



The Anfal Decision: Breaking New Ground for Women's Rights in Iraq **FOR REFERENCE ONLY**

The Iraq High Tribunal's (IHT) opinion in the *Anfal* trial represents a step forward for women's rights and international law in Iraq by recognizing the widespread sexual violence perpetrated by Saddam Hussein's regime. By discussing rape and sexual violence in the language of International law, the IHT enforced the right to justice of victims of these crimes. The courageous open testimony by women to various forms of sexual violence led to the court's acknowledgement that this type of violence was part of the widespread crimes against humanity, genocide and war crimes committed by the regime, and not a private matter of family honor, as crimes of sexual violence have so often been regarded in the past. By giving rape the same gravity as murder and torture, the IHT has ensured that Saddam's outburst during the prosecutor's opening statement of the trial that, "I can't sit down and remain silent when it's said that an Iraqi woman was raped... This couldn't happen while Saddam Hussein is alive,"¹ will not stand as the historical record. Instead, the voices of the Kurdish women who testified for themselves and on behalf of thousands of others will be the ones that are heard and legitimized in a court of law.

The IHT was created in the aftermath of the Hussein regime and is responsible for prosecuting crimes committed by the regime between 1968 and 2003. The *Anfal* opinion, released on June 24, 2007, attempts to provide justice and accountability to six of the highest officials responsible for the genocidal campaign against Iraqi Kurds that took place in 1987-1988. The *Anfal* (which means "the spoils [of war] in Arabic) campaign involved the use of chemical weapons against civilian populations, mass executions of

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unarmed civilians, destruction of Kurdish villages, and rape, torture and murder of civilians imprisoned in government detention camps. Based on the testimony of dozens of survivors, the defendants were charged with committing genocide, war crimes, and crimes against humanity.

With the *Anfal* decision, the IHT joins the International Criminal Tribunals of Yugoslavia (ICTY) and Rwanda (ICTR) in recognizing rape as a form of both torture and genocide. This paper will focus on the importance of the IHT's recognition of crimes of sexual violence and how this compares to and builds on the progress made by the ICTY and ICTR. This paper will also explore how the *Anfal* decision can change the perception of sexual violence in Iraq. As it stands, rape is regarded as private crime and a form of shame to the victim and her family, which in the worst case can end in the victim's death by a so-called "honor killing," where a brother or father of a rape victim kills her in order to restore honor to his family. The *Anfal* decision offers an opportunity to remove rape and sexual violence from the shadows of private shame by recognizing those women as victims and survivors who deserve justice and criminal redress for the crimes committed against them.

There is a tremendous amount of work to be done by women in Iraq and around the globe to ensure that these abstract rights on paper become understood as rights on the ground in day to day society. To do this successfully, domestic Iraqi law must first be brought up to international standards. Our hope is that the *Anfal* decision can be a tool for the women of Iraq in bringing about that change and asserting the right of all women to be free from sexual violence of any form, both during conflict and in times of peace.

Background on Sexual Violence in International Law and the Role of the IHT

During the 1990's, the concept of violence against women as an international crime became a focus of the United Nations and the international community, largely as a result

of the highly publicized sexual atrocities in Rwanda and the former Yugoslavia. In each of these wars, rape was widespread and used as an integral part of the overall genocidal strategy. When the UN created the International War Crimes Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY), the women's rights community was determined to end the tradition of overlooking these crimes and ensure that the victims of sexual violence in these conflicts were given access to redress and justice. As a result of these efforts, both the ICTY and the ICTR statutes listed rape as a crime against humanity.² By the time The Rome Statute, the document that created the International Criminal Court, was ratified, witnesses at the ICTY and ICTR had already testified to serious sexual crimes other than rape (such as forced pregnancy and intentional genital mutilation). Because of the severity of these crimes, The Rome Statute of the International Criminal Court was written to include not only rape, but "any other form of sexual violence of comparable gravity," as a crime against humanity.³

The Statute of the IHT is based on the Rome Statute of the International Criminal Court and, like the Rome Statute, prohibits all forms of sexual abuse. It also directs the judges to look to previous international criminal tribunals for guidance in making a ruling. In the *Anfal* decision, the judges of the IHT accept as a matter of law a number of important conclusions reached by the ICTY and ICTR: that rape involves the extreme agony or suffering that is the hallmark of torture; that sex with one's captor while one is held in government detention is inherently coercive; that rape can be a form of genocide; that rape and sexual violence are foreseeable when armed men guard "enemy" women; and that by illegally creating an environment in which rape was a reasonably foreseeable occurrence, leaders assume criminal responsibility for rapes committed by their subordinates.

