

# Prosecution of Reproductive Crimes Committed During the Halabja Attack in the Iraqi High Tribunal

by

Alyssa C. Scott\*

## INTRODUCTION<sup>1</sup>

From March 16 to 17, 1988, the Iraqi government waged the worst chemical attack in modern history in the Halabja region of Iraqi Kurdistan. The attack was made principally on civilians, resulting in thousands of deaths and many more severe and permanent injuries. In particular, women sustained long-term reproductive injuries including birth defects and infertility. These reproductive injuries must be recognized and appropriately treated under both Iraqi domestic and international law. This paper considers how the Iraqi High Tribunal (IHT) may prosecute reproductive crimes perpetrated during the 1988 Halabja attack in Iraqi Kurdistan.

The reproductive crimes committed during the Halabja attack may be prosecuted under several different theories. First, under the IHT statute, these crimes may be prosecuted as crimes against humanity including “[t]orture,”<sup>2</sup> “[r]ape, sexual slavery, forcible prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity,”<sup>3</sup> “[p]ersecution 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,”<sup>4</sup> and “other inhumane acts of a similar character intentionally causing great suffering or serious injury to the body or to the mental or physical health.”<sup>5</sup> Second, reproductive crimes are cognizable as war crimes including “[t]orture or inhuman treatment, including biological experiments,”<sup>6</sup> and “[w]illfully causing great suffering, or serious injury to body or health.”<sup>7</sup> These crimes may also be treated as crimes of genocide including

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\* Alyssa C. Scott is a 2011 J.D. candidate at Columbia Law School. She wishes to thank her family for their support and inspiration as well as Professor Yuval Shany and the Global Justice Center for their guidance in writing this article.

1. This article is based on Alyssa C. Scott’s work while at the Global Justice Center during the Spring of 2010.

2. Iraqi High Criminal Court Law, art. 12(First)(F), No. 4006 Al-Waqa’I Al-Iraqiya, (2005), [hereinafter IHT Statute].

3. *Id.* at art. 12(First)(G).

4. *Id.* at art. 12(First)(H).

5. *Id.* at art. 12(First)(J).

6. *Id.* at art. 13(First)(B).

7. IHT Statute, *supra* note 2, at art. 13(First)(C).

“[c]ausing serious bodily or mental harm to members of the group,”<sup>8</sup> and “[i]mposing measures intended to prevent births within a group.”<sup>9</sup>

Reproductive crimes committed during the Halabja attack may also be prosecuted in the IHT under international law. In the Dujail trial, in which Saddam Hussein was sentenced to death for committing crimes against humanity, war crimes, and genocide, the IHT declared that violations of international treaties signed by the Republic of Iraq could be redressed by the Tribunal. Specifically, the court could characterize these crimes as violations of both the International Convention on Civil and Political Rights (“ICCPR”) and the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), both of which Iraq has ratified and declared enforceable by the IHT.<sup>10</sup> Lastly, reproductive crimes committed during this attack are also a violation of customary international law, which prohibits the use of biological and chemical weapons.

Under either domestic or international law, the IHT has the power to redress the reproductive crimes perpetrated during the 1988 Halabja attack in Iraqi Kurdistan. Because of the gravity of these crimes, the IHT must use this power to award justice to the victims of the Halabja attack by prosecuting the perpetrators of the attack for the reproductive crimes they committed.

#### THE ATTACK ON HALABJA

On March 16, 1988, after two days of conventional attacks, the Iraqi military waged a chemical attack on the town of Halabja in northern Iraq, home to between 45,000 and 80,000 predominantly Kurdish residents.<sup>11</sup> This attack was the most severe chemical attack ever inflicted on a civilian population.<sup>12</sup> Here, the Iraqi military used a mixture of mustard gas and the nerve agents in sarin, tabun, and VX.<sup>13</sup> This resulted in horrifying health problems both for the individuals who sustained the attack and for their future children.

The chemicals covered civilians’ skin and clothes and contaminated their water and food supplies.<sup>14</sup> Health effects included damage to victims’

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8. *Id.* at art. 11(First)(B).

9. *Id.* at art. 11(First)(D).

10. International Covenant on Civil and Political Rights, March 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]. Iraq signed the ICCPR on February 18, 1969 and ratified the Covenant on January 25, 1971. States Parties and their ratification status may be found at: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en); Covenant on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]. Iraq ratified and acceded to the CEDAW on August 13, 1986. States Parties and their ratification status may be found at: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en).

11. *See generally* Christine Gosden, *Why I went, What I Saw*, *The Washington Post*, March 11, 1998 at A19; Jeffrey Goldberg, *The Great Terror*, *The New Yorker*, March 25, 2002 at 52, *available at* [http://www.newyorker.com/archive/2002/03/25/020325fa\\_FACT1?currentPage=all](http://www.newyorker.com/archive/2002/03/25/020325fa_FACT1?currentPage=all).

12. Gosden, *supra* note 11, at A19.

13. *Id.*

14. *Id.*; *see also* Goldberg, *supra* note 11, at 52.

respiratory tracts and eyes, blindness, skin disorders, multiple cancers including of the skin, head, neck, respiratory system, gastrointestinal tract, breast and childhood cancers, infertility, neuropsychiatric problems including severe depression leading to suicidal ideation, and death.<sup>15</sup> One estimate puts the immediate death toll from this attack at 5,000.<sup>16</sup> A study by Human Rights Watch estimates that between 4,000 and 7,000 Iraqi Kurds ultimately died from the attack.<sup>17</sup> For those who survived, health effects continued to surface even ten years later.<sup>18</sup>

Disability has also plagued children born to parents who survived the attack. Infertility rates for survivors are similar to those found in individuals living in Hiroshima following the atomic bombing.<sup>19</sup> For those who have been able to conceive, birth defects which have occurred at a higher incidence rate for those born in the region following the attack have included harelips, cleft palates, spina bifida, congenital heart disease, Down syndrome, and other major chromosomal disorders.<sup>20</sup> According to one study, Halabja's current population is 10 percent smaller than it would have been had the attack never taken place because of the greater incidence of infertility and miscarriage.<sup>21</sup>

