

THE WAR ON TERROR AND THE RIGHTS OF WOMEN:
COMBATING DOMESTIC VIOLENCE IN AFGHANISTAN AND IRAQ

Richard W. McCoy

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Introduction

New initiatives to combat domestic violence in the United States usually involve the creation or perfection of techniques to better apply well-established and widely accepted general principles about the rights of women and their place in society;¹ in many other parts of the world, particularly in the Middle East, the challenge is to first introduce those same general principles in societies that still view women as less than the equals of men.²

From a legal perspective, at the very least, the fundamental equality of men and women is clearly recognized in the United States and the rest of the Western World.³ American law

¹ *E.g.* Laws designed to protect women from abuse at the hands of their domestic partner, such as the Pennsylvania Protect from Abuse Act (23 Pa.C.S.A §6101 et seq.), presuppose that women have a right not to suffer violence or the threat of violence from their spouses or domestic partners. *Cf. Id.* at §6102 (defining abuse).

² *See generally* p. 4, *infra*.

³ *See generally* U.S. Const. amend. 5, 14, & 19; *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *U.S. v. Virginia*, 518 U.S. 515 (1996). Although gender equality is clearly recognized and established under U.S. law, it is not expressly protected in the U.S. Constitution. In 1972, an Equal Rights Amendment that would have expressly established constitutional gender equality was passed by Congress,

recognizes that a woman has the right not to suffer physically or psychologically at the hands of her husband or domestic partner,⁴ and that the relationship between husband and wife is one of equals, not of a master and subordinate.⁵

Anti domestic violence initiatives in the United States and in other Western countries generally involve the actual practical enforcement of the general principles that women are the equals of men before the law and that women have a right not to suffer physical or psychological abuse.⁶ In contrast, the legal codes of many developing countries, particularly in the Middle East, are based on religious interpretations and traditions that often cast women in a subservient and servile role.⁷

The 'War on Terror' has had a dramatic positive effect on the legal status of women in the Middle East, and in particular in the two countries that have been the scenes of U.S. military action and reconstruction since 2001. Prior to their overthrow by the United States and its allies, the Taliban imposed on Afghanistan an extreme interpretation of Islamic law⁸ under which women were forbidden, among other things, from attending schools, from working, or from having access to professional healthcare.⁹ Women also suffered a variety of human rights violations in Iraq under Saddam Hussein's Ba'athist regime. These included occurrences where women were arrested without charges (sometimes as a way of punishing a male relative), were

but the Amendment has not been ratified by the requisite three-fourths of the states. H.J. Res. 208, 86 Stat. 1523 (1972); Jane J Mansbridge, *Why We Lost the ERA* (University of Chicago Press 1986).

⁴ See e.g. 23 Pa.C.S.A §6101 et seq.

⁵ Cf. Randy Lee, *Why the government has an interest in marriage: Finding Marriage Amidst a Sea of Confusion: A Precursor to Considering the Public Purposes of Marriage*, 43 Cath. Law. 339 (2004).

⁶ See generally notes 1, 3 & 4, *supra*.

⁷ See p. 4, *infra*.

⁸ The Taliban are followers of the teachings of the Deoband school of Islam. Some commentators have suggested that they follow an extremely strict and simplistic version of the Deoband school's teachings. See generally, e.g. Ahmed Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia* (Yale University Press 2001).

⁹ These examples come from a story reported by the BBC on December 20, 2000. This story can be viewed online at http://news.bbc.co.uk/2/hi/south_asia/144382.stm (last retrieved November 14, 2006).

raped while in police custody, or even beheaded on suspicion of prostitution.¹⁰ Today, both the Afghans and Iraqis are grappling with the interpretation and enforcement of new Western-style constitutions that purport to guarantee the equality of women under the law,¹¹ but does the reform go far enough?

The Middle East is in a period of transition, and the outcome is far from certain. Ideally, from the prospective of combating domestic violence, the change of governments in Afghanistan and Iraq will result in (1) the meaningful adoption of the principle of gender equality in those countries, and (2) the consequential introduction of new legal mechanisms for protecting women and the victims and potential victims of domestic violence in those countries.

In Section 1 of this paper, some of the implications of the new Afghani Constitution on the rights of women are explored. In Section 2, the nature and potential of the Independent Human Rights Commission of Afghanistan as an advocate for abused women are evaluated. In Section 3, the new Iraqi Constitution is compared to the new Afghani Constitution with respect to its treatment of women. In Section 4, several possible applications of international law to the situations of women in Afghanistan and Iraq are outlined. Section 5 contains a summary and conclusion.