The IHT is the first court in the Middle East, criminal or civil, created to handle issues laid out by international law. As such, it presents a historic opportunity to take international law, including some of the most progressive law in the world on gender crimes and human rights, and incorporate it into Iraq's own domestic law. This will ensure ongoing access to justice for women in Iraq and a new precedent on women's rights in the Middle East.

Rape as Torture

The IHT joins earlier international tribunals in recognizing that rape can be used as a form of torture, but also reaches remarkably further than earlier tribunals in protecting victims of sexual torture. The ICTY definition of torture required that the “extreme pain of suffering” characteristic of torture “must have occurred in order to obtain information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person.”⁴ This emphasis on the *intent* of the torture allowed defendants accused of torture by rape to claim that their actions were merely motivated by their own sexual gratification and that the pain and degradation suffered by the victim were merely incidental. The ICTY judges rejected these arguments for the specific defendants before them, finding that their rapes had served multiple purposes and that a crime against humanity had occurred. Their ruling, however, was specific to these defendants and did not ensure that coerced sex in the context of an ongoing campaign of ethnic cleansing would always be a crime against humanity.

The IHT, however, is not concerned with *why* the individual torturer chooses the specific form of torture that he uses. What matters is that the act is something that is likely to cause extreme agony or suffering in the average person and that the perpetrator knew or should have known that this was the case. By defining torture in this way, the IHT shows respect for the pain suffered by victims of torture and rejects the idea that a lack of sexual

self-control is an acceptable excuse for torture.

Inherently Coercive Conditions and Rape

Both the IHT and the ICTY heard testimony from women who were raped by soldiers while in government detention camps. The cases heard by the ICTY examined rapes carried out both with and without overt use of violence. From this, the tribunal established that the chief characteristic of rape is not the perpetrator's use of physical force, but the lack of consent from the victim. The ICTY recognized in *Kunarac* that when the victim is held captive by government forces, or an armed militia, of which the perpetrator is a member, this "amount[s] to circumstances that were so coercive as to negate any possibility of consent."⁵ In the case of the IHT, all of the testimony from the trial that has so far been translated into English shows that the witnesses who appeared before the IHT testified that force was used when they were raped. However, several of those witnesses not only testified to their own rape, but also the rape of other women in these camps. One woman mentioned during testimony committed suicide after being raped. Although the testimony about this incident did not indicate whether or not physical force was involved, the IHT judges accepted this as an instance of rape based on the definition provided by the ICTY. They did not require additional evidence of the use of force against this victim, but relied on the circumstances of her detention to show her lack of consent.

Rape as Genocide

The IHT Statute defines genocide as certain illegal acts done with the intention of destroying a national, ethnic, racial or religious group, either in whole or in part.⁶ Acts of sexual violence can also be acts of genocide when they are intended to prevent births within one group (by mutilating or sterilizing the women of the group, for example), to force women of one group to bear children fathered by men outside the group, or to subject members of the group to intolerable living conditions. In *Akayesu*, the judges of

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the ICTR recognized that rape can be a genocidal act because, for the perpetrators of the genocide, “[s]exual violence was a step in the process of destruction of the Tutsi group - destruction of the spirit, of the will to live, and of life itself.”⁷ In addition to the pain caused by the attack itself, rape often causes secondary harms to its victims. It is, in many societies, a crime that renders the victim a social outcast, destroying family unity or rendering young women unmarriageable. It also causes mental suffering to the victim’s loved ones, who are often forced to watch her being attacked.

Like the judges of the ICTR, the judges of the IHT recognized the many ways in which rape and control over sex can serve a genocidal intent. In the *Anfal* decision, the judges recognized the gender segregation in the government camps as an aspect of genocide because prolonged segregation would prevent births within the group. It also regarded rape as an aspect of the genocide perpetrated against the Kurds, in that it was part of a campaign to “deliberately inflict[...] on the group living conditions calculated to bring about its physical destruction in whole or in part,”⁸ meaning that rape was part of the inhumane conditions in the detention camps, where prisoners were also denied adequate food and medical care.

