the condemnation of perpetrators, promoting democracy by strengthening the rule of law, and showing a commitment to HR.[100]

A suitable arena for the management and potential resolution of conflicts, investigation of past crimes, and organisation and mobilisation of resources for the reconstruction of Iraq may be provided by a truth commission. It may be a desirable outcome of any preliminary consultation that such a commission is established to address local concerns, and be embraced by the Iraqi people themselves.[101] The use of trials and truth commission hearings could improve national unity by allowing victims and perpetrators the space to create 'a shared national historical narrative'.[102] Relations between communities may also be improved by revealing the suffering which has occurred, and understanding how atrocities came to be committed, which in turn can help to prevent repetition. They can further be used to inform new legislation 'within the framework of national reconciliation. Here one can think of anti-corruption measures'.[103]

However, despite these potential advantages, truth commissions are not a cure-all, as some commissions established in post-conflict nations have not learned the lessons of previous commissions.[104] A partnership with a vibrant civil society is one such important lesson,[105] as is the notion that '[T]o be as effective as the [South African] TRC, truth commissions must be independent, well-resourced and endowed with subpoena power; must hold public hearings when necessary; and must be able to name the accused publicly'.[106] It is crucial, therefore, that in Iraq the establishment of a truth commission is considered alongside the already existing National Reconciliation Committee (NRC), and there should be a comprehensive understanding of what their aims are and how they can meet the criteria mentioned above. For these bodies to make progress, their independence and impartiality must be ensured. They need to be well-funded and in a secure

[100] IILHR et al. (n 67) 30.
[101] Ibid.
[102] See O'Driscoll and van Zoonen (n 72) 36.
[103] Ibid.
[104] The Truth and Reconciliation Commission established by the Sun City Accord for the Democratic Republic of the Congo is an example of this. Its mandate is to 'consider political, economic, and social crimes committed from 1960 until 2003 in order to establish truth and help bring individuals and communities to reconciliation.' The Commission, by most accounts, was improperly established, proven entirely ineffective, and lacks legitimacy. See Hollywood (n 16) Ch. 5, 72-75.
[105] The Swiss Peace Foundation, in a government report entitled Dealing with the Past Foundation, explains that 'without the active participation of civil society and without the resultant sense of public ownership of and investment in the process, a truth commission could produce a technically accurate history of the conflict and abuses, but the report might be relegated to an academic shelf […] As a consequence, a nation in which the institutions and organizations of civil society have been wholly decimated by civil war or by a long period of harsh repression will not, in general, be an appropriate candidate for a truth commission'. Ibid. 73. It is also claimed that a top-down approach may be appropriate if a state does not meet such criteria in order to lead the efforts of reconciliation. Kritz (n 99) 18; however, apart from a strong civil society, it has become clear in the light of enormous shortcomings facing truth commissions revealed by research that 'there is a need for reliable alliance partners in parliaments, governments and administrations who are willing to engage in institutional reforms and establish the rule of law'. Fischer (n 29).
[106] Hollywood (n 16) Ch. 5, 73.

environment without fear or intimidation. Political parties, governmental bodies and other segments of society must be willing to cooperate and facilitate their work. In order to gain trust and have legitimacy for Iraqis, their proper composition, and interaction with affected communities needs to be fully ensured.[107] In addition, it is argued that they need to be focused not only on individual hearings, but also on institutional matters in order to call to account those institutions directly or indirectly responsible for the fragility of the Iraqi state and for serious HR violations.

Given the political challenges, high ethno-sectarian divisions, mistrust, the sensitivity of the issues, especially any allegations of the involvement of political parties, government officials and bodies and pro-government militia, directly or indirectly, in the committing of violence in Iraq with impunity, the task of the NRC and any proposed truth commission can be expected to face tremendous difficulties. Nevertheless, their task may be helped should various ethno-sectarian communities be willing to reconcile the past, to live peacefully and resolve differences through dialogue not violence. In addition, it needs to be carefully considered whether the offer of limited and conditional amnesty by amending, for instance, Amnesty Law, No. 27 of 2016, with the agreement of the affected communities, would be in the interest of reconciliation and truth recovery. Their task may, also, be to receive the support of protest and civil society movements. It is encouraging that one study finds that investment in recent citizen-oriented governance in Iraq, such as civil society programmes, has begun to have a positive impact by providing an opportunity for civil society to improve governance and advance reconciliation.[108] Civil society is, in gradually gaining the trust of Iraqis, becoming a growing arena for citizen action, and for their voices to be heard.[109] Citizens' anger over poor public service delivery, as evidenced in frequent demonstrations since 2015, has channelled peaceful pressure through civil society actors towards tackling corruption and government abuses.[110] These persistent peaceful demonstrations are important in strengthening Prime Minister Abadi in the pursuance of his reform agenda and reconciliation. This study further recommends that encouraging dialogue between government and citizens will improve transparency, accountability and legitimacy, and long-term support for Iraqi civil society needs to be given.[111] Where the NRC and any proposed truth commission are

[107] In December 2016, Prime Minister Al-Abadi decreed the establishment of a directorate to address minority issues within the National Reconciliation Committee. IILHR et al. (n 67) 34.
[108] For further details, see Proctor and Tesfaye (n 26) 1-7.
[109] Ibid.
[110] Ibid. 19.
[111] Ibid. 1.

supported by government and all affected communities and civil society, they will be useful for addressing past violence and restoring trust and hope in new respectful shared norms of reciprocal relationships of accountability. This may be a key to the re-establishment of stability, security and a peaceful, stable and healthy civil society in Iraq. In turn, implementation of the positive obligations discussed in this thesis would be likely to become a more realistic prospect in future, a point pursued below.