¹⁰ Amnesty International reports that women were “tortured, ill-treated and in some cases extrajudicially executed in Iraq.” *Iraq: Systematic Torture of Political Prisoners* 8 (Amnesty International 2001) (AI Index: ASA 14/008/2001). Some women were detained, tortured and raped as a means of discouraging relatives who lived outside of Iraq from speaking out against the Ba’athist regime. *Id.* In one incident (in 2000), a videotape of a woman being raped was sent to a relative living abroad who had joined the Iraqi opposition. *Id.* In another incident (also in 2000), authorities beheaded dozens suspected prostitutes without any judicial process. *Id.*

¹¹ See pp. 5-14, *infra*.

1. The New Afghani Constitution: A Roadmap to Equality or the Codification of Servility?

Men are the maintainers of women because Allah has made some of them to excel others and because they spend out of their property; the good women are therefore obedient, guarding the unseen as Allah has guarded; and (as to) those on whose part you fear desertion, admonish them, and leave them alone in the sleeping-places *and beat them*; then if they obey you, do not seek a way against them...(emphasis added)

The Quran 4:34¹²

Some Muslim scholars have interpreted the above passage of the Quran as an express recognition of the superiority of men over women and as a specific license for husbands to use physical force to chastise their wives.¹³ Among those who believed in such strict interpretations of the Quran (and in drastically limiting the rights of women) were the Taliban and their followers in Afghanistan, who ruled that country from 1996 through the U.S.-led military campaign of 2001.¹⁴

¹² (M.H. Shakir, trans., Tahrike Tarsile Qur'an, Inc. 1983).

¹³ This passage has been the subject of a wide spectrum of interpretations through the centuries. Its relevance within the context of this discussion is merely that in a number of predominantly Muslim countries it can be a basis for condoning practices that are contrary to generally accepted Western views on gender equality. For a detailed analysis of this passage, see Azizah Y al-Hibri, *An Islamic Perspective on Domestic Violence*, 27 Fordham Int'l L.J. 195 (2003). Al-Hibri argues that the "chastisement" passage authorizes only minimal physical chastisement of wives and only in a few very specific circumstances. He also posits that such authorization was only intended to apply until such time as society reached a level where such punishments were no longer appropriate. *See Id.* at 206-09.

¹⁴ *See generally e.g.*, the BBC's online timeline of events in Afghanistan, available at http://news.bbc.co.uk/1/hi/world/south_asia/country_profiles/1162108.stm (last retrieved November 14, 2006).

In October of 2001, the United States and its allies began military operations in Afghanistan in response to the al-Qaeda attacks of September 11th, 2001.¹⁵ Within months, the Taliban authorities were driven from power¹⁶ and the Afghani people, with the help of the United States and the international community, began work on the creation of a new democratic government in Afghanistan.¹⁷ In January of 2004, a new constitution was approved that included a number of passages aimed at protecting the rights of women.¹⁸

The primary guarantee of the rights of women under the new Afghani Constitution is found in Article 22.¹⁹ Article 22 provides that “[a]ny kind of discrimination and privilege between the citizens of Afghanistan are prohibited. [sic] The citizens of Afghanistan – *whether man or woman* – have equal rights and duties before the law.” (emphasis added)²⁰ Although the new constitution prohibits the passage of any law contrary to the principles of Islam,²¹ it appears that constitutional provisions are at least co-equal legally to Islamic law and that express constitutional guarantees are supposed to supersede any contrary interpretations of Islamic law.²² Thus, the basic guarantee of equality of men and women before the law is probably on its face immune to any legal challenge as being contrary to the teachings of Islam.

The immediately apparent problem with interpreting the Afghani Constitution is the repeated attempts by the drafters to incorporate Islamic law by reference without identifying which

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ The process of creating a new government in Afghanistan began when Afghani leaders met in Germany under U.N. auspices in late 2001 and developed a plan of reconstruction known as the “Bonn Agreement.” *Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions*, signed in Bonn, Germany on December 5, 2001. The Bonn Agreement substantially ‘reset’ the constitution of Afghanistan to its 1964 status (excepting the provisions relating to the monarchy) for the transitional period. *Id.* at art. II(1)(i)

¹⁸ The new constitution even goes so far as to specify that a certain number of seats in the upper house of the Afghan National Assembly are required to be held by women (50% of the members appointed by the President, or one-sixth of the total). Afghanistan Const. art. Eighty-four Ch. 5, art. 4 cl. 1-2.