#### PAST TRIALS CONCERNING THE HALABJA ATTACK

The Halabja attack was perpetrated as part of the larger al-Anfal campaign authorized by Saddam Hussein and led by Ali Hassan al-Majid, known as "Chemical Ali."<sup>22</sup> While Kurdish people estimate that the number of individuals killed in this campaign reaches 200,000, Human Rights Watch puts the death toll between 50,000 and 100,000 people.<sup>23</sup> Experts maintain that Saddam Hussein's intent in waging this campaign was to break the Kurds' morale so that they would abandon their quest for independence.<sup>24</sup>

Subsequent to the fall of the Ba'ath regime and Saddam Hussein's capture in 2003, the Coalition Provisional Authority approved legislation establishing the Iraqi Special Tribunal for War Crimes to prosecute officials from the Ba'ath regime under international law.<sup>25</sup> This statute was later replaced with an

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15. Gosden, *supra* note 11, at A19; Goldberg, *supra* note 9 at 52; Jim Muir, *Kurds Look Back with Fear*, BBC News, July 22, 2002, [http://news.bbc.co.uk/2/hi/middle\\_east/2138447.stm](http://news.bbc.co.uk/2/hi/middle_east/2138447.stm).

16. Gosden, *supra* note 11, at A19.

17. Middle East Watch and Human Rights Watch, *First Anfal: The Siege of Sergalou and Bergalou in Genocide in Iraq*, (Human Rights Watch 1993) available at <http://www.hrw.org/reports/1993/iraqanfal/ANFAL3.htm>.

18. *Id.*

19. Goldberg, *supra* note 11, at 52.

20. Goldberg, *supra* note 11, at 52; Gosden, *supra* note 11, at A19; Muir, *supra* note 15.

21. Muir, *supra* note 15.

22. Goldberg, *supra* note 11, at 52, Muir, *supra* note 15.

23. Goldberg, *supra* note 11, at 52, Muir, *supra* note 15.

24. Goldberg, *supra* note 11, at 52, Muir, *supra* note 15.

25. John C. Johnson, *The Iraqi High Tribunal and the Regime Crimes Liaison's Office*, Army Lawyer, July 2008, available at [http://findarticles.com/p/articles/mi\\_m6052/is\\_2008\\_July/ai\\_n31063571/](http://findarticles.com/p/articles/mi_m6052/is_2008_July/ai_n31063571/), Nehal

amended statute, which officially created the Iraqi High Tribunal (IHT).<sup>26</sup> In the IHT's first trial, the Dujail trial, Saddam Hussein and six other defendants were found guilty of crimes against humanity based on torture, forced deportation, imprisonment, willful killing, and other inhumane acts against the people of Dujail.<sup>27</sup> Hussein was executed on December 30, 2006.<sup>28</sup>

Next, the IHT turned its attention to individuals engaged specifically in the Al-Anfal campaign waged against Iraqi Kurds.<sup>29</sup> The campaign is believed to have been named after a chapter in the Koran, which "allows conquering Muslim armies to seize the spoils of their foes."<sup>30</sup> Most of the murders committed during the Anfal campaign were part of mass executions at night followed by mass burials.<sup>31</sup> "Chemical Ali" who masterminded the campaign, was prosecuted in the IHT and sentenced to death for convictions of genocide, crimes against humanity, and other serious violations of laws and customs of war in 2007.<sup>32</sup> "Chemical Ali" was executed in January 2010.<sup>33</sup>

Additionally, several trials have taken place outside Iraq concerning those involved in the Halabja attack. Frans van Anraat, a Dutch citizen who supplied key substances used to produce the chemical weapons used in the Halabja attack to the Iraqi military, was criminally prosecuted in a Dutch court in The Hague in 2005 for his participation in the attack.<sup>34</sup> Van Anraat was charged with complicity in war crimes and genocide under international law.<sup>35</sup> Ultimately, van Anraat was found guilty of complicity in war crimes and sentenced to seventeen years in prison for commission of this crime. However, van Anraat was ultimately acquitted on the charge of genocide since the prosecution failed to prove that he had knowledge of Hussein's genocidal plan.<sup>36</sup>

There is also an ongoing class action suit being brought in Maryland<sup>37</sup> in which plaintiffs, on behalf of themselves and other survivors and families of victims of the Halabja attack, along with a sub-class of children who have experience birth or genetic defects, are suing the Republic of Iraq and US-based corporate defendants. Plaintiffs believe defendants supplied some of the chemicals used to make the chemical weapons used in the attack. The complaint alleges that:

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Buta, *Fatal Errors: The Trial and Appeal Judgments in the Dujail Case*, 6 J. Int'l Crim. Just. 39, 61.

26. Buta, *supra* note 25, at 61.

27. Johnson, *supra* note 25.

28. *Id.*

29. Goldberg, *supra* note 11.

30. *Id.*

31. *Id.*

32. *Prosecutor v. Ali Hassan Al Majid (Al-Anfal)*, Judgment, Case No. 1/C Second, 505 (June 24, 2007) [hereinafter *Anfal Verdict*].

33. Nada Bakri, *Hussein Aide 'Chemical' Ali Executed in Iraq*, *The New York Times*, January 25, 2010, <http://www.nytimes.com/2010/01/26/world/middleeast/26execute.html>.

34. Profile: Frans Van Anraat, Trial Watch, [http://www.trial-ch.org/en/trial-watch/perfil/db/facts/frans\\_van-anraat\\_286.html](http://www.trial-ch.org/en/trial-watch/perfil/db/facts/frans_van-anraat_286.html).