6.2.2 Towards Gradual and Future Institutional Reforms

While the numerous unresolved ills within the state since 2003 require challenging and long-term institutional reforms, these are essential for any future successful reconciliation and transition. These reforms must ensure that widespread violations of HR, especially the right to life, will not be repeated, and that the state and its criminal justice system will gradually be able to restore the collective sense of social protection. This can be done by fulfilling their positive obligations with due diligence, to meet the legitimate expectations of Iraq's citizens as rights holders, in addition to rebuilding trust between citizens and their public institutions. However, as noted, one of the main concerns with the Iraqi Constitution of 2005 is that it contains flaws and ethno-sectarian discourse which has helped reinforce political strife and differences within Iraqi society,[112] and damaged the peaceful secular norms which marked the early period of Iraq.[113] With recent positive developments and reconciliation initiatives, there is an opportunity to provide stability, unify the country, and improve legitimacy by strengthening state-society relations,

[112] The relationship between the scope of Islamic religious provisions and a democratic political system embodying equal individual HR and the rule of law is a serious concern; Article 2, Section 1 of the Iraqi Constitution states that 'Islam is the official religion of the State and is a foundation source of legislation' and that '[n]o law may be enacted that contradicts the established provisions of Islam'. 'While Iraq is not unique in its incorporation of some form of Islamic law [a law that is either embodied in or derived from Islam's foundational legal sources] into its legal system, the precise scope and effect of this restriction on legislation in Iraq remains […] unclear', long after the adoption of the Iraqi Constitution of 2005. Many articles in the Iraqi Constitution, including Article 2, Section 2, 14, 41 and 43 recognise the rights of Iraqis, especially minority groups, to freedom of religious belief; their equality 'before the law, without discrimination based on religion'; freedom of their 'personal status according to their religions, sects, beliefs, or choices' and freedom to practise them. However, the requirement that provisions of Islamic law should be established 'makes the protection of the rights of religious minorities [under these Articles] even more difficult' to protect. For further details about the problematic nature of the principles embodied in the Iraqi Constitution, see David Pimentel and Brian Anderson, 'Judicial Independence in Post Conflict Iraq: Establishing the Rule of Law in an Islamic Constitutional Democracy' (2013) 46 *The George Washington International Law Review* 29, 34-39; the positive aspects in the Constitution regarding the respect and protection of liberties and HR of Iraqi citizens (Articles 14-46) have potentially been rendered meaningless because, in reality, with the domination of religious parties, institutions and personalities on the Iraqi scene since 2003, any of these liberties and HR could be undermined if religious institutions and figures claim that it contradicts Islamic beliefs. See Jawad (n 27) Ch. 5, 15-16; Al-Bayan Center for Planning and Studies (n 43) Ch. 5, 25; because of this domination, there is a seemingly deliberate decision on the part of the Constitution's drafters to keep international legal obligations binding Iraq through conventions or customs to what appears a limited role in domestic courts and, thus, the demand to entrust the judiciary with a fair amount of independence and legitimacy and, thereby, to the possibility that these international obligations become a part of a domestic judicial process has ended with so unwilling a reaction. See Hamoudi (n 472) Ch. 5, 121.

[113] Although Iraq, since its foundation in 1921, has adopted secularist norms, intellectual and political plurality, peaceful co-existence of various ethnic groups and religions, it has experienced a striking increase in the role of religion in its politics. See Safwan Al-Amin, 'The Future of Secularism in Iraq' (2016) *Atlantic Council* <http://www.atlanticcouncil.org/blogs/menasource/the-future-of-secularism-in-iraq> accessed 17 November 2016; Khaled Sheykholeslami and Asad Khezri, 'Failuring of Secular Nationalism in Iraq and Rising of Radical Islamism' (2015) 9 *Bulletin of the Georgian National Academy of Science* 280, 280-283.

motivated by the idea of citizenship rights.[114] This can help re-establish clear norms of state secularity to rebuild a healthy civil society based solely on citizenship which values, respects and reassures all secondary social affiliations. It must also be remembered that some recent severe violations, especially against minority communities, are attributed to hostility towards their identities and the escalation of political violence, extremism, ethno-sectarian tension, and armed conflict. This has led many to flee Iraq, and it is clear that these refugees' major concern is to ensure that these violations are not repeated in future.[115] They require immediate protection and long-term legislative guarantees, constitutional reforms and policy efforts to reassure them of their valued and equal place in Iraq.[116]

