

ISIS accountability for mass  
violations against Iraqi women  
study in the Iraqi criminal  
framework

مسائلة داعش عن الانتهاكات الجسيمة ضد  
النساء العراقيات: دراسة في الإطار الجنائي العراقي

الكلمات الافتتاحية :

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**Abstract**

In light of the grave violations committed by the terrorist organization ISIS in Iraq, especially against women, there are several cases that are still under legal discussions. In this article, we will examine the current Iraqi criminal framework and whether it is appropriate to prosecute the perpetrators of these violations in parallel with the principles of international criminal law as well as the Security Council actions taken after ISIS took control of Mosul in 2014 and other areas of Iraq. This research will discuss critical issues, for example: Is the Iraqi criminal framework qualified to fulfill the mission of investigation and accountability for ISIS crimes? Is there a legislative void or contradiction in the Iraqi criminal framework? How does the Iraqi Council of Representatives address these issues in legislative policy, whether by amending current legislation or enacting a new law to prosecute crimes such as genocide or crimes against humanity?

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**الملخص**

في ظل الانتهاكات الجسيمة التي ارتكبتها تنظيم داعش الارهابي في العراق وخاصة ضد النساء , هناك عدة قضايا لا تزال قيد النقاشات القانونية. في هذا المقال , سنبحث في الإطار الجنائي العراقي الحالي وما إذا كان من المناسب ملاحقة مرتكبي هذه الانتهاكات

بالموازاة مع مبادئ القانون الجنائي الدولي وكذلك إجراءات مجلس الأمن التي اتخذت بعد سيطرة داعش على الموصل في عام 2014 وغيرها من مناطق العراق. سيناقش هذا البحث القضايا الحاسمة ، على سبيل المثال: هل الإطار الجنائي العراقي مؤهل لتحقيق مهمة التحقيق والمحاسبة على جرائم داعش؟ هل ثمة فراغ تشريعي او تناقض في الاطار الجنائي العراقي ؟ كيف يعالج مجلس النواب العراقي هذه القضايا في السياسة التشريعية سواء بتعديل التشريعات الحالية أو سن قانون جديد لمقاضاة جرائم مثل الإبادة الجماعية أو الجرائم ضد الإنسانية؟

## Introduction

In light of the mass violations committed by ISIS in Iraq, especially against women, there are several issues, still under legal debate. this article will examine the current Iraqi criminal framework and whether it was appropriate to prosecute these violations in parallel with the principles of international criminal law as well as the security council measures have been taken after ISIS took control of Mosul in 2014 and other areas in Iraq.

This article will debate critical issues ,for example: Is the Iraqi criminal framework qualified to achieve the task of investigation and accountability for ISIS crimes? if the response is positive, then why did the Iraqi government present a request in 2017 to the Security Council demanded to offer assistance in this issue? Especially after three years of committed atrocities against Iraqi women?

In contrast ,if the response is negative, in other words, there is a legislative vacuum or contradiction in the Iraqi criminal framework, then why did the Council of Representatives of Iraq, did not treat these issues in the legislative policy, either by amending current legislation or enacting a new law to prosecute crimes like genocide or crimes against humanity?

In this regard, it may the previous answers are insufficient, because the accountability of ISIS for its violations is not specific to Iraq, and therefore the Iraqi inability to self-prosecute is more complex and requires an integrated international effort with the Iraqi national authorities, to achieve justice for the victims and prevent the recurrence of these violations again at the international level.

So to comprehensive assessment of the current Iraqi criminal framework, as well as the best legal process to prosecute of ISIS on mass violations against Iraqi women, this part will focus on critical legal issues as bellow:

I.Iraqi criminal framework before the control of ISIS

This part of the article will discuss the current criminal framework related to the prosecution of mass violations of Iraqi women before the emergence of ISIS and its control over large areas of Iraq.

In this regard, the research will focus on accountability mechanisms against mass violations, whether implicitly or explicitly, and the timeline for enacting legislation will be the standard in the research, especially with the emergence of variables in the Iraqi criminal policy.

### A. Iraqi Penal law No.111 of 1969

First of all, by reviewing the Iraqi criminal legislations, we did not find a provision referring to the concept of mass violations, except for some provisions that regulate the issue of crimes committed and causing mass damage to the public money or public interests of the country.<sup>1</sup>

The Penal Law No. 111 of 1969 did not take into provisions the concept of mass violations for several facts:

First: When the Iraqi Penal Law was enacted in 1969, it did not refer to the concept of mass violations, like most penal legislation in many countries.

Second: The failure to refer to the concept of mass violations in Iraqi penal legislation, continued even after additional Protocol II of 1977 entered in force for Iraq, as neither the Penal law nor any other Iraqi penal legislation was referred to regulate mass violations. the reason for non regulates was as a policy to not recognize opposing political parties against the former regime, such as the Kurdish opposition in the north of Iraq, and the Shiite opposition in the south of Iraq.