Joint Criminal Enterprise and Rape

One of the most important legal decisions made by the ICTY found that high ranking superiors could be held legally responsible for the sexual assaults committed by their subordinates.⁹ If the sexual assault was a reasonably foreseeable outcome of an illegal decision made by the superior, then they were equally responsible because of "joint criminal liability" The traditional theory of joint criminal liability, what the ICTY calls “basic” joint criminal liability, states that all people who plan a criminal act can be held criminally responsible for the occurrence of that crime, even if they did not personally commit the act. Thus, the generals and politicians who order soldiers to commit war crimes or crimes against humanity are guilty of the crimes committed on their orders.

However, in the ICTY many of the crimes committed by subordinates did not apply to this traditional definition. Instead, the judges were confronted with cases where soldiers carrying out illegal orders, such as genocide or forced deportation, were also perpetrating additional crimes, perhaps on their own initiative. The question before the ICTY was whether or not to hold superiors responsible for these crimes under joint criminal liability. The ICTY decided to do so because these additional crimes were foreseeable given the original, agreed-to crime. In other words, if an officer orders the creation of camps where women from an “enemy” group are separated from the rest of the population and guarded by young men with guns who are aware that their superiors eventually want all of the “enemy” people dead, it is logical to anticipate that those armed guards are going to rape those women. If a person orders the creation of those camps and does not take adequate precautions to prevent the women in them from being raped, then that person is responsible for the rapes as well as for the creation of the camps. The IHT has accepted and applied this logic in the *Anfal* case, understanding that joint criminal enterprise liability extends to reasonably foreseeable additional crimes, including rape.

The Importance of the IHT’s Decisions for Rape Victims

The decisions made by the ICTY, ICTR and IHT are groundbreaking advances that give women access to justice for crimes committed against them through the use of international tribunals. By regarding conditions like gender segregated detention camps as inherently coercive, rape is much easier to prove. The tribunals' decision on joint criminal enterprise allows tribunals to prosecute not only the individual rapists, but also the architects of a system that left women obviously vulnerable to rape. By determining rape to be a form of torture and a form of genocide, the tribunals not only increased the number of charges that can be leveled against defendants, but also emphasized that rape is not only a crime of violence against the woman, but a form of persecution.

This view of rape is remarkable in its stark contrast to Iraqi domestic penal law, which

treats rape as an issue of family honor or a loss of a woman's body as property. As it stands, Iraq's domestic penal code calls for monetary compensation for virginal rape victims, not for the crime itself but only for the loss of the hymen.¹⁰ If the accused rapist marries his victim, "any action becomes void and any investigation or other procedure is discontinued, and if a sentence has already been passed in respect of such action, then the sentence will be quashed."¹¹ This often results in women being forced by their families to marry their attackers. Given that this law clearly blocks a woman's access to justice, it is essential to find a way to shift the thinking on rape away from proprietary interests and family honor and change Iraqi penal law so that it reflects the advances made by the IHT and international law.

The IHT Can be a Vehicle for Domestic Legal Reform in Iraq

With *Anfal* and other decisions, the IHT is enforcing the human rights treaties and other international laws applicable to Iraq. In doing so, the Tribunal Judges are establishing a progressive domestic legal framework for enforcing Iraqi women's right to be free from gender-based violence which is more in line with the progressive international law on gender crimes. The IHT Statute was enacted using the normal procedures for implementing domestic law; it is therefore part of Iraq's domestic legal code. The creation and structure of the tribunal is only one part of the IHT Statute; it also defines and outlaws War Crimes, Crimes Against Humanity and Genocide. Even after the Tribunal is dissolved, these acts will remain illegal under Iraqi domestic law. Also, since many of the acts outlawed by the IHT statute (murder, rape, destruction of property, etc.) are also illegal under the regular Penal Code, decisions by the IHT can influence the decisions of judges in Iraq's regular criminal courts. As one Tribunal Judge acknowledged in a private letter to the GJC, "...we are aware that our pronouncements on human rights principles in our decisions will influence domestic Iraqi law."¹²

The IHT has already taken steps to integrate international human rights standards with