¹⁹ *Id.* at art. Twenty-two Ch. 2, art. 1.

²⁰ *Id.*

²¹ *Id.* at art. Three Ch. 1, art. 3.

²² *See Id.*

interpretations of Islamic law is being incorporated. For example, the Afghani Constitution states in Article 54 that the “[f]amily is the fundamental unit of society and is supported by the state. The state adopts necessary measures to ensure physical and psychological well-being of family, especially of child and mother, upbringing of children and *the elimination of traditions contrary to the principles of [the] sacred religion of Islam.*” (emphasis added)²³

The ultimate effect of Article 54 is not at all clear. Although it appears to be aimed at protecting women and children from abuse (“The state adopts necessary measures to ensure physical and psychological well-being of family...”)²⁴, it also aims to eliminate “traditions contrary to the principles of [the] sacred religion of Islam.”²⁵ The problem is in identifying which interpretation of Islamic law is to be applied, and by extension which traditions are to be eliminated as being contrary to Islam. As mentioned earlier, the Taliban considered the practices of sending women to school, letting women have jobs, and allowing women to have access to healthcare as being “contrary to Islam.”²⁶ Does Article 54 protect a woman from a husband or father who denies her an education, a career, or medical treatment; or does Article 54 vindicate such a man for trying to eliminate influences that he sees as threatening to an Islamic family? Is Article 54 a guarantee against domestic violence or a constitutional validation of a husband’s supposed right to protect the well-being of his family by physically dominating and chastising his wife and children?²⁷

²³ *Id.* at art. Fifty-four Ch. 2, art. 32.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *See* p. 2, *supra*.

²⁷ As discussed earlier, the Quran has been interpreted by some as allowing husbands to use varying level of physical force against their wives. *See* p. 4, *supra*.

With a dearth of statutory law following the adoption of the new constitution, courts are generally applying a religious code based on the Sunni ‘Hanafi school’ of Sharia.²⁸ In at least one instance, statutory law has officially incorporated such religious law into the criminal code.²⁹

Since the Afghani Constitution does not state the principles of Islamic law that it incorporates or offer a clear means of identifying which interpretations of Islamic law bear constitutional authority, judges in Afghanistan are left with very little guidance as to the extent and nature of various constitutional protections and are free to apply extremely strict interpretations of Islamic law.³⁰ In some cases, judges may have treated Islamic law as trumping statutory law.³¹ There are reports of women who are detained by local judges for seeking to avoid forced marriages despite statutory law ensuring that a woman may marry only by her choice.³² In such a situation, it is questionable what protection against domestic violence can be expected from courts that do not even uphold a woman’s right to choose who she marries.

Some early decisions of the Afghani Supreme Court³³ under the original leadership of the conservative Chief Justice Faisal Ahmad Shinwari appear to demonstrate a reluctance to treat

²⁸ International Religious Freedom Report: Afghanistan 2004 (U.S. Dept. of State, Bureau of Democracy, Human Rights, and Labor, September 15, 2004). Available online at <http://www.state.gov/g/drl/rls/irf/2004/35513.htm> (last retrieved November 14, 2006). The Hanafi school is favored by the majority Sunni population, but is applied equally to the minority Shia, who generally prefer the “Jafari school.” *Id.*

²⁹ The Afghan Press Law states that if existing law provides no punishment for listed offenses, then the punishment shall be determined in accordance with the Hanafi school of Sharia. *Id.*

³⁰ Amnesty International reports that judges in Afghanistan have detained women for “crimes” that have no basis in statutory law, such as “running away” or so-called “zina” crimes, including marriage without parental permission or sexual intercourse outside of marriage. In many of these cases, the women are victims of domestic violence or some other form of abuse. *No One Listens to Us and No One Treats Us as Human Beings: Justice Denied to Women* 34-38 (Amnesty International 2003) (AI Index: ASA 11/023/2003).

³¹ It is necessary to qualify most statements about the decisions and rationales of Afghani courts because the written opinions of Afghani courts (and/or English translations thereof) are presently unavailable. Perhaps one day Afghani court decisions will be reported on WESTLAW® or LEXIS®?