Third: Contrary to what international instruments, the Iraqi Penal law has Severe punishment in some of its provisions that regulate behaviors committed by the opposed individuals the regime, these provisions considered these acts as political crimes punished by the death penalty or life imprisonment, without taking into account the guarantees referred to the common article 3 of the Geneva Conventions of 1949.<sup>2</sup>

Although the Iraqi Penal law has adopted the principle of comprehensive jurisdiction by article (13)<sup>3</sup>, but it is limited to mass violations that had been mentioned exclusively, like trafficking in women and children.

The Iraqi legislator considered the crime of rape in the category of crimes against public morals in articles (393-399) with defined rape in the article (393) of the Iraqi Penal law by states: "female intercourse without her consent", the legislator believes that the criminalization of intercourse act lies in two things :

First: sexual intercourse embodies a violation of women's sexual freedom when the perpetrator coerced a female for sexual behavior. Thus, rape is the most serious crime against physical and psychological rights.

Second, sexual intercourse crime involves an attack on the victim's freedom. in other words it is an attack on her body's immunity, it would harm the woman's material or mental health as well as it constitutes an assault on the honor of women in a way that reduces the chances of marrying them according to traditions and customs in Iraqi society, and touches the stability of the family if they were married.

In the same context, accordance to the first paragraph of the article (396) any person who sexually assaults a man or woman or attempts to do so without his or her consent and with the use of force, menaces, deception, or other means is punishable by a sentence of imprisonment not exceeding 7 years or by detention.<sup>4</sup>

While pursuant to the second paragraph of the same article stated:" the penalty will be a sentence of imprisonment not exceeding 10 years if the person against whom the offense is committed is under 18 years of age or an offender is a person described in subparagraph 2 of paragraph 393".<sup>5</sup>

In this regard, and because the law of Supreme Iraqi Criminal Tribunal has a timeline and objective restrictions, as well as the absence of explicit provisions in the Iraqi Penal Law regulating the acts of terrorism that became apparent after 2003, the Iraqi legislator tried to stand in the face of this legislative gap by enacting Anti-terrorism Law No. 13 of 2005.<sup>6</sup>

### **B. The Supreme Iraqi Criminal Tribunal law No.10 of 2005**

After May 1, 2003, and as a result of the US occupation in Iraq ,then change of its political system, two new processes can be marked within the framework of penal legislation, the first to accountable of the former regime for committed mass violations in Iraq, while the second process to accountable against terrorist acts and other crimes like crimes against humanity, genocide and war crimes.

Regarding the first process, several options are similar in terms of goal to prosecute the accused previous regime for it mass violations had been

committed against Iraqi civilians, but this was not an easy process, because some of the mass violations were not organized in the Iraqi penal legislation, in particular Iraqi penal law No. 111 of 1969, as the violations were described as widespread and systematic perpetrated by the organs of the former regime, and thus they were closer to some of the international criminal statutes such as ICTY, ICTR and ICC, in particular genocide, crimes Against humanity, and war crimes.

In the same context, it was not possible to refer cases of mass violations to the International Criminal Court, even if Iraq ratified the Rome Statute or through referring the cases either from the Security Council or by *proprio motu* investigation by the ICC Prosecutor according to the article (13) of the Statute of the ICC, as pursuant to article (1:11) of the Statute, The Court has jurisdiction only with crimes committed after the entry into force of this Statute.<sup>7</sup>

In light of this gap, the best option was not with the application of the Iraqi Penal law, nor even with enact amendments to it due to the legal status of Iraq and the difference of visions between the political parties and the Iraqi legislative authority, as well as that any amendment may need a long time to be discussed. then the available option was to enact a new law to set up a tribunal with granting authority to investigate, prosecute and conduct trials.

This option was approved in law No. 10 of 2005 by the National Assembly as representing the legislative authority according to the State Administration Law for the Transitional Period of 2004.<sup>8</sup>

In this regard, according to the tribunal statutes, the second paragraph of the article (1) states: the tribunal shall have jurisdiction over every natural person, whether Iraqi or non-Iraqi resident of Iraq, accused of committing any of the crimes listed in Articles 11, 12, 13 and 14 of this law, committed during the period from 17 July 1968 to 1 May 2003, in the Republic of Iraq or elsewhere, including the following crimes:

- A. Genocide,
- B. Crimes against humanity,
- C. War crimes, and
- D. Violations of Iraqi laws listed in Article 14 of this law.<sup>9</sup>

In comparison, the provisions of law No. 10 of 2005, in particular, the articles related to the classification of crimes were similar to a statute of ICTY, particularly in articles 11, 12, and 13, which are similar in legal terms of articles 4, 5, and 6 of the Statute of ICTY.<sup>10</sup>

With concerning the subject of the report, according to paragraph (first / G) of the article (12) of the supreme Iraqi criminal tribunal law, had been criminalized Rape, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity, While the paragraph (second /C) of the article (12) had been criminalized slavery, especially women, and considered it as a crime against humanity.<sup>11</sup>

In comparison with the mass violations committed by ISIS as a whole and against women, in particular, it would have been more appropriate to re-enforce the law of the supreme Iraqi criminal tribunal in a new form, instead of restricting its jurisdiction in both temporal and substantive sides, by amending the second paragraph of the article (1), or any other article to lift the conflict in tribunal's jurisdiction with any other Iraqi criminal legislation to apply it to the mass violations that may be committed by any terrorist organization or armed group.

