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# ESSAY

## The Anfal Genocide: Personal Reflections and Legal Residue\*

*Michael A. Newton\*\**

I was humbled to be asked to share some of my perspectives on the Anfal Genocide against the Kurdish people with you tonight. I am honored to be here and able to share in this series of events that in the aggregate form the 30th Annual Holocaust Memorial Lecture Series. As many of you know, the annual Vanderbilt University series is the oldest of its kind on a college campus. The thematic thread running throughout the series is that human suffering and genocidal frenzy has been a constant component of our “modern” world. This series is dedicated to commemorating the lessons to be drawn from past suffering and to confronting current realities that threaten the lives and safety of people in conflict zones around the world. The strong support for this lecture series, as well as your attendance tonight, reflects an admirable seriousness and a commitment to academic discourse that befits a great university. These are serious topics for a serious time, and it is a rare and genuine pleasure to be with you to share a few comments on the suffering of the Kurdish people. It is particularly gratifying to see such a strong representation by the local Kurdish community in attendance.

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\* This is an edited transcript of an address delivered at Vanderbilt University Law School on October 17, 2007 by Professor Michael A. Newton to members of the community, staff, and faculty, and many assembled students. The lecture was delivered as part of the 30th Annual Vanderbilt University Holocaust Lecture Series, see *Calendar for Broken Silence: 30th Annual Vanderbilt University Holocaust Lecture Series*, <http://www.vanderbilt.edu/religiouslife/holocaustlectures.html> (last visited Nov. 16, 2007). The theme for the Thirtieth Annual Holocaust Lecture Series—Broken Silence—reaffirms Vanderbilt’s long-standing commitment to expand the frontiers of our conversation about the Holocaust and other genocides by providing a stage for new perspectives and new questions, and for conveying those narratives that have struggled to find a voice or an audience.

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As a preface, and in the interests of full disclosure, you should understand that I have spent much time with Kurdish lawyers and leaders. I was actively involved in the preparations for this trial and also advised the Iraqi High Criminal Court on aspects of international law associated with the complex legal issues presented by the Anfal facts. My interactions with the Kurdish people began in the mountains of northern Iraq in April 1991 as they fled the persecution of the regime in the immediate aftermath of the Gulf War. In my continuing interactions with the Kurdish community, I have often sensed the ethos of the suffering of the people, and over time I grew to admire their will to survive and thrive. At the same time, there was a quiet fortitude and resolute sense of community and family that has provided an admirable example of enduring strength of human spirit in the face of adversity and almost unspeakable suffering. The Kurds possess what one writer described as *Kurdi zin duah*, meaning a fierce warrior spirit wrapped in a love of homeland, tradition, respect and love of family, and an abiding respect for ancestors and village spirits.<sup>1</sup> I also felt the quiet and intense need for justice as the only appropriate response to what happened to the Kurds during the 1988 Anfal campaigns.

There is a very deep and almost palpable sense in which justice feeds the soul of the Kurdish people. For the Greek philosophers, the pursuit of justice was the highest calling of human endeavor.<sup>2</sup> Many Kurds dedicated their lives to pursuing peace and justice in the aftermath of the Anfal campaigns of 1988. In my work with Iraqi judges and lawyers, I have grown to respect their sincerity and sheer physical courage. For nearly seven years now, I have been privileged to work extensively with Iraqi judges and lawyers, and I was involved in the preparations for the Anfal genocide trial. I can assure you that the Iraqi jurists felt the weight of their duty on behalf of the people and on behalf of the law itself. I salute your efforts in being here tonight to reach across cultures and chasms of experience to perhaps absorb some the lessons that come from the Kurdish experience.

I hope to leave you with some tangible sense of the legal importance of the Anfal genocide trial that has recently concluded in Baghdad, as well as some of my observations of key legal concepts that the trial marks. The series of eight military campaigns conducted from February to August 1988 together constitute one of the most concerted and tragic series of events in the history of human

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1. See MIKE TUCKER, *HELL IS OVER: VOICES OF KURDS AFTER SADDAM* xiii (2004).