In this context, Iraq's flawed social contract in the current Constitution of 2005 needs to be reformed by introducing 'a respected, coherent, and representative document' to unite Iraqis behind their political and legal institutions.[117] In this way, it can repair the damage to the moral relations and shared norms of living peaceably, and enshrine citizens' right to be free from fear and physical violence by explicitly de-legitimising violent actions. It also emphasises that the key rationale for the existence of the state is to provide protection and procedural and substantive remedies should it fail in this responsibility. Although the fight to gradually reform the constitution unlikely to cure all Iraq's troubles or be straightforward, 'without it, the state lacks legal foundations and sovereignty, and changes to the country's political structures will be fraught'.[118] Therefore, a type of legitimacy will be granted to the constitution when its amendment ensures both the involvement of all or most sections of Iraqi society and the major political entities' consensus and support. It will also highlight a tangible point of change towards national

[114] See Bapir (n 54) Ch. 5, 117, 118-124; O'Driscoll and van Zoonen (n 72) 8.
[115] It has been noted that 'while there is no official data on the numerical size of minority communities that remain in Iraq, early 2017 figures indicate that 100,000 Yezidis have already left the country, with a further estimated 100-200 people continuing to leave each day. Iraq's Christian community, numbering 1.4 million people in 2003, has declined to no more than 300,000'. See IILHR et al. (n 67) 26, 32.
[116] Ibid. 33.
[117] Mina Al-Oraibi, A Decade of Flawed Governance: Iraq's Troubled Constitution Hinders Its Sovereignty, (15 October 2015) Yale Journal of International Affairs <http://yalejournal.org/op-ed_post/a-decade-of-flawed-governance-iraqs-troubled-constitution-hinders-its-sovereignty/> accessed 9 November 2017; to 'reconcile and satisfy, as much as possible, the divergent aspirations and diverse identities of Iraqis', most, if not all, sections of Iraqi society need to agree a social contract to address the fragility of the state. The proposed Iraqi social contract needs to create an environment in which 'the state's monopoly on the legitimate use of force throughout its territory' is recognised by all the different sections of Iraqi society and is committed to respect and promote the interests of all, especially with regard to security and justice. It should also include: 'development of the rule of law and parliamentary institutions, which guarantee constitutional promises, particularly with respect to the HR provisions contained in the constitution; and [also] an appropriate framework for subordinating the military and militias to civilian control and authority and the establishment of institutions to entrench accountability'. See Bouillon (n 14) Ch. 1, 290-293.
[118] Al-Oraibi (n 117); the political practice in Iraq over the past years has not been based on any constitutional or legal framework, so it has not become an agreed norm. Therefore, the Iraqi political actors, especially in the context of national reconciliation, must find a formula for a democratic consensus. See Yahya Al Kubaisi, There is no Alternative for the Real Consensual democracy in Iraq, (20 Jan 2017) <http://www.alquds.co.uk/?p=661710> accessed 10 November 2017.

unity, consensus, and reconciliation in which the narrow sectarian or party interests of the politicians can be set aside.[119] In particular, many Iraqi academics and researchers believe that a secular constitution will unite sects, ethnic groups and races, if religion is separated from the state and the state becomes the sole guarantor of the rights of citizens.[120] This could provide a solution to outstanding problems, address the needs of a fragmented society, and make all citizens equal before the law regardless of their affiliations. It will, also, prevent the state abuse of religion for political purposes and resolve sectarian strife when its general legislation is independent of all sectarian blocs.[121] Although the exact meaning of secularism is controversial among thinkers and researchers, its main feature is to ensure the separation of religion from politics because it maintains that the state and all institutions function better without religious interference.[122] This does not mean, as some religious leaders claim, that secularism in Iraq is hostile, disrespectful or in denial of the role of religion. On the contrary, it respects religion and protects it from being exploited for selfish interests.[123] Some influential religious clerics have controversially declared that secularism is a western philosophy incompatible with the conservative principles of the majority of Iraq's Muslim society[124] and, thus, some Iraqis have been

[119] An example of constitutional negotiation processes is provided by South Africa's experience. Following the conflict in South Africa, the political elite took ten years to negotiate, write, and implement a new constitution. In the light of this, the Iraqi government must give all parties adequate time and opportunity to agree the details and avoid the mistakes of the 2005 constitution. Moreover, 'grassroots support for national unity and against ethno-sectarian politics [is required] to encourage politicians to keep negotiating and avoid brinkmanship'. See Al-Bayan Center for Planning and Studies (n 43) 42-43. However, some clauses of the current constitution have been interpreted by the IFSC to promote national unity, prevent the escalation of a new conflict, and curb narrow political ambitions. For example, its decision on the 2017 Kurdish independence referendum (based on Articles 1 and 109 of the Iraqi Constitution) voided the results. See the Iraqi Federal Supreme Court, Cases Nos 89, 91-93/federal/2017 on 20 Nov 2017 <https://www.iraqfsc.iq/krarat/1/2017/89_fed_2017.pdf> accessed 2 March 2018; see UN Assistance Mission for Iraq, Statement on the Federal Supreme Court Decision concerning Kurdistan Referendum [EN/AR/KU], 21 Nov 2017 <https://reliefweb.int/report/iraq/statement-federal-supreme-court-decision-concerning-kurdistan-referendum-enarku> accessed 3 March 2018.