Also, It would have been better to harmony the provisions of the Anti-terrorism Law No. (13) of 2005 and unify them with the Supreme Iraqi Criminal Tribunal law, to enact a new law that would prosecute mass violations, whether those that fall within the scope of accountability of ISIS or other crimes against humanity may be committed by armed groups.

In light of the current legislative gap, in particular the issue of accountability of ISIS for mass violations against Iraqi women, the situation remains as it, because according to the principle of legitimacy, an individual cannot be criminalized or prosecuted except through a law according to Article (19) of the Iraqi constitution, by states:" 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".<sup>12</sup>

Currently, the Presidency office of the Republic of Iraq Issued a republican decree to establish a team with a membership of criminal professors, to rethink Iraqi penal law, as well as consider new violations in harmony with international criminal principles, by adding new crimes to the penal law related to crimes against humanity, genocide, and war crimes.<sup>13</sup>

As the continued application of current penal legislation will not be appropriate for investigating mass violations against women, for example, the crime of rape.

It is hoped that this team will finish its tasks soon, and then propose to amend the current penal law to be complementary with other international

criminal processes to curb mass violations as well as prosecute those involved in committing these violations.

### C. Anti-Terrorism Law No. 13 of 2005

In last of 2003, Iraq faced a rapid increase in bombings, kidnappings, and other terrorist activities carried out by Al Qaeda.<sup>14</sup>

These circumstances have revealed the inability of the Iraqi penal legislation to prosecute those involved in these mass violations, and for the reasons we mentioned above, such as a legislative gap to prosecute the perpetrators, the Iraqi legislative authority, and to face this issue, enacted the current anti-terrorism law, to be the specialist in accountability for terrorist crimes exclusively.

Despite the decline in terrorist operations carried out by Al-Qaeda in the last of 2013, Anti-terrorism Law No. 13 of 2005 still the applicable law for accountability for terrorist operations, and it continued even after the emergence of ISIS in Iraq.

This part, will examine the critical questions, for example, are the mass violations committed by ISIS against Iraqi women, full within the jurisdiction of Law No. 13 of 2005? if yes, is the appropriate option to accountable for perpetrators?

The investigation on the mass violations committed by ISIS, and whether they fall within the jurisdiction of Iraqi penal legislation in particular anti-terrorism law, it's a matter of great consideration and scrutiny. the line between adaptation and applicable law is in confirming core elements, contained in restricted rules (*Lex specialis*), in addition to those stated in a national legislation framework, particularly in the scope in which these violations occurred, in other words, the circumstantial contexts like the date of the commit of crime, the party that committed it, as well as the party of the victim.

In this regard, any effective criminal policy, in any country that is exposed to such mass violations, must confront the crime by two aspects are, preventive and remedial, by a taken process like:

1. The investigation, prosecution, and issuance of punishments against every person have been involved in commit of mass violations.
2. Determining the identity of the victims and understanding the circumstances as well as the causes that led to the perpetration of violations against specific minorities or sects.

3. Compensation for the victims or their families, as well as offering psychological rehabilitation.

4. Emphasis on preventing mass violations from being committed again.

As mentioned above, Anti-terrorism Law No. (13) of 2005 is the law currently applied to most of the violations committed by ISIS.

By reviewing this law as a whole, will find that the Iraqi legislator dealt with the issue of terrorism on its direct side (for those who committed the criminal behavior), without the text being extended to those who sponsor terrorism indirectly.

