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# Reparations for the Victims of Conflict in Iraq

Lessons learned from comparative practice



**Cover photo:**

Civilians walk by the destroyed Al-Nuri Mosque as they flee from the Old City of Mosul on 5 July 2017, during the Iraqi government forces' offensive to retake the city from ISIS fighters.

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# 1

## Introduction

Iraq is a country devastated by decades of conflict. Millions of victims have suffered as a consequence of gross human rights violations and serious violations of humanitarian law over the years, whether during Saddam Hussein's dictatorship, Iraq's invasion of Kuwait, the occupation of Iraq by the United States and its allies, or, more recently, as a result of the conflict with ISIS. These victims have a right to adequate, prompt and effective redress for harm suffered as a result of such violations.

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There are compelling moral and political reasons why reparations matter to victims and societies as a whole. There are equally compelling legal reasons why states should provide reparations, not least because they are bound by various international treaties that incorporate this obligation. Iraq has ratified most international human rights treaties including the International Covenant on Civil and Political Rights (party since 1971), the International Convention on the Elimination of All Forms of Racial Discrimination (1970), the International Covenant on Economic, Social and Cultural Rights (1971), the Convention against Torture (2011), and the Convention for the Protection of all Persons from Enforced Disappearances (2010). Iraq has also ratified most treaties on humanitarian law, including the Geneva Conventions of 1949 (1956).

Iraq already has significant experience in providing redress to victims. In 1991, the United Nations (UN) Security Council set up the UN Compensation Commission to provide reparations to some victims of Iraq's invasion of Kuwait. Subse-

quently, after Saddam Hussein was removed from power, the Iraq Property Claims Commission (later renamed the Commission for the Resolution of Real Property Disputes) was created to deal with land-related violations committed under his regime. Finally, a more recent effort in Iraq is Law No. 20 of 2009 on Compensating Victims of Military Operations, Military Mistakes and Terrorist Actions (amended in 2015), which provides redress to victims who have suffered violations since 2003.

While these efforts to provide redress in Iraq act as important precedents, the most recent phase of conflict raises new challenges. Since 2014, fighting between government-allied forces and ISIS has led to widespread violations, with millions displaced, thousands killed, and targeted campaigns perpetrated against ethnic and religious communities. Moreover, damage to infrastructure and personal property is widespread. At the same time, state institutions in large parts of the country have been left paralyzed and incapable of providing basic services to citizens.

As Iraq prepares to rebuild and recover from the conflict with ISIS, providing redress to victims of violations is an important priority. However, it is questionable whether the current legal and institutional framework in Iraq is capable of effectively addressing the violations committed, given their enormous scale and the diversity of actors involved. The task of providing reparations to victims of the conflict is also complicated by the fact that justice has still not been obtained by many victims of previous violations. The United States and other belligerents are arguably yet to take appropriate measures to redress the violations that took place as a result of the 2003 invasion and occupation of Iraq, and many victims of the Saddam Hussein regime are still waiting to receive reparations decades after violations occurred, even though relevant laws and processes have been put in place.

This report seeks to inform the discussion on reparations in Iraq through analysis of both international and domestic practice, with the goal of encouraging the development of a comprehensive framework that can provide adequate and effective reparations to victims of the conflict from 2014 onwards. The introduction provides an overview of the concept of reparations and their impact on individuals and societies. Section 2 outlines the relevant international legal instruments that obligate states to provide reparations. Section 3 expands further upon the scope and reach of this obligation, referring to examples of repara-

tions programmes from international practice for the purpose of comparison. Section 4 serves as a case study on the reparations scheme established by Iraq's Law 20, and examines both the progress and challenges faced so far in granting reparations to victims in the midst of ongoing conflict. Section 5 suggests how lessons from the implementation of Law 20 can be harnessed for the purpose of designing a more comprehensive reparations scheme for victims of the most recent conflict with ISIS, outlining ways in which the framework can be expanded and improved. Finally, Section 6 ends with some conclusions and recommendations.

While this report is mainly focused on monetary compensation, it has to be remembered that the right to reparation is not exhausted simply by providing compensation to victims. Full reparation should also include justice – including effective investigations leading to the identification of those responsible for violations – and truth, as victims have a right to know what happened. Moreover, states should take necessary measures to address the roots of conflict and repression to ensure that violations do not happen again. In other words, reparations programmes should take place as part of a holistic approach to transitional justice that will enable victims and society as a whole to move forward from conflict. Isolated reparation practices carry risks, as they do not properly address the harm suffered by victims and can even cause re-victimization.

## Why do reparations matter?

Victims of serious violations of international law such as gross human rights violations or serious violations of humanitarian law become targets because they are dehumanized by perpetrators. The role of reparations is to restore their humanity. Reparations aim to correct serious international wrongs that not only affect those directly victimized, but also those around them and the societies in which they live.

Pablo de Greiff, a philosopher by training and UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, makes a very powerful case for reparations. Reparations are clearly about fairness, or in other words, about trying to undo the harm that has been caused to the extent possible. However, this process cannot occur in isolation when many others have suffered similar violations. It is here that de Greiff calls for a change of approach. While for him fairness should be sought, it should be conceived as an element of a political project,<sup>1</sup> as this would enable the pursuit of other aims, namely recognition, civic trust, social reconciliation and democratization.<sup>2</sup>

Recognition is about reaffirming individuals' status as citizens by acknowledging them as both the subjects and objects of action in a society. Victims should be recognized as individuals whose rights as

citizens were violated<sup>3</sup> and who are worthy of reparation in order to wipe out this harm. As de Greiff writes, 'those whose rights have been violated deserve special treatment, treatment that tends towards the reestablishment of the conditions of equality.'<sup>4</sup>

Civic trust is about restoring trust among citizens.<sup>5</sup> In states devastated by authoritarianism or conflict, relationships of trust break down. Individuals, not only victims, distrust the state and its institutions as well as their fellow citizens. Therefore, reparations function to help re-establish civic trust as they symbolize the intention of the state and fellow citizens to rebuild relations based on equality and respect.<sup>6</sup> A reparation effort that is genuine sends the message that victims matter to society and that without their participation a society will not be able to move forward.

Reconciliation, according to de Greiff, refers to:

*'the condition under which citizens can trust one another as citizens again (or anew). That means that they are sufficiently committed to the norms and values that motivate their ruling institutions, sufficiently confident that those who operate those institutions do so also on the basis of those norms and values, and sufficiently secure about their fellow citizens' commitment to abide by and uphold these basic norms and values.'*<sup>7</sup>

De Greiff, however, notes that reconciliation and democracy are ultimate

goals that are not exhausted by transitional justice or by its measures, including reparations. Indeed, he states that 'the most that transitional justice measures can do is to give reasons to individuals to trust institutions'.<sup>8</sup>

Finally, transitional justice and its measures can make a key contribution to the achievement of democracy. Here, de Greiff does not have in mind only the rule of law. Instead, what is crucial is how victims and society as a whole experience and relate to mechanisms such as reparations, and whether they create forms of participation. Therefore, in addition to building systems of law that are independent, impartial and certain, de Greiff believes that it is crucial to provide victims, and society as a whole, with institutional experiences that allow them to be active citizens and to act democratically. However, he recognizes that transitional justice, or for that matter, reparation, cannot deliver democracy, but the experiences that its mechanisms create can trigger important democratic behaviour in the future.<sup>9</sup>

In sum, reparations matter not so much because they fully redress the harm that victims have suffered in terms of equal pay for equal harm, but because, if well conceived, they provide a transformative experience to victims. Reparations can empower, dignify and return a voice to victims, as well as provide them with the opportunity to become agents of social change.

# 2

## The right to reparation under international law

There is an established principle that the wrongful breach of an international obligation imposes on states the duty to redress the harm caused to another state and cease the violation of the international rule.<sup>10</sup> While this rule was for centuries applicable when a state breached an international obligation owed to another state, today it is recognized that such a duty can also be owed to individuals affected by certain violations of international law.