35. *Id.*

36. *Id.*

37. Complaint at 1, *Aziz v. Republic of Iraq*, No. 09-869 (D. Md. 2009).

Epidemiological research also has demonstrated a link between exposure to the types of chemical, biological and nerve agents to which Plaintiffs were exposed and long-term genetic damage, which has manifested itself in birth defects in the children of those persons who were exposed to chemical and nerve agents in Iraq in 1988 and thereafter.<sup>38</sup>

In addition to these trials, several other trials involving officials who orchestrated the Halabja attack have commenced in the IHT. The status of these trials is unclear, but what is known is that four new officials: Mahmoud Samarra, Muzahim Sabir Hassan, Hamid Raza Shalah, and A'mir Muhammad Rashid have been indicted and possibly already tried for their involvement in the attacks.<sup>39</sup> A ruling has not yet been issued in this trial.

Because of the horrifying effects of the chemical weapons unleashed on the Kurdish population in Halabja, and specifically those that impact women's reproductive abilities, it is imperative that the IHT hold the perpetrators of the Halabja attack responsible for reproductive crimes. The prosecution of reproductive crimes will provide for justice in the face of this horrible tragedy while also creating a legal precedent that could be invoked in future prosecutions of reproductive crimes against women.

#### POWER OF THE IRAQI HIGH TRIBUNAL TO REDRESS REPRODUCTIVE CRIMES

The Iraqi High Tribunal (IHT) has the power to redress reproductive crimes under the IHT statute, relevant Iraqi domestic law, customary international law, and international criminal law. First, Article One of the IHT statute states:

The Court shall have jurisdiction over every natural person whether Iraqi or non-Iraqi resident of Iraq and accused of one of the crimes listed in Articles 11 through 14 below, committed during the period from July 17, 1968 and until May 1, 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.<sup>40</sup>

Because each of the individuals indicted for his participation in the Halabja attack was a citizen of Iraq, as each was a member of the Iraqi government, and the attack took place within the relevant time frame, the IHT's jurisdiction under this statute is proper.

In addition to having jurisdiction to adjudicate crimes defined in the IHT Statute, the IHT has determined that it may also adjudicate crimes under other relevant international law. In the Dujail trial, the IHT declared that crimes that have become part of customary international law could be prosecuted in the IHT. The IHT declared that it:

[H]as the right to consider the international crimes, not because the court of law, which is an internal law, stipulated so, but also either because Iraq ratified on international treaties included international crimes, as the condition in respect to war crimes stipulated in Geneva convention of 1949 and additional protocols annexed thereto, and the ethnic

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38. *Id.*

39. AK News, *Four More Ba'ath Officials to Stand Trial in Halabja Case*, The Kurdish Globe, June 17, 2009 at 9, available at [www.kurdishglobe.net/servlet/WritePDFServlet?ID=188](http://www.kurdishglobe.net/servlet/WritePDFServlet?ID=188).

40. IHT Statute, *supra* note 2, at art. 1.

extermination stipulated in the international criminal law are applied not only in Iraq but in all countries of the world directly, without the need to be stipulated in the laws of those countries, as it is with respect to crimes against humanity, even with respect to war crimes and ethnic extermination which are already forbidden by virtue of international rules before being convicted by international treaties.<sup>41</sup>

Here the IHT is saying that it is not confined to prosecuting only those crimes outlined in the IHT statute. It is able to prosecute crimes recognized under customary international law and violations of international treaties to which Iraq is a signatory.

It is also important to note that IHT is a time-limited juridical device. However, even if prosecution of those involved in the Halabja attack continues after the Tribunal has been dissolved, all crimes described in the IHT statute as well as legal precedent created thereunder will remain good law in Iraq. In the Dujail trial, the Tribunal declared itself a national court, making all IHT decisions part of Iraq's domestic law.<sup>42</sup> Therefore, prosecutions pursued after dissolution of the tribunal will be able to use the same body of applicable law.

Lastly, the jurisdiction of the IHT is limited to crimes defined in the statute and other crimes recognized under international criminal law.<sup>43</sup> Because the reproductive crimes committed may be cognized as crimes against humanity, war crimes and genocide, the IHT has jurisdiction to prosecute the reproductive crimes committed during the Halabja attack.

#### EVIDENCE

Unfortunately, there has been little evidence introduced in the IHT that is specifically relevant to the prosecution of reproductive crimes. In the Al-Anfal trial the court only noted the effects of the chemical attacks used by "Chemical Ali" as they relate to the charge of genocide.<sup>44</sup> The opinion does not make any mention of the effects of chemical weapons on the reproductive health of victims. This is likely due to the fact that the crime of enforced sterilization was omitted from the IHT Statute. Since there are no other crimes under the IHT statute that specifically address reproductive rights, it is not surprising that the court has failed to admit a large amount of evidence on this issue.<sup>45</sup>

Although the court has yet to admit such evidence, Dr. Christine Gosden has conducted extensive research on the effects of the chemical weapons used in

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41. Al-Dujail Lawsuit, Case No. 1/9 First/2005, Judgment, 42 (Nov. 5, 2006), English translation available at <http://law.case.edu/saddamtrial/dujail/opinion.asp> [hereinafter Dujail Verdict].

42. The Anfal Decision: Breaking New Ground for Women's Rights in Iraq, Global Justice Center, [www.globaljusticecenter.net/media/Anfal\\_White\\_Paper-FINAL.pdf](http://www.globaljusticecenter.net/media/Anfal_White_Paper-FINAL.pdf).