[120] See, for instance, Sana Kazem Kata, 'The Future of Secularism in Iraq' (2008) 4 *WU Journal of College of Education* 241, 243; Al-Ali (n 5) Ch. 1, 244-246; Al-Qarawee (n 28) Ch. 5, 1-3; Abdel-Qader Abu Issa, 'Secularism and the Separation of Religion from Politics is an Urgent Need for the Iraqi Society' (15 June 2015) <https://www.kitabat.com/ar/page/15/06/2015/53288/> accessed 17 November 2016. In the opinion of an Iraqi judge, one of the worst issues with the constitution is that it has entrenched the rule of religion in the administration of the state. Othman Al-Mukhtar, 12 years on the Writing of the Iraqi Constitution: Who Drafted it Overturned Against It, 16 October 2017 <https://www.alaraby.co.uk/politics/2017/10/15/12-عاما-على-كتابة-الدستور-العراقي-من-صاغه-انقلب-عليه> accessed 6 November 2017.

[121] Kata (n 120) 244.

[122] Ibid. According to Abdelwahab El-Affendi, 'secularism recommends itself by claiming to offer something for everyone: freedom for religion and freedom from religion. As a doctrine advocating the "containment" of religion outside the realm of public policy, it seeks to protect religion from coercive state interference, while preventing the state from enforcing a divisive religious view'. Religious sectarian divisions lead to violence and short term gains. Fundamentally, this demonstrates that religion and its leaders are in a state of crisis. Secularism also 'has evolved largely peacefully and by consensus in the United States and many European countries. Often this also followed a series of violent conflicts in which the state secured a monopoly of religious authority by suppressing or annexing independent religious institutions (as in England)' Abdelwahab El-Affendi, 'Beyond Secularism: Sectarian Conflict and the Resilience Challenge for the African State' (2015) *Tana High-Level Forum on Security in Africa* 1, 7.

[123] In Iraq, the ruling establishment in recent years has cloaked itself in pseudo-Islamic religious principles to give itself a sacred character, allowing its policy of threats to be beyond criticism, accountability, and change. Such religious overemphasis has strengthened the militant sectarian groups and weakened the legitimate authority of the state, escalated violence, and prevented the establishment of independent institutions devoted to the rule of law. If it adopted secular norms, clerical religious authorities would not be able to assert themselves as a dominant factor in political affairs and judge the legitimacy or illegitimacy of its political decisions. Kata (n 120); if the first task of the constitution in the modern state is to establish the rule of law through the state institutions, the Iraqi constitution has neutralised this authority in favour of the ruling Islamic parties. Yahya Al Kubaisi, Towards Building the Authority of Al-Faqih, (9 November 2017) <http://www.alquds.co.uk/?p=823190> accessed 10 November 2017.

[124] Al-Amin (n 113).

hostile to a secular re-building of the state and its political system. Therefore, these misconceptions must be addressed to balance the power of religious parties, or religion and sectarianism will remain entrenched in traditionally secular state institutions like the security forces and the educational system. On this basis, political and societal conflict will remain in society on the basis of religious alignment. Indeed, 'given the urgent need for national reconciliation, the establishment of state institutions, and the curbing of terror attacks, secular Iraqi politicians should promote and defend secularism more aggressively as a potential solution.'[125]

Most Iraqi citizens desire a secular form of government rather than the ethno-sectarian framework that has existed since 2003, as shown in 2011, when a poll revealed that they 'would prefer politics to be separate from religion'.[126] The demonstrations made by citizens from all social backgrounds that emerged since 2015 could well encourage the secular movements in Iraq in their demands for the de-politicisation of Islam and the establishment of a truly reformed civil state.[127] Since the defeat of ISIS, the improvement of the security situation, along with protest movements and the national election due in 2018, there is an opportunity to reinforce the state by halting the cycle of failure that has undermined efforts to assert national cohesion and win citizens' confidence in government institutions since 2003.[128] It appears likely that ethno-sectarian political leaders are less able to rally or unify their constituents principally on identity politics in this round of state reinforcement.[129] This cautious optimistic development may stem from the tendency for protest movements, which offers a potential new platform to influence the formation of a government and, thereby, the process of enhancing the state.[130] It suggests that 'many Iraqis are no longer bound by the identity politics that underpinned the legitimacy of the post-2003 elite' and that the demonstrators are 'now unwilling to allow their leaders to hide behind identity politics – or related arguments based on the need for security or stability – in order to ensure their own position'.[131] Although Iraqis are now more willing to support state institutions since the state, under the leadership of

[125] Ibid.
[126] The majority of citizens also 'consistently pronounces itself in favour of democracy, equality, the peaceful transfer of power, governmental accountability and equity'. Al-Ali (n 5) Ch. 5, 245.
[127] Al-Amin (n 113).
[128] See Mansour (n 267) Ch. 5, 2; a survey conducted across Iraq by the National Democratic Institute (NDI) in 2017 reveals some of these positive aspects at some levels, including security, Sunni/Shia relations, Abadi policies and sectarianism. See National Democratic Institute, 'Improved Security Provides Opening for Cooperation in Iraq: March to April 2017 Survey Findings' (7 June 2017) <https://www.ndi.org/publications/improved-security-provides-opening-cooperation-iraq-march-april-2017-survey-findings> accessed 15 November 2017.
[129] Mansour (n 267) Ch. 5, 11-14.
[130] Ibid.
[131] Ibid.