This duty of states to provide reparation to individuals is well established today under international human rights law and international criminal law. Such a duty also exists, although in limited terms, under humanitarian law.<sup>10</sup>

A key dimension to note is that this obligation is not bound territorially. Therefore, a state is responsible for violations of human rights (and for that matter of international humanitarian law) even if they are committed outside its own territory. This has been the reiterated position of UN and regional human rights bodies on the issue regardless of whether the violation happened during a conflict situation or not. Indeed, the Human Rights Committee, the body that oversees the International Covenant on Civil and Political Rights, states in General Comment 31 that: ‘the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality [...] who may find themselves in the territory or subject to the jurisdiction of the State Party’.<sup>11</sup> The committee also noted that ‘this principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory ...’<sup>12</sup>

### The duty under international human rights law

The first international human rights treaties to be enacted, such as the International Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, as well as regional treaties such as the European Convention or the American Convention on Human Rights, did not contain explicit norms recognizing the right of individuals to obtain reparation for harm suffered as a result of the violations of rights incorporated in those treaties. However, those treaties establish the general obligation that states have to respect and ensure rights of individuals recognized under the treaties, which includes the obligation to have adequate and effective remedies in place to deal with violations, regardless of their gravity. One such remedy is precisely the duty to make reparation.<sup>13</sup> This has been the authoritative and reiterated interpretation given by bodies with jurisdiction to apply and interpret those treaties.

The right to reparation, however, has been explicitly established in various other human rights treaties. For example, Article 14 of the UN Convention Against Torture explicitly recognizes the right of victims to compensation and rehabilitation when breaches occur. Similar articles are also present in regional treaties dealing with torture, such as the Inter-American Convention to Prevent and Punish Torture. Newer treaties, such as the UN Convention on Enforced Disappearances, contain an even stronger and more holistic approach to the right to reparation. Article 24.4 of the Convention reads as follows: 'Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.' The article also elaborates on the forms of reparation, the concept of victim, the right to know the truth and other related obligations held by states parties.

Treaty law, as described above, has been complemented and strengthened by the 2005 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 (Basic Principles). Work on the Basic Principles began in 1989, just over four years after the signing of the UN Convention Against Torture in December 1984. While many years passed before they were finalized and adopted by consensus by the UN General Assembly in 2005, the Basic Principles helped to consolidate a common view about the obligation to provide reparation, both at the procedural and at the substantive level.<sup>14</sup> Today it is possible to assert that victims have a right to reparation for violations of human rights law, and that this right entails adequate, prompt and effective redress<sup>15</sup> for victims in the form of compensation, restitution, satisfaction, rehabilitation, and guarantees of non-repetition.<sup>16</sup>

## The duty under international criminal law

The Rome Statute of the International Criminal Court (ICC) recognizes in Article 75 that victims of international crimes under the jurisdiction of the court, namely crimes against humanity, war

crimes, genocide and aggression, are entitled to reparation and specifically refers to three forms of reparation: restitution, compensation and rehabilitation. The ICC is a criminal tribunal and therefore it decides on reparations owed by convicted perpetrators (and not states or armed groups) to their victims. While this is an important development under international criminal law, its reach continues to be limited given that the ICC cannot exercise jurisdiction over all persons responsible for international crimes and that it cannot award reparations to all victims of the situation but only to some of them.

## The duty under international humanitarian law

Under humanitarian law there is no express recognition of the right to reparation for victims of violations except for two articles that apply to international armed conflicts, that is to say, conflicts between two or more states. The first is Article 3 of the Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex (1907), which establishes that '[a] belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.' Such a norm is almost replicated in Additional Protocol I to the Geneva Conventions in Article 91, which states that: '[a] Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.' It should be noted that such articles refer specifically to compensation and not to other forms of reparation.

While there is otherwise silence on the issue under international humanitarian law treaties, the Basic Principles on the Right to a Remedy and Reparation included such a right not only in relation to gross violations of human rights but also in relation to serious violations of international humanitarian law. Drafters of the Basic Principles had in mind violations that amount to international crimes. While some states were dissatisfied with the inclusion of serious violations of international humanitarian law, the Basic Principles

were adopted at the UN General Assembly by consensus.

Still, although the Basic Principles reflect international law as it stands today in relation to serious violations of international humanitarian law, the lack of a specific norm under humanitarian treaty law constitutes a gap that needs to be corrected. Nevertheless, lack of express recognition of this right should not be seen as an obstacle to claiming reparation as indeed there is legal recognition under both human rights law, which also applies in times of conflict or occupation, and under international criminal law, if violations of certain gravity occur.<sup>17</sup> An additional issue not resolved by the international legal instruments already men-

tioned is whether non-state actors, such as armed groups, have an obligation to provide reparation for harm suffered as a result of their actions. This point is particularly important when armed groups are considered to have significant resources but there are no laws indicating that they shall make reparation to victims. An important precedent in this regard is contained in the Colombian Peace Agreement signed with the Revolutionary Armed Forces of Colombia (FARC) in which, after much negotiation, the FARC not only recognized the right to reparation of victims but also agreed to support the reparations process by helping with social work, demining fields and contributing financial assets obtained through the armed conflict.<sup>18</sup>

# 3

## The scope and reach of the right to reparation

The Basic Principles on the Right to a Remedy and Reparation, the Set of Principles to Combat Impunity (2005) and the jurisprudence of the Inter-American Court of Human Rights have been essential for defining the scope and reach of the right to reparation, at least for gross human rights violations and serious violations of humanitarian law. While there are areas where questions remain as to what the right entails, there are some basic principles, both substantive and procedural, that are broadly accepted, as detailed below.

### Broad and flexible meaning of ‘victim’

There has been much debate in case law and the academic literature over the question of who qualifies as a victim for the purposes of reparation.<sup>19</sup> However, there is consensus that the term cannot be defined in narrow terms. Indeed, there is a valid and implicit assumption that when violations of human rights or humanitarian law occur, victims are not only those who suffered direct harm (the person who is tortured or disappeared, for example) but also others affected by the violation (such as the next of kin of a person tortured or disappeared) or a witness of the events. Both the Basic Principles and the UN Convention on Enforced Disappearances offer broad definitions of the term. The Basic Principles, for example, state that:

*‘[V]ictims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their*

*fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.’<sup>20</sup>*

Domestic reparation programmes have also adopted a flexible concept of victim. For example, the Victims and Land Restitution Law (Law 1448/2011) in Colombia defines victims as ‘persons who individually or collectively suffered harm as a result of violations that occurred from 1 January 1985’, and also includes family members and ‘persons who have suffered harm when intervening to assist a potential victim or to prevent victimization’.<sup>21</sup>

An important exception to the above has been the tendency in various experiences around the world to prevent the con-

cept of victim from being extended to members of armed groups who could be perpetrators of violations themselves. For example, in Colombia, under the Victims and Land Restitution Law, members of armed groups, such as the FARC, cannot be considered as victims for purposes of that law unless they were still children when they left the armed group.<sup>22</sup> In Peru, the law creating the Comprehensive Reparations Plan was even more limited. It established that members of the armed groups will not be considered as victims and as result they will not be beneficiaries of reparations'.<sup>23</sup>

However, there is nothing under international law that would indicate that a person loses his or her right to reparation as a result of being a member of an armed group. Indeed, there is evidence of the opposite. The Inter-American Court of Human Rights, in the case of *Bamaca v. Guatemala* concerning the disappearance of a guerrilla member during the conflict, awarded him, his partner and his family reparations for harm suffered (pecuniary and non-pecuniary damages).<sup>24</sup> So, in principle, the legality of a programme that impedes the right to reparation of certain categories of victims could be challenged for contravening international standards.

At the very least, efforts should be made to distinguish among members of armed groups and to treat them differently depending on whether or not they themselves were perpetrators of serious violations of international law.<sup>25</sup> Another basis to distinguish among perpetrators could be the degree of vulnerability of the perpetrator. For example, many children have been recruited worldwide as child soldiers, and states have failed to prevent their recruitment despite their obligations under

the Convention on the Rights of the Child and its Optional Protocol on the involvement of children in armed conflict. Therefore, there are good moral arguments as well as legal ones to consider child soldiers as victims entitled to reparation. Indeed, child soldiers have been awarded reparation by the ICC<sup>26</sup> and were afforded special treatment in Sierra Leone.<sup>27</sup> If perpetrators in particular vulnerable situations are not recognized as entitled to reparations, at the very least demobilization, disarmament and reintegration strategies should be designed and implemented that could have a similar effect to that of reparations.