³² *Id.* at 38

³³ The Afghani Supreme Court consists of nine justices nominated by the President and confirmed by the Wolesa Jirga (an upper legislative body). Afghanistan Const. art. One hundred and seventeen Ch. 7, art. 2.

women equally with men, or to protect women from even some extreme forms of abuse.³⁴ The Afghani Supreme Court has ruled, among other things, that women are banned from singing on television.³⁵ More ominously with respect to cases involving domestic violence, the Afghani Supreme Court initially denied a divorce to a thirteen-year old girl who was severely abused by her 52-year old husband of an arranged marriage that took place when she was only nine years old, despite statutory law that a girl cannot marry until she is sixteen years of age.³⁶ Shinwari's tenure as Chief Justice ended this year, and he was replaced by U.S. educated Abdul Salam Azimi on August 5th, 2006.³⁷ It is probably too early to tell in what direction Azimi will lead the Afghani Supreme Court in the coming years.

Despite the continuing occurrences of abuse in Afghanistan, it is important to remember just how far Afghanistan has come in the last few years. Prior to the U.S. military intervention of 2001, the Taliban relentlessly oppressed women with their extremist interpretation of Islamic law. The Afghan legal system had no codified protection recognizing the equality of women, and the law condoned a variety of egregious abuses of the rights of women and in many respects licensed the abuse of women by men. The new Afghani Constitution now recognizes the rights of women, and the debate has reached the level of discussing the precise nature and extent of those rights. Continuing abuses by local magistrates and the failures of the appellate courts to

³⁴ Again, these conclusions must be qualified because of the present unavailability of any written opinions from Afghani courts. *See* note 31, *supra*.

³⁵ This story was reported by the BBC news on January 16, 2004 and can be viewed online at http://news.bbc.co.uk/2/hi/south_asia/3402283.stm (last retrieved October 17 2006). Unfortunately, I have not been able to find a citation or copy of this or any other ruling from the Supreme Court of Afghanistan. *See* note 31, *supra*.

³⁶ In the Arizona Daily Star's report of this story, Sudarsan Raghavan reports that when asked if he believed that men and women should have equal rights, Afghani Supreme Court Justice Sayeed Omar Munib answered "It's impossible. We are Muslims, and God has given a place for men and a place for women. We can't change that." Afghan girl, given as bride at 9, fights for divorce (Arizona Daily Star website, November 14, 2004). This story can be viewed online at <http://www.azstarnet.com/sn/attack/48031.php> (last retrieved October 17 2006).

³⁷ Kenneth Katzman, *Afghanistan: Post-War Governance, Security, and U.S. Policy* 9 (Congressional Research Service Report for Congress, August 23, 2006). Available online at <http://fpc.state.gov/documents/organization/71863.pdf> (last retrieved November 14, 2006).

enforce the law are most likely a symptom of the current weakness of the national government in establishing the authority of law and enforcing what it decrees.³⁸ It seems likely that as respect for the rule of law spreads throughout the country, the true impact of the new constitution's protections will truly start to be felt.

³⁸ *See generally* The United Nations National Human Development Report for Afghanistan, 2004, note 46, *infra*.

2. The IHRCA: A Viable Advocate for the Rights of Women in Afghanistan?

The Afghani Constitution creates a body that has the potential to serve as a gateway to the justice system for victims of domestic violence by spreading awareness of the new constitutional provisions and advocating for victims. Article 58³⁹ provides for the establishment of an “Independent Human Rights Commission of Afghanistan” (IHRCA⁴⁰) and states that any person whose fundamental rights have been violated can file a complaint with the Commission⁴¹ (the IHRCA had, in fact, been established by decree of (then interim) President Hamid Karzai, on June 6, 2002, even prior to the passage of the new Constitution⁴²). The Commission can “refer cases of violation of human rights to the legal authorities, and assist in defending the rights of the complainant.”⁴³

The IHRCA has a unit dedicated to Women’s Rights that includes as part of its program various activities, such as workshops, seminars, and mass media initiatives to spread awareness of women’s issues and promote women’s rights in Afghan society.⁴⁴ In a country where the rule of law is still very much being established,⁴⁵ it is possible that a leading role in defining victims’ rights may be played by the groups that first make the people aware of their new rights and assist

³⁹ Afghanistan Const. art. Fifty-eight Ch. 2, art. 36

⁴⁰ Sometimes abbreviated as AIHRC.

⁴¹ Afghanistan Const. art. Fifty-eight Ch. 2, art. 36.

⁴² Presidential Decree on the Establishment of an Afghan Independent Human Rights Commission 2002 (Decree of 06/06/2002) (Afghanistan).