In contrast, although the Iraqi penal law ( No. 111 of 1969) is one of the first enacted legislation in the Middle East region, in criminalizing international terrorism, especially the accounts of those accused of sponsoring terrorism, even if the perpetrator is a person who has diplomatic immunity, by making an exception to the principle of diplomatic immunity referred to in article (11) of the law itself. the rule for this exception remains weak, as the legislator did not explicitly mention criminal behavior in wider, but rather mentioned it exclusively in the article (13),<sup>15</sup> which requires an amendment that closes a legal loophole that covers all terrorist acts in the broadest sense.<sup>16</sup>

Regarding the subject of the report, the current anti-terrorism law can be applied to the mass violations that Iraqi women have suffered or will be exposed to, whenever the violation against women is for purpose of spread terror among civilians, as Paragraph (8) of the article (2) stated : "Kidnap or impede the freedoms of individuals or detain them either for financial blackmailing for political, sectarian, national, religious or racially beneficial purposes that threaten security and national unity and promote terrorism".<sup>17</sup>

## II. The legal framework in the post-ISIS

On September 21, 2017, the Security Council issued its Resolution No. (2379), based on a request submitted by the Iraqi government through its permanent representative on August 14, 2017, calling on the Security Council to assist in holding ISIS accountable.<sup>18</sup>

In this part, will discuss the substantive and procedural challenges arising between the Iraqi penal legislation and the results that will be issued by UNITAD during the performance of its mandate as bellow:

### A. The substantive challenges



The first challenge is if we assume that the UNITAD will conduct the investigation based on describing ISIS as an armed group fighting government forces and not as a terrorist group. in this case, the challenge will be more difficult because the Iraqi penal legislation does not include provisions that prosecute genocide, crimes against humanity, and war crimes, this matter we discussed earlier in this report.

In this regard, the position on the previous judgments issued by the Iraqi criminal courts regarding the conviction of ISIS individuals under anti-terrorism law No. (13) of 2005, will be inconsistent with any other description of the crimes and cannot be applied, as the law does not apply retroactively (ex post facto) as a person cannot be prosecuted twice for the same crime if the UNITAD describe the mass violations against Iraqi women, are crimes against humanity or genocide.

In addition to the inconsistency in the concept of mass violations, according to previous reports issued by the General Secretary of the UN, described ISIS as a secret global terrorist organization,<sup>19</sup> and between Resolution of Security Council (2379), which described violations of ISIS, as potentially amounting to crimes within the scope of international humanitarian law.<sup>20</sup>

On the other hand, there appears to be another legal dilemma, about the death penalty, as Iraq has clearly stated that it will cooperate with the investigation team, whenever the results of the investigation and the recommendations issued by it conform with Iraqi laws, including imposing the death penalty on the members of ISIS.

In this regard, some members of the United Nations declared their assertion on resolving the legal conflict, that may appear after the team completes its tasks.<sup>21</sup>

For example, the representative of Germany referred to the ex-report prepared by the Secretary-General of the UN, which prevents judicial cooperation between states, if the punishment is the death penalty.<sup>22</sup>

This meant that a new challenge will assume in non-cooperation with the Iraqi side if insists on punishing those convicted of ISIS by the death penalty.

France also has taken the same position, through its representative in the United Nations, who expressed France's refusal to cooperate in the event of Iraqi insisting on imposing the death penalty on Those convicted of ISIS.<sup>23</sup>

While the representative of Belgium referred to this issue, by stressing regarding the exchange of evidence, as an independent and impartial

mechanism of the United Nations, he also announced the commitment of UNITAD to comply with the policies and practices of the United Nations as well as international law, to achieve the goal of applying the practice followed in international tribunals and mechanisms that established by the United Nations, whether in the field of procedural guarantees, protection of victims and witnesses, or in non-apply of the death penalty.<sup>24</sup>

As for Iraq's position, its permanent representative to the United Nations stated his implicit refusal to violate the jurisdiction of Iraqi law, including the application of the death penalty, he states: "We emphasize that the work of the Investigative Team must fully respect the sovereignty of Iraq and its jurisdiction over its territory and people. Evidence must be used in independent and fair legal criminal proceedings conducted by Iraqi national courts, in line with applicable international law. Iraqi authorities are the main party in receipt of such evidence. Any other use of such evidence must be in coordination with the Iraqi Government and on a case-by-case basis".<sup>25</sup>

In this context, other mixed substantive/ procedural issues should be discussed in this section, such as the legal status of convicted individuals of ISIS, as well as their accused partners residing outside Iraq.

The questions are: what is the guarantee in the supposed judicial cooperation in exchanging information on wanted persons for the Iraqi judiciary? then extradite those involved in mass violations to the Iraqi side. Can a retrial for ISIS convicts if they are extradited to the Iraqi side? Will the investigation be repeated if UNITAD presents new evidence that changes the description of a crime that does not fall within the substantive competence of the Iraqi criminal law?

In this regard, the obstacle concerning with the ex-judgments issued by the Iraqi criminal courts convicted ISIS individuals, it is not possible to retry the investigation of trial according to the results of UNITAD investigation, unless it reaches new evidence emerges regarding the issues of accusation within Iraqi Criminal Procedures Law No. (23) of 1971.

What we mentioned above, also applies to the convicted partners or those who are undergoing the ongoing investigation process while residing outside Iraq, therefore the difficulty that will arise in the situation may be that these countries will not cooperate in extraditing those accused or convicts residing outside Iraq, as these countries may claim that UNITAD still exercises its mandate to collect evidence, while the second assumption

is that these countries may refuse to cooperate with the Iraqi authorities in principle as a position on objecting to apply the death penalty.

