

Acknowledging the Suffering caused by State-Mandated Sexual Violence and Crimes:

An Assessment of the Iraqi High Tribunal

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Violence, and the threat of violence, in Saddam Hussein's Iraq was a pernicious and pervasive element of everyday life, conditioning the behaviours and attitudes of Iraqis of whatever class, ethnicity, or sect.¹ The Ba'th regime was, in this regard, relatively constant in its treatment across society's many different ethnic groupings, sectarian associations, tribal formations, and socio-economic strata. Episodes of violence in Saddam's Iraq have been well documented, by human rights observers during the period in which the Ba'th regime ruled (1968-2003), and since then as academics have sought to shed light on events that had taken place in what had been one of the most authoritarian of states to have emerged in the post-Second World War period.² Horrifying episodes of state-mandated atrocities, up to and including ethnic cleansing and genocide, are now recognized to have occurred in Iraq, with security services, military and para-military forces, being used to enforce the writ of the regime by actual actions and by the creating of a sense of paranoia and mistrust, thus breaking the bonds that held society together.³ Analyses of human rights violations in what has been labelled by Iraqi writer Kanan Makiya as a 'Republic of Fear' have, until relatively recent years, been largely lacking in terms of understanding what happened to women

specifically, including the manner in which the regime undertook systematic actions targeting women in particular, with sexual violence being a commonplace act committed by state organizations (and sometimes by organizations specifically tasked with undertaking sexual violence).⁴ Just as men, they were put into detention, where they were tortured and sexually abused.⁵ Girls and women were raped by soldiers in their villages and houses, rape took place in an organized form during the attempted obliteration of the Kurds,⁶ and it was used as ‘punishment’, as in the case of ‘Dujail’,⁷ to get information, to destroy opposition groups,⁸ or simply for enjoyment, as by Saddam’s sons, Uday and Qusay.⁹ The torment of Iraqi women and girls was continued when coalition forces entered Iraq in 2003.¹⁰

While it has been established through victims’ accounts that rape was used as part of Saddam Hussein’s political program and war machinery, the number of these crimes committed in Iraq is still difficult to pinpoint.¹¹ Following this, there are as yet no accounts of how the victims of sexual violence have been treated by the post-2003 judicial system – principally encapsulated by the Iraqi High Tribunal (IHT). This article attempts to fill this gap by providing an analysis and assessment of the activities and record of the IHT with regard to sexual violence.

The Iraqi High Tribunal

The Iraqi High Tribunal (IHT) was first established as the Iraqi Special Tribunal on 10 December 2003, by the US-appointed Iraqi Governing Council (IGC) and was later approved by the Iraqi Transitional National Assembly (TNA) through

Iraqi Law No.10 in 2005.¹² The tribunal had as its purpose to take legal action against high-level members of the former regime. It had under its jurisdiction to prosecute

every natural person whether Iraqi or non-Iraqi resident of Iraq and accused of the crimes listed in Articles 11 to 14 below, committed during the period from 17 July 1968 and until 1 May 2003, in the Republic of Iraq or elsewhere, including the following crimes:

A The crime of genocide;

B Crimes against humanity;

C War crimes;

*D Violations of certain Iraqi laws listed in Article 14 below.*¹³

As such, the IHT was one in an already long queue of permanent and *ad hoc* international criminal tribunals, as well as hybrid courts, which have been established to deal with atrocities, such as genocide, crimes against humanity and war crimes.¹⁴ But the IHT, as an ‘internationalized domestic court’, was unique amongst the above courts, as it has been established as a national court with limited jurisdiction of trying international crimes. While the tribunal’s statute and rules of procedure were modelled after the international criminal tribunals of Yugoslavia, Rwanda and Sierra Leone, as well as the International Criminal Court and it follows the precedent of the UN tribunals, its prosecutors and judges were Iraqi and it had its seat in Baghdad.¹⁵

With the choice of its structure and the time of establishment, the tribunal triggered critique from various sides. The legality of the first iteration of the IHT – the Iraqi Special Tribunal - was questioned from its inception as it was created at a time when Iraq was still under control of the interim Coalition Provisional

Authority (CPA), and thus not a sovereign nation.¹⁶ It was further criticized for being dependent on and influenced by the US, which originally established the tribunal with a 75 million dollar fund¹⁷ and which, through the Regime Crimes Liaison Office (RCLO),¹⁸ provided training for prosecutors, investigators and judges and in general assisted *'in establishing a fully functioning and independent Iraqi High Tribunal'*.¹⁹

But the criticism did not stop there. Also the geographical positioning of the tribunal, as well as the judges appointed were considered by some as inadequate. While the IHT could not be critiqued for being too distant from its people, as sometimes claimed for the international tribunals for Yugoslavia and Rwanda, which are both located outside their countries' territories, it has been contended that the IHT's position in Baghdad posed a security threat to the country, as evidenced by the assassinations of a judge and three defence lawyers, during the trial of the Dujail case.²⁰ Additionally, it was doubted that the Iraqi judges appointed to the tribunal were ready to handle the complexity and difficulty of the cases in front of them and concerns were also raised concerning the objectivity of the judges, as most of them had been practicing under the rule of Saddam Hussein.²¹ Later the tribunal was especially criticized for political interference from outside.²²

As valid as the critique concerning the establishment of the IHT might have been, it led to knock-on effects that promulgated further complications, and in the long run arguably led to an undermining of the objectives of the tribunal – to try perpetrators of past atrocities under the legal system and to support the

reconstruction of a greatly destroyed country – and thus to a lack of support for a tormented population. As the IHT was established under US and not UN leadership, unlike the ICTY and the ICTR before it, the IHT was not assisted by international human rights groups as well as the UN.²³ It was consequently excluded from any UN training programmes and international assistance, which resulted in a lack of training on international legal standards. It followed that the tribunal has been criticized by groups such as Amnesty International of falling short of exactly these standards,²⁴ while acknowledging at the same time that efforts have been made to ensure fair trials.²⁵ Criticisms included that there were no provisions in place, which prohibited the use of statements made as a result of torture or inhuman treatment; there were irregularities in the criteria for appointing and removing prosecutors and judges²⁶ and there was no insurance of a fair representation of people from all backgrounds, nor a fair representation of men and women when it came to the appointment of judges, who coincidentally did not need to have specialist legal expertise in the issues before the tribunal.²⁷

As predicted by the critiques, the consequential launch of the IHT's conduction of cases did not start without problems. Especially the first case tried by the tribunal, the Dujail case, which attracted most of the public attention for trying Iraq's former dictator, Saddam Hussein, was criticized for being chaotic and mismanaged.²⁸ Moreover the fairness and legitimacy of the trial, including the handing down of the death penalty to Saddam Hussein and his co-defendants, was questioned.²⁹

Similarly, the second case in front of the tribunal, the Al-Anfal case,³⁰ was forced to face issues, such as fairness, a clear line of analysis, questionable individual criminal responsibility of the accused and the issuance of the death penalty.³¹ But in contrast to the Dujail case, criticism was widely contained in favour of the importance of charging and securing a conviction for the crime of genocide against the Kurds.

After the release of the Al-Anfal trial judgment in 2007, the attention given to the activities of the IHT diminished. Public criticisms have become more diluted as time has passed, and the work of the IHT seems mostly forgotten by the international community, as well as the people in Iraq. Nevertheless the tribunal achieved to a certain extent, which had not been achieved in the Middle East before, namely the public prosecution of perpetrators of atrocities, and thereby set important precedents, which can be used and learned from in the future. One way in which the IHT created precedence in the Middle East was through its jurisdiction of charging rape as part of a war crime and a crime against humanity.