## The requirement to be adequate, effective and prompt

Reparations aim to wipe out all the harm caused to the victim. However, when gross human rights violations and serious violations of humanitarian law are at stake, full reparation can be considered a guiding principle but is unlikely to materialize for different reasons, including the numbers of victims (thousands if not millions of them); the non-existence of state institutions capable of reaching victims; lack of financial and human resources to design and implement reparations; and the continuation of violence and conflict. Nevertheless, the Basic Principles state that reparations should be 'adequate, effective and prompt'.<sup>28</sup>

Although neither the Basic Principles nor other international instruments define these terms, important guidance can be derived from the international legal rule that allows exceptions to



the requirement of exhausting domestic remedies when these remedies are not adequate or effective. Here, a remedy is considered to be *adequate* when it is suitable to address the violation at stake<sup>29</sup> and it is *effective* when, besides being adequate, it 'is capable of producing the result for which it was designed'.<sup>30</sup> *Prompt* refers to the availability of the remedy within a reasonable period of time. These concepts are directly applicable to the right to reparation as it is also a remedy that should be available to individuals at the domestic level to address violations of human rights. However, the nature of the right to reparation, and its application to gross human rights violations and serious violations of humanitarian law, calls for further specification of what these adjectives mean in the context of redress.

### Adequate

When serious violations of international law are at stake, the question of which remedies are adequate to deal with the violations and the harm that ensues from them is critical. Part of the answer is contained in the five substantive forms of reparation available to deal with such harm, as found in the Basic Principles, the Principles to Combat Impunity and the jurisprudence of international bodies: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. While restitution is the preferred form of reparation under public international law, it is not always sufficient, possible or desirable under human rights law and therefore other forms of redress are needed to wipe out the consequences of the violation depending on the nature of each case.<sup>31</sup> Here, however, there has been a tendency to prioritize compensation over other forms of reparation. While compensation is important, it is not sufficient to adequately address the harm suffered by victims. Moreover, survivors of serious violations may see compensation as dirty money.

Reparations should also be individual, or both individual and collective, for them to be adequate.<sup>32</sup> The Basic Principles are based on the idea that the right to reparation is primarily an individual right but also recognizes the existence of collective victims and collective reparations.<sup>33</sup> While international law has not defined collective reparations, it is standard practice today domestically and internationally to award collective reparations to groups of victims when there is communal harm

that cannot be wiped out simply by providing individual reparations. Therefore, an adequate remedy in terms of reparation would consider carefully how to use various forms of reparation, including individual and collective reparation, to maximize its potential for providing full redress to victims and should be assessed on those terms.<sup>34</sup>

Remedies should also take due consideration of the victim and provide the necessary measures to ensure that reparation addresses the harm caused without leading to re-victimization. This is particularly relevant in relation to vulnerable groups such as women, children, LGBTI (lesbian, gay, bisexual, transgender and intersex) persons and victims of sexual violence, who are more vulnerable to violations. While international law does not specify how reparation programmes should be designed to avoid re-victimization, various measures have been taken, in practice, to achieve this goal. These have included consulting victims on the way that reparation should be made, ensuring that there is work on guarantees of non-repetition, enabling victims to have their voices heard so that they can avail themselves of remedies and reparations, fighting stigma, adopting affirmative action measures, and establishing and delivering on urgent reparation measures.<sup>35</sup>

Other factors should also be taken into account when deciding what remedies would be adequate to deal with harm caused, including the religious, cultural and political context. For example, providing land restitution to internally displaced persons (IDPs) would not be adequate when conflict is still ongoing and safety conditions are not in place. Providing compensation to victims of sexual violence without addressing the many ways in which their bodies and minds were affected, and the stigma that often ensues, would also be inadequate.

While a combination of forms of reparation is desirable, it is equally important that each reparation measure is also adequate. For example, rehabilitation is a crucial form of reparation that should always be available for victims of serious violations. Rehabilitation requires access to adequate health services for a prolonged period of time both for physical and mental health issues. 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.<sup>36</sup> On the other hand, if the victim is a refugee who cannot return to the country where the violations occurred, compensation might be the best means possible to ensure access to adequate health services in another country.

Reparations provided to victims without recognition of responsibility, full investigation of the violations suffered and disclosure of the truth about what happened, would also place in question any process of redress and would indicate that reparations have not been adequate.

The Chilean reparation programme presents an interesting comparison. For example, for victims killed by Pinochet's regime, it offers a comprehensive range of reparations, including a one-time reparation payment (*bono*), a pension for life for the widow, scholarships for the children and free access to the Programa de Reparación y Atención Integral en Salud y Derechos Humanos, known as PRAIS (The Program for Reparation and Integral Health Assistance for Victims of Human Rights) health care system for the widow and children. It even allows children to opt out of military service if they so wish.<sup>37</sup> In addition to this, forms of satisfaction have also been used such as naming streets after victims and setting up monuments to honour the victims.<sup>38</sup> Most of these measures have also been applied to victims of enforced disappearances and torture.

The Victims and Land Restitution Law (2011) in Colombia also stands out in terms of design. It not only includes all forms of reparation for victims, including land restitution and housing restitution, but also provides great detail in relation to the way each one should be implemented and the way they are jointly provided. It is of particular importance to note that the law also includes, in addition to all forms of reparation, various forms of assistance that it explicitly considers as complementary to reparations and not as a replacement for them.<sup>39</sup>

While Chile and Colombia are landmark cases in the design of reparation programmes, it must be noted that they are countries with strong state institutions and relatively low levels of corruption. In Chile, reparation only began after the dictatorship had ended and improved over the years after the dictatorship. In Colombia, the law was adopted

and began to be implemented in the midst of the armed conflict but there are relatively strong institutions in the country.

In other countries devastated by war that lacked the resources, strong state institutions and political will to adequately redress victims, different packages of reparations had to be designed. In Sierra Leone, the Truth and Reconciliation Commission recommended in 2004 that reparations be provided to certain categories of victims who were in a situation of extreme vulnerability and who suffered the most during or as a consequence of the conflict, namely amputees, others wounded in the war, victims of sexual violence, child victims and war widows. Taking into account Sierra Leone's limited resources, the Truth and Reconciliation Commission also recommended providing victims with social services and means to enhance their livelihood such as 'health care, pensions, education, skills-training and micro-credit/projects, community and symbolic reparations'.<sup>40</sup> However, in practice the recommendations of the Truth Commission have not fully materialized.

### Effective

Reparations should also be effective. This means that they should try as far possible to wipe out the harm caused. While it is almost impossible to bring things to the *status quo ante* in a context where gross violations are at stake, reparations need to be designed and implemented in a manner that allows victims to address the harm incurred to the maximum extent. In addition the substantive dimensions of redress, the process through which victims access reparation is also crucial, as acknowledged in the Basic Principles.

### Institutional structure

In contexts of generalized victimization, states often opt for domestic administrative reparation programmes as a means of delivering redress to victims. In such circumstances, when there may be thousands if not millions of victims, administrative reparation programmes are more effective than tribunals at delivering redress quickly, at minimal expense to victims, and with lower standards of evidence. These types of programmes are encouraged by the Basic Principles as well as the Principles to Combat Impunity.<sup>41</sup> There is no one-size-fits-all when it comes down to an ideal domestic administrative reparation programme.

However, there is a tendency to create new state institutions with a specific mandate to provide reparations, and with an assigned budget to work for a specific period of time. It should be noted that the establishment of administrative reparations programmes does not mean that judicial processes should not be available, as all victims have the right to adequate and effective judicial remedies to claim reparation.