It has been customary in such international practices to adopt an agreement between the government of the host country and any other international investigation team for clarifying critical issues such as the team's competencies and cooperation, as well as the duties and rights of the two parties.<sup>26</sup>

The absence of an explicit agreement currently, will mean that UNITAD is in control of the primary investigations process, while the role of the Iraqi judicial authorities will be secondary. this means a clear breach of Security Council Resolution No. (2379), as it confirmed the adoption of an agreement with the Iraqi government.<sup>27</sup>

In the same context, any evidence that UNITAD will present to the Iraqi judicial authorities, without a clear agreement framework, will mean that the evidence will lack both legality and legal significance.

The issue mentioned above can be proven by reviewing paragraph (51) of the report of the head of UNITAD, it states, " work is also being undertaken by the Office of Legal Affairs with respect to the conclusion of a host country agreement between the United Nations and Iraq, which would further clarify the legal framework governing the activities of the Investigative Team in Iraq, including with respect to privileges and immunities, medical facilities and security ".<sup>28</sup>

In this regard, the legal contradiction will appear again, and this can be explained in a question about the value of the evidence that UNITAD will present? Do the Iraqi judicial authorities accept this evidence in a binding manner? It is clear that this assumption is not accepted by the Iraqi legal framework, because UNITAD was established based on Security Council Resolution 2379, which affirmed the respect for Iraqi jurisdiction.

To solve this dilemma, UNITAD has two options: the first is to adopt an agreement with the Iraqi government as soon as possible, and this agreement will have no effect without the parliament's intervention to ratify this agreement and enact a new process regarding it because it is by the principle of separation of powers mentioned by the Iraqi constitution in the article ( 2), the executive authority cannot ratify international agreements or impose new criminal procedures that fall within the core of the functions of the judicial authority without the prior approval of the legislative authority.

The second option is to consider the evidence submitted by UNITAD as non-binding evidence, while the Iraqi judicial authority can review it in accordance with the Iraqi Criminal framework.

## B. Procedural challenges

Although the substantive legal challenges we mentioned earlier in this part, will affect the level of cooperation between UNITAD and the Iraqi judiciary, there are procedural challenges that may also affect investigations taken by UNITAD.

In this regard, this part will examine the presumed questions that address the legality of the investigation procedures that UNITAD undertakes, such as: What is the value of the evidence that UNITAD will investigate if its collection procedures are inconsistent with the Criminal Procedure Law? Can UNITAD be considered an alternative for the Iraqi investigation authorities? lastly Is there any difference in the investigation technique? for example, the procedures for collecting and analyzing evidence? Can we expect a wide legislative technical difference between the Iraqi Criminal Procedures Law and the code of Procedure approved by UNITAD?

The answer to these questions is a complex matter, as the overlap between the substantive and procedural aspects is clear regarding the two aspects (substantive legality) and (procedural legitimacy). this is what we will search in according to the following.

By reviewing paragraph (8) of Security Council Resolution (2379), it will be clear that the primary goal for establishing UNITAD , is to support Iraqi judicial authority to collect and analyze evidence, classify it, as well as save and transfer it to the Iraqi side. in addition to completing the investigations carried out by the Iraqi investigative authorities, with assisting the Iraqi investigation authorities to develop their capabilities in the criminal aspect, in particular benefiting from the international expertise related to the investigation on crimes that rise to the level of an international threat.

In this regard, the Security Council resolution (2379) stressed in paragraph (2) thereof that the final use of the evidence that will be disclosed by the team will be in the possession of the Iraqi side, by stating: “Requests the Secretary-General to establish an Investigative Team, headed by a Special Adviser, to support domestic efforts to hold ISIL (Da’esh) accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide

committed by the terrorist group ISIL (Da'esh) in Iraq, to the highest possible standards, which should be addressed by the Terms of Reference referred to in paragraph 4, to ensure the broadest possible use before national courts, and complementing investigations being carried out by the Iraqi authorities, or investigations carried out by authorities in third countries at their request".<sup>29</sup>

Also, this is confirmed by paragraph (5) of the same resolution by stating: "...and further underscores that evidence of crimes collected and stored by the Team in Iraq should be for eventual use in fair and independent criminal proceedings, consistent with applicable international law, conducted by competent national-level courts, with the relevant Iraqi authorities as the primary intended recipient as specified in the Terms of Reference, and with any other uses to be determined in agreement with the Government of Iraq on a case by case basis".<sup>30</sup>

By reading these two above paragraphs, it will be clear that it is ambiguous in content as stating: ... provided that any other uses related to an agreement with the government of Iraq are determined, on a case-by-case basis, " this paragraph meant indicating the possibility of separating the evidence presented, without disclosing the purpose of it.