Abadi, seems to be strengthening these institutions in a positive way, they have also expressed their concern that the root causes of the rise of ISIS have not been adequately addressed.[132] Therefore, they stress the need to defeat and prevent ISIS from returning, and counter corruption by proper state-building and improved governance. Security and corruption are intertwined and so the leaders of the future must be accountable for national security and service provision, in a way which avoids corruption.[133] The corruption of government officials, legal authorities and the courts, as noted above, is one reason for the impaired establishment of the rule of law, the ineffective fulfilment of HR, and the incapability of the ICJS to meet its binding obligations under international law,[134] especially with regard to positive obligations. In addition, considering that grievances surrounding corruption and deprivation have been used by various sectarian insurgent and terrorist groups, especially ISIS, to gain grassroots support, it is apparent that endemic corruption, lack of stable services, and reliable infrastructure can reawaken violence. This indicates that 'preventing corruption, [and] providing development, reconstruction and opportunities are not only significant on their own; they are also significant towards a sustainable process of reconciliation and stability'.[135] Prime Minister Abadi has recently vowed to fight corruption and corrupt officials, and called on citizens, especially young people and civil society organisations and activists, to cooperate and support the government by detecting corruption and providing accurate information about it.[136] This movement towards long-term stability, unity and the reinforcement of state authority also requires dealing with the challenges surrounding Al-Hashd Al Shaabi (PMU),[137] perhaps

[132] Ibid. 14.
[133] Ibid. Corruption was perceived by many Iraqis in a survey by the NDI as a greater driver of the emergence of ISIS than sectarian tension. National Democratic Institute (n 128); see also Nussaibah Younis and Sali Mahdy, The Next War in Iraq Needs to be on Corruption, (16 December 2016) War on the Rocks <https://warontherocks.com/2016/12/the-next-war-in-iraq-needs-to-be-on-corruption/> accessed 16 November 2017.
[134] See also Almusawi (n 17) Ch. 5, 276-277.
[135] Al-Bayan Center for Planning and Studies (n 43) Ch. 5, 39-41; see Report of the Task Force on the Future of Iraq Achieving Long-Term Stability to Ensure the Defeat of ISIS, May 2017, Atlantic Council, 7-13 <http://www.atlanticcouncil.org/images/publications/Future_of_Iraq_Task_Force_0531_web.pdf> accessed 6 March 2018. To move towards sustainable reconciliation and stability, Iraq also needs to address the impacts of the de-Ba'athication policies which have caused continued resentment among much of the Sunni population, and provided the rallying call for a number of insurgent groups. 'While the demands of total reversal of de-Ba'athication cannot be realistically fulfilled, it does highlight a need for a new, comprehensive policy regarding de-Ba'athication so that this particular chapter of Iraq's history can be closed'. The South African model, in particular the TRC, is recommended for Iraq to comprehensively address de-Ba'athification. Al-Bayan Center for Planning and Studies (n 43) Ch. 5, 37-39; it has been suggested further that 'controversial practice of de-Ba'athification should be reversed and de-politicized and left to the judicial authorities'. Also, the current Iraqi laws and regulations regarding the controversial counter-terrorism need to be 'eliminated or amended to exclude its future abuse'. See Ali (n 398) Ch. 5.
[136] See Iraqi Dinar, Abadi declares war on the corrupt and threatens them with {surprises}, 22 November 2017, <http://iraqidinarchat.net/?p=50881> accessed 23 November 2017; Osama Mahdi, Abadi: We ended a military call and we will celebrate the day of his defeat soon, 21 November 2017, <https://search4dinar.wordpress.com/2017/11/21/abadi-we-ended-a-military-call-and-we-will-celebrate-the-day-of-his-defeat-soon-dr-osama-mahdi/> accessed 23 November 2017.
[137] The PMU is considered one of the divisive issues among Iraqi society. 'For many Iraqis, particularly Shia Muslims (but other groups as well), the PMF is a set of religiously sanctioned paramilitaries –some refer to it as al-Hashd al-muqadis (the Sacred Mobilisation Units). As one fighter from the city of Amarah stated, 'You can criticize any politician or even religious cleric, but you cannot speak against the Hashd and its martyrs.' To many, they have defended their country with their lives. Iraqi society is now full of popular songs, commercials, and banners that honour the leaders and martyrs of various PMF military groups. For other Iraqis,

by integrating them into the Iraqi Security Forces. Having one army, police force and border patrol with a single command structure, beholden to civil oversight, would not only be essential to improved security, it would also be 'an important symbol in aiding national reconciliation and promoting cooperation between different communities'.[138]

Supporters of this solution would be assured that Sunni and Shia were working within one official military body with allegiance only to Iraq, and this would help move away from ideas of sectarianism and foreign influence which could later lead to renewed conflict.[139] Were this solution applicable, it could reassure all society that the main government priority is to ensure that the PMU do not threaten state authority, thus restoring the legitimate coercive power of the state to prevent and control illegal activities and defend state borders by establishing well-functioning and unified security and military institutions subject to the rule of law.