43. IHT Statute, *supra* note 2, at art. 1.

44. Anfal Verdict, *supra* note 32.

45. Memorandum from Gabe Arce-Yee on potential ways to frame the reproductive crimes of Halabja under the IHT Statute to Janet Benshoof (June 2009) (on file with author) [hereinafter GJC Memorandum], *Compare* IHT Statute, *supra* note 2, at art. 12(g)(2005) *with* Rome Statute of the International Criminal Court art. 7(g), July 17, 1998, 2187 UNTS 90, *available at* <http://www.unhcr.org/refworld/docid/3ae6b3a84.html> [hereinafter Rome Statute].

the Halabja Attack, particularly with respect to the ways in which these weapons harmed victims' reproductive systems. In April 1998, Dr. Gosden testified before the United States Senate Judiciary Subcommittee on Technology, Terrorism and Government and the Senate Select Committee on Intelligence on Chemical and Biological Weapons Threats to America.<sup>46</sup> Dr. Gosden testified that she traveled to Iraq for humanitarian reasons to study the effects of the chemical weapons used in the Halabja attack and to attempt to help those who had been injured.<sup>47</sup> Using the Halabja attack as a case study, Dr. Gosden lays out the long-term effects of a chemical attack of this nature.<sup>48</sup> She first lists the most serious health effects of the weapons including: respiratory problems, eye problems, skin problems, neuropsychiatric problems, cancers of the head, neck respiratory tract, gastrointestinal tract, leukemias and lymphomas (especially in children), and reproductive (including breast and ovary), congenital abnormalities, infertility, and miscarriages, stillbirths and neonatal and infant deaths.<sup>49</sup>

Dr. Gosden estimates that most victims exhibit symptoms of at least two of these major effects.<sup>50</sup> While it may initially seem surprising that the range of health effects from the same attack is so variant, Dr. Gosden explains this by pointing out that there were multiple chemicals used and also that victims received different doses of the chemicals.<sup>51</sup> While some victims were "drenched in liquid," others were able to wrap themselves in some kind of skin covering and quickly cleanse their bodies of the toxic chemicals.<sup>52</sup> Differing levels of exposure to the chemicals help explain the wide variety of health effects.

With regard to reproductive health, Dr. Gosden states that, while it is clear that the weapons in many cases have adversely affected the reproductive health of victims, the long-term effects remain largely unknown.<sup>53</sup> However, Dr. Gosden has documented a wide range of congenital malformations including congenital heart conditions, mental handicap, neural tube defects, and cleft lip and palate.<sup>54</sup> She attributes these birth defects largely to exposure to chemical weapons during the attack.<sup>55</sup> Evidence of reproductive effects was also produced in the Bulletin of the United Nations Institute for Disarmament Research ["UNIDIR"].<sup>56</sup> One report states that toxic residues from exposure to chemical,

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46. *Are we Prepared?: Hearing before the S. Judiciary Subcomm. on Technology, Terrorism and Government and the S. Select Comm. On Intelligence on Chemical and Biological Weapons Threats to America*, 105<sup>th</sup> Cong. 2 (1998) (statement of Christine Gosden) [hereinafter Gosden Testimony].

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. Gosden Testimony, *supra* note 46.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Christine Gosden, Mike Amitay, Derek Gardener & Bakhtiar Amin, *Examining Long-term Severe Health Consequences of CBW Use against Civilian Populations*, Disarmament Forum 1993 No. 3 at 67, available at [http://www.unidir.org/bdd/fiche-article.php?ref\\_article=221](http://www.unidir.org/bdd/fiche-article.php?ref_article=221).

biological, or nuclear weapons can result in sterility, genetic damage spanning generations, effects on unborn children, and effects on the fertility and health of future generations.<sup>57</sup>

#### WAYS REPRODUCTIVE CRIMES MAY BE PROSECUTED UNDER THE IHT STATUTE

Given the extensive evidence already gathered for previous IHT trials and independently by Dr. Gosden and other humanitarian workers, the IHT can and must prosecute these reproductive crimes. First, the IHT can prosecute these crimes as crimes against humanity on the basis of “torture,” “sexual violence,” “persecution,” “other inhuman acts,” and “enforced sterilization.” Second, the IHT can prosecute these crimes as war crimes including “torture,” and “willfully causing great suffering, or serious injury to body or health.” Third, the IHT may characterize reproductive crimes as genocide insofar as they cause “serious bodily or mental harm” and are “measures intended to prevent births.”

#### *Reproductive Crimes as Crimes Against Humanity*

Under Article Twelve of the IHT Statute, the Tribunal has the power to address crimes against humanity.<sup>58</sup> Article Twelve states that “For the purpose of this Law, crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>59</sup> Acts relevant to reproductive crimes include “torture,” “sexual violence,” “persecution,” and “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or the mental physical health.”<sup>60</sup>

In addition to the crimes listed, the court may also consider the crime of enforced sterilization. While the IHT was modeled on the Rome Statute of the International Criminal Court, the crime of enforced sterilization was omitted from the IHT statute.<sup>61</sup> Still, in the Dujail case, the IHT held that international tribunal laws applicable in the IHT. Therefore, while this crime is not present in the IHT statute, the court may still consider it an available prosecutorial tool.<sup>62</sup>

In order to prosecute reproductive crimes under Article Twelve, the prosecutor must show that the relevant act was committed as part of a widespread or systematic attack directed against a civilian population.<sup>63</sup> “Attack directed against any civilian population” is further defined as “a course of conduct involving the multiple panel of acts... against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack.”<sup>64</sup>

First, the circumstances of the attack itself will likely satisfy the criterion that this was a “widespread attack directed against [a] civilian population.”<sup>65</sup>

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57. *Id.*

58. IHT Statute, *supra* note 2, at art. 12(First).

59. *Id.*

60. *Id.*

61. *Compare* IHT Statute, *supra* note 2, with Rome Statute, *supra* note 45.