The IHT and Sexual Violence

From the outset, the IHT's basis for convicting crimes of rape was not a very strong one. From a national point of view, the issues of rape and sexual violence are still problematic subjects in today's Iraq. The topic is considered a taboo in society and national legislation surrounding 'rape' and other sexual violence in Iraq is limited in its extent. While rape is considered a crime by the Iraqi Penal Code,³² and the maximum penalty has in recent years been raised to life

imprisonment, the law still contains provisions, which can be considered challengeable when compared to the international standard. Under article 393, rape in the sense of 'sexual intercourse' can only be committed against women, and with her explicit dissent, and unlawful actions committed against any victim without their consent are limited to 'sexual intercourse', which is not further defined, and 'buggery'. In addition, article 398 establishes that all charges become void, if the offender lawfully marries his victim.³³

From an international point of view, the process of achieving groundbreaking judgments in the area of gender violence was further complicated by the IHT's exclusion from international assistance, as explained above, and the consequential lack of support and guidance on gender issues by the UN. As argued by the Global Justice Center this was one reason for the underdevelopment of the tribunal's gender component, which merely consisted of two female judges out of 55,³⁴ which contradicted other tribunals in similar circumstances, where women's representation has slowly risen in recent years.³⁵ In order to compensate for the loss of assistance by the UN, other organizations stepped forward to provide guidance. To ensure that the judges and the prosecution were equipped with the up-to-date knowledge on gender specific crimes and to initiate communication between the judiciary and civil society, the judges of the IHT met in Jordan in November 2006, together with members of the government and civil society, as well as legal experts on international law and gender crimes to discuss international law on gender-based violence as well as the practical challenges which come with addressing such issues, under the

leadership of the Global Justice Center, a human rights legal organization, based in New York.³⁶ Throughout the conference, legal issues as well as practical problems were discussed, such as the impact of trauma of sexual violence in the trial, or the necessity of the IHT to reach out to civil society.³⁷

Despite the challenging circumstances, the prerequisites for a successful and thorough prosecution of offenders of sexual violence by the IHT were given from the outset. As the tribunal's statute had been modelled after the Rome Statute 1998,³⁸ recognizing rape and other forms of sexual violence as a part of the war machinery and a crime against humanity,³⁹ it thus included the most up-to-date definitions of sexual-violence and gender-based crimes, and approaches to their prosecution.

With these necessary prerequisites in place, the IHT and its judgments provided a new opportunity to change these culturally-constrained practices by recognizing the suffering of victims, bringing offenders to justice and, as part of this, to set legal precedents on women's rights in the new Iraq.⁴⁰

But the IHT's considerations of rape during war time had the possibility of not only being of value for Iraq, but also for the wider international community. While dramatic developments have taken place since the first international recognition of rape during war time 75 years ago,⁴¹ and the following pioneering work of the international tribunals of Yugoslavia, Rwanda and Sierra Leone, as well as the International Criminal Court have achieved that rape today is not only seen as a by-product of armed conflict, but is often part of a planned policy,⁴² prosecution of offenders through war tribunals is still limited.⁴³

It was thus the IHT's chance to contribute to the existing proceedings against perpetrators, while not being burdened with having to introduce or develop sexual violence and rape as a war crime or crime against humanity, as the necessary foundation had been laid by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).⁴⁴

The IHT embraced the work achieved in this regard by previous international tribunals and legalization and applicable provisions within the IHT statute, which either explicitly include rape and other sexual crimes or could be used to include such are manifold: According to the IHT statute, '*causing serious bodily or mental harm to members of the group*', '*deliberately inflicting on the group living conditions calculated to bring about its physical destruction in whole or in part*', and '*imposing measures intended to prevent births within the group*' were considered as 'genocide' if they were committed '*with the intent to abolish, in whole or in part, a national , ethnic, racial or religious group*', in accordance with the International Convention on the Prevention and Punishment of the Crime of Genocide 1948.⁴⁵ Additionally, in the style of the Rome Statute, the tribunal specifically considered '*rape, sexual slavery, forcible prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity*' a 'crime against humanity', if the act was committed '*as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack*',⁴⁶ thereby altering the original provision,⁴⁶ in the Rome Statute and omitting the crime of 'enforced sterilization'.⁴⁷ It thereby has to be noted that the IHT

statute also limited Article 7(1)(h) of the Rome statute to say that '*Persecution against any specific party or group of the population on political, racial, national, ethnic, cultural, religious, gender or other grounds that are impermissible under international law, in connection with any act referred to as a form of sexual violence of comparable gravity*' (in comparison to '*any act referred to in this paragraph or any crime within the jurisdiction of the Court*' in the Rome statute) can constitute a crime against humanity.⁴⁸

Furthermore, following the Rome Statute and the Geneva Conventions of 1949, the IHT included in 'war crimes' '*torture or inhuman treatment*',⁴⁹ '*committing rape, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity*',⁵⁰ as well as '*committing outrages upon personal dignity, in particular humiliation and degrading treatment*' of civilians or members of the armed forces who have laid down their weapons or are unable to fight.⁵¹ Finally the IHT statute stipulated in Article 24 that '*a person convicted of sentences stipulated under Iraqi Penal Code shall be punished if he committed (or participated in committing) an offence of murder or rape as defined under Iraqi Penal Code*'.⁵²

As a consequence of its status as a national court, the IHT also resorted to national legislation, such as the Iraqi Penal Code of 1969. As explained above, the definition of rape in the Iraqi Penal Code is limited, but the picture is a different one when it comes to the definition in the IHT's statute.

The definition of rape by the IHT⁵³ was taken from the definition by the ICC,⁵⁴ namely that

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

As part of the explanatory notes it is thereby clarified that ‘the concept of ‘invasion’ is intended to be broad enough to be gender-neutral’ and that ‘it is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age related incapacity’.⁵⁵

By taking the ICC definition on rape, the IHT accepted that rape can be committed against a woman, as well as a man, that penetration cannot only occur with a sexual organ, but also with an object or another part of the body and that consent can be lacking through the simple fact of the victim being situated in a ‘coercive environment’, such as a detention center or the situation of an armed conflict in general.

The fact that the IHT accepted the ICC’s definition as part of its statute should thereby not be taken for granted, as the IHT’s national nature did not compel it to take such steps. This being said, the practical usage of the possibilities provided was only partly satisfactory, as will be seen further below.