For the technical side, UNITAD techniques in terms of gathering or analyzing evidence are better than what is known on the Iraqi side, This issue confirmed by the head of UNITAD within his statement: "the Investigative Team will also endeavor to ensure that such evidence is collected, preserved and stored with due regard to the procedural and evidential rules of that State ".<sup>31</sup>

This fact means a huge difference in forensic investigation techniques. Despite the assumption that UNITAD will assist the Iraqi judicial authorities in developing their capabilities on the technical side, this has not yet been proven, and we cannot expect a benefit in a short time, because of the limited duration of the UNITAD mandate, as well as the development of the capabilities of the Iraqi side requires courses Training may take a long time.

This means not benefiting from the technical investigation conducted by UNITAD on the mass violations against Iraqi women.

To confirm what we mentioned above, the head of the UNITAD stated, “with respect to the establishment of its core infrastructure in Iraq, the Investigative Team will prioritize the completion of the refurbishment of the buildings to be used as its official premises, and install key physical and technological equipment in order to facilitate the storage and preservation of evidentiary material in line with international standards”.<sup>32</sup>

In addition to what we mentioned previously, the other procedural challenge is that UNITAD will preserve all evidence without sharing it with the Iraqi side. this procedure will complicate the disclosure of mass violations formerly suffered by Iraqi women.

To avoid these challenges, it is possible to review the Supreme Iraqi Criminal tribunal Law No. (10) of 2005, specifically article (18) thereof, by agreeing with the Iraqi judicial authorities and UNITAD that explicitly regulates the following issues:

First: The Iraqi Investigative Judge shall initiate investigations on the basis of information obtained from any source, particularly from the police or any governmental or non-governmental source. The Investigative Judge shall assess the information received and decide whether there is sufficient basis to proceed.

Second: The Investigative Judge shall have the power to question suspects, victims or their relatives, and witnesses, to collect evidence, and to conduct on-site investigations.

In carrying out his tasks, the Investigative Judge may, as appropriate, request the assistance of the relevant governmental authorities, who shall be required to provide full cooperation with the request.

Third: Upon a determination that a prima facie case exists, the Investigative Judge shall prepare an indictment containing a concise statement of the facts and the crime with which the accused is charged under the Law, and shall refer the case to the trial chamber.<sup>33</sup>

If we assume that the UNITAD will not agree to follow the above proposal, does that mean that the team has confiscated the jurisdiction of the Iraqi investigative judge? particularly his procedural jurisdiction, in gathering or analyzing evidence?

To discuss this issue, there are two assumptions: First: UNITAD started its procedural jurisdiction as an alternative to the jurisdiction of the Iraqi investigation courts, and this means that it exercised its mandate in accordance with Resolution (2379), thus collecting and analyzing the

evidence on behalf of the Iraqi investigation courts, while the Iraqi criminal courts are competent to receive this evidence and then hold Trial sessions.

The second hypothesis: that the Iraqi investigation courts will continue in their original jurisdiction, especially in reviewing and assessing the value of the evidence presented by the UNITAD to these courts, whether they are enough to convince them, or take other measures such as releasing the accused or closing the case temporarily due to lack of evidence-based on article (130) of the Iraqi Criminal Procedure law.

The second assumption is the closest interpretation of Security Council Resolution (2379), when it affirmed the respect for the sovereignty and legal jurisdiction of Iraq.

On the practical side, Iraqi criminal courts cannot conduct trials based on the evidence presented by UNITAD, unless the Iraqi investigation courts have a direct role or as an effective partner in collecting, analyzing, and evaluating evidence under the provisions of the criminal procedures law, in other words, It should apply the same procedures that usually taken by the Iraqi investigation courts into ordinary criminal cases under paragraph (A) of the article (203) of the Law, states: “the court shall rule on the case based on its conviction that it has the evidence presented in any of the investigative or trial roles, which is the confirmation And the testimony of witnesses, investigation records, records and other official statements, reports of experts and technicians, and other legally-established evidence and evidence.”<sup>34</sup>

In this regard, for example, the UNITAD excavated mass graves in the Sinjar district in 2018, in addition to conducting meetings with female surviving victims to record their testimonies, as well as collecting evidence and analyzing DNA samples in laboratories of UNITAD,<sup>35</sup> without effective participation of the Iraqi judicial authority.

This means that this evidence cannot be accepted categorically before the Iraqi criminal courts, due to an explicit breach of paragraph (a) of the article (220) of the Iraqi Criminal Procedure Law, which states: “the investigation records and evidence gathering records and what they contain are considered detection and inspection procedures and other official records are among the evidentiary elements that are subject to the discretion of the court, and litigants may discuss them or prove the opposite of what is stated in them”.<sup>36</sup>

Although the head of the UNITAD emphasized on several occasions that UNITAD is complementary to the Iraqi investigation, this issue cannot



be decided upon with statements, especially since the team is obligated to provide facts on this cooperation and integration.