62. Dujail Verdict, *supra* note 40.

63. IHT Statute, *supra* note 2, at art. 12(First).

64. IHT Statute, *supra* note 2, at art. 12(Second)(A).

65. *Id.*



The attack was executed by Iraqi troops and included the use of airborne chemical weapons with the capacity to reach a large number of victims at once. Further the chemical weapons were released over an entire city as opposed to being released only over a military camp. Second, the prosecution will be able to prove that the Halabja attack was part of a “widespread and systematic” attack against a civilian population because the court in the Anfal trial convicted “Chemical Ali” of crimes against humanity for his participation in the Al-Anfal campaign, and the Halabja attack is believed to have been part of the Al-Anfal campaign. Lastly, there is evidence that after the attack, Iraqi troops returned to Halabja to assess the effectiveness of their weapons, providing further evidence of the “systematic” nature of the act.<sup>66</sup>

Once the initial criteria have been satisfied, the prosecution must show that the acts resulting in reproductive harm may be characterized as one of the named acts. First, reproductive crimes can be addressed as “torture” under Article Twelve, First, Paragraph F.<sup>67</sup> The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“CAT”) defines torture as:

[A]ny act by which severe pain and suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>68</sup>

In the case of the Halabja attack, the release of chemical weapons was an act that caused severe pain and suffering, both physical and mental. Further, the act can be characterized as having been committed for a discriminatory purpose. The fact that the attack was aimed at injuring the largely Kurdish population of Halabja would satisfy this prong of the definition. Finally, because the attack was committed by Iraqi troops and was ordered by the government, it was “at the instigation of or with consent or acquiescence of a public official.”<sup>69</sup> Therefore, these reproductive crimes could be redressed as torture constituting a crime against humanity.

Next, Article Twelve, Paragraph G states that an act of “[r]ape, sexual slavery, forcible prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity” constitutes a crime against humanity.<sup>70</sup> The only part of this definition under which reproductive crimes could be cognized would be “any other form of sexual violence of comparable gravity.”<sup>71</sup>

Article Seventeen, Second of the IHT statute gives the court the power to use decisions made by international criminal courts as a basis for interpreting

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66. U.S. Dep’t of State Int’l Information Programs, *Iraq: From Fear to Freedom* (2002), <http://library2.parliamanet.go.th/ebook/content-eb/iraq.pdf>.

67. IHT Statute, *supra* note 2, at art. 12(First)(F).

68. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 (emphasis added) [hereinafter CAT].

69. *Id.*

70. IHT Statute, *supra* note 2, at art. 12(First)(H).

71. *Id.*

and understanding crimes outlined in the statute.<sup>72</sup> Under this provision, it is appropriate for the court to consider the definition of “sexual violence” created by the International Criminal Tribunal for Rwanda (“ICTR”).<sup>73</sup> In the Akayesu case, the ICTR defined sexual violence as “any act of a sexual nature which is committed on a person under circumstances which are coercive.”<sup>74</sup> In that case, the court held that for an act to qualify as sexual violence it did not need to involve penetration or physical conduct as it is “not limited to physical invasion of the human body.”<sup>75</sup> Furthermore, the court held that “coercive circumstances” could include various forms of duress which do not involve physical contact and that coercion might be inherent “in certain circumstances such as armed conflict.”<sup>76</sup>

Here, the ICTR here does seem focus on acts involving the physical presence of a perpetrator.<sup>77</sup> However, due to the broad nature of the ICTR’s definition of sexual violence, it would be possible for the IHT to conclude that the unleashing of chemical weapons, which invaded the bodies of civilians causing serious harm, could be considered sexual violence. In the case of the Halabja attack, the circumstances of the violence were more than coercive. In this case, the affected individuals had absolutely no choice in allowing or disallowing significant damage to their sexual and reproductive organs that in some cases resulted in sterilization. Further, while the Akayesu court did not limit sexual violence to situations where there was “physical invasion of the human body,”<sup>78</sup> it is clear that the chemicals used in the attack “inva[ded]... the human body,” satisfying the ICTR’s definition of sexual violence.<sup>79</sup> Lastly, because sterilization is treated as a crime of sexual violence under the Rome Statute, it is likely that the court would find that the acts committed during the attack were “of comparable gravity” to the other acts of sexual violence described in the statute.<sup>80</sup> Precedent from other international tribunals concerning their interpretation of the Rome Statute is not binding on the IHT since it has jurisdiction under its own statute. However, because the Tribunal is interpreting crimes almost identical to those outlined in the Rome Statute, interpretations of other international tribunals are persuasive authority. Reproductive crimes committed during the attack on Halabja could be prosecuted under this section of the statute if the IHT adopted the ICTR’s broad reading of “sexual violence.”

Reproductive crimes could be cognizable under Article Twelve, First, Paragraph H which states “[p]ersecution 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

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72. IHT Statute, *supra* note 2, at art. 17(Second).

73. GJC Memorandum, *supra* note 45.

74. *Prosecutor v. Akayesu*, Case. No. ICTR-96-4-T, Judgment, ¶ 598 (Sept. 2, 1998).

75. *Id.*

76. *Id.*

77. GJC Memorandum, *supra* note 45.

78. *Akayesu*, *supra*, note 71, at ¶ 598.

79. *Id.*

80. Rome Statute, *supra* note 45, at art. 7(1)(g); GJC Memorandum, *supra* note 45.

any act referred to as a form of sexual violence of comparable gravity.”<sup>81</sup> “Persecution” is further defined as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”<sup>82</sup>

It would not be difficult to prove that the attack on Halabja was “persecution” as defined under the statute. The court has already concluded the trial of “Chemical Ali,” where it took evidence that the Al-Anfal campaign was waged predominantly against Iraqis of Kurdish descent.<sup>83</sup> Further, the prosecutor should have no difficulty showing that this ethnic group was specifically targeted since the town of Halabja was largely inhabited by Iraqi Kurds. Next, many Iraqis of Kurdish descent, by virtue of being the targets of reproductive crimes, have been deprived of the fundamental right to family. The Universal Declaration of Human Rights (“UDHR”), to which the IHT declared it is committed to enforcing in the Dujail decision,<sup>84</sup> declares that “[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family... The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>85</sup> Therefore, the IHT would be justified in finding that those who perpetrated the Halabja attack committed a crime against humanity because they released chemicals that either destroyed or significantly adversely affected the ability of the Iraqi Kurds living in Halabja during the attack to found a family.