Additional positive steps to facilitate the prosecution of rape and sexual violence was provided by the IHT by making a special effort, in comparison to

previous courts, to ensure the protection of victims and to give them the opportunity to speak up, as part of their Rules of Procedure and Evidence. The IHT gave the Iraqi victims and the families of the victims the possibility to file charges.⁵⁶ Moreover the IHT established a Victims and Witness Unit, which had as one of its duties to ensure that victims and witnesses receive support especially in cases of rape and sexual assault⁵⁷ and to include experts on trauma related to crimes of sexual violence.⁵⁸ In order to ensure the protection of victims, witnesses and plaintiffs it was possible to order a closed session for cases involving sexual offences.⁵⁹ Finally, Rule 63 of the Rules of Procedure and Evidence of the IHT provided a simplification of the provision of evidence in cases of sexual assaults.⁶⁰

Despite the vast range of opportunities provided by and for the IHT, a ground-breaking judgment concerning gender-crimes and sexual violence to the extent it would have been possible, did not take place. As will be seen, the crimes were acknowledged, which provided an important starting point and a new basis for future development in this area within Iraq, but wider implications are lacking. Nevertheless – as will be seen below – charges were upheld with the support of rape and sexual violence as proof of their existence. General charges of violence can thereby often be seen as a euphemism for rape, especially where rape is ‘a crime without a victim’, as victims are often unable to come forward in public: the dishonor that a woman would attract were she to give evidence makes it impossible for her to do so. Considering that in the case of the IHT, women did

indeed come forward to testify to rape being committed against them, this was an important possibility lost by the judges of the IHT,

There were no specific charges, and consequently no convictions, on the crime of rape or any other sexual violence by the Iraqi High Tribunal. Nevertheless, evidence was provided for rape as part of the Ba'athist war machinery and the acts committed were discussed in detail in the first two cases dealt with by the tribunal, the Al-Dujail case⁶¹ and the Al-Anfal case,⁶² to an extent that they arguably have the capability to lead as precedents for future trials inside Iraq. It is for this reason that these two cases have been chosen to be discussed in this article, together with the circumstances that brought them about:

The Al-Dujail Massacre

On 8 July 1982, Saddam Hussein was a president with problems. Having invaded neighbouring Iran in 1980, the early successes enjoyed by Iraqi forces against their disorganized Iranian foes had begun to be reversed. Buoyed by revolutionary zeal, and by more significant numbers, Iranian forces had begun to put up stronger resistance, causing Saddam embarrassment back home. For Saddam, Iran posed a threat not just on the battlefield, but among the majority population of Iraq who shared the same Shi'i confessional identity as their co-religionists in Iran. He therefore had to ensure that the Shi'i populations of Iran, and especially those huge numbers conscripted into the Army, remained loyal to the state, and not swayed by their religion.⁶³

On this day in July, Saddam chose to confront possible Iranian sympathies by visiting Dujail – a town with a history of association with the underground Shi'i *Da'wa* Party, and one which had also sent many recruits to fight in the war. Upon making his speech and embarking on his return journey to Baghdad, Saddam's convoy was attacked by up to a dozen gunmen, resulting in a gunfight lasting several hours. The result was in no doubt – the overwhelming defensive firepower of the presidential guard was enough to overcome the attackers, most of whom were killed. What was also in no doubt was the reprisals which were then enacted. All suspected *Da'wa* members were rounded up and, by the end of year, 393 men and 394 women and children from Dujail and nearby Balad had been arrested.⁶⁴

Human Rights' Watch has documented extensively the manner in which the male detainees were tortured, in Abu Ghraib prison, and other facilities, following their arrest, with many being summarily executed. Of those arrested, 254 were executed, including children under 17 – executions for which Saddam Hussein was found guilty of and hanged on 30 December 2006.⁶⁵

As stipulated by the IHT during its proceedings against the former dictator, next to the killing of hundreds, Saddam Hussein and his entourage were responsible for mental and physical torture of hundreds of men, women and children, the raping of women, as well as the plundering and destroying of property, houses and agricultural land; all of which was done '*to instill terror and fear among the Iraqi people in general*'.⁶⁶

For the atrocities committed, the main actors of the event were later charged with committing crimes against humanity, including willful murder, extermination, deportation, imprisonment and torture as part of the Al-Dujail case.⁶⁷ Despite not charging rape as a crime in itself, the court took its first steps in acknowledging and incorporated the crime into its judgment. The judges, in their summary of the final outcome of the trial, concluded that the attack on the Dujail people involved *'rape of women and girls in front of the eyes of their parent, which is more serious than murder'*. The judges continued that this amounted to a violation of national law also at its time of committing, as the act constituted a violation of the Iraqi Constitution, which was at least in theory in force during Saddam Hussein's reign.⁶⁸

Further to the acknowledgment of the occurrence of rape, the judges included 'rape' in their legal considerations by explaining as part of the legal argumentation of what constitutes a 'systematic attack' on the people, that rape may form such an attack, if it is executed on a systematical and wide-ranged basis.⁶⁹ Furthermore, in the Al-Dujail case, the court, just as *Furundzija* before, applied rape as a type of torture. As part of the charges of torture against Saddam Hussein and Barazan Ibrahim Hassan, rape was used as proof for the existence of torture as a crime against humanity against the people of Dujail. Thereby the court expanded the categories of sexual violence, which can constitute torture to include

rape of relatives; threat to personally rape the victim; forcing the victim to watch another person being violated; subjecting the victim to humiliating treatment, such as the forceful stripping of clothes

accompanied with a method of menacing, such as threatening to cause a severe harm,

and it was concluded that all of these practices were conducted in Al-Hakimiya prison, Abu Ghraib prison and in the Lea desert detention camp, where the detainees from Dujail were held.⁷⁰

Witnesses and plaintiffs were heard against Saddam Hussein and Barazan Ibrahim Hassan, who established through their accounts that rape and other sexual violence had been conducted in the different prisons and detention camps. And as a consequence of both these witness and plaintiff statements, Saddam Hussein and Barazan Ibrahim Hassan, were consequentially convicted for crimes against humanity, including torture, for which the rape and sexual assault of women was used as part of the proof that torture against the population had been committed.⁷¹

While this could be considered a first step and the mere acknowledgment of rape and other sexual violence having taken place as part of the attack for which Saddam Hussein was later hanged, was of significant importance, discussions surrounding the acts committed as well as further legal considerations were greatly lacking.

Even the women issuing the above evidence in the Dujail case did not openly state the crimes they witnessed. They paraphrased the happenings with phrases like *'torture of women used to take place at night'*, they *'undressed them'*,⁷² or *'they raised a women's legs'* and *'most of the girls did not marry because of the effects of the torture'*.⁷³ While the court explained that the women are unable to name the crimes of rape or sexual assault due to the possible

resulting of a social scandal,⁷⁴ which might be considered unsatisfactory from a victim's recovery point-of-view, it has to be noted positively that the judges recognized the happening of sexual violence on the women, even though there was no explicit pronouncement of these specific crimes committed through the victims. This changed in the *Al-Anfal* case.

The Al-Anfal Campaign

Al-Anfal is the eighth *sura* of the Quran which depicts the victory of the early Muslims over the non-believers at the Battle of Badr in 624 AD. In Saddam's Iraq, the religious symbolism of the name was used to provide justification for the ethnic cleansing of the Kurdistan region of the country – the northern, mountainous, provinces bordering Turkey and Iran that is home to some 4 million Kurds – a people distinct in ethnicity, culture, and language from their Arab neighbours to the south.⁷⁵

As non-Arabs in an Arab nationalist state, the Kurds had a well-earned reputation for rebelliousness against successive Iraqi regimes, and had received support, as proxies, from enemies of Iraq in the past. By the mid-1980s, Kurdish rebel successes against Iraqi forces, stretched by the conflict with Iran, had created significant concerns in Baghdad – particularly as elements of the Kurdish rebel forces had begun to operate in conjunction with the Iranian government and military forces.⁷⁶ In what can only be described as a state-designed and implemented programme of ethnic cleansing tantamount to genocide, the *Al Anfal* campaign divided the Kurdistan Region into a series of zones that were systematically targeted with conventional and chemical weapons with the

intention of depopulating the rural areas and removing the ability of Kurdish rebels to operate. Starting in 1986 and ending in 1989, the operation was headed by Saddam's cousin, Ali Hasan al-Majid – a figure who would earn the moniker of 'Chemical Ali' due to his usage of chemical weapons in the campaign. The campaign was devastating, with some 4,500 villages destroyed, a million people displaced, and with Iraqi prosecutors estimating that 182,000 people were killed.⁷⁷ Those who were not initially killed were put into different camps, where the detainees were exposed to various forms of torture and inhuman treatment, notwithstanding differences in sex, age or circumstances. As recognized by the judges in the Al-Anfal case in front of the IHT in 2006, guards in the camps used to rape women '*without any conscience or moral restrictions*', and hundreds of inmates died as a consequence of these and similar tortures.⁷⁸