In Chile, the Rettig Commission – a truth commission – was established in 1990 to deal with extrajudicial killings and disappearances that occurred during Pinochet's regime between 1973 and 1990. The commission was also mandated with identifying the individual victims of extrajudicial killings and disappearances, and recommending reparations. This served as an impetus to create the *Corporación Nacional de Reparación y Reconciliación* (CNRR), a national institution responsible for providing reparations, determining the whereabouts of the disappeared, and continuing to identify victims.<sup>42</sup> The CNRR was created as a government institution under the direction of the Ministry of Interior.<sup>43</sup> While it was responsible for reparations, it delivered them in cooperation with other state institutions such as the PRAIS health system.

Torture survivors were not part of the mandate of the Rettig Commission. Only in 2004 did Chile establish the Valech Commission (*Comisión Nacional sobre Prisión Política y Tortura*) to establish the truth surrounding victims of torture. The commission's mandate had to be extended twice to ensure that all victims could be included. The Valech Commission identified victims, while other state institutions were mandated with providing reparations. For example, the PRAIS health system was mandated to provide rehabilitation to victims, and the Pensions Institute (*Instituto de Previsión Social*) was responsible for paying pensions to surviving victims. The commission finished its work in 2011.

In contrast, Colombia's 2005 Justice and Peace Law tasked the Justice and Peace Jurisdiction with providing reparations to victims. This system, however, proved ineffective and slow in deciding on cases, and awarded reparations amounts to victims that were too high to be extended to all cases. Learning from its mistakes, in 2011 Colombia enacted the Victims and Land Restitution Law,

thereby moving from a reparation system that took place through the judiciary to a domestic reparation programme. The law created the Unit for Victims (*Unidad para las Víctimas*), responsible for coordinating all state institutions involved in the National System to Redress Victims and supporting victims' participation in the reparation process.<sup>44</sup> Furthermore, given the acute problem of internal displacement in Colombia (considered at the time to be the highest in the world), the Unit for Land Restitution was also established to create a registry of all land that had been abandoned or lost during the conflict, to receive restitution claims and to present the cases before the restitution judges on behalf of victims. Colombia chose to pursue restitution as the preferred form of reparation, only considering compensation where restitution was materially impossible. Between 2011 and 2016, the unit received 90,395 restitution claims. As of 2016, 51 per cent had been resolved and the restitution judges had issued 1,812 judgments.<sup>45</sup>

#### Processes and evidence

As important as the institutional structure of reparations mechanisms are the process and rules they apply. Domestic reparation programmes require clear, accessible and summary procedures and relaxed standards of evidence.<sup>46</sup>

In Colombia, for example, under the Victims and Land Restitution Law, any person can register as a victim and the administrative process is fast and effective. Moreover, the burden of proof falls on the state, not the victim.<sup>47</sup> The law indicates that state authorities should always presume the good faith of victims and their ability to corroborate the harm they have suffered by any means legally acceptable.<sup>48</sup> The law also establishes various principles that should be applied to cases where persons allege to have been victims of sexual violence. For example, the previous sexual behaviour of the victim cannot be used as evidence to deny reparations.<sup>49</sup> The law also contains important evidentiary rules in relation to land. For example, if a victim seeking land restitution is able to show that he or she owned, possessed or occupied the land, and the person has been recognized as an IDP, the burden of proof rests on the party alleging the opposite unless the person is also an IDP.<sup>50</sup>

In the case of Chile, a person would qualify as a victim if recognized as such by the Rettig Commis-

sion or the Valech Commission. To be recognized as a survivor of detention and/or torture during the dictatorship, the person had to have been detained and/or tortured for political reasons, by state agents or people acting with their acquiescence, between 1973 and 1990. The standard of evidence for victims was low, requiring them to simply complete a form with key information about the allegations such as places of detention, dates and description of facts, and then submit the form to the commission. The commission would then invite the person to an interview to take his or her testimony, then investigate the allegations using a database of information compiled from governmental, non-governmental, and international sources.<sup>51</sup> Most people who appeared before the commission were recognized as victims, leading to more than 50,000 recognized survivors of detention and/or torture.<sup>52</sup>

#### Registries of victims

Official registries of victims enable access to reparations.<sup>53</sup> Not all countries have set up registries of victims, but the more the number of victims grows in armed conflicts, the more they constitute a suitable tool to identify victims and facilitate reparation.

In Colombia, a registry of victims (Registro Único de Víctimas) was created by Article 154 of the Victims and Land Restitution Law. Before 2011, the country had many registries of victims, including a large registry on internal displacement, but there was no clarity as to the number of victims and the nature of the violations they had suffered. Therefore, Colombia decided to create a unified system as part of the Unit for Victims, linking all existing information and identifying new victims who could provide reliable information about victims of the armed conflict and specific human rights violations. As of June 2017, there were 8,421,627 victims registered in the country.<sup>54</sup>

In Peru, a registry was also created as part of the Comprehensive Reparations Plan. The institution responsible for it is the equivalent to the Unit for Victims in Colombia, called the Reparations Council (Consejo de Reparaciones).<sup>55</sup> It has the authority to register both individual and collective victims but expressly excluded the registration of victims that were at the same time members of armed groups.

#### Prompt

In addition to the existence of adequate and effective mechanisms to identify and register victims, it is equally important to ensure that victims have access to prompt reparation. Lack of access to prompt reparations makes even an adequate remedy ineffective, and therefore promptness is an essential element of an effective remedy.

Domestic reparation programmes are frequently instituted many years after human rights violations or violations of humanitarian law have taken place, often in the context of transitional justice processes. This means that reparations, if they happen, are provided very late in the process while harm often continues to ensue. For example, in Sierra Leone, reparations were only put in place in 2007 and became partially effective between 2007 and 2009, although the conflict ended in 2003. Similarly, in Chile, although the worst human rights violations happened during the first five years of the dictatorship (1973–8), they only began to be redressed in 1992.

It is a challenge to provide reparations in the midst of conflict or repression, as there is usually insufficient political will and a lack of adequate institutions to implement them. In such extreme situations, other remedies should be made available to contain or to deal with the harm suffered by victims, such as humanitarian aid. Urgent reparation measures should also be adopted for those most in need. While urgent measures have not been broadly used across states, they should be encouraged and they have proven important where they have been implemented.

In South Africa, for example, they were used in the form of urgent interim reparations. The South African Truth and Reconciliation Commission's rationale for urgent interim measures was that victims would receive 'information about and/or referral to appropriate services [...] as well as financial assistance in order to access and/or pay for services deemed necessary to meet specifically identified urgent needs'.<sup>56</sup> Urgent needs were defined as 'medical, emotional, educational, material and/or symbolic needs'.<sup>57</sup> The Committee on Reparations at the Truth Commission identified beneficiaries and for the most part provided them with cash payments that varied from US\$250 to US\$713 depending on the number of dependants.

Urgent reparations were paid between 1998 and 2001, benefiting more than 14,000 victims.<sup>58</sup>

Urgent measures were also used in Sierra Leone. These measures were originally envisaged to include different types of victims, such as amputees, victims of sexual violence, and conscripted children, as well as different types of measures. However, in practice, the programme played out differently.<sup>59</sup> Interim payments of about US\$100 were granted predominantly to amputees and victims of sexual violence. Approximately, 21,700 victims received this interim relief.<sup>60</sup> Besides this payment, a few victims also benefited from urgent medical care. The International Center for Transitional Justice (ICTJ) indicates that 31 victims in critical condition underwent surgery and 235 victims of sexual violence received medical treatment.<sup>61</sup>

Urgent priority payments are also known to Iraq as the UN Compensation Commission took them into account when considering claims related to damage caused during Iraq's invasion of Kuwait. Of the six categories of claims eligible for presentation before the commission, categories A, B and C were considered urgent. Category B, in particular, focused on serious personal injury and death, and as a consequence such claims were considered and paid with priority.<sup>62</sup> Category B claims constituted a small number and therefore the commission was able to deal with them efficiently.<sup>63</sup> A total of 3,935 claims were processed urgently and with priority under Category B.<sup>64</sup>

## Funding for reparation programmes

Part of the success of a domestic reparation programme depends on allocation of financial resources to make it viable. While different mechanisms could be used to this end, the establishment of special reparation funds is a common practice.