Additionally, the IHT could redress reproductive crimes under Article Twelve, First, Paragraph J, which concludes “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or the mental or physical health” constitute crimes against humanity.<sup>86</sup> The release of highly toxic chemical weapons was an intentional act committed to cause “great suffering” as well as “serious injury to the body.” Further, there is precedent in other tribunals for prosecuting a sexual crime as an “other inhumane act.”<sup>87</sup> In *Prosecutor v. Brima, Kamara and Kanu*, the Special Court for Sierra Leone held that there was no reason the inclusion of sexual crimes under Article Two of the Rome Statute “should foreclose the possibility of charging as ‘other inhumane acts’ crimes which may among others have a sexual or gender component.”<sup>88</sup> While reproductive crimes clearly have a sexual component and could be considered “sexual violence,” there is a stronger legal basis for redressing these reproductive crimes as “other inhumane acts” since the statutory definition is unquestionably fulfilled.

Lastly, although the crime of enforced sterilization was omitted from the definition of crimes against humanity in the IHT statute, it may still be considered a means of addressing reproductive crimes.<sup>89</sup> The crime of enforced

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81. IHT Statute, *supra* note 2, at art. 12(First)(H).

82. *Id.*, at art. 12(Second)(E).

83. Goldberg, *supra* note 11.

84. Dujail Verdict, *supra* note 41.

85. Universal Declaration of Human Rights arts. 16(1), (3), G.A. Res. 217 (III) A, U.N.Doc. A/RES/217(III) (Dec. 10, 1948).

86. IHT Statute, *supra* note 2, at art. 12(First)(J).

87. GJC Memorandum, *supra* note 45.

88. *Prosecutor v. Brima, Kamara, and Kanu*, Case No. SCSL-2004-16-A, Appeal Judgment, para. 185-6 (Feb. 22, 2008).

89. GJC Memorandum, *supra* note 45.

sterilization is included in the definition of crimes against humanity in the Rome Statute of the International Criminal Court upon which the IHT statute was modeled.<sup>90</sup> The act of enforced sterilization was omitted from the IHT statute, because it was thought to be irrelevant;<sup>91</sup> however, it is clearly relevant to crimes committed in Iraq given that enforced sterilization was effectuated in the Halabja attack. Because the charge is now relevant, one could argue that it should be made available.<sup>92</sup> Alternatively, because the court found in the Dujail trial that “International Tribunal Laws” could be applied in IHT cases, the crime of enforced sterilization could arguably be pulled in from other bodies of international criminal law and prosecuted in the IHT.<sup>93</sup> If the court accepts that this charge should be available under either of these lines of reasoning, the court would easily be able to find that the crime had been committed as there is sufficient evidence showing that the attack resulted in sterility for many of its victims.

#### *Reproductive Crimes as War Crimes*

Reproductive crimes may also be cognized as war crimes under Article Thirteen of the IHT statute. This Article defines “war crimes” as “[g]rave breaches of the Geneva Convention of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention . . . B. Torture or inhuman treatment, including biological experiments; C. Willfully causing great suffering, or serious injury to body or health . . . .”<sup>94</sup> Therefore, violations of these provisions are violations both of the Geneva Conventions of 1949<sup>95</sup> and of the IHT Statute.

In the context of an armed conflict that is not of an international character, Article Three of the Fourth Geneva Convention prohibits inhuman treatment of those taking no part in the hostilities.<sup>96</sup> Such actions are similarly prohibited by the IHT Statute under Article Thirteen, First, Paragraph B, which characterizes “torture or inhuman treatment, including biological experiments” as a war crime.<sup>97</sup> This provision is applicable here because both the perpetrators and victims of the Halabja attack were Iraqi citizens and the conflict took place within Iraq. As described above, it is clear that the attack on Halabja, and the reproductive damage caused thereby, may be characterized as torture. Further, depriving civilians of the ability to reproduce, or imposing such harm on their future children as was caused subsequent to the Halabja attack, may be characterized as inhuman treatment. Also under Article Thirteen, First, Paragraph B, there may be an argument that the attack was a biological

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90. *Rome Statute*, *supra* note 45, at art. 7(1)(g).

91. Bernard Kuschnik, *The Legal Findings of Crimes against Humanity in the Al-Dujail Judgments of the Iraqi High Tribunal: A Forerunner of the ICC?* 7 *Chinese J. Int'l L.* 459, 462 (2008).

92. GJC Memorandum, *supra* note 45.

93. Anfal Verdict, *supra* note 32, at 24.

94. IHT Statute, *supra* note 2, at art. 13(First)(B), (C).

95. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, available at <http://www.unhcr.org/refworld/docid/3ae6b36d2.html>. Iraq ratified this convention on February 14, 1956.

96. *Id.* at art. 3.

97. IHT Statute, *supra* note 2, at art. 13(First)(B).

experiment as there is evidence that Iraqi soldiers returned to Halabja after the danger had subsided to assess the effectiveness of their weapons.<sup>98</sup> Therefore, violations described in Article Thirteen, First, Paragraph B, were committed during the Halabja attack.

Next, Article Thirteen, Paragraph C, which characterizes “willfully causing great suffering, or serious injury to body or health” as a war crime, of the IHT would also be satisfied by the reproductive crimes committed during the Halabja attack.<sup>99</sup> Chemical weapons were “willfully” dropped on the city of Halabja. These chemical weapons then caused horrible damage to the reproductive organs of victims, to the extent of causing sterility in some cases. Dr. Gosden reported in her testimony to the United States Congress that handbooks created for use by doctors in the Iraqi military show that the military had substantial knowledge about the effects of many of the chemicals used in the attack.<sup>100</sup> Additionally, Gosden notes that while the handbooks also show that military doctors were aware of an antidote for Soman, a chemical sometimes used in warfare, those perpetrating the attack chose to use Tabun, Sarin and Vx, chemicals for which there is no known antidote.<sup>101</sup> This satisfies the definition of the crime, which requires “serious injury to body or health.” Here there was clearly serious injury to both body and health. Commission of the reproductive crimes therefore constitutes a violation of both of these provisions. In causing reproductive harm, those responsible for the Halabja attack committed the war crimes of torture and willfully causing great suffering.

