



## ***The Anfal Decision: Breaking New Ground for Women's Rights in Iraq***

*Prosecutor v. Ali Hasan Al Majid (Al-Anfal), Appellate Verdict, Case No. 1/ C Second/2006 (Iraq High Trib., Tr. Chamber II, June 24, 2007).*

The IHT is responsible for prosecuting crimes committed by the Saddam regime between 1968 and 2003; the *Anfal* campaign against Iraq's Kurdish population, which took place in 1987-88, involved the use of chemical weapons against civilian populations, mass executions of unarmed civilians, destruction of Kurdish villages, and rape, torture and murder of civilians imprisoned in government detention camps. The six defendants were charged with committing genocide, war crimes, and crimes against humanity.

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 the *Anfal* decision,<sup>1</sup> the IHT judges accept as matters of law a number of important conclusions reached by the ICTY and ICTR.

### **Rape as Torture**

The IHT reaches 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."<sup>2</sup> This emphasis on *intent* allowed defendants accused of torture by rape to claim that they were motivated by their own sexual gratification and that the pain and degradation suffered by victims were merely incidental. The ICTY judges rejected these arguments for the specific defendants before them, finding that their rapes had served multiple purposes, but the ruling was specific to those 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 a specific form of torture.<sup>3</sup> What matters is that the act 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 and rejects the idea that a lack of sexual self-control is an acceptable excuse for torture.

### **Rape as Genocide**

In *Akayesu*, the judges of 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.”<sup>4</sup> In *Anfal*, the judges recognized 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,”<sup>5</sup> meaning that rape was part of the inhumane conditions in the detention camps, where prisoners were also denied adequate food and medical care.<sup>6</sup>

### **Joint Criminal Enterprise and Rape**

One of the most important legal decisions made by the ICTY was that superiors could be held legally responsible for sexual assaults committed by subordinates.<sup>7</sup> The traditional theory of joint criminal liability states that all people who plan a criminal act can be held criminally responsible for its occurrence, even if they did not personally commit the act. Thus, the generals and politicians are guilty of the crimes committed on their orders. However, the ICTY judges were confronted with cases where soldiers carrying out illegal orders, such as genocide or forced deportation, were also perpetrating additional crimes of their own initiative. The ICTY decided to hold the superiors responsible for these additional crimes when they 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 *Anfal*.<sup>8</sup>

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

Although the Statute of the IHT does not apply to other Iraqi courts, the Tribunal can still have a permanent impact on the domestic system in a number of ways. One is by changing public opinion about sex crimes through the way they are labeled and prosecuted by the Tribunal. Another is as an example of how to protect and encourage victims to come forward and report crimes. 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, such as those concerned with protect the privacy of all witnesses. Security is a very real concern for Iraqi women who have been sexually assaulted. 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.<sup>9</sup> Without ensuring security and anonymity, fear and shame will continue to prevent women from coming forward and testifying to the crimes committed against them.

### **The IHT Can be a Vehicle for International Law Globally**

Not only is the IHT dealing with international crimes, but, in the *Dujail* decision, the Tribunal stated that it derives its authority to do so from Iraq’s international obligations. Specifically, the judges declared that international criminal law as embodied in the IHT Statute is customary international law, applicable to all countries.<sup>10</sup> As a court interpreting international customary law, the IHT is an appropriate legal source for all future international courts to consider. Just as the *Anfal* decision clearly shows the influence of the ICTR and ICTY, we hope that future criminal tribunals will build on the progress made in *Anfal*.

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<sup>1</sup> *Prosecutor v. Ali Hasan Al Majid (Al-Anfal)*, *Appellate Verdict*, Case No. 1/ C Second/2006 (Iraq High Trib., Tr. Chamber II, June 24, 2007).

<sup>2</sup> *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.)

<sup>3</sup> *Al-Anfal*, at 553.

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

<sup>5</sup> Iraq Statute, *supra* note 11 at Art. 11(1)(C).

<sup>6</sup> *Al-Anfal*, at 509-510.

<sup>7</sup> *See: Prosecutor v. Milomir Stakic*, ICTY Case No.: IT-97-24-A; 22 March 2006.

<sup>8</sup> *Al-Anfal*, at 572.

<sup>9</sup> 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).

<sup>10</sup> *Prosecutor v. Saddam Hussein (Al-Dujail)*, *Special Verdict*, Case No. 1/ 9 First/ 2005 (Iraq High Trib., Tr. Chamber I, Nov. 22, 2006). (“There is a class of acts whose criminal quality is derived directly from international custom, that is, without the intervention of conventional international law. Thus they are international crimes even though they are not written in a treaty or convention.”) [There is as yet no definitive English-language version of the Dujail verdict, nor any translation of which we are aware where the pagination matches with the original Arabic. Page numbers have therefore not been included in citations to this decision.]