⁴³ Afghanistan Const. art. Fifty-eight Ch. 2, art. 36.at cl. 3.

⁴⁴ This information is from the website of the IHRCA’s Women’s Rights Unit located at <http://www.aihrc.org.af/womenrights.htm> (English website, last retrieved October 17 2006).

⁴⁵ See generally The United Nations National Human Development Report for Afghanistan, 2004, note 46, *infra*.

the people in exerting those rights.⁴⁶ The United Nations National Human Development Report for Afghanistan, 2004 recognized that as the justice system in Afghanistan is being created, it is left to “bodies like the [IHRCA] and a few NGOs to build the capacity to seek justice within the Afghan population – through legal awareness and legal education [programs] and legal aid schemes.” In a country where large parts of the population, particularly women, were not even aware of the ratification of a new constitution⁴⁷, a group that spreads awareness could have significant influence over how the rights outlined in the new Afghani Constitution are perceived and enforced.

⁴⁶ *Afghanistan National Human Development Report 2004: Security With a Human Face, Challenges and Responsibilities* 148 (Shahrbanou Tadjbakhsh ed., United Nations Development Programme 2004).

⁴⁷ *Id.* at 128 (Table 5.1)

3. The Second Front: The Situation in Iraq

Although the Ba'athist regime that ruled Iraq until 2003 was far more secular than the Taliban regime in Afghanistan,⁴⁸ human rights violations, including serious abuses aimed at women, were clearly widespread under Ba'athist rule. For example, women in Iraq prior to 2003 faced detention, torture, rape, and even murder at the hands of government authorities.⁴⁹ Women were also left unshielded from certain acts of violence by family members, including murder, by a 1990 decree that granted immunity from prosecution to men who committed so-called "honor crimes."⁵⁰ An "honor crime" could include the murder of a woman for supposedly "immodest behavior."⁵¹

In 2003, an international coalition led by the United States invaded Iraq and overthrew Saddam Hussein's Ba'athist government.⁵² After a transitional period of approximately two years,⁵³ the Iraqi people ratified a new permanent constitution for their country.⁵⁴

⁴⁸ The Ba'athists are a secular pan-Arab nationalist party. See generally Hanna Batatu, *The Old Social Classes and New Revolutionary Movements of Iraq* (al-Saqi Books, London 2000); The Constitution of the Ba'ath Arab Socialist Party (Approved by the First Congress of the Party in 1947), Fundamental Principles.

⁴⁹ See note 10, *supra*.

⁵⁰ *Country Reports of Human Rights Practices: Iraq 2001* (U.S. Dept. of State, Bureau of Democracy, Human Rights, and Labor, March 4, 2002). Available online at <http://www.state.gov/g/drl/rls/hrrpt/2001/nea/8257.htm> (last retrieved November 14, 2006).

⁵¹ *Id.*

⁵² "Operation Iraqi Freedom" began in late March, 2003 (President Discusses Beginning of Operation Iraqi Freedom, President's Radio Address. White House Press Release, March 22, 2003), and the Iraqi capital, Baghdad, was occupied on April 9, 2003 (see the BBC timeline, available online at http://news.bbc.co.uk/2/hi/middle_east/737483.stm, last retrieved November 14, 2006).

⁵³ During most of the transitional period, Iraq was ruled under the authority of a document entitled "The Law of Administration for the State of Iraq for the Transitional Period," abbreviated "TAL" (effective March 8, 2004). The TAL did not specifically address the issue of women's rights, but did "aim to achieve the goal of having women constitute no less than one-quarter of the members of the National Assembly[.]" TAL at art. 30(C). The TAL is available on the website of Coalition Provisional Authority (CPA) at <http://www.cpa-iraq.org/government/TAL.html> (last retrieved November 14, 2006). The CPA website is no longer updated because the CPA no longer exists.

⁵⁴ Iraq Const. (approved by referendum, October 15, 2005).

The Iraqi Constitution, like the Afghani Constitution, contains both equal protection clauses⁵⁵ and a clause that protects families,⁵⁶ but the Iraqi family-protection clause, unlike its Afghani counterpart, does not directly incorporate religious law. The new Iraqi Constitution is generally far more explicit in its protections than its Afghani counterpart, lacking as it does so many ambiguous incorporations of Islamic law.⁵⁷ For example, article 14 of the Iraqi Constitution states that “Iraqis are equal before the law without discrimination based on *gender*, race, ethnicity, origin, color, religion, creed, belief or opinion, or economic and social status” (emphasis added)⁵⁸ and Article 20 states that “[t]he citizens, *men and women*, have the right to participate in public affairs and to enjoy political rights including the right to vote, to elect and to nominate” (emphasis added).⁵⁹

The Iraqi Constitution’s family protection clause reads as follows:

Article 29

First: A. The family is the foundation of society; the State preserves its entity and its religious, moral and patriotic values. B. The State guarantees the protection of motherhood, childhood and old age and shall care for children and youth and provided them with the appropriate conditions to further their talents and abilities.