2. BRIAN R. NELSON, *WESTERN POLITICAL THOUGHT: FROM SOCRATES TO THE AGE OF IDEOLOGY* 31 (1982) (describing Plato's idealized conception of societal order in which the appropriate order of virtues is maintained. Justice is the "virtue of virtues" in the sense that it permits the maintenance of a "proper relationship between wisdom, courage, and temperance.").

affairs. These campaigns began close to the Iranian border, but eventually stretched far across a swath of Iraqi territory and to the border between Iraq and Turkey. The Anfal campaign stands as a monument to the level of savagery that eats at the very heart of what polite people call civilization. Civilized people want what is good for each other. The defendants brought before the bar of justice in Baghdad<sup>3</sup> conducted a deliberate, systematized, and orchestrated series of campaigns intended to eradicate every trace of Kurdish civilization and culture across a broad swath of Northern Iraq. They acted with a calculated cruelty and deliberateness of purpose because they felt secure in the belief that they were more important than the law. They embody the essence of impunity because their actions betrayed the belief that Saddam's power would forever shield them from any accountability. Juxtaposed against the ongoing work of the ad hoc tribunals established by the United Nations Security Council,<sup>4</sup>

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3. The Anfal trial began in Baghdad on August 21, 2006. When the trial began, Saddam Hussein al-Tikriti, former President of Iraq, was one of the named defendants. His execution at the hands of Iraqi officials following conviction in the al-Dujail trial meant that the Anfal trial received far less attention outside the region. One defendant, Taher Tawfiq Tawfiq Al-Ani, was acquitted by Trial Chamber II even though he was the Head of the Northern Affairs Committee and served as the Governor of Mosul. At the time of this writing, the defendants currently awaiting final resolution of their cases are as follows: Ali-Hassan Al-Majid Al-Tikriti (Majid is known around the world as Chemical Ali for his role in the use of chemical weapons against Kurdish villages. He exercised superior responsibility over each and every attack conducted against each and every one of the Kurdish villages throughout the eight Anfal campaigns.); Sultan Hashim Ahmad Al-Jabbouri Al-Tai (Jabbouri served as the Commander of Task Force Anfal from February 1988 to April 1, 1988, when he was made commander of the 1st Corps in Suleimaniyah. This defendant was a career military officer, serving forty-one years in the Iraqi Regular Army, reaching the rank of General and eventually Minister of Defense in 1995.); Farhan Mutlak Salih Al-Jiburi (Jiburi served as the head of the Iraqi Intelligence Service (Istikhbarat) Eastern Regional office and prepared and forwarded a series of memorandums to his superiors regarding villages that had been "eliminated," which establishes his knowledge of the overall plan and its goals. In addition, every detainee or civilian deportee during Anfal would have gone through the control of this defendant's Istikhbarat office in Kirkuk for processing. Therefore, this defendant had first-hand knowledge of the number of civilians forced from their villages during Anfal, as well as the treatment they received.); Husayn Rashid Muhammed (Muhammed served as Deputy of Operations of the Iraqi Armed Forces, and attended many meetings related to the planning and coordination of military operations throughout the Anfal campaigns. Units under his direct authority were involved in sweeps of the Rubar-I Qashan Valley villages and forced relocation of Kurdish residents.); Sabir Abd Al-Aziz Husayn Al-Duri (Director of the Istikhbarat). See Judge Munqadh Al Far'un, Chief Public Prosecutor, Prosecutorial Closing Argument in the Anfal Case, at 5-7, <http://www.iraq-ih.org/en/doc/ppb.pdf> (last visited Dec. 17, 2007) [hereinafter Anfal Closing Argument]; see also Michael A. Newton, *Inside Look at The Anfal Trial*, NASHVILLE B.J., Sept. 2006, at 8-9, 17-18.