Eighteen years after the atrocities took place, seven of the highest decision makers from the operations, including Saddam Hussein himself, his cousin Ali Hasan Al-Majid, and later minister of defense, Sultan Hashim Ahmad, were charged with and convicted for genocide, crimes against humanity and war crimes by the IHT.⁷⁹

In the Al-Anfal trial, just as in the Al-Dujail trial before it, the accused were not charged with rape or other sexual violence, neither as a crime against humanity nor as a war crime. Instead of charging rape and other sexual violence as such, the judges incorporated the crimes against women in other charges against the accused, such as '*causing serious bodily or mental harm to members of the group*,⁸⁰ and '*deliberately inflicting on the group living conditions calculated*

*to bring about its physical destruction in whole or in part*⁸¹ as part of the crime of genocide under article 11 of the tribunal's statute, as well as '*deportation or forcible transfer or population*',⁸² '*torture*',⁸³ '*other inhumane acts of similar character intentionally causing great suffering or serious injury to the body or to the mental or physical health*',⁸⁴ and '*persecution [...] in connection with any act referred to as a form of sexual violence of comparable gravity*'⁸⁵ as part of crimes against humanity under article 12 of the statute. Additionally five of the six accused were charged with '*use of violence against life and persons, in particular murder of all kinds, mutilation, cruel treatment and torture*'⁸⁶ and '*committing outrages upon personal dignity, in particular humiliating and degrading treatment*'⁸⁷ as part of war crimes against non-fighters.⁸⁸

When reading through the Al-Anfal case it comes as a surprise that rape and other sexual violence were not charged as crimes in their own right. The tribunal conducted very detailed and engaged preparation work, including the working through thousands of documents, international experts' reports, the hearing of dozens of witness and plaintiff statements, who provided substantial evidence of the crimes committed, and the visiting of on-site locations.⁸⁹ Furthermore, the tribunal chose to charge all sub-categories of 'crimes against humanity', except for rape, while at the same time repeatedly discussing the committing of rape within the judgment in considerable detail:

In its account of the crimes committed during the different Anfal operations, the tribunal explicitly recognizes that crimes, included '*preventing sexual reproaches*', took place in large numbers for longer than nine months and

thus constituted an act of genocide. Moreover it was recurrently confirmed by the tribunal that rape was committed at the different detention facilities, such as Tupzawa, Dibs, Nazarki, Al-Salamiyyah and Nuqrat Al-Salman, in a form, which can be classified as falling under provisions of crimes against humanity,⁹⁰ and the judges used these findings as part of their charges against the accused.⁹¹

As part of the investigation and the trial, the tribunal heard explicit evidence of sexual violence in the detention facilities, some of which were included in the judgment, such as the following statement by a protected female plaintiff:

In (Tupzawa) men were separated from women, and there they took my son, father, and mother; they still remain with an unknown fate. I stayed with my grandfather and grandmother who died in the detention facility. We were badly treated in the detention facility. And once while we were standing in line waiting for food an officer named (Ja^cfar Al-Halawi) tore the clothes of a pretty girl and asked for the presence of her parents and raped her in front of her parents and the people, and killed her after that, by shooting her in the head and then we were taken to (Nuqrat Al-Salman) detention facility. We were treated very badly; they separated men away from women and young women away from elder ones. In (Nuqrat Al-Salman) detention facility I was in a hall with six other girls, [NAME REDACTED] from (Kirkuk), ([NAME REDACTED]) from (Hawraman), ([NAME REDACTED]) from (Kuysinjaq) and there were guards and officers who used to enter the room and assaulted all girls in the room and their names are (Hajjaj), (Shawqi) and (Sakhr) who were (Hajjaj) guards. (Hajjaj) used to rape the girls in front of the other girls. He raped me and raped (Sazan). We shouted and resisted, and once I put my nails in his face, he hit me in the face and until now the marks of the wounds are still on my face and then we were moved to (Tupzawa) camp. I am presenting a complaint against Saddam Hussein, suspects and the officers who raped us.⁹²

Another plaintiff, a 57 year old housewife at the time of the judgment, added that she wanted to inform the court that *'in Dibis detention facility, they used to take the girls in order to rape them and return them after midnight [...]*'.⁹³

And a housewife from Kalar district reported that

*there was an officer named (Hajja) [in (Nuqrat Al-Salman) detention facility] used to rape women and I used to see him taking a girl named [NAME REDACTED] to his room raping her constantly.*⁹⁴

Consequentially to these testimonies, the prosecutor even went as far as proposing that the crime of rape had been proven to the court through plaintiffs' statements and thereby indicating that the accused in front of the tribunal should be charged with rape under Article 15, Second (F) of the IHT statute,⁹⁵ as it was foreseeable for the men in charge that sexual violence is likely to occur when women are put in camps, which are supervised by men only. He continued that the accused were negligent in this regard and refrained from taking measures to prevent the assaults.⁹⁶ The prosecutor's suggestion to charge the accused with rape was not pursued. It would have been easy in this instance for the IHT to pursue the path, which was already laid down in 1998 the International Criminal Tribunal for the former Yugoslavia, as part of the judgment against Anto Furundzija,⁹⁷ in which the ICTY did not only recognize crimes of commission, but it also recognized crimes of omission, and thereby opened up the possibility to try those individuals with authority, who did not stop the crime of torture or other inhumane acts from occurring in the individual's presence,⁹⁸ but the tribunal's judges abstained from doing so.

Instead, in its charges and convictions against Ali Hasan Al-Ma'id, who was in charge of the North Organization Office during the Al-Anfal Campaigns, Sultan Hashim Ahmed, the First Al-Anfal Operations' Commander and 1st Corps' Commander and Sabir Abd-al Aziz Husayn, the Military Intelligence General Director and Armed Forces General Commands member, the tribunal included the crime of rape and other sexual violence as proof for causing serious bodily or mental harm to members of the group,⁹⁹ and for deliberately inflicting on the group living conditions calculated to bring about its physical destruction in whole or in part¹⁰⁰ as genocide, deportation or forcible transfer of population¹⁰¹ and torture.¹⁰² Additionally 'rape' constituted a substantial part in the charges for other inhumane acts of a similar character intentionally causing great suffering or serious injury to the body or to the mental or physical health¹⁰³ as crimes against humanity, where the tribunal stated as part of its verdict against Ali Hasan Al-Majid that

Under these circumstances, and the availability of pretty women in these camps, as well as an acknowledgment among wardens of Convict 'Ali Hasan Al-Majid intentions and purpose, it is logic to expect rape cases since all security systems were aware of decree No (160) for the year 1987, which dismissed all legal codes that contradicts the aforementioned decree. In other word, they all know that there will be no legal restrictions to charge them for such perpetrations. Accordingly, the court finds that convict 'Ali Hasan Al-Majid contributed individually, as well as with others, in executing a joint criminal plan via a joint aim and purpose to partially or totally eradicate the civil inhabitants in North Iraq.¹⁰⁴