In Colombia, for example, the 2005 Justice and Peace Law created a Fund to Redress Victims, which was later put under the responsibility of the Unit for Victims.<sup>65</sup> Since it was created under the Justice and Peace Law, which dealt with the criminal responsibility of members of paramilitary groups that were demobilized under the law, the fund obtained financial resources and assets from members of paramilitary groups, resources allocated from the national budget, international funding, and donations. Today, the fund pays reparations to victims under both the Justice and Peace Law and the Victims and Land Restitution Law.<sup>66</sup> A special fund for land restitution was also established under the Victims and Land Restitution Law responsible for managing all aspects of land recovery and restitution.

In the case of Iraq, the UN Compensation Commission paid reparations from the United Nations Compensation Fund. Notably, the fund received 5 per cent of the proceeds from Iraq's oil exports to redress victims.<sup>67</sup>

In Sierra Leone, the establishment of a fund was part of the Lomé Agreement (1999),<sup>68</sup> and was also a recommendation of the Truth and Reconciliation Commission.<sup>69</sup> The establishment of the fund only took place in 2009, a decade after it was envisaged in the Peace Agreement. Contributions to the fund have been minimal and highly dependent on international cooperation. For example, during the first year of the reparation programme, the United Nations Peace Building Fund gave US\$3 million, with Sierra Leone contributing only US\$246,000.<sup>70</sup>

The Rome Statute that established the ICC also created the Trust Fund under Article 79. The fund has a double mandate. Not only does it implement the reparations ordered by the ICC in the cases it decides, but it also provides assistance programmes to victims. The fund is financed by private and public sources, including states' voluntary contributions, and receives court-ordered fines and forfeitures.

# 4

## **Case study: Iraq's Law No. 20 on Compensation for Victims of Military Operations, Military Mistakes and Terrorist Actions**

As detailed in the Introduction, Iraq has experience with a number of reparations initiatives corresponding to the different periods of conflict and dictatorship through which the country has passed. These have included reparations awarded in the aftermath of Iraq's invasion of Kuwait and various reparations schemes put into place after 2003 for victims of the Saddam Hussein regime. The most relevant scheme for the purposes of this report, however, is the scheme created by Law 20 on Compensation for Victims of Military Operations, Military Mistakes and Terrorist Actions. Passed in 2009 and amended in 2015, the law remains in force, raising the question of whether it can act as an effective basis for compensating victims of the conflict with ISIS.

This section explores Law 20 in depth, assessing progress in providing reparations to victims under its framework while also discussing some of the shortcomings in the process to date. It draws on analysis of the law itself and related documents, as well as interviews conducted with stakeholders in Iraq and media sources.

### **Law No. 20 of 2009 and its 2015 amendment**

Following the 2003 US-led removal of Saddam Hussein, Iraq witnessed a near-total breakdown in law and order. The proliferation of armed groups which formed to resist the US-led invasion, coupled with the occupation's controversial and often divisive policies, led to an upsurge in generalized violence. During the worst two years of bloodshed, from

2006 to 2007, more than 55,000 civilians were killed in attacks that were often carried out along sectarian lines.<sup>71</sup>

It was in this context that the Iraqi parliament passed Law No. 20 on Compensation for Victims of Military Operations, Military Mistakes and Terrorist Actions in late 2009. The law covers all natural persons harmed by the types of incidents specified in the title and also provides support to their family members. It applies retroactively to incidents occurring on or after 20 March 2003, the date of the American invasion of Iraq. Initially, the law was envisaged to apply to both civilians and military personnel, but responsibility for the latter was later shifted to the Ministry of Defence under a separate law.

In terms of the specific types of damage covered, the law identifies five categories eligible for reparation: martyrdom or loss;<sup>72</sup> full or partial disability; injuries and conditions re-

quiring short-term treatment; damage to property; and damage affecting employment and study. For the first three categories, all of which involve bodily harm, the law stipulates three types of reparation: a one-time grant, the value of which ranges from IQD1.75 million to IQD3.75 million (US\$1,480 to \$3,173) depending on the severity of the case; a monthly pension; and a plot of residential land. All three types of reparation are awarded directly to the victim in the case of disability or injury, or to the family of the victim in the case of martyrdom or loss. The family of the victim includes the parents, sons, daughters, spouse, brothers and sisters of the victim. Islamic inheritance law determines each relative's share in the compensation amount.

Compensation for damage to property is awarded on a case-by-case basis depending on the assessed value of the item and the extent of the damage incurred. The types of property eligible for compensation are wide-ranging and include vehicles, houses, agricultural lands, fixtures, stores and inventory, and companies. Finally, damage affecting employment and study is redressed by reinstating the victim to his or her former place of study or work, and paying any outstanding salaries or benefits for the period in which the victim was prevented from working.

In terms of the institutional structure for receiving and assessing compensation claims, the law creates a Central Committee in Baghdad, headed by a judge representing the Higher Judicial Council and formed of representatives of eight government ministries and the Kurdistan Regional Government (KRG). The law also creates subcommittees with a similar composition in each governorate and region. Victims wishing to claim compensation are required to apply through one of the subcommittees, which are responsible for preparing the case files and conducting investigations into the incidents in question. In cases of martyrdom or injury, the subcommittees themselves issue the decision on compensation, whereas for cases of property damage or lost persons, they issue a recommendation that is forwarded to the Central Committee for decision. The Central Committee also reviews appeals submitted by compensation claimants to prior decisions.

In 2015, the Iraqi parliament approved an amendment to the law that included a series of significant

changes. The scope of the law was expanded to include both natural and legal persons, as well as injured members of the Popular Mobilization Forces (PMF) and the Peshmerga. Kidnapping was added as a form of damage covered under the law, and both kidnapping and loss are now treated in the same way as martyrdom for the purposes of compensation. The 2015 amendment also created a new division within the Martyrs' Foundation<sup>73</sup> for the victims of military operations, military mistakes and terrorist actions, and allocated it responsibility for forming subcommittees in each governorate responsible for receiving all types of claims. The role of the Central Committee in Baghdad is now limited to making the final decision on cases of property damage and reviewing appeals on other types of cases. The composition of the Central Committee was also changed to include only three ministries, as well as representatives of the KRG, the Iraqi High Commission for Human Rights, and a representative of the victims themselves. Lastly, the one-time grant amounts provided under the law were increased and now range from IQD2.5 million to IQD5 million (US\$2,115 to US\$4,230), depending on the gravity of damage.

## Progress on compensating victims from 2009 to present

Official figures obtained from the Central Committee show that considerable progress was made in compensating victims of military operations, military mistakes and terrorist actions since Law 20 was passed. During the period 2011–16, decisions were reached on a total of 65,046 cases involving property damage and 118,894 claims involving martyrs, injuries and lost persons. The total amount awarded to victims over this five-year period was more than IQD420 billion (over US\$355 million).

It should be noted that the years in Table 1 correspond to the year in which the claim was processed, and not necessarily the year in which the incident took place. Since the law applies retroactively and claims are processed in the order they are received, even the most recent yearly figures likely include claims for incidents dating back as early as 2003. Moreover, since the subcommittees in Anbar, Salahuddin and Ninewa governorates

**Table 1:** Claims processed by the Central Committee and subcommittees, 2011–16

Year processed	Number of claims processed by the Central Committee for Compensating Victims (property)	Number of claims processed by the subcommittees (martyrs, the injured the lost)	Total amount disbursed to victims (IQD)
2011–12	12,227 claims	45,741 claims	168,235,846,000
2013	13,653 claims	35,631 claims	56,387,345,526
2014	13,732 claims	18,594 claims	50,908,448,570
2015	10,403 claims	17,136 claims	74,422,997,864
2016	15,031 claims	1,792 claims	70,110,547,589
<b>Total</b>	<b>65,046 claims</b>	<b>118,894 claims</b>	<b>420,065,185,549</b>

Source: Central Committee for Compensating Victims of Military Operations, Military Mistakes and Terrorist Actions.

were forced to suspend their work following the ISIS advance in 2014, the totals above include only pre-2014 incidents from those governorates.