4. See generally Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by S.C. Res. 827, UN Doc. S/RES/827 (May 25, 1993) (establishing the criminal tribunal for atrocities committed in the former Yugoslavia); Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing same for Rwanda).

the first trials in the permanent International Criminal Court, the proliferation of internationalized/hybrid domestic mechanisms, and the increasing use of domestic forums to prosecute the most serious crimes of concern to the international community, the Anfal trial represents irrefutable evidence that the era of accountability is irreversibly underway.

The State of Iraq, whose very existence should have served as the primary protection for all Iraqis, instead became the engine of evil that sought to harm and kill the Kurdish people as a group.<sup>5</sup> By unanimously adopting Resolution 96(I) in 1946, the United Nations General Assembly defined genocide as "a denial of the right of existence of entire human groups."<sup>6</sup> In other words, the intentional destruction of people based on the stable and objective characteristics that make them part of an identifiable group undermines their very right to exist and therefore erodes the essence of their very humanity.<sup>7</sup> This premise became the foundation upon which the modern meaning of the term "genocide" and the scope of the expanding jurisprudence was built. That, ladies and gentlemen, is the heart of the genocide charges—the Ba'ath party leadership sought to eliminate the Kurdish people from northern Iraq based on their ethnic identity.

The Iraqi effort to incorporate the law of genocide into its domestic legal fabric is well in line with modern trends around the world. The modern field termed "international criminal law" is an interrelated system in which domestic forums, such as those established by the Iraqis, are responsible for implementing international norms alongside the institutions established by the international community. In essence, Iraqi officials harmonized the Iraqi criminal code with international law to the same extent as those officials in other nations who are enacting implementing legislation after accession or ratification of the Rome Statute of the International Criminal Court.<sup>8</sup>

5. Thomas Aquinas wrote that the first principle of natural law is do good and to avoid evil. According to Aquinas, the very purpose of government is to foster "the unity and peace of the people." PAUL CHRISTOPHER, *THE ETHICS OF WAR AND PEACE: AN INTRODUCTION TO LEGAL AND MORAL ISSUES* 77 (1994).

6. G.A. Res. 96 (I), at 188–89, U.N. Doc. A/64/Add. 1 (Dec. 11, 1946). President Reagan commented that "nations of the world came together and drafted the Genocide Convention as a howl of anguish and an effort to prevent and punish future acts of genocide." Pres. Ronald Reagan, *Genocide Convention Implementation Act of 1987*, 89 DEPT OF ST. BULL. 38, 38 (Jan. 1, 1989).

7. See, e.g., *Prosecutor v. Goran Jelusic*, Case No. IT-95-10, Judgment, ¶ 69 (Dec. 14, 1999), available at <http://www.un.org/icty/jelusic/trialc1/judgement/index.htm> (noting that the protection extends to and is limited to groups defined by "stable" characteristics).

8. For a summary of state practice implementing the provisions comparable criminal provisions in the Rome Statute, see M. CHERIF BASSIOUNI, *THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS, AND*

Today, the force of genocide law is becoming nearly ubiquitous and increasingly uniform. The world today shares a common framework of definitions and principles that have been applied in a growing body of jurisprudence. On that basis alone, the Anfal genocide case is an important trial because it represents the latest and most notable benchmark in the jurisprudential pathway. As the prosecutor said in his closing argument,

Your honorable court represents the voice of the Iraqi civilization, which says to the world that the law in Iraq will not permit these crimes to go unpunished. These are the crimes of genocide, the crimes against humanity, and the war crimes which were committed against the innocent people of Kurdistan.

These crimes were widespread and brutal to the point that they have gone beyond the borders of our country[] and have been imposed upon the conscience of humankind throughout the world.