Additionally the judges used the raping and sexual abusing of women as proof for the existence of continuous systematic series of attacks,¹⁰⁵ that the attacks were committed against the civil population, in comparison to the

fighters¹⁰⁶ and to prove the intention of eradication as part of the committed genocide.¹⁰⁷

As the above case summary shows, note was taken quite extensively of the existence of rape and sexual violence by the tribunal, and an effort was made to hear victims and witnesses. It follows that, as already shortly raised above, there seems to be no reason for not charging rape. This stance was also taken by other academics reflecting on the case, such as Jennifer Trahan, who expressed that rape was clearly a '*foreseeable risk of the joint criminal enterprise*'. According to her the lack of charging rape resulted in insufficient acknowledgment of the criminality of the crime and the suffering of the victims and the fact that attention had been placed by the tribunal on rape committed, was not an adequate substitute to charging it.¹⁰⁸

This criticism can be taken one step further. While it is certainly true that the tribunal has taken note of gender crimes committed, the types of crimes committed was arguably too narrowly considered. In its judgments the Iraqi High Tribunal concentrated very much on rape committed in detention facilities. There is no discussion about rape having been committed outside of detention, in the houses or on the street. Additionally, while forceful undressing, the threat of rape or having to watch rape as being able to constitute torture was shortly discussed as part of the judgment,¹⁰⁹ no other type of sexual violence was considered, as done by the ICTY/R and the ICC before it,¹¹⁰ which is sure to have occurred inside and outside the detention facilities, such as sexual slavery, forced prostitution, trafficking or forced marriage. Finally the act of rape, once

discussed, is only so when it comes to girls and women. There is no consideration about the possibility that boys or men could have been raped.

The reasons for why rape and other sexual violence were only discussed one-sidedly by the tribunal and were also not charged as crimes in their own right, is likely to lead back to what has been said at the beginning of considering the IHT's interrelationship with gender crimes, namely that the issues of rape and sexual violence are still problematic subjects in today's Iraq. It is thus likely that the judges did not wish to cross a certain line of cultural sensitivity and decided to take one step at a time, starting with the 'mere' acknowledgement of the existence of rape and sexual violence as part of the previous war machinery. While the work achieved by the judges should be honoured and not underestimated, as the work can indeed provide a source of information, as well as a basis for the future,¹¹¹ it is likely that the judges in this instance missed a chance of revolutionizing the treatment of gender crimes within their region, which is not likely to return very soon.

Only going half-way might thereby have been a loss for all sides to a certain extent. While the extent of gender crimes discussed in the trial are likely to offend anybody who considers even the mentioning of such crimes a taboo, the unwillingness by the judges of going the whole way did nothing to minimize the impunity of offenders and might thus potentially have a negative – or at least a neutral – effect on society.

The effects of Rape and its Prosecution on Society

Coming to terms with the past occurrence of large-scale violence is a great challenge for every country and society, the suffering of the past being inscribed in the individual, as well as in the collective memory of the community.¹¹² Thinking needs to be changed and shattered trust has to be rebuilt,¹¹³ to be able to reconstruct a functioning society. Different mechanisms have been established and deployed to support this 'process of social healing', such as truth speaking, retributive justice, restorative justice, apologizing, or the payment of compensation. In the case of Iraq, this function was undertaken by the Iraqi High Tribunal, which aimed to support Iraq's path to recovery by prosecuting high-level participants of the past regime. It thereby had the possibility to show up the crimes committed, to provide the population with a platform to step forward and accuse the perpetrators of crimes committed against them and to see them convicted. For transitional justice to be relevant to and effective for the whole of the population, all atrocities committed during the times of war need to be considered, including crimes committed specifically against women.¹¹⁴

The various groups of the population suffer in different ways during and after an armed conflict. While they are all suffering from great atrocities, the type of atrocities can vary. There are certain crimes, which are more specific to women than to men, such as sexual slavery, forced prostitution or rape, which impact on the women's psychology and physiology as well as on society as a whole.¹¹⁵ Rape during the time of war has much more as its aim than to go against in individual, it aims at destroying family ties and aims to demoralize the enemy.¹¹⁶ It is the idea that by devaluing the women of a particular group, the

male part of the community is concomitantly devalued and the structure, morale, and abilities of the enemy group then suffers and is diminished.¹¹⁷ As such, the sexual violation of women's integrity of a specific group can be seen as a perverse type of male-to-male communication, which aims to demoralize the enemy group by showing them that they are unable to protect their women and consequently their community from harm.¹¹⁸ Rape can also work as a 'fuel' or 'reward' for the soldiers during war¹¹⁹ or it can be part of a strategic plan of 'ethnic cleansing', as it has happened in crimes of genocide throughout history, including in Iraq.¹²⁰ Considering the wide-reaching effects these crimes have on different actors within society, it becomes apparent that acknowledging them, as well as accounting for them will have an effect on society as a whole.

For the women themselves, who were forced to experience rape, the impact of the committed act has a long term impact. With notions of 'shame' and 'honour' being particularly redolent in Middle East societies, those subjected to sexual violence carry with them a burden of guilt on behalf of their entire community, and are subsequently shunned by their communities in the future, thus generating complex patterns of social exclusion, both of those who were victims of sex crimes, and the progeny of them. Women who suffered from sexual violence during the time of armed conflict, often continue to be victimized by society once arms are laid down. This could also be seen in Iraq where the issue of sexual violence is still considered taboo. Women on whom sexual crimes were committed are stigmatized and in some families they are considered to be a problem for the family's honour.¹²¹ As such, gender crimes, such as certain acts

of sexual violence or rape, especially in highly patriarchal societies, may have the same effects as genocide, as argued by Dixon, as it renders its victims socially infertile, since they are often seen as 'untouchable' or 'unmarriageable' in society.¹²² The refusal of acceptance by society makes many former victims even more vulnerable. Many consequently suffer from long lasting psychological traumas, and also physical effects. They might have persistent fear, a feeling of shame, difficulties in establishing intimate relationships and problems in leading an interactive life.¹²³ One part of working against this development, is to publicly acknowledge their suffering, have victims heard and supported and hold the perpetrators to account, as to encourage understanding within society and initiate personal reconciliation for the victims and their families. As it has been explained by several victims of genocide, crimes against humanity or war crimes, they cannot have any feeling of reconciliation, if they do not see justice being done.¹²⁴

This has only partly been achieved by the IHT. While the suffering of victims was indeed publicly acknowledged through the tribunal, only a certain type of victim was heard and perpetrators were not specifically held to account for the gender crimes committed.

Next to the arguable shortcomings vis-à-vis the victims as a result of not fully utilising the possibilities provided under the tribunal's jurisdiction, further limitations materialized as a consequence of the issues, which were not part of the tribunal's jurisdiction: The tribunal was unable to deal with all crimes and many had to be ignored. This is especially true for the atrocities committed after

2003, including by the American forces, as the IHT had no jurisdiction for after the fall of Saddam Hussein.