Figures from the Central Committee also provide a breakdown by governorate of the claims processed each year over the period 2011–16. While the distribution of claims within and between governorates varied significantly each year, Baghdad ranked consistently as the governorate with the highest total number of claims over this period. Other governorates with relatively high numbers of claims processed over the period included Diyala, Anbar, Ninewa, Babel, Basra, Salahuddin and Kirkuk. The figures for these governorates are presented in Figure 1. Figures for the remaining governorates of Dhi Qar, Najaf, Maysan, Karbala, Wasit, Qadisiyya and Muthanna are not represented in Figure 1 due to the relatively low numbers of claims from these governorates.

## Gaps and challenges

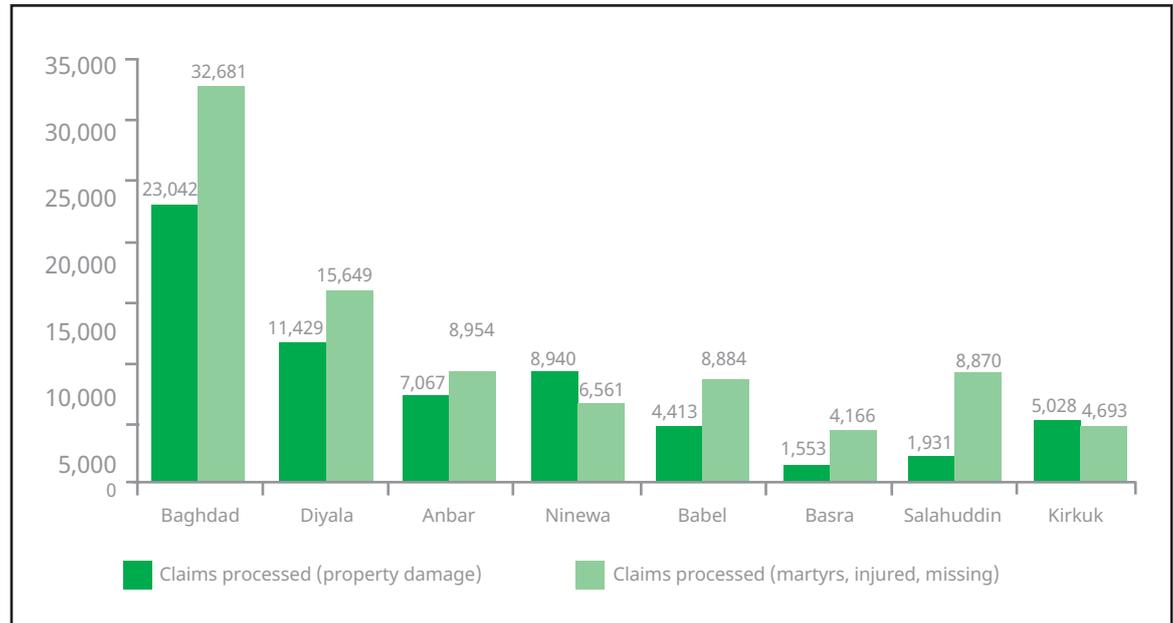
Despite the achievements detailed above, the process of implementing Law 20 has not been without its shortcomings and challenges. To some degree, these are emblematic of the difficulties of implementing a reparations programme in the midst of ongoing conflict and in a context where state institutions are weak. Others are connected to the particular processes and structures created by the law.

First of all, extensive delays have marred the process of delivering reparations to victims under the Law 20 framework. According to a representative of an Iraqi civil society organization, although Law 20 was approved by the Iraqi parliament in late 2009, it was not until mid-2011

that the Ministry of Finance issued the directives required to put the law into practice.<sup>74</sup> Even after implementation begun, it reportedly took an average of two years to process a claim.<sup>75</sup> Many governorates quickly accumulated a backlog of claims due to the high number of victims claiming compensation.<sup>76</sup>

According to a legal adviser to the Human Rights Committee in the Iraqi parliament, the law's bureaucratic procedures are a major source of delays in delivering reparations to victims.<sup>77</sup> Unlike many of the other country examples presented in earlier sections of this report, Iraq did not opt to establish a strong central institution responsible for delivering reparations to victims. Instead, the Central Committee and subcommittees established under Law 20 are formed of representatives of various government ministries, headed by a judge. This means that there is no full-time, specialized institution dealing with reparations, even if some secretariat facilities have been established. In fact, in the original version of the law, the Central Committee was only required to meet once a week, and the subcommittees twice a week. This was undoubtedly a major factor causing a backlog in claims to build up.

It is also clear from analysis of the law and related documents that the process for claiming reparations involves quite onerous evidentiary requirements, obliging both victims and the subcommittees to obtain numerous official documents from multiple government offices. For victims these could include, depending on the case under consideration, authenticated investigation reports, death certificates, medical reports, property deeds, estate division documents, custody documents, power of attorney forms,

**Figure 1:** Top eight Iraqi governorates by number of claims processed, 2011–16

Source: Central Committee for Compensating Victims of Military Operations, *Military Mistakes and Terrorist Actions*.

identification documents for the victim and all surviving heirs, and others. A senior official connected to the Central Committee in Baghdad explained that they had dealt with high numbers of fraudulent claims over the years, which may explain the reliance on heavy evidentiary requirements:

*'During the time of the transitional authority when we had the Al-A'immah bridge disaster in Baghdad, hundreds of people died. But over 3,300 submitted claims, and they all had original death certificates and authenticated witness statements! We need to check claims and prevent fraud.'*<sup>78</sup>

Nevertheless, the use of a high standard of proof is at odds with best practices internationally, where a more relaxed standard has been favoured to avoid placing undue burden on victims. In the Iraqi case, the need to obtain documents from different government offices is very costly for victims, especially in terms of time and transportation. This process can be seen as adding insult to injury for victims who have already suffered immense harm as a result of violations.

The poor security situation in Iraq has also negatively impacted on the implementation of the law. In governorates with active conflict, victims often

faced difficulties in obtaining the documents needed to submit reparations claims from government offices.<sup>79</sup> The reparations process was slow to accommodate the reality of displacement, initially requiring victims to submit their claims in the governorate that the incident occurred even if they were living somewhere else.<sup>80</sup> The situation deteriorated further following the advance of ISIS in 2014. The subcommittees in Kirkuk, Ninewa, Anbar, and Salahuddin governorates were forced to suspend their work completely – Kirkuk for a period of three months, and the others for more than two years. In June 2014, the Central Committee reported that the secretary of the Diyala subcommittee was killed in a terrorist attack on his way to the office. According to an Iraqi Member of Parliament, prolonged displacement caused by the conflict hampered victims' ability to obtain reparations. Compensation money is distributed at the governorate level, but many IDPs were unwilling to return to their governorates due to the volatile security situation.<sup>81</sup>

There is also no central funding system to operationalize payments and other forms of reparation under Law 20. Instead, the Central Committee and the subcommittees forward their decisions to the Ministry of Finance, the Pension Authority, and the local authorities, which are responsible for issuing the compensation grants, the pension pay-

ments, and the plots of land respectively. This means that even when victims receive a positive decision on their cases, a variety of factors could prevent the reparations from being delivered to them by the other government offices. Three members of parliament interviewed in Baghdad stated separately that many victims had received confirmation of a positive outcome on their cases, but no actual money.<sup>82</sup> According to the Central Committee, the delays encountered in the release of payments are due to the standard checks and procedures followed by the budget and cash accounting divisions in the Ministry of Finance. The process of granting land to victims has also proved problematic, especially in Baghdad governorate where there is a shortage of suitable residential land. As a result, many eligible victims have received neither a plot of land nor the equivalent monetary value specified under the law.<sup>83</sup>

Following the 2015 amendment to Law 20, some changes have been made to the institutional structure through which claims are received, partly in an effort to speed up the process of granting reparations. The Central Committee and subcommittees now work full-time, and their membership structure has been somewhat simplified. The Central Committee has also formed teams of administrative staff to speed up the processing of applications and to perform preliminary checks on case files before presenting them to the committee members for final decision.<sup>84</sup> Nevertheless, the Central Committee and subcommittees remain quasi-judicial bodies in essence rather than administrative institutions, which places important limitations on victims in accessing reparations.