#### *Reproductive Crimes as Genocide*

Finally, reproductive crimes may also be understood as crimes of genocide as defined in the IHT Statute. Article Eleven defines genocide as,

[A]ny of the following acts committed with the intent to abolish, in whole or in part, a national, ethnic, racial or religious group such as:

- A. Killing members of the group.
- B. Causing serious bodily or mental harm to members of the group.
- C. Deliberately inflicting on the group living conditions calculated to bring about its physical destruction in whole or in part.
- D. Imposing measures intended to prevent births within the group.
- E. Forcibly transferring children of the group to another group.<sup>102</sup>

As is explained below, the reproductive crimes committed during the attack on Halabja fall under the definitions of the crime of genocide outlined in Paragraphs B and D.

First, a prosecutor would have to prove that the attack was “committed with the intent to abolish, in whole or in part, a national, ethnic, racial or religious group.”<sup>103</sup> Again, because the attack was focused on a town with a largely

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98. *Iraq: From Fear to Freedom*, *supra* note 66.

99. IHT Statute, *supra* note 2, at art. 13(First)(C).

100. Gosden, *supra* note 11.

101. *Id.*

102. IHT Statute, *supra* note 2, at art. 11(First)(A)-(D).

103. *Id.* at art. 11(First).

Kurdish population, and because it has already been proven that the larger Al-Anfal campaign constituted genocide, a prosecutor could likely prove that this attack was similarly motivated.

Second, the act described in Paragraph B, “causing serious bodily or mental harm to members of the group,” includes reproductive crimes. In *Prosecutor v. Kayishema and Ruzindana*, the ICTR defined serious bodily harm as “harm that seriously injures the health, causes disfigurement, or causes any serious injury to the external [or] internal organs or senses.”<sup>104</sup> In *Prosecutor v. Blagojevic and Jokic*, the ICTY adopted this definition and concluded that this also includes acts of torture, inhuman or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and deportations.<sup>105</sup> Although damage to reproductive organs was not included in this definition, the definition is fairly expansive and seems to be attempting to include various types of serious bodily harm. It would be reasonable for the IHT to conclude that damage to reproductive organs is similar enough to the damage caused by the acts in the definitions adopted by the ICTR and ICTY to be appropriately included under this section of the statute. Alternatively, if one looks to the plain language of the statute, as described with respect to war crimes, damage to reproductive organs including sterility constitutes both serious bodily and mental harm. Therefore, under any of these definitions, reproductive crimes may be prosecuted as the war crime of “causing serious bodily or mental harm” under Article Eleven of the IHT Statute.

Additionally, sterility, one of the reproductive effects of the chemical attack, would also “prevent births within the group” such that reproductive crimes could be prosecuted under Article Eleven, First, Paragraph D. In *Akayesu*, the ICTR defined “measures intended to prevent births” as including “sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriage.”<sup>106</sup> The most difficult part of this argument would be proving that prevention of births was an intended effect of the chemical attack and not simply an effect that the perpetrators were unaware of. However, the Halabja Post Graduate Medical Institute found that “Iraqi government documents indicate [the chemicals used in the attack] were used deliberately for known long-term effects, including cancers, birth defects, neurological programs and infertility.”<sup>107</sup> If, as this study suggests, the Iraqi government’s previous knowledge of these reproductive effects can be proven, both Paragraphs B and D of the definition of genocide would be satisfied such that reproductive crimes could be prosecuted under Article Eleven of the statute.

#### REPRODUCTIVE CRIMES AS VIOLATIONS OF THE ICCPR AND THE CEDAW

In the Dujail trial, the IHT declared that violations of international treaties to which Iraq is a party may be redressed by the IHT. The reproductive crimes committed during the Halabja attack also constitute violations of two international treaties that Iraq is a party to, the ICCPR and the CEDAW, enabling the IHT to act. Multiple rights guaranteed by the ICCPR, most notably

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104. *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Judgment, para. 109 (May 21, 1999); GJC Memorandum, *supra* note 45.

105. *Prosecutor v. Blagojevic and Jokic*, Case No. IT-02-60-T, Trial Judgment, para. 645-46 (Jan. 17, 2005); GJC Memorandum, *supra* note 45.

106. *Akayesu*, *supra*, note 74, GJC Memorandum, *supra* note 45.

107. Treatment & Research Programs for WMD Survivors in Iraqi Kurdistan, Halabja Post-Graduate, Medical Institute (HMI), <http://www.kurd.org/halabja/home.html>. GJC Memorandum, *supra* note 45.

Articles Seven, Seventeen, and Twenty-three, were violated during the Halabja attack and by the reproductive damage it caused.<sup>108</sup> There is also an argument that the CEDAW was violated. However, because the attack on Halabja was not specifically directed at women, violations of the CEDAW would be significantly harder to prove.

The ICCPR guarantees a set of rights deprived to of which the victims of the Halabja attack were deprived. Under Article Seven, “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”<sup>109</sup> As discussed above, the reproductive crimes committed during the Halabja attack may be characterized as torture. Further, it is arguable that the Halabja attack may be considered scientific. A December 2002 U.S. State Department report concludes, “Iraqi soldiers, wearing protective gear, returned to study the effectiveness of their attacks by dividing the city into grids and then determining the number and location of the dead . . . Halabja appears to have been a testing ground.”<sup>110</sup> Because the reproductive crimes committed during the Halabja attack constitute torture and also likely constitute scientific experimentation, Article Seven of the ICCPR has been violated and the IHT is required to redress these crimes.

Next, Article Seventeen of the ICCPR mandates that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence . . . .”<sup>111</sup> Similarly, Article Twenty-three of the ICCPR guarantees, “the right of men and women of marriageable age to marry and *to found a family* (emphasis added).”<sup>112</sup> Because the chemical weapons used in Halabja cause sterility, miscarriages, and myriad severe birth defects, there was unlawful interference by the Iraqi government with each victim’s “family” and, in the case of sterilization, complete deprivation of the right to “found a family.”<sup>113</sup> According to the ICCPR, violations of these rights must be redressed.<sup>114</sup> Stemming from its decision in Dujail, the IHT may redress these harms.