It is in general a problem, including in the case of the IHT, that impunity of former perpetrators persists after the conflict. Criminal tribunals by nature focus primarily on leaders and senior ranks, they take a long time to deliver a judgment, and the number of people convicted is not satisfying for many.¹²⁵ It is a fact that the tribunal is only able to try a few of the war criminals, and many go unpunished.¹²⁶ This is also the case in Iraq. It is consequently questionable how effective the courts are for the situation, since they often seem more symbolic than anything else.¹²⁷ If the perpetrators are not held accountable for their actions and impunity persists, the victims feel that their suffering is ignored and their need for justice is unmet.¹²⁸

One way of working against this impunity is to install smaller, nation-wide courts, such as the Gacaca Courts in Rwanda, which work on the ground and within the communities and have as their aim to achieve personal justice and reconciliation.¹²⁹ But this has not happened yet in Iraq. Another possibility would be the use of restorative justice, where the whole society is involved, as done by the Truth and Reconciliation Commission in Sierra Leone.¹³⁰ Having a Truth and Reconciliation Commission operating next to the tribunal would allow more victims to be heard and would provide the possibility of a different form of personal reconciliation for the victims, such as apologies by the perpetrators. While the establishment of such a commission was thought of in the case of Iraq, its realization has not yet commenced.

Considering that the IHT only tried few of the perpetrators of war crimes and crimes against humanity committed in Iraq in the recent decades, none of which had been convicted for a gender based crime; considering that the victims of these past atrocities have no possibility of bringing lower ranks to justice, as no other local courts to deal with such crimes exist; and considering that by far not all victims or even all types of victim have yet had a chance to speak out, as it would be possible as part of a Truth and Reconciliation Commission, the practical positive effects for victims in general, and victims of gender crimes in particular, remains questionable.

Coming back specifically to the recognition of sexual violence by the tribunal and the consequential influence on the personal reconciliation for the victims, it can be said that while a first – and important – step was taken, not enough was done. Especially the Al-Anfal trial constituted an advance to the end of impunity for sexual offenders in Iraq, as the tribunal recognized the widespread sexual violence perpetrated, accepted it as part of torture and genocide, provided protection for the victims and did not ask for additional evidence as part of witness testimonies and thereby arguably opened the way for future improvements in the Iraqi national law.¹³¹ At the same time reconciliation for the victims themselves can arguably only be seen to a very limited degree. The plaintiffs and witnesses being able to talk about the atrocities committed against them were very few, and not a single perpetrator was convicted for the crime by the IHT. It is not very well known within Iraqi society that the IHT

included discussions on rape within its judgments and the fact that no perpetrator was convicted does not support the victims' in their quest for justice.

Conclusion

The work to end impunity for gender crimes during conflict is ongoing. On 26 April 2012 Charles Taylor, former head of state of Liberia was convicted for sexual violence.¹³² The case of Prosecutor v. Jean-Pierre Bemba Gombo, the former Congolese opposition leader accused of rape, was brought before the ICC, being held in detention in The Hague since 2008 and with his second ICC trial taking place in 2015..¹³³ When comparing the actions taken by the IHT's to advances worked for in other parts of the world, it materializes that internationally the IHT's efforts concerning rape and other sexual violence is not of specific significance. While the problems in the country at the time of the set-up of the IHT, as well as the criticism the IHT's had to face from various sides certainly did not support significant advances in any legal areas, they can also not be used as an excuse. The IHT is not alone in its problems when it comes to the prosecution of sexual violence and rape. Also the ICTY and the ICTR had start-up difficulties. In both tribunals rape was not initially charged in their first cases, and it was only after civil society groups filed requests for the prosecution of these crimes that they were heard at the tribunals. Throughout time the ICTY, the ICTR and later the Special Court of Sierra Leone (SCSL) and the International Criminal Court played their part in making a valuable contribution to the international jurisprudence. While the IHT has made an effort in considering gender-based crimes, and there does not seem to have been inadequate investigations when it

comes to the prosecution of sexual crimes during conflict, as argued in other cases,¹³⁴ and the IHT has, just as the ICTY, used rape to fulfill elements of other crimes, such as enslavement or torture,¹³⁵ considering that all foundations were already laid in advance to the commencement of the trials the steps taken by the IHT were not as great as they could have been and will in this regard rather be of importance on a national, than an international level.

On a national level, the actions taken by the IHT have until now not been transformative when it comes to the prosecution of rape and sexual violence, but they certainly have the capability of being so. The definition and classification of rape in Iraqi national law has not been changed since the beginning of the IHT's proceedings. The law is still equally limited and the country still has some way to go to eliminate impunity for perpetrators of gender crimes in everyday life. Nevertheless, through its statute, the IHT confirmed Iraq's willingness to comply with international standards in this regard, and the public acknowledgement of rape having taken place in the country, together with all the necessary legal prerequisites of charging it, arguably forms a basis, which can be taken up by anybody inside the country to lobby for change of the national law.

When considering the effects of the IHT's work on the people themselves, a first positive step was taken, the necessary further steps for reconciliation of the victims with their perpetrators as well as within society as a whole are until now lacking. The judgments did not achieve transformation in the area of sexual violence. No perpetrator was held to account, the gender crimes recognized were limited in the type of crimes and possible victims, as well as in the time frame

committed, not enough potential perpetrators were charged, and no follow-up support for victims was initiated.

In conclusion it can thus be said that the IHT certainly played its role in Iraq's transitional justice system, and in this regard would not want to be missed. The IHT also created a basis for the acknowledgment and charging of crimes of sexual violence. At the same time the problems surrounding the set-up of the IHT and the lack of support from various sides, in conjunction with the lack of courage from the judges to go all the way when it came to the prosecution of gender crimes, resulted in a loss of truly transformative potential. It will be upon the current as well as the coming Iraqi generations to decide to either take up and use the basis provided by their tribunal or to disregard its achievements and to form the country accordingly.

Notes

¹ There exists a voluminous literature on the conditions of existence in Saddam's Iraq. Of particular noteworthiness with regard to the subject of this article are: Nadjie Al-Ali, *Iraqi Women: Untold Stories From 1948 to the Present* (London: Zed Books, 2007); Choman Hardi, *Gendered Experiences of Genocide: Anfal Survivors in Kurdistan-Iraq* (Farnham: Ashgate Publishing Limited, 2011); Jean Sasson, *Mayada, Daughter of Iraq: One Woman's Survival in Saddam Hussein's Torture Jail* (London: Bantam, 2004)

² Human Rights Watch, *The Anfal Campaign Against the Kurds* (New York: Human Rights Watch, 1993); Joost Hiltermann, *A Poisonous Affair: America, Iraq, and the Gassing of Halabja* (Cambridge: Cambridge University Press, 2007); Hardi, supra n.1

³ Al-Ali, supra n.1; Hardi, supra n.1

⁴ Kanan Makiya, *Republic of Fear: The Politics of Modern Iraq* (Berkeley: University of California Press, 1989).

⁵ Cynthia Enloe, *Nimo's War, Emma's War, Making Feminist Sense of the Iraq War* (Berkeley: University of California Press, 2010), 73.

⁶ *Al Anfal* Case no 1/C Second/2006

⁷ *Al-Dujail* Case no 1/9 First/2005 (as translated by Mizna Management LLC)

⁸ Lucy Brown and David Romano, 'Women in Post-Saddam Iraq: One Step Forward or Two Steps Back?' *NWSA Journal* 18:3 (2006): 54.

⁹ *Ibid.*, 56.

¹⁰ Anna Badkhen, 'Iraq: The Hidden Crime of Rape' (2009),

http://www.pbs.org/frontlineworld/stories/pakistan802/video/video_index_baghdad.html (accessed 2 February 2014).

Marjorie Lasky, *Iraqi Women under Siege* (CODEPINK/ Global Exchange 2006) 7.