Once again, we confirm that any evidence collected or presented by UNITAD to be considered by the Iraqi criminal courts, prior approval must be obtained.

For example, the Supreme Judicial Council of Iraq has agreed to allow UNITAD to obtain a record of ISIS calls while committing mass violations. this indicates that UNITAD should obtain the full prior approval from the Iraqi side, not in specific aspects that the team chooses.<sup>37</sup>

### Conclusion

At the conclusion of this article, it is clear that the criminal jurisdiction closest to the mass violations committed and still by ISIS against Iraqi women (rape, forced prostitution, insulting dignity, etc.) is the current anti-terrorism law according to Lex specialis, this is in the case of adapting ISIS acts like a terrorist.

On the other hand, if ISIS's acts are considered as violations of international humanitarian law, in this case, the Iraqi criminal framework should be rethought by adding new crimes to its scopes, such as crimes against humanity or genocide.

Also, we will not expect that the evidence obtained or will obtain by UNITAD will have a legal significance in case of non-cooperating with the Iraqi judicial authorities, especially with regard to mass violations against women, as these violations have social privacy in Iraq, as it is not easy to transcribe testimonies of women survivors, only in case of providing protection guarantees to them. this also applies to women under ISIS captivity, which international organizations estimate hundreds of women.<sup>38</sup>

It was possible to develop the efficiency of the Iraqi criminal framework, with regard to the mass violations committed by ISIS against Iraqi women, with rapid and effective treatment without submitting a request to the Security Council and then forming an investigation team that would complicate the accountability of ISIS for its violations.

The legislation treatment was and still available through adding a section to the current Iraqi penal law by criminalizing mass violations that fall within the scope of international humanitarian law, this is possible through the adoption of articles (11,12,13) of the ex- Supreme Iraqi Criminal tribunal Law no. (10) of 2005, that regulate crimes of genocide, crimes against humanity and war crimes.



This is in the event that the violations of ISIS do not codify within the anti-terrorism law, while if ISIS violations codified within the jurisdiction of anti-terrorism, then we repeat what we mentioned earlier by the mandate of anti-terrorism Law on the mass violations committed by ISIS against Iraqi women.

In this regard, The Yazidi Women Survivors Law No. 8 of 2021, enacted on March 1, 2021, is an advanced step in confronting the mass violations committed by ISIS against women from the Turkmen, Christian, and Shabak<sup>39</sup> minorities in Iraq, especially in the remedy and preventive measures.<sup>40</sup>

Although the law was titled (the women Yazidi Survivors Law), Paragraph (2) of Article (2) has expanded the scope of the application of the law on all other women or girls from the Turkmen, Christian, and Shabak minorities, the law in paragraph (3) and (4) of the same article ,did not stop this limit but included children and men from the same minorities and survivors of mass violations committed by ISIS.<sup>41</sup>

It is noted that the law has regarded these violations as crimes of genocide and crimes against humanity, in paragraph (1) of the article (7).<sup>42</sup>

Nevertheless, Iraqi legislation remains primarily concerned with victims of mass violations and compensation issues more than measures that would curb these violations, particularly in amending Iraqi criminal legislation and harmonizing it with international instruments on accountability for mass violations, particularly a war crime, genocide, and crimes against humanity.

## Footnotes

<sup>1</sup>Pursuant to Art 341 : " 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 ", see Iraqi penal law No.111.of 1969.

<sup>2</sup>See common article 3 of the Geneva Conventions, August 12, 1949, available at <https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> last visit, 11-4-2020.

<sup>3</sup> Pursuant to article .13: Universal jurisdiction : In circumstances other than those stipulated in paragraphs 9, 10 and 11, the provisions of this law are applicable to all those who enter Iraq subsequent to committing an offence abroad whether as principals or accessories to the following offences: Destroying or causing damage to international means of communications or trading in women, children, slaves or drugs. see Iraqi Penal law, article (13) ,op.cit.

<sup>4</sup>Article. 396 of Iraqi penal law,Ibid.

<sup>5</sup>Ibid.

<sup>6</sup> Anti-terrorism Law No.13 of 2005, Al-Waqa'a Al-Iraqiya gazette, Issue No. 4009 , Issue Date: 11-09-2005.

<sup>7</sup> Rome Statute of the International Criminal Court ,available at : [www.icc-cpi.int › documents › rs-eng](http://www.icc-cpi.int/documents/rs-eng), last visit 12-7-2020

<sup>8</sup>LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD ,8 March 2004. article,30.

<sup>9</sup> Law of the Supreme Iraqi Criminal Tribunal, No.10 of 2005 , article.1.

<sup>10</sup>ICTY, UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, available at <https://www.icty.org/en/documents/statute-tribunal> last visit 17-8-2020 ,see also Law of the Supreme Iraqi Criminal Tribunal,op.cit.