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Iraqi domestic law. In its decision in *Dujail*, the Tribunal declared itself a national court, rather than an international one. This makes the IHT decisions part of Iraq's domestic legal landscape. Yet at the same time, the Tribunal is judging violations of international criminal law, basing their authority to do so on Iraq's international obligations. Specifically, the judges declared that international criminal law as embodied in the IHT Statute is customary international law, meaning that it is applicable to all countries and therefore applicable to Iraq. They also stated that the Universal Declaration of Human Rights was binding on member states of the United Nations, including Iraq. This equips the IHT to take international standards and apply them to domestic law based on Iraq's obligations to the treaties they have signed and the IHT's role as part of the domestic legal system. This is a major step forward for the recognition of human rights in Iraq because the IHT is uniquely positioned to set new precedents on gender justice in the Middle East by recognizing as law international human rights treaties that Iraq has ratified, including: the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; and the Convention on the Rights of the Child.

The IHT Failed to Prosecute Specifically for Rape

Despite the advances that the IHT has made in applying international law standards and embracing international human rights law, there were still weaknesses in the IHT's rulings on rape that need to be addressed in future trials. Unfortunately, the IHT Trial Chamber for *Anfal* chose to leave rape off of the list of charges against the six *Anfal* defendants, despite the prosecutor's arguments to include rape. When the IHT issued indictments on February 20, 2007, the Judges had made only one change to the prosecutor's list of requested charges – they had not charged a single defendant with rape or any other inherently sexual crime. This is especially disheartening given the trial

procedures of the IHT, where defendants are not charged with any crimes until *after* the prosecution presents its evidence, at which time charges are filed and the defense presents its evidence. In spite of the fact that several prosecution witnesses came forward and testified to experiencing and/or witnessing rapes or other acts of sexual violence, the Judges still chose not to charge any of the defendants with rape or other sex crimes. Instead, the Judges used the testimony of these witnesses as part of the basis for convictions for other crimes, such as torture¹³ or “other inhumane acts.”¹⁴

While it is significant that the Trial Chamber recognized rape as a form of torture, it is essential to changing the dialogue on rape and sexual violence that defendants are charged with rape itself. A key purpose of any war crimes tribunal is to construct a record of historic accountability that makes public the crimes committed during conflict. It is therefore essential that the IHT specifically prosecute the “hidden” gender crimes inflicted on women, including rape. Although the testimony provided by rape victims was ground-breaking, as time passes the convictions become the historical record of a court and the testimony given during the trial is often forgotten. In this case, that means these defendants will be remembered as murderers and torturers, but not as rapists. Torture and inhumane acts are very vague terms. Although they are useful in acting as blanket terms that give the court jurisdiction over the full range of crimes it may uncover, they should not be used as a way to disguise the exact nature of the crimes that have been committed. The IHT statute includes provisions specifically outlawing rape and sexual assault, and numerous victims came forward to testify about rapes they suffered as part of the *Anfal* campaign. To exclude rape, a crime that is directed primarily at women, legitimizes the stigmatization of female victims of sexual violence and denies these victims of equal access to judicial redress on account of their gender.

Moving Forward With Sex Crimes Prosecutions At The IHT

Although it is encouraging that the *Anfal* judges heard witness testimony about rape, we

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hope that the remaining ten cases will take more steps to provide justice to rape victims. Not only do the decisions made by the IHT have the potential to transform Iraqi domestic law, but the IHT also had the ability to change the procedures of the trials that reach these decisions in order to better protect and empower women so that they are able to come forward and testify to the crimes that were committed against them. This will ensure a more complete and accurate record of the atrocities, especially those that are gender specific, committed during Hussein's regime. One way the IHT can do this is to make use of all of the provisions in the IHT statute specifically designed to encourage testimony by victims of sexual assaults. It is essential to protect the privacy of all witnesses by allowing the taking of testimony via video from outside the country and encouraging the right to anonymity and the removal of any corroboration requirement.

Security is a very real concern for Iraqi women who have been sexually assaulted. The stigma against reporting any form of sex crime in Iraq is extremely strong and exacerbated and perpetuated by Iraq laws which condone so-called honor killings. For example, Article 128 of the Iraqi Penal Code reads "...The commission of an offence with honorable motives or in response to the unjustified and serious provocation of a victim of an offence is considered a mitigating excuse."¹⁵ While this might seem to be a standard "heat of passion" defense, in practice it has been used to protect men from punishment for the killing a female relative who has been (or rumored to have been) raped.¹⁶ The UN Special Rapporteur for Violence against Women reported that more than 4,000 women have been victims of so-called "honor killings" since 1991, when Article 128 was added to the Penal Code.¹⁷ By publicly protecting and supporting victims of sexual crimes, the IHT can help undermine social support for honor killings throughout Iraq. Without ensuring security and anonymity, the fear of honor killings and shame will continue to prevent women from coming forward and testifying to the crimes committed against them, blocking their access to justice and permitting the prevailing view on rape

and women's rights to continue unchecked.