Finally, though the defense may claim that Iraq was in a state of “public emergency” as defined under Article Four such that its actions did not violate the Covenant, according to Paragraph Two of that Article, “no derogation from articles...seven...may be made under this provision.”<sup>115</sup> As discussed above, Article Seven was violated during the attack on Halabja. Further, even if Iraq attempts to claim that its actions that violate other parts of the Covenant not excepted by Article Four, Paragraph Two were not violations of the Covenant due to this provision, the Iraqi government’s actions would still not be excused as it did not inform the other parties to the Covenant as is required by Paragraph

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108. See ICCPR, *supra* note 10, at art. 2 (requiring that States Parties “give effect to rights recognized within the covenant” as well as provide an “effective remedy” for any violation of those rights).

109. *Id.* at art. 7.

110. *Iraq: From Fear to Freedom*, *supra* note 66, at 6.

111. ICCPR, *supra* note 10, at art. 17.

112. *Id.* at art. 23.

113. Gosden, *supra* note 11.

114. ICCPR, *supra* note 10, at Part II, art. 2(3).

115. ICCPR, *supra* note 10, at art. 4(2).

Three of Article Four.<sup>116</sup> Thus, Iraq may not defend its actions simply by claiming the country was in a state of public emergency.

The IHT may also be able to redress reproductive crimes as violations of the CEDAW. Under Article Eleven of the CEDAW, States' Parties are required to "take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same right, in particular . . . (f) The right to protection of health and safety in working conditions, including the safeguarding of the function of reproduction (emphasis added)."<sup>117</sup> Here, the Iraqi government failed to uphold its obligation to safeguard the function of reproduction, actually endangering, and in some cases foreclosing altogether, the ability of many Iraqi women to reproduce. However, the main obstacle to redressing reproductive crimes under the CEDAW is that it may be difficult to prove that the Iraqi government intentionally discriminated against women in the commission of the Halabja attack since the chemical weapons targeted the civilian population of Halabja generally. Still, due to the government's purported knowledge of the reproductive effects of the chemicals used and the disproportionate effect this has on women, the court could choose to hold perpetrators of the attack responsible for violations of the CEDAW.

#### REPRODUCTIVE CRIMES AS VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW

Lastly, reproductive crimes perpetrated in the Halabja attack may also be prosecuted as a violation of customary international law. International customary law, which is binding on all States, prohibits the use of biological and chemical weapons.<sup>118</sup> This prohibition extends to "the development, production and stockpiling" of these weapons.<sup>119</sup> Further, not only are such weapons proscribed where they are lethal, in situations of armed conflict, even the development, production, stockpiling or use of non-lethal biological and chemical weapons is prohibited.<sup>120</sup> Here, reproductive crimes committed during the Halabja attack included the development, production and use of lethal chemical weapons, violating international customary law. Reproductive crimes, therefore, can also be addressed as a violation of international customary law.

#### EFFECT OF THE FAILURE TO ADDRESS REPRODUCTIVE CRIMES

Although the acts committed during the Halabja attack would likely be prosecuted under many of the statutes mentioned in this analysis without being characterized as reproductive crimes, reproductive crimes must be individually recognized and addressed. Because the social role and relative power of a woman is often premised on her ability to procreate, reproductive crimes leave women in a particularly vulnerable position.<sup>121</sup> Atighetchi describes the effect of sterilization on a woman under Shari'a rules:

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116. *Id.* at art. 4(3).

117. CEDAW, *supra* note 10, at art. 11.

118. Customary International Humanitarian Law 259 (Jim Henckaerts & C. Doswald-Beck eds., Cambridge University Press 2005), *available at* <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5ksk7q?opendocument>.

119. *Id.*

120. *Id.*

121. Dariusch Atighetchi, *Islamic Bioethics: Problems and Perspectives* 137 (Springer 2006).



[I]f the wife is sterile, the husband can remarry without repudiating this previous wife, as Muslim law allows polygamy with up to a maximum of four wives (Koran 4.3). Alternatively, the husband can choose to repudiate his wife. Unilateral repudiation by the husband has always led to abuse, to the extent that the excuse of supposed sterility of the wife sufficient for the husband to repudiate her. On the contrary, when it is the husband that is sterile, Shari'a does not grant the wife the faculty of repudiating him.<sup>122</sup>

Because reproductive crimes can have such a serious effect on the rights of women in Iraq, and in many other areas of the world, it is important to create legal precedent bringing such crimes within the definitions of established crimes under international law. Once reproductive crimes become part of the definition of the crimes outlined above, such crimes may be prosecuted by any country applying international law. This would result in justice being served to individuals around the world who have fallen victim to reproductive crimes. Without such legal precedent, it is likely that these crimes, because they are not specifically defined in the language of international criminal statutes, may go unpunished and the victims may not have access to redress for their injuries. It is vital that such horrible atrocities do not go unpunished. Because reproductive crimes are cognizable under a large number of sections of the IHT statute as well as punishable under other forms of international law, the IHT can and must redress these crimes.

#### CONCLUSION

The chemical attack waged on civilians living in Halabja in March 1998 resulted in devastating reproductive effects for its female victims. While the immediate attacks were abominable, long-term effects continue to be visible more than a decade after the attack. These reproductive health effects include miscarriages, severe birth defects, and sterility. The IHT has the power to redress these crimes under domestic and international law, and must do so in its ongoing trials where it is currently prosecuting many of the Halabja attack's organizers. In order to deliver justice to these victims, the IHT must use its power to add reproductive crimes to the definition of applicable violations of international law and address these crimes in its upcoming trials of the perpetrators of the attack on Halabja.

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122. *Id.*