Second: Children have right over their parents in respect to upbringing, care and education. Parents shall have right over their children in regard to respect and care especially in times of need, disability and old age.

⁵⁵ The Iraqi constitution’s equal protection clauses are located in articles 14 and 20, *infra*. The Afghani constitution’s equal protection clause is located in Afghanistan Const. art. Twenty-two Ch. 2, art. 1, *supra*.

⁵⁶ The Iraqi constitution’s family protection clauses are located in article 29, *infra*. The Afghani constitution’s family protection clause is located in Afghanistan Const. art. Fifty-four Ch. 2, art. 32, *supra*.

⁵⁷ Although the Iraqi constitution bans legislation contrary to the established provisions of Islam (Iraq Const. Art. 2(A)), in a coequal clause it states that “[n]o law that contradicts the rights and basic freedoms stipulated in this constitution may be established.” (*Id.* at (C)). (All cites to the Iraq constitution are from the U.N. translation approved by the Iraqi government).

⁵⁸ Iraq Const. art. 14 (2005).

⁵⁹ *Id.* at 20.

Third: Economic exploitation of children shall be completely prohibited. The State shall take the necessary measures to protect them.

Fourth: *All forms of violence and abuse in the family, school and society shall be prohibited.* (emphasis added)⁶⁰

Article 29 of the Iraqi Constitution thus lacks any equivalent to the Afghani Constitution's ambiguous provision that families are to be protected by "the elimination of traditions contrary to the principles of [the] sacred religion of Islam."⁶¹ The absolute language of the article ("All forms of violence and abuse in the family, school and society shall be prohibited.") appears thus to be an express constitutional prohibition on all forms of domestic violence.⁶²

With respect to statutory law, no relevant legislation appears to have been produced that interprets Article 29 as of the time of this writing.⁶³ During the transitional period between the U.S.-led invasion in 2003 and the adoption of the new Iraqi Constitution, the civil and criminal codes were 'reset' to earlier additions. The 1969 Criminal Code and the 1971 Civil Code were adopted by order of the Coalition Provisional Authority as binding,⁶⁴ but the 1959 Iraqi Law of Personal Status,⁶⁵ which governs family law related issues, was left in effect. The 1959 Law of Personal Status places most family law disputes under the jurisdiction of religious courts,⁶⁶ and it is unclear how the new constitution will affect the Law of Personal Status.

⁶⁰ *Id.* at 29.

⁶¹ Afghanistan Const. art. Fifty-four Ch. 2, art. 32.

⁶² Cf. note 3, *supra*.

⁶³ This statement must be qualified in light of the difficulty in researching Iraqi legal developments. The author does not have access to any system for "shepardizing" Iraqi law, and must rely on secondary sources, or the absence thereof, in reaching this conclusion.

⁶⁴ Coalition Provision Authority "Order Number Seven," of June 10, 2003 adopted the 1969 Criminal Code and the 1971 Civil Code as binding. "Order Number Thirty-one" of September 10, 2003 made some minor modifications to the Criminal Code.

⁶⁵ *Iraqi Gazette*, Second Year, No. 280, December 30, 1959.

⁶⁶ *Id.*

4. International Law as a Conduit for Enforcing the Rights of Women in Afghanistan and Iraq.

“International law imposes obligations on bound states and, through international pressure, such obligations may be enforced.”

Bonita C. Meyersfeld⁶⁷

a) The Covenant on the Elimination of All Forms of Discrimination against Women

Beyond the internal struggle to define the nature and extent of the rights of women as defined in the Afghani and Iraqi Constitutions, there is also the possibility of enforcing women’s rights through the application of international law. Afghanistan and Iraq are both parties to a number of international treaties that either directly or indirectly address women’s rights.⁶⁸ The Covenant on the Elimination of All Forms of Discrimination against Women (CEDAW), passed by the U.N. General Assembly in 1979 and formally acceded to by Afghanistan in 2003 and by Iraq in 1986,⁶⁹ requires signatory states to “embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle[.]”⁷⁰ CEDAW is binding on member states,⁷¹ and disputes among member states

⁶⁷ Bonita C Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 Albany L. Rev. 371, 375 (2003).