Lessons Learned From Anfal, And What To Do With Them

The *Anfal* trial was an incredible achievement for women's rights in the region. The IHT reinforced many of the achievements in human rights made by previous international tribunals – recognizing rape as a form of torture and of genocide, recognizing the existence of inherently coercive circumstances and expanding the theory of joint criminal enterprise to include reasonably foreseeable additional crimes. Furthermore, the IHT has taken the initiative to go beyond the decisions of previous tribunals, taking additional steps forward by including sexual crimes other than rape and discarding a requirement of intent for rape to be regarded as torture. These advances are even more impressive when one considers that the ICTY and the ICTR made these strides largely as the result of advocacy by the female judges at the tribunal, and there were no female judges at the *Anfal* trial.

With ten trials still ahead of them, we have high hopes for the IHT. By exercising the full range of options given to them by the IHT statute, including charging rape and sexual assault as crimes against humanity in their own rights, protecting the victims of sexual crimes who have the courage to come forward as tribunal witnesses, and continuing to recognize the wide range of ways in which sexual crimes can be committed, they can build a legal foundation for the new Iraqi government that acknowledges and protects women's human rights. The IHT needs the support of the international community now more than ever to ensure that these advances are made and that the dialogue on women's rights in the Middle East is transformed into one of equal access to justice and empowerment.

¹ *New York Times*, August 22, 2006; section A; Column 1; Page 6.

² Statute of the International Criminal Tribunal for the Former Yugoslavia, S/RES/1166 (1998), Art. 5(g); Statute of the International Tribunal for Rwanda, S/RES/955 (1994), Art. 3(g).

³ Rome Statute of the International Criminal Court, A/CONF.183/9 (1998), Art. 7(1)(g) (hereinafter “Rome Statute”)

⁴ *Prosecutor v. Radoslav Brdjanin*, case IT-99-36-T, para. 380, 1 September 2004 (Trial Chamber, ICTY). (The Court in this case found that rape met the severity test for torture, stating that “Severe pain or suffering, as required by the definition of the crime of torture, can be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering” *Brdjanin* at para 384.)

⁵ *Prosecutor v. Draoljub Kunarac, Radomir Kovac, and Zoran Vukovic*, case IT-96-23&23/1, para. 132, 12 June 2002 (Appeal Chamber, ICTY).

⁶ Iraqi High Criminal Court Law, No. 4006 of Oct. 18, 2005, Art. 11. (hereinafter “Iraq Statute”)

⁷ *The Prosecutor v. Jean-Paul Akayesu*, case ICTR-96-4-T, 2 September 1998 (Trial Chamber, ICTR).

⁸ Iraq Statute, *supra* note 11 at Art. 11(1)(C).

⁹ *See: Prosecutor v. Milomir Stakic*, ICTY Case No.: IT-97-24-A; 22 March 2006.

¹⁰ 1969 Penal Code, para. 393(4) (Iraq).

¹¹ *Id.* para. 398.

¹² Letter from Raheed Johi, Chief Investigative Judge, Iraqi High Tribunal, to Janet Benshoof, President, Global Justice Center (June 20, 2006) (on file at the Global Justice Center).

¹³ Iraq Statute, *supra* note 11 at Art. 12(First)(F).

¹⁴ *Id.*, at Art. 12 (First)(J)

¹⁵ Penal Code, *supra* note 15, at Article 128

¹⁶ Ziyad Khalaf al-Ajely, PeaceWomen, Killing for Honor (May 17, 2005),

<http://www.peacewomen.org/news/Iraq/May05/honour.html>. (“According to a study conducted by the ministry of women’s affairs, more than 400 women have been raped since the fall of the Saddam regime - and more than half were later murdered in honour killings.”)

¹⁷ U.N. Commission on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective*, U.N. Doc. E/CN.4/2002/83/Add.1 (Jan. 28, 2002) (prepared by Radhika Coomaraswamy).