6.3 Summary Remarks

In recent years, domestic protection of HR, especially the right to life and observance of ethical and international HR principles, has been extremely limited for complex reasons. This analysis has shown that Iraq has not provided redress to the victims of non-state actor violence and that its positive duties under international HR instruments to protect its citizens from such violence have not been adequately fulfilled. It has also shown, in the context of a very difficult and volatile security situation, that the Iraqi government has not fully investigated criminal activity via mechanisms and processes in place to protect citizens from non-state actor violence. However, recent positive developments concerning the defeat of ISIS and the sound leadership of the current Prime Minister, together with some reconciliation and transitional initiatives, have created an unprecedented opportunity to address the previous endemic failure and deficiencies of

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however, the PMF is a group of problematic militias neither accountable to the state nor under the rule of law'. See Renad Mansour and Faleh A. Jabar, The Popular Mobilisation Forces and Iraq's Future, (April 2017) Carnegie Middle East Center, 3-12.

[138] However, it has been said that 'the current situation on the ground, in terms of security, reconciliation, and political will, precludes an aggressive, straight-forward pursuit of this objective. This necessitates an initial phase in which significant progress in these areas is made before incorporation of most PMF units can realistically take place'. See O'Driscoll and van Zoonen (n 72) 8, 30.

[139] See NDI, A Fragility Unity: After Military Gains, Iraqis Look to Leaders for a Better Future, Focus Group Findings, (February 2017) 2; as Iraqi forces edge closer to declaring victory over ISIS, disarming the PMF is seen as the most difficult test for Prime Minister Al-Abadi. It is encouraging that one of the most important militias in Iraq indicated recently that 'it would give any heavy weapons it had to the military once Islamic State was defeated' and that 'the heavy weapons belong to the Iraqi government, not us. We are not rebels or agents of chaos and we do not want to be a state within a state'. It said that 'The PMF is under the command of the Commander-in-Chief of the Armed Forces [Prime Minister Abadi] and naturally when the war is over and victory is declared, the final decision will be his'. See Ahmed Aboulenein, Iraqi Militia Indicates will Hand Heavy Guns to Army after Islamic State Quashed, 23 November 2017, <http://www.oann.com/iraqi-militia-indicates-will-hand-heavy-guns-to-army-after-islamic-state-quashed/> accessed 28 November 2017.

Iraqi authorities to meet the legitimate HR-based expectations of its citizens. If these developments combine with the institutional reforms proposed above, with the support of all or most sections of Iraqi society, it is argued that real prospects for gradual and incremental reforms in Iraq, specifically related to the subject of this thesis, are likely to be achievable. This would provide an important opportunity for Iraqis to learn from the atrocities of post-2003 and consolidate their state, creating a genuine democratic and accountable system of government and functional institutions strictly based on the rule of law, capable of tackling any activities of criminal, terrorist and militia groups. It may also establish an effective criminal justice system with independent courts, to prevent any future attempts to escalate ethno-sectarian divisions and extremism. Such a message may reassure all Iraqi citizens of its commitment to adequate legal, judicial, political, administrative and cultural means of tackling the roots of violence against their right to life from whichever source, and provide justice and adequate reparation should this right be violated. In this context, Iraq needs to take concrete steps to gradually bring its legal system and practice into closer conformity with HR norms. These norms, as stipulated in various jurisdictions of the HRC, ECtHR and IACtHR, prohibit a state from absolving itself from complying with them on the grounds of its own particular culture, religion, customs or the nature of its political and legal systems and practices.[140] Regrettably, victims in Iraq still have no effective domestic or international mechanism by which the breach of these norms can be heard adequately. Repeated demands have been made by the HRC and other HR bodies, to the conventions of which Iraq is a party, such as the Committee of Enforced Disappearances, that Iraq submit itself to their jurisdiction. By doing so it will give the right to individuals, who allege that their rights of protection, justice and reparation have not been adequately addressed by their own domestic judicial system, to petition the HRC and other committees of HR should these demands not be met.