⁶⁸ *E.g.* The Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/830 (1979) (CEDAW); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the International Covenant on Civil and Political Rights (ICCPR). *See also* UN Security Council Resolution 1325 (2000) on Women, Peace and Security.

⁶⁹ Iraq’s accession, which occurred during the period of Ba’athist rule, was made with reservations. Presumably the new Iraqi government intends to be bound by that accession.

⁷⁰ CEDAW Art. 2 cl. (a).

“concerning the interpretation or application” of CEDAW are subject to arbitration in the International Court of Justice.⁷² It is possible that protection for women and victims of domestic violence could also be sought within the courts of Afghanistan and Iraq by invoking those countries obligations under CEDAW and other similar international treaties.

Afghanistan’s International Human Rights Commission (IHRCA) could potentially play an important role in furthering the protection of women and victims of domestic violence through the invocation of CEDAW. IHRCA’s Women’s Rights Unit already lists as one of its areas of activity the lobbying for compliance with CEDAW under the new constitution.⁷³ Also, since the IHRCA is tasked with assisting the victims of human rights violations with seeking redress through judicial process,⁷⁴ presumably IHRCA could assist women and victims of domestic violence in asserting legal claims based CEDAW. Most likely this could be achieved by assisting victims in invoking CEDAW as a binding legal authority within the context of Afghanistan’s own court system.

Another potential mechanism for encouraging compliance with CEDAW may be found in the Committee on the Elimination of Discrimination against Women, an international forum created under CEDAW.⁷⁵ Signatory nations are required to submit progress reports within one year of accession, and every four years after that, outlining the legislative, judicial, and administrative measures the nations have taken towards compliance with CEDAW.⁷⁶ The Committee evaluates

⁷¹ The United States signed CEDAW in 1980, but does not appear to have formally acceded to it as of the date of this writing.

⁷² CEDAW art. 29.

⁷³ This information is from the website of the IHRCA’s Women’s Rights Unit, located online at <http://www.aihrc.org.af/womenrights.htm> (last retrieved October 17 2006).

⁷⁴ See Afghanistan Const. art. Fifty-eight Ch. 2, art. 36. cl. 3.

⁷⁵ CEDAW art. 17.

⁷⁶ *Id.* art. 18.

these reports and makes its own report, including recommendations, to the U.N. General Assembly.⁷⁷

Having acceded to CEDAW on March 5th, 2003, Afghanistan should have filed their first report by that same date in 2004. As of the time of this writing, Afghanistan has not yet submitted its first report to the Committee, and Iraq, which acceded to CEDAW in 1986, has not submitted a periodic report since the overthrow of the Ba'athist regime and the creation of the new Iraqi government.⁷⁸

Although CEDAW itself does not contain any provisions relating to the failure of a signatory state to submit the required reports, and the Rules established by the Committee provide only for the transmission of a “reminder” via the Secretary General and a reference to the failure in the Committee’s annual report to the General Assembly,⁷⁹ perhaps the international community could apply political pressure to encourage these two countries to fulfill their reporting requirements?

⁷⁷ *Id.* art. 21.

⁷⁸ Iraq filed its last periodic report in 2000. Reports and reporting information are available at the UN website, at <http://www.un.org/womenwatch/daw/cedaw/reports.htm> (last retrieved November 14, 2006).

⁷⁹ *Rules of procedure of the Committee on the Elimination of Discrimination against Women*, Annex I of the Report of the Committee on the Elimination of Discrimination against Women (U.N. Doc. A/56/38).

b) International Laws Against Torture as a Vehicle for Combating Domestic Violence?:

Another approach to applying international law to the protection women and the victims of domestic violence is the application of international systems aimed at combating the practice of torture. The basic argument is that domestic violence is itself a form of torture, what Bonita Meyersfeld has called a “private torture.”⁸⁰

Some sources of international law prohibit torture and provide various remedies to combat torture. The Rome Statute of the International Court of Justice defines “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” as crimes against humanity.⁸¹ Some incidents of domestic violence include these offenses as elements.