- ¹¹ See cases below and Zainab Salbioff, Maryam Moody and Karla Mantilla, 'Interview: After the War: Women in Iraq' *Off Our Backs* 33:7/8 (2003): 8.
- ¹² Scharf, Michael, 'Basic Information about the Iraqi Special Tribunal', <http://law.case.edu/saddamtrial/content.asp?t=1&id=1> (accessed 31 January 2014).
- ¹³ Law of The Iraqi Higher Criminal Court, Law No. (10) 2005 Article 1, Second.
- ¹⁴ Rudina Jasini and Victoria Phan, 'Victim participation at the Extraordinary Chambers in the Courts of Cambodia: are retributive and restorative principles enhancing the prospect of justice?' *Cambridge Review of International Affairs* 24:3 (2011): 387.
- ¹⁵ Scharf, supra n 13.
- ¹⁶ Céline Folsché, 'The Challenges Faced by the Iraqi High Tribunal: The Dujail Trial' *The Law and Practice of International Courts and Tribunals* 6 (2007): 409; for an account of the situation of Iraq under the CPA, please see: James Dobbins et al., *Occupying Iraq, a history of the coalition provisional authority* (Santa Monica: RAND, 2009); Kaiyan Home Kaikobad, 'Problems of Belligerent Occupation: The Scope of Powers Exercised by the Coalition Provisional Authority in Iraq, April/May 2003 – June 2004' *Int'l Comp. L.Q.* 54 (2005): 253-256; Larry Diamond, 'Lessons From Iraq' *Journal of Democracy* 16:1 (2005): 9-23
- ¹⁷ Scharf, supra n 13.
- ¹⁸ Established under the National Presidential Directive 37, dated 13 May 2004.
- ¹⁹ Case Western Reserve University School of Law, 'Transcript of Anfal Trial Judges 1/29/08 Presentation at Case Western Reserve', January 2008, <http://law.case.edu/grotian-moment-blog/content.asp?t=1&id=141> (accessed 30 January 2014)
- ²⁰ Folsché, supra n 17 at 412.
- ²¹ *Ibid.*, 410/411.
- ²² Amnesty International, 'Annual Report 2012, Iraq', <http://www.amnesty.org/en/region/iraq/report-2012#section-4-8> (accessed on 2 February 2014).
- ²³ Ilias Bantekas, 'The Iraqi Special Tribunal for Crimes against Humanity' *The international and Comparative Law Quarterly* 54:1 (2005): 242.
- ²⁴ Amnesty International, *Iraqi Special Tribunal – fair trials not guaranteed* (Report, AI Index: MDE 14/007/2005, 2005) p.2.
- ²⁵ As can be seen in Article 4(d) of the Tribunal Statute, Rule 11, Rule 31 and Rule 49
- ²⁶ Amnesty International, supra n 25 at 2.
- ²⁷ *Ibid.*, 13.
- ²⁸ Folsché, supra n 17 at 407.
- ²⁹ *Ibid.*, 434.
- ³⁰ *Al Anfal* Case no 1/C Second/2006
- ³¹ Jennifer Trahan, 'A Critical Guide to the Iraqi High Tribunal's Anfal Judgment: Genocide against the Kurds' *Mich. J. Int'l L.* 30 (2008-2009): 316/7, 319
- ³² Penal Code No. 11 of 1969 (as amended to 14 March 2010) Article 393
- ³³ *Ibid.*, Article 398.
- ³⁴ PeaceWomen, 'Iraq: The Iraqi High Tribunal Makes Strides Toward Improving Women's Rights in International Law', http://www.peacewomen.org/news_article.php?id=1561&type=news (accessed 31 January 2014).
- ³⁵ Two of the three Chief Prosecutors of the ICTY/R Tribunals have been women (Louise Arbour and Carla del Ponte), one of the three Registrars of the ICTY has been as women (Dorothy De Samayo) and both the ICTY and ICTR have had a woman as President of the Tribunal (Gabrielle Kirk McDonald and Navanethem Pillay), other women has served as permanent judges to the Tribunals. The ICTY elected eight females out of the twenty-seven ad litem judges elected. (see: Kelly Askin, 'The Quest for Post-Conflict Gender Justice' *Columbia Journal of Transnational Law* 41 (2002-2003): 514.) Ten of the eighteen judges of the ICC are female. (see: ICC Website, 'Current Judges', http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/the%20judges/Pages/the%20judges%20%20%20biographical%20notes.aspx (accessed 30 January 2013).)
- ³⁶ Global Justice Center, Women's Alliance for a Democratic Iraq, *Iraqi Women's Rights and International Law: A High Level Conference on Gender Rights in Transitional Justice and Beyond for the Judges of the Iraqi High Tribunal and Iraqi Civil Society and Government Leaders* (Report, Dead Sea, Jordan, November 13-15, 2006) 4.
- ³⁷ *Ibid.*, 10.
- ³⁸ Which established the International Criminal Court
- ³⁹ Article 7 Rome Statute of the International Criminal Court 1998
- ⁴⁰ Global Justice Center, supra n 37 at 5.

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- ⁴¹ See The Geneva Conventions of August 12, 1949, Convention (IV) relative to the Protection of Civilian Persons in Time of War, Article 27 ('*Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault*')
- ⁴² Doris Buss, 'Rethinking 'Rape as a Weapon of War'' *Fem Leg Stud* 17 (2009): 145.
- ⁴³ Debra Bergoffen, 'Exploiting the Dignity of the Vulnerable Body: Rape as a Weapon of War' *Philosophical Papers* 38:3 (2009): 307.
- ⁴⁴ Rana Jaleel, 'Weapons of Sex, Weapons of War' *Cultural Studies* 27:1 (2013): 119.
- ⁴⁵ Law of The Iraqi Higher Criminal Court, Law No. (10) 2005 Article 11, First.
- ⁴⁶ *Ibid.*, Article 12, First.
- ⁴⁷ Compare Rome Statute of the International Criminal Court 2002 Article 7(1)(g)
- ⁴⁸ Law of The Iraqi Higher Criminal Court, Law No. (10) 2005 Article 12, First (H)
- ⁴⁹ *Ibid.*, Article 13, First, B.
- ⁵⁰ *Ibid.*, Article 13, Second, V and Fourth, F.
- ⁵¹ *Ibid.*, Article 13, Second, U and Third, B
- ⁵² *Ibid.*, Article 24, Fourth, A and B
- ⁵³ See Iraqi Special Tribunal, *Elements of Crimes* Section 3 (8) and Section 4 (38) and (59)
- ⁵⁴ International Criminal Court, *Elements of Crime* (2011) Article 7(1) (g)-1
- ⁵⁵ *Ibid.*, Article 7(1) (g)-1 footnotes 15 and 16.
- ⁵⁶ The Iraqi Higher Criminal Court, Law No. (10) 2005 Article 22
- ⁵⁷ Iraqi Special Tribunal, *Rules of Procedure and Evidence* 2005, Rule 31 First (iii)
- ⁵⁸ *Ibid.*, Rule 31 Second.
- ⁵⁹ *Ibid.*, Rule 51 First (c).
- ⁶⁰ *Ibid.*, Rule 63.
- ⁶¹ *Al-Dujail Case no 1/9 First/2005* (as translated by Mizna Management LLC)
- ⁶² *Al Anfal Case no 1/C Second/2006*
- ⁶³ For an account of the Iran-Iraq War, see Shahram Chubin and Charles Tripp, *Iran and Iraq at War*. London: I B Tauris, 1988.
- ⁶⁴ For a detailed account on the happenings in Dujail, as well as the Dujail judgment, see: Human Rights Watch, *Judging Dujail: The First Trial Before the Iraqi High Tribunal*. (Vol. 18, No. 9 (E), November 2006).
- ⁶⁵ *Ibid.*
- ⁶⁶ *Al-Dujail Case no 1/9 First/2005* (as translated by Mizna Management LLC) Document 1 of 6, p.18
- ⁶⁷ *Ibid.*, 22.
- ⁶⁸ *Ibid.*, 18.
- ⁶⁹ *Ibid.*, 14.
- ⁷⁰ *Ibid.*, Document 3 of 6, p.36
- ⁷¹ Conviction Saddam Hussein: *Ibid.*, Document 3 of 6, p.48; conviction Barazan Ibrahim Hassan: *A Ibid.*, Document 5 of 6, p.8
- ⁷² *Ibid.*, Document 3 of 6, pp.37/38
- ⁷³ *Ibid.*, Document 4 of 6, p.11
- ⁷⁴ *Ibid.*, Document 3 of 6, pp.37/38
- ⁷⁵ For a more detail account of the Kurds and the Anfal campaign, see: George Black, *Genocide in Iraq: The Anfal Campaign Against the Kurds* (New York: Human Rights Watch, 1993)
- ⁷⁶ For a detailed account of Kurdish history in Iraq see: David MacDowall, *A Modern History of the Kurds* (Third Edition, London: I.B. Tauris, 2004), Book IV
- ⁷⁷ Black, *supra* n 76
- ⁷⁸ *Al Anfal Case no 1/C Second/2006* p.53
- ⁷⁹ *Ibid.*, 59.
- ⁸⁰ Article 11, First B
- ⁸¹ Article 11, First C
- ⁸² Article 12, First D
- ⁸³ Article 12, First F
- ⁸⁴ Article 12, First J
- ⁸⁵ Article 12, First H
- ⁸⁶ Article 13, Third A
- ⁸⁷ Article 13, Third B
- ⁸⁸ *Al Anfal*, *supra* n 79 at 60-76.
- ⁸⁹ *Ibid.*, 21.
- ⁹⁰ During the 2nd Al Anfal Operation, see *Ibid.*, 403; During the 3rd Al Anfal Operation, see *Ibid.*, 407/8; During the 4th Al Anfal Operation, see *Ibid.*, 413