Without a remedy for victims at the domestic level for any political and/or judicial reason, the need for an international one has proven 'increasingly significant as the only avenue

[140] When transitioning from a period of gross and systematic HR violations, in addition to various pressures which will influence government policies on how to respond to such violations, legal constraints also exist; that is, states are obliged under international HR law to bring perpetrators to justice in a fair trial, provide reparations to victims, and reveal the truth. These obligations have created 'a normative framework to guide governmental action, setting out "the right thing to do" in a way that cannot be ignored regardless of what a government's political concerns may demand. They also apply important pressures on governments to ensure that responses to atrocity serve two important goals: the restoration of dignity for the victims of HR violations and the non-recurrence of those violations'. In this context, 'a state cannot rely on its inability to prosecute more than a handful of accused individuals as an excuse for not considering other complementary truth-finding mechanisms'. See Szoke-Burke (n 54) Ch. 3, 530-532.

towards a measure of justice and accountability', in cases of HR violations.[141] This does not mean, however, as Helen Duffy asserts, that international litigation fails to be a 'panacea' and 'replacement' for effective domestic national courts; rather, 'the objective of such litigation is very often, ultimately, to impel the national process'.[142] Many positive goals can be achieved by following the path of judicial litigation at domestic and international levels for the litigants who seek the cessation and prevention of violations of their rights and, in addition, redress when such violations occur.[143] One positive goal is 'social, legal, political or institutional change'.[144] Regarding these, it is necessary for victims in Iraq to access litigation before international judicial courts to effect their legal rights at the domestic level, because it seems that the reluctance of the state authorities to explicitly incorporate their positive obligations into the Iraqi legal system, as repeatedly required by HR bodies, and to honour these obligations in their practice, will not be overcome soon. This would hopefully compel the domestic courts to ensure these rights, establish accountability, and bring the necessary changes in law and practice. Such reluctance has also negatively affected the possibility of building a new tradition in which the scope and nature of these positive obligations and their effective interpretation and enforcement as stipulated in various case law of HR bodies can be considered, to entrench them in the Iraqi domestic legal system, both in theory and practice.

To this end, the benefits of implementing the principles of international HR law for Iraqis will be significant. However, to achieve this: (1) judges need to be able to effectively interpret rules according to international standards, and must study the international jurisprudence case law of the HRC, IACtHR and the ECtHR; and (2) law enforcers need basic education on international standards, via the curriculum of educational institutions like police colleges.[145]

Clearly, changing a culture in which the rights of victims are not recognised in practice takes time. Building a new culture of awareness, true norms and values and the adoption of obligations to protect citizens' right to life and uphold the rights of victims should be

[141] See Duffy (n 81) Ch. 2, 890.
[142] Ibid. 891.
[143] Ibid.
[144] It has been suggested that 'the practice of human rights litigation [particular in the context of counter-terrorism] has reinforced the critical role for the courts in human rights protection in recent years'. According to Duffy, 'simply taking a human rights violation to court may assist in the framing of an issue as a matter of law, not only politics. As such it reasserts the principle of legality and the rule of law in the highly politicised discourse around terrorism and security'. Thus, a judicial response to the violation of HR rebukes the executive when it fails to protect rights, checks the executive action or inaction, and establishes government accountability. Ibid. 892-893.
[145] See Almusawi (n 17) Ch 5, 295.

the prime concern of any future competent Iraqi state, criminal law-makers, academic institutions, society, and NGOs, to address the neglected rights of Iraqi citizens adequately. In particular, Iraq is at present just emerging from the ISIS-related conflict, and, therefore, while it was engaged in that conflict, it was less able to establish sound criminal justice policies. As such, it is far from achieving the criminal justice standards reflected in many HR treaties and case law. It may well, post-2018, struggle to do so in any event, due to all the issues with which it will have to deal in future. Nevertheless, some of the positive developments mentioned above reveal small signs that eventually the positive obligations regarding victims may be accepted and, thus, Iraq is gradually moving in the direction of accepting such standards. To bring Iraq into closer conformity with international HR norms and enable the ICJS to meet the rights of victims, some tentative suggestions can be made, and among these are:

- The inability of Iraqi victims to be considered as having equal reciprocal relations of accountability must be addressed because the current and previous atrocities committed against victims, whether under the former or post-2003 regime, may have seriously undermined relations. This requires the creation of a sound rule of law in which state authorities are accountable for acts of violence, from whatever source, irrespective of who is responsible, if there is evidence that these authorities have not taken reasonable measures with due diligence to prevent them or punish the perpetrators. This is essential if past atrocities against the citizens are to be avoided in future. In other words, citizens' sense of protection and justice for victims cannot be restored unless the moral and legal duties of state are carried out in practice.
- The adoption of comprehensive legal reform. This requires a well-functioning and effective criminal justice system based on the rule of law, which must be upgraded where necessary, and rigorously applied if it is to comply with the HR norms. These norms demand positive obligations of provision of effective protection, investigation into deaths and injuries, prosecution and punishment of perpetrators and adequate reparations for victims. This study has highlighted the need to address multiple institutional and legislative problems so that the criminal justice system can adequately respond with due diligence to acts of violence by non-state actors, including gender-based violence, enforced disappearance, torture, and violence by terrorists and armed militia. For instance, the controversial Anti-

Terrorism Law of 2005 and the laws and regulations regarding domestic violence, including the draft Law of Anti-Domestic Violence, need to be amended to comply with HR norms and prevent future abuses. Comprehensive legislative measures also need to be established to address enforced disappearance.