Perhaps the most directly effective relief that can be provided to domestic violence victims living in countries like Afghanistan and Iraq is asportation away from their abusers to jurisdictions such as the United States where they can be more effectively protected. One potential vehicle for granting shelter within the United States is rooted in a nexus between the United Nations Convention Against Torture (CAT)⁸² and U.S. immigration law. Article 3 of CAT states that “[n]o State Party shall expel, return ... or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁸³ Signatory states are to determine whether such grounds exist by “tak[ing] into

⁸⁰ Bonita C Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 Albany L. Rev. 371, 373 (2003).

⁸¹ Rome Statute of the Int'l Crim. Court, U.N. Doc. A/ CONF.183/9, reprinted in 37 I.L.M. 999, 1004 (1998) art. 7 § 1(g). The United States is not a signatory nation of the Rome Statute.

⁸² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113. The United States acceded to this Convention in 1994.

⁸³ *Id.* at Art. 3 (1).

account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”⁸⁴ The requirement of CAT against the return of persons to countries where they will potentially face torture has been incorporated into the regulations of the Immigration and Naturalization Service⁸⁵ in 1999 in the form of a new form of relief referred to as withholding of removal.⁸⁶

⁸⁴ *Id.* at Art. 3 (2).

⁸⁵ In March of 2003, the Immigration and Naturalization Service (INS) was integrated into a new agency, the Immigration and Customs Enforcement Agency (ICE).

⁸⁶ Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (1999).

c) General Weakness of International Law Approaches to Combating Domestic Violence.

International law is necessarily an extreme and uncertain resort in combating domestic violence. Withholding of removal and similar remedies are only available when the victim has fled their home country, and remedies based on international laws prohibiting torture, such as CAT and the Rome Statute, *supra*, would only be available, if at all, in the most extreme cases of domestic violence.⁸⁷ As a source of legal authority within a country, international law is only binding to the extent that a country fulfills its obligations under it, and at present neither Afghanistan nor Iraq is even fulfilling their reporting requirements under CEDAW.⁸⁸ It is hopeful, however, that as reconstruction efforts proceed the rule of law will gain ground in these two countries.

⁸⁷ Under the Rome Statute, the violence involved would have to rise to the definition of a “Crime Against Humanity,” see p. 18, *supra*.

⁸⁸ See p. 17, *supra*.

5. Summary and Conclusion

As the balancing between Islamic law, new constitutional protections, and international obligations is played out, the future for women and the victims of domestic violence in Afghanistan and Iraq remains hopeful but uncertain. Progress towards better protecting the rights of women is being made in both Afghanistan and Iraq, but that progress is slow. Both Afghanistan and Iraq have recently adopted new Western-style constitutions that contain equal protection clauses guaranteeing the equal treatment of women under the law⁸⁹. The new constitutions of these two countries also both contain family protection clauses, but whereas the Iraqi Constitution's family protection clause appears to expressly ban all forms of domestic violence,⁹⁰ the Afghani Constitution's family protection clause incorporates an unspecified interpretation of Islamic law which may limit its effectiveness as a bar on domestic violence.⁹¹ In both countries, the new constitutions came into effect so recently that there is not yet any significant new legislation on domestic violence,⁹² and in both countries courts are still currently ruling at least in part based on Islamic law to uncertain results.⁹³

Several important avenues for combating domestic violence in Afghanistan and Iraq appear to be available. The Independent Human Rights Commission of Afghanistan has the potential to be an influential advocate for the rights of women.⁹⁴ The extent of the rights of women in Afghanistan and Iraq may even be determined, at least in part, by the manner in which groups

⁸⁹ See notes 19, 58 & 59 and accompanying text, *supra*.

⁹⁰ See note 60 and accompanying text, *supra*.

⁹¹ See note 23 and accompanying text, *supra*.

⁹² See notes 18 & 54 and accompanying text, *supra*.

⁹³ See pp. 7-8 & notes 55 & 56 and accompanying text, *supra*.

⁹⁴ See pp. 10-11, *supra*.

like the IHRCA present those rights to the people of their countries. Also, international obligations such as CEDAW⁹⁵ and CAT⁹⁶ can potentially be invoked to protect the victims of domestic violence either in the courts of the countries where the victims live, or in other tribunals, such as the International Criminal Court, the U.S. Immigration Courts, or before the international community and international opinion.⁹⁷ Ultimately, the future status of women in Iraq and Afghanistan may depend on the pursuit of some or all of these avenues for combating domestic violence.

⁹⁵ *Supra* note 68.

⁹⁶ *Supra* note 82.

⁹⁷ *See pp. 15-20, supra.*