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- ⁹¹ Ibid., 444.
- ⁹² Ibid., 183/184.
- ⁹³ Ibid., 187.
- ⁹⁴ Ibid., 188.
- ⁹⁵ Ibid., 439: the prosecutor suggested charging the accused with rape as a crime against humanity, namely that they 'committed such a crime by taking action that commences its execution'.
- ⁹⁶ Ibid., 431.
- ⁹⁷ *Prosecutor v Anto Furundzija* [1998] IT-95-17/1-T
- ⁹⁸ Chaf Marzen, 'The *Furundzija* Judgment and its continued vitality in International Law' *Creighton Law Review* 43 (2010): 515.
- ⁹⁹ See e.g. *Al Anfal* Case no 1/C Second/2006 p.503 (Ali Hasan Al-Ma'id), p.851 (Sabir Abd-al Aziz Husayn)
- ¹⁰⁰ See e.g. Ibid., 509 (Ali Hasan Al-Ma'id), p.647/8 (Sultan Hashim Ahmed)
- ¹⁰¹ See e.g. Ibid., 542 (Ali Hasan Al-Ma'id), p.684/704 (Sultan Hashim Ahmed)
- ¹⁰² See e.g. Ibid., 553/8 (Ali Hasan Al-Ma'id)
- ¹⁰³ See e.g. Ibid., 570/1, 573 (Ali Hasan Al-Ma'id), p.673, 707 (Sultan Hashim Ahmed)
- ¹⁰⁴ Ibid., 573.
- ¹⁰⁵ See e.g. Ibid., 858.
- ¹⁰⁶ See e.g. Ibid., 859.
- ¹⁰⁷ See e.g. Ibid., 833.
- ¹⁰⁸ Jennifer Trahan, 'A Critical Guide to the Iraqi High Tribunal's Anfal Judgment: Genocide against the Kurds' *Mich. J. Int'l L* 30 (2008-2009): 349.
- ¹⁰⁹ *Al Anfal*, supra n 100 at 553
- ¹¹⁰ Clare McGlynn and Vanessa Munro (ed.), *Rethinking Rape Law, International and comparative perspectives* (Milton Park: Routledge, 2010), 58.
- ¹¹¹ Ibid., 69.
- ¹¹² Susanne Buckley-Zistel in Phil Clark, Zachary Kaufman (ed.), *After Genocide, Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (London: Hurst & Company, 2008), 125.
- ¹¹³ Charles Webel and Johan Galtung, *Handbook of Peace and Conflict Studies* (New York: Routledge, 2007), 183.
- ¹¹⁴ Sanam Naraghi Anderlini, *Women building Peace, What They Do, Why it Matters* (London: Lynne Rienner Publishers, 2007), 161.
- ¹¹⁵ United Nations Economic and Social Commission for Asia and the Pacific, *Women and Armed Conflict, A Regional Analysis on Asian and the Pacific* (Bangkok, December 2009) 9.
- ¹¹⁶ Bülent Diken, Carsten Bagge Laustsen, 'Becoming Abject: Rape as a Weapon of War' *Body & Society* 11:1 (2005): 111.
- ¹¹⁷ Ibid., 117.
- ¹¹⁸ Sonja Wölte, *Human Rights Violations against Women during War and Conflict* (Women's International League for Peace and Freedom, Report of a Roundtable Discussion parallel to the UN Commission on Human Rights, Geneva 1997) 23.
- ¹¹⁹ Kelly Askin, 'The Quest for Post-Conflict Gender Justice' *Columbia Journal of Transnational Law* 41 (2002-2003): 511.
- ¹²⁰ Wölte, supra n 119 at 24.
- ¹²¹ Karin Mlodoč, "We Want to be Remembered as Strong Women, Not as Shepherds': Women Anfal Survivors in Kurdistan-Iraq Struggling for Agency and Acknowledgement' *Journal of Middle East Women's Studies* 8:1 (2012): 74.
- ¹²² Rosalind Dixon, 'Rape as a Crime in International Humanitarian Law: Where to from Here?' *EJIL* 13:3 (2002): 703/704.
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- ¹²⁴ Phil Clark and Zachary Kaufman (ed.), *After Genocide, Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (London Hurst & Company, 2008), 33.
- ¹²⁵ Anderlini, supra n 115 at 155.
- ¹²⁶ Janine Natalya Clark, 'The three Rs: retributive justice, restorative justice, and reconciliation' *Contemporary Justice Review* 11:4 (2008): 336.
- ¹²⁷ Anderlini, supra n 115 at 156.
- ¹²⁸ Dolgopol and Gardam, supra 125 at 262.
- ¹²⁹ Ari Kohen, Michael Zanchelly, and Levi Drake, 'Personal and Political Reconciliation in Post-Genocide Rwanda' *Soc Just Res* 24 (2011): 91.
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¹³² Askin Kelly, 'Charles Taylor Judgment: A Victory for Gender Justice' (26 April 2012), <http://www.charlestaylortrial.org/2012/04/26/charles-taylor-judgment-a-victory-for-gender-justice/> (accessed 3 February 2014)

¹³³ Kas Wachala, 'The tools to combat the war on women's bodies: rape and sexual violence against women in armed conflict' *The International Journal of Human Rights* 16:3 (2012): 543/544.

¹³⁴ McGlynn and Munro, *supra* n 111 at 64.

¹³⁵ *Ibid.*, 51.