- The strengthening of the rights of Iraqi victims by explicitly embedding the relevant principles concerning the positive obligations of the state in its constitution and enacting or amending the existing laws, including criminal and civil laws, to strictly correspond with these principles. The courts must provide assurance that they will honour them in any judgment of complaints by victims alleging that their government has failed to observe them. The constitution needs to indicate specifically that these principles are part of the domestic legal system and may be invoked directly by victims before the domestic courts, in order to overcome the reluctance of these courts to apply them. Compelling Iraqi judges to take these principles strictly into account may, hopefully, have a genuine positive impact on HR protection in practical terms. It would provide victims with a mechanism of accountability and encourage them to bring cases before the courts against any passive attitude, negligence or unwillingness by the state, and on the future development of the Iraqi legal system, in the sense of gradually reforming it and bringing it, both in theory and practice, into closer conformity with these principles.
- If there is conflict on how far the above principles are compatible with domestic provisions, such as in cases of domestic violence, it is essential for any proposed constitutional reform to consider the latter invalid. Iraq could also draw lessons from other states, such as South Africa, whose constitution stipulates that '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'.[146] Therefore, to build a culture in which the rights of potential and actual victims are observed, it is insufficient to incorporate the rights of victims and the correlative positive obligations of the state in their constitution; the domestic courts, including the Iraqi Federal Supreme Court, should also adopt an effective interpretation mechanism according to HR case law, to consider

[146] See S 33 and S 39 of the Constitution of South Africa 1996; Almusawi (n 17) Ch. 5, 40.

whether reasonable measures with due diligence have been taken by state authorities to ensure these rights.

- The rights of victims, both in theory and practice, must also be acknowledged in the ICJS and the next of kin of the deceased must be involved in the criminal proceedings and treated with the respect and fairness necessary to safeguard their legitimate demands to discover the truth of what happened to their relative(s), and to ensure that all relevant procedures have been adequately addressed by the police, investigators, public prosecutors and judges.
- The establishment of a genuinely independent and well-functioning judicial system which is capable of ensuring that violations of the right to life of individuals are adequately addressed, in the sense that there must be a thorough, impartial, forensic investigation into the facts, leading to prosecution and punishment of perpetrators or those who contributed to them by negligence, unwillingness to take action, or lack of due diligence. This requires addressing both the shortcomings of the Criminal Procedures Code and the practice of the investigative system, and combatting abuses of HR in criminal procedures and corruption. This is essential to prevent perpetrators from going unpunished and avoid any impunity by a state official, and to send a stern message to perpetrators, state officials and victims that such violations will not be tolerated.
- The adoption of a comprehensive symbolic, monetary and moral reparations programme, as required by HR norms, to deal with the large scale unlawful violation of the right to life. In particular, 'Iraq should carefully reflect on the merits and flaws of [its compensation system under Law 20] and use the lessons learned in the design of a more comprehensive scheme for victims of the conflict with ISIS. Such an undertaking will require significant expansion in the scope of the law and a reconsideration of processes in order to effectively reach all victims, as well as strong implementing institutions with adequate financial resources'. The Iraqi government, specifically, must:

  • Strengthen those institutions in the reparations process, by giving staff specialised training on reparations.

  • Recognise violations by all parties in the conflict and provide all eligible victims with reparations.

  • Develop the range of harm entitled to reparation to cover mental and sexual violence as well as physical.

• Use multiple approaches to reparations, including restitution, rehabilitation, satisfaction, and compensation, as well as ensuring non-repetition.

• Review special measures to address collective harm inflicted on communities, especially ethnic and religious minorities.

• Employ simpler and more flexible evidence requirements for reparations, to avoid excess strain on victims.

• Involve communities in the design and improvement of any reparations measures.

• Review the creation of a single register of victims to facilitate reparations and reparations programmes.

• Base reparations measures within a plan for transitional justice, including aspects such as judicial accountability and truth-seeking as well as reparation.[147]

The promotion of the rights of victims also requires the Iraqi state to improve the performance of the HCHR and promote resort to the Iraqi Federal Supreme Court, thereby invoking constitutional HR to ensure the protection of certain fundamental HR, such as the right to life and physical integrity against any violations, and improving the conduct of Iraqi institutions in this regard. In addition, Iraq needs to sign the First Optional Protocol of the ICCPR to enable victims to make complaints to the HRC against their state, should its legal and judicial systems have failed to adequately address their rights. Similarly, Iraq must submit itself to the judgment of other legal bodies, such as the Committee of the Enforced Disappearances, should it fail in its positive obligations to respect and ensure the rights of victims.

There is a hope that by gradually considering the above proposals and other reconciliation and transitional efforts post-ISIS conflict, Iraqi citizens can create the future they deserve, living free from threats to their right to life in a viable and competent state. The first priorities of such a state would be the protection of its citizens' HR, and, should those rights be violated, provision of the right to have their case properly investigated, such that those accountable for these violations are justly tried and punished in the courts, with appropriate reparations.

[147] See Sandoval and Puttick (n 475) Ch. 5, 27-28. To ensure compensation for damage suffered as a result of a wrong or arbitrariness of arrest, detention or sentence, in 2016 Iraq established a law to compensate for miscarriages of justice. See Iraqi Parliament Council, Law for the Compensation of Victims of Justice, 13 August 2016, < http://ar.parliament.iq/2016/08/13/قانون-تعويض-ضحايا-العدالة/> accessed 30 November 2017.

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