Another 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 the

Martyrs' Foundation. This change has stirred political tensions. According to a representative of an Iraqi civil society organization, the Martyrs' Foundation is closely associated with the Dawa Party, which places high priority on compensating victims of the regime of Saddam Hussein.<sup>85</sup> As a result, many within the establishment are resistant to the idea of incorporating victims of military operations and terrorism under their remit and granting them the same privileges as victims of the Saddam Hussein regime. The Ministry of Finance and the Public Pensions Authority also filed an objection to the amended law before the Federal Supreme Court, claiming the increase in compensation amounts for martyrs constituted an untenable financial burden on the state. However, according to a representative of another Iraqi civil society organization, the reasons behind this opposition are political rather than financial, as there was also strong opposition to the law in 2008, when oil prices were at a record high.<sup>86</sup>

As a result of the 2015 amendment, the process of granting reparations to victims has met with further delays. The process of reconstituting the Central Committee and the subcommittees according to the new membership structure specified in the law took several months.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup> Consequently, cases of property damage are the only area of compensation in which the 2015 amendment has been implemented.<sup>90</sup>

# 5

## Towards a comprehensive reparations scheme for victims of the conflict with ISIS

*“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 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 – nearly every bridge in Mosul has been destroyed.”*  
– Former Chair, Central Compensation Committee, Baghdad

*The first priority is to liberate the land from ISIS, and then the next priority is to protect people. Compensation comes after liberation. Currently, donor money is going to reconstruction, rather than compensation.<sup>92</sup>*

Conditions in Iraq now are very different from when Law 20 first went into practice. The conflict with ISIS has led to the displacement of over 3 million people, large-scale destruction, and widespread violations of human rights and international humanitarian law perpetrated by an array of actors. With the defeat of ISIS appearing imminent, ensuring accountability for these violations and justice for victims is an immediate priority as Iraq seeks to rebuild and recover from the conflict. Reparations should be a central element of these processes. This section explores some key considerations to be taken into account when planning for reparations for victims of the conflict with ISIS, identifying ways in which the framework established by Law 20 could be expanded and improved.

### Scope of violations and forms of reparations

In its current form, it is unlikely that the Law 20 framework would be able to effectively cover the range of violations committed during the most recent conflict. While the stated focus of the law is ‘victims of military operations, military mistakes and terrorist actions’, it does not further specify the types of violations included under those categories. In practice, the only victims covered under the law are those who have been killed, kidnapped or gone missing; the physically injured; those who have been forced to leave studies or employment; and those who have lost property.

While a prioritization of certain types of violations has been justified in many cases where providing reparations to all victims would be unfeasible, the focus of Law 20 clearly excludes major types of violations that have been central features of the conflict. For example, victims of 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 col-

lective 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.

Addressing this range of violations appropriately would require a mix of different forms of reparations. Currently, Law 20 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.<sup>93</sup> 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.

Redressing violations committed against vulnerable groups poses particular challenges that are unlikely to be resolved through compensation alone. In the case of child soldiers, comparative experience has shown that compensation can actually produce negative effects, and may not be effectively spent to the benefit of the child.<sup>94</sup> A combination of measures, such as access to rehabilitation and education, can be more effective in redressing the harm inflicted on a child's development by under-age military recruitment. Similarly, reparations for victims of sexual violence should be designed in a way that appropriately addresses the multiple and long-term dimensions of the harm suffered without causing re-victimization. This could include elements such as access to psychosocial care, vocational training, and education for the victim's children in addition to compensation.<sup>95</sup>

## Responsibility of international actors and armed groups

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.

This report has centred on the measures taken by the Iraqi government to provide reparations, but the Law 20 framework is clearly insufficient on its own to cover violations committed by all the actors above. While the categories of 'military operations' and 'military mistakes' would appear to refer primarily to actions taken by the Iraqi Security Forces, and 'terrorist actions' presumably covers some actions by non-state armed groups, further measures are needed to ensure that violations committed by all parties to the conflict are included.

### ISIS and other non-state armed groups

In Iraq, as in many other modern conflicts, non-state armed groups have been responsible for a large share of the violations committed against civilians. This includes most obviously ISIS elements, but also an array of other militias operating under the umbrella of the Popular Mobilization Forces<sup>96</sup> or outside of it. Armed opposition groups party to conflicts are bound by international humanitarian law and it is also becoming increasingly recognized that they may

## Reparations for victims of enforced disappearances

Enforced disappearance is recognized as a serious violation that causes long-term pain and suffering not only for the direct victims, if they survive the ordeal, but also their relatives and friends, who are left in a state of uncertainty about the fate of their loved ones. As such, international law requires enforced disappearance to be recognized as a distinct offence with characteristics distinguishing it from other deprivations of liberty. The International Convention on the Protection of all Persons from Enforced Disappearances (ICPPED), to which Iraq is party, defines enforced disappearance as:

*'the arrest, detention, abduction or any other form of deprivation of liberty by*

*agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.'*

While enforced disappearances were practised widely by the Saddam Hussein regime until its overthrow by US-led forces, the period since 2003 has seen the increased use of enforced disappearance by non-state actors, including by ISIS. Most recently, the PMF have been accused of forcibly disappearing hundreds or even thousands of Sunni Arab men and boys captured while fleeing ISIS-held territory. The ICPPED also requires state parties to take measures to address enforced disappearances committed by non-state actors, while recognizing these acts as distinct

from enforced disappearances committed by state actors.

While Law No. 20 provides reparations to the families of victims who have been kidnapped or gone missing, it does not specifically cover cases of enforced disappearance. In fact, there are no Iraqi laws that criminalize the act of enforced disappearance, as required by the ICPPED. 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.

have certain human rights obligations, alongside states.<sup>97</sup> However, it is less clear whether they should be responsible for providing reparations to victims of their violations, or whether this role should be left for states.

In practice, it is not always feasible or desirable to compel armed groups to provide reparations. Armed groups may be militarily defeated and cease to have an organized presence in the aftermath of a conflict. Even if they continue to exist, 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.<sup>98</sup>

The factors above mean that it is unrealistic to expect that ISIS will play a direct role in granting reparations to its victims, as this is a role neither the group nor the Iraqi government would be

likely to accept. 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 that have been active on the anti-ISIS side may continue to exist after the end of the conflict and some enjoy a higher degree of legitimacy in the eyes of the Iraqi government. These groups might be engaged in the reparations process as a means of holding them accountable for violations committed. Appropriate reparations in this case should not be limited to compensation alone but could also include symbolic measures such as public apologies.

### Members of the US-led coalition

*'Those who have created the destruction should pay the compensation. And the greatest responsibility [in Ramadi] lies with the Americans.'*<sup>99</sup>

*I know a man from al-Whyalieh [in Tal Afar district] who lost all 26 members of his family in an airstrike. They told him it was a mistake. In the Strategic Framework Agreement [between Iraq and the US] is there a provision giving impunity to the military? We don't know.'*<sup>100</sup>

The US-led Combined Joint Task Force (also known as Operation Inherent Resolve), which began conducting anti-ISIS airstrikes in Iraq in August 2014, is clearly responsible for significant civilian casualties and damage to civilian homes and infrastructure. While incidental civilian casualties are not necessarily unlawful under international humanitarian law, the scale of civilian deaths raises the question of whether members of the coalition have taken constant care to spare the civilian population and taken all feasible precautions to avoid, or in any event minimize, civilian death or injury or damage to civilian objects. In certain instances, coalition attacks have also been alleged to breach the proportionality principle in the conduct of military operations in Iraq.