<sup>11</sup>Law of the Supreme Iraqi Criminal Tribunal , article.12,Ibid.

<sup>12</sup> Article 19 of the Iraqi constitution of 2005.

<sup>13</sup>The Presidency of the Republic of Iraq, the new draft penal law, the Office of the Council of Advisors, No. M.J / 1/15/2808 on 17/1/2019

<sup>14</sup>Kenneth Katzman , "Al Qaeda in Iraq: Assessment and Outside Links", congressional research center ,Updated August 15, 2008,p.8.

<sup>15</sup> See article.13. of Iraqi penal law,op.cit.

<sup>16</sup>In this regard, it is imperative to mention the criminal contribution to acts of terrorism, especially the sponsors of funding or incitement of high levels that have the characteristic of sovereign immunity. for example see The Justice Against Sponsors of Terrorism Act , S.2040. available at: <https://www.congress.gov/114/bills/s2040/BILLS-114s2040es.pdf> last visit , 7-9-2020.

<sup>17</sup> Anti-terrorism Law No.13 of 2005,op.cit.

<sup>18</sup> Letter dated 14 August 2017 addressed to the President of the Security Council from the Chargé d'Affairs to the Permanent Mission of Iraq to the United Nations: Document (S / 2017/710) of 16 August 2017.

<sup>19</sup> The report of the Secretary-General of the United Nations, in paragraph (3) of it, referred to ISIS by stating" ISIL has continued to morph into a covert global network, with a weakened yet enduring core in Iraq and the Syrian Arab Republic, regional affiliates in the Middle East, Africa and Asia, and

the complex challenge posed by its returning and relocating foreign terrorist fighters and their families". see : seventh report of the Secretary-General on the threat posed by ISIL (Da'esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat, [S/2018/770](#), 16 August 2018.

<sup>20</sup> See the preamble to Security Council Resolution (2379), third paragraph, it states "..... its violations of international humanitarian law and abuses of human rights, particularly those committed against women and children,.....", Security Council Resolution (2379), available at <https://www.un.org/securitycouncil/content/sres2379-2017> last visit 13-9-2020.

<sup>21</sup> UNSC, Threats to international peace and security, Letter dated 17 May 2019 from the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant addressed to the President of the Security Council (S/2019/407), Seventy-fourth year 8573rd meeting Monday, 15 July, 2019 ( S/PV.8573). p.8.

<sup>22</sup> UNSC, Threats to international peace and security, Letter dated 17 May 2019 from the Special Adviser and Head of the United Nations Investigative Team, op.cit, p.12.

<sup>23</sup> Ibid, p.14.

<sup>24</sup> Ibid, p.17.

<sup>25</sup> Ibid, p.18.

<sup>26</sup> UNSC ,Letter dated 17 May 2019 from the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant addressed to the President of the Security Council, **S/2019/407**, 17 May 2019. para 57, p.12

<sup>27</sup> UNSC, S/RES/2379 (2017) ,21 September 2017, para.5 available at [https://undocs.org/fr/S/RES/2379\(2017\)](https://undocs.org/fr/S/RES/2379(2017)) last visit 15-7-2020.

<sup>28</sup> UNSC, First report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh / Islamic State in Iraq and the Levant, S/2018/XXX 18 November 2018, para. 51.

<sup>29</sup> Ibid, para.2.

<sup>30</sup> Ibid, para.5.

<sup>31</sup> UNSC, First report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh / Islamic State in Iraq and the Levant S/2018/XXX, 18 November 2018 para 24.

<sup>32</sup> Ibid, para.111.

<sup>33</sup> The Supreme Iraqi Criminal tribunal Law No. (10) of 2005, op.cit, art.(18).

<sup>34</sup> Iraqi Criminal Procedures Law, No.23 of 1971, op.cit, para (A) of Art.(203).

<sup>35</sup> UNAMI/OHCHR "Unearthing Atrocities: Mass Graves in territory formerly controlled by ISIL" 6 November 2018, p.7.

<sup>36</sup> See paragraph (a) of Article (220) of the Iraqi Criminal Procedure Law, op.cit.

<sup>37</sup> See UNSC, Letter dated 11 May 2020 from the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant addressed to the President of the Security Council, S/2020/386, 11 May 2020, para.61.

<sup>38</sup> UNAMI/OHCHR "Unearthing Atrocities: Mass Graves in territory formerly controlled by ISIL", op.cit, p.4.

<sup>39</sup> Yazidi Women Survivors Law No. (8) for the year 2021, Al-Waqi'a Iraqi gazette, No. 4621 , March 15, 2021.

<sup>40</sup> Article (4), Ibid.

<sup>41</sup> Article (2) Ibid.

<sup>42</sup> Article(7) Ibid.

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