Up to now, the coalition and its members have appeared reluctant to conduct thorough investigations into incidences of civilian casualties, and there has been almost no effort to provide reparations to victims of airstrikes. As of July 2017, the coalition had publicly admitted to 603 'accidental' civilian deaths in the course of its airstrikes in Iraq and Syria. However, the coalition did not conduct interviews with witnesses on the ground as part of its information-gathering, and a leading monitoring group contended as of August 2017 that the true death toll was 5,117 – more than eight times the coalition figure.<sup>101</sup> Despite these high figures, the coalition had reportedly only received two compensation requests and issued two condolence payments over the course of the operation as at June 2017.<sup>102</sup>

The US-led coalition, as well as its individual members, must take greater responsibility towards the victims of its military operations. This should include conducting effective, prompt, thorough and impartial investigations into all civilian casualties, and paying reparations to victims or their families in cases where international law has been violated. The US should also consider granting condolence payments in cases where international law has not been violated

but harm has been incurred, in line with previous practice.<sup>103</sup>

## Processes and evidence

As discussed in the previous section, the standard of evidence used up until now in the Law 20 reparations process is quite high. Although the need to verify claims and prevent fraud is understandable, the evidentiary requirements currently used place barriers on victims in accessing reparation. Moreover, they cause long delays in the process of receiving and assessing claims. This problem will likely be compounded in the future given the large number of victims who have suffered violations during the most recent conflict. Consequently, efforts should be made to simplify the documentation requirements and speed up the processing of claims for victims of the conflict with ISIS.

There are already examples in Iraq where documentation requirements have been simplified to ease the processing of reparations claims in special cases. Following the July 2016 Karrada bombing, which claimed the lives of hundreds of civilians, an ad hoc reparations committee set up by the Prime Minister opted to accept victims' claims on the basis of death certificates only, reportedly allowing them to finish their work within 40 days.<sup>104</sup> Property claims are another area that warrants the adoption of a more flexible approach, since many victims are unlikely to possess complete documentation that confirms their ownership of damaged property or housing, especially if they have been displaced. The Central Committee has already initiated some modifications to the procedures for victims from rural areas, who are now permitted to submit a pledge by a village leader or other relevant authority to confirm their ownership of property if they do not possess official documents.<sup>105</sup> A representative of a civil society organization interviewed for this report also stated that her organization was supporting victims in Ninewa governorate to use geographic information system (GIS) data to corroborate damage to their properties.<sup>106</sup>

In addition to carefully reconsidering the documentation requirements needed to claim reparations, Iraq should also take steps to ensure that

citizens are made aware of the reparations process and their rights thereunder. In the course of interviews conducted for this report, it emerged that even politicians lacked understanding of the reparations process created by Law 20, and some appeared completely unaware of the system. According to a senior UN representative interviewed in Baghdad, there may have been insufficient investment in raising awareness about the law.<sup>107</sup> Awareness-raising will not only ensure that the greatest possible number of victims are able to claim reparations, but will also enhance the efficiency of the process by reducing the incidence of improperly submitted claims.

Finally, Iraq should also place priority on building a central and unified registry of victims to further improve its method of work. A registry of victims is needed to facilitate reparation but also to measure the reach of the programme and to be able to correct work on reparations as the programme is implemented. When interviewed in March 2017, the director of the division in the Martyrs' Foundation responsible for compensating victims under Law 20 stated that his team was working on building a database of martyrs killed since 2003, but that they needed more support to ensure the inclusion of all those killed after the ISIS advance of 2014.<sup>108</sup>

# 6

## Conclusions and recommendations

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.

Iraq already has significant expertise in the implementation of reparations programmes, most notably the system established by Law 20 on Compensation for Victims of Military Operations, Military Mistakes and Terrorist Actions. Iraq should carefully reflect on the merits and flaws of this system 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.

Lastly, 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.<sup>109</sup> 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.

### Recommendations

#### To the Government of Iraq:

- Strengthen the capacity of institutions involved in the reparations process by ensuring that staff have access to specialized training on the delivery of reparations

- Acknowledge violations committed by all parties to the conflict and ensure that all victims are eligible for reparations
  - Expand the scope of harm eligible for reparation to include mental and sexual violence in addition to physical violence
  - Adopt a multi-pronged approach to reparations that includes measures such as restitution, rehabilitation, satisfaction and guarantees of non-repetition alongside compensation
  - Consider designing special measures to address instances of collective harm inflicted on communities, especially ethnic and religious minorities
  - Adopt simplified and flexible evidentiary requirements for reparations processes so as to avoid putting an excessive burden on victims
  - Consult with affected communities in the design and improvement of any reparations programmes
  - Consider the establishment of a central registry of victims to facilitate access to reparations and enable the reparations programme to be measured and further improved
  - Abide by a 'do-no-harm' approach in all reparations programmes
  - Anchor reparations programmes within a transitional justice framework, which includes elements such as judicial accountability and truth-seeking alongside reparation
  - Cooperate with other governmental and international agencies to identify points of congruence between reparations programmes, humanitarian assistance, and development programmes.
- To the international community:**
- Conduct effective, prompt, thorough and impartial investigations into all instances of civilian casualties caused by international military intervention, and provide reparations to victims
  - Provide technical support to the Iraqi government in designing a comprehensive and appropriate reparations scheme for victims of the conflict with ISIS
  - Consider developing jointly funded and implemented reparations programmes in cooperation with the Iraqi government
  - Work with civil society organizations to raise awareness of existing reparations schemes and support victims in filing claims.

## Endnotes

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# Reparations for the Victims of Conflict in Iraq: Lessons learned from comparative practice

## In brief

The responsibility of states to provide reparation to individuals who have experienced violations in armed conflict is well established today under international law. If well designed, reparations can empower, dignify and return a voice to victims, as well as provide them with redress for the harm caused. From Colombia and Peru to Sierra Leone, a variety of reparations schemes have been designed around the world to address the effects of serious violations on those directly affected and on the societies in which they live.

In Iraq, millions of victims have suffered over the decades as a consequence of gross human rights violations and serious violations of humanitarian law. Most recently, the conflict with ISIS has led to the displacement of over 3.1 million people, the killing of thousands, and targeted campaigns against ethnic and religious communities. The conflict has also resulted in widespread damage to infrastructure and personal property. Victims of these violations have a right to adequate, prompt and effective redress for the harm they suffered.

Iraq already has significant experience in providing reparations, including the work of the Iraq Property Claims Commission covering land-related violations committed during the Saddam Hussein regime. More recently, Law No. 20 on Compensating Victims of Military Operations, Military Mistakes and Terrorist Actions, first passed in 2009, provides redress to victims who have suffered violations since 2003. Between 2011 and 2016, more than IQD 420 billion (USD \$355 million) was distributed to victims under this framework.

While considerable progress has been made under the Law No. 20 framework in compensating victims of military operations, military mistakes and terrorist actions, the most recent phase of conflict raises new challenges. These include the range and severity of violations committed, the wide diversity of armed actors involved, and the barriers that widespread destruction and displacement present to victims' ability to participate in reparations processes. This report argues that the existing reparations framework in Iraq could be strengthened by expanding the scope of violations covered, em-

ploying multiple forms of reparations, widening coverage to include all parties to the conflict, and simplifying evidentiary requirements imposed on victims.

As Iraq prepares to rebuild and recover from the conflict with ISIS, ensuring accountability for violations committed and justice for victims is an immediate priority. This report seeks to inform the discussion on reparations in Iraq through analysis of both international and domestic practice, with the goal of encouraging the development of a comprehensive framework that can provide adequate and effective reparations to victims.

This report recommends:

- The Government of Iraq should acknowledge violations committed by all parties to the conflict, and ensure that victims are eligible for reparations. Building upon existing experience, it should adopt a multi-pronged approach to reparations that includes measures such as rehabilitation, satisfaction and guarantees of non-repetition alongside compensation
- Reparations programmes should be anchored within a transitional justice framework, which includes elements such as judicial accountability and truth-seeking alongside reparation
- Members of the U.S.-led coalition and other foreign states conducting military operations in Iraq should conduct effective, prompt, thorough and impartial investigations into all instances of civilian casualties caused by their forces, make the results transparent and provide reparations to victims
- The international community should consider developing jointly funded and implemented reparations programmes in cooperation with the Iraqi government, and work with civil society organizations to raise awareness of existing reparations schemes and support victims in filing claims.

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