The Anfal shows to the world that the defendants are former officials who abandoned the most important duty of government, which is to protect and ensure the precious lives of its people.<sup>9</sup>

The textbook definition of genocide flows from the 1948 Genocide Convention, and has been revalidated in every one of the international tribunal statutes. The Iraqi High Criminal Court statute, as it was originally drafted and then re-promulgated by sovereign Iraqi officials in October 2005, replicates the well-established law of genocide.<sup>10</sup> For those unfamiliar with its legal content, the accepted definitions are clear:<sup>11</sup>

"genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life 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

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INTEGRATED TEXT, Vol I, 188–91 (2005). See also Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (Mar. 2001).

9. Anfal Closing Argument, *supra* note 3, at 4.

10. Compare Al-Waqa'i Al-Ivaqiya [The Official Gazette of the Republic of Iraq], Law of the The Iraqi Higher Criminal Court, Oct. 18, 2005, 4006 No. 10, arts. 11, 12, 13, available at [http://www.law.case.edu/grotian-moment-blog/documents/IST\\_statute\\_official\\_english.pdf](http://www.law.case.edu/grotian-moment-blog/documents/IST_statute_official_english.pdf) [hereinafter Statute of the Iraqi High Criminal Court] with Rome Statute of the International Criminal Court arts. 6–8, July 17, 1998, 2187 U.N.T.S. 90.

11. Statute of the Iraqi High Criminal Court, *supra* note 9, art. 11. The Iraqi Statute mirrors the other substantive categories for individual accountability by also criminalizing conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide, and complicity in genocide.

Martin Luther King believed that the force of God expressed in society is justice.<sup>12</sup> If I may be so presumptuous as to add an addendum, call it Newton's Corollary if you like, I believe that the force of God expressed personally results in passion. The purest and finest offerings of the human spirit come from the deeply held principles that motivate us and lead us through enormous pain to emerge triumphant and whole. The extent of the Kurdish genocide was preserved for history by many brave people who had the passion to document the suffering of their people. They smuggled out photographs, took witness statements, preserved evidence, and swore to work for justice so long as they had free will and the breath to power their efforts. In documenting the crimes committed against the Kurdish people, the survivors displayed the same fierce resilience that is one of the defining characteristics of Kurdish culture. They risked their lives in the hopes that they could provide the ammunition for the pursuit of justice long in the future. The daily testimony unfolding in Baghdad represented their vindication.

The quintessence for the modern conception of genocide law is the preservation of the existence of every distinctive society and culture across the globe. While the modern treaty regime and its judicial implementation does not extend quite as far as Raphael Lemkin originally conceived,<sup>13</sup> the law of genocide is designed around the central goal of preventing the physical destruction of human groups defined in terms of stable and fixed characteristics rather than the vast range of mutable or transient identifiers. That explains why the modern law of genocide requires that the targeted group be defined only by its positive characteristics as opposed to negative reasons such as "non-Serb" or, in this case, "anti-Iraqi."<sup>14</sup> The Kurdish people are people. That is not a profound sentiment. Let me explain. The people who lived in the region of the Northern Bureau in 1988 were just like you and I— they had hopes, they had

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12. See ALEX AYRES, *THE WISDOM OF MARTIN LUTHER KING, JR.: AN A-TO-Z GUIDE TO THE IDEAS AND IDEALS OF THE GREAT CIVIL RIGHTS LEADER* 125 (1993). The author explains:

For King justice was the critical issue of earthly life. Justice was more than a legal issue; it was more than a moral issue; it was a spiritual issue. The realization of justice was the realization of God's presence on earth. "The Lord God is a god of justice," he asserted.

*Id.*

13. JOHN QUIGLEY, *THE GENOCIDE CONVENTION: AN INTERNATIONAL LAW ANALYSIS* 5 (2006) (quoting Lemkin's opinions that genocide ought properly to be envisioned as the destruction of any aspects of political, social, cultural and physical existence of a targeted group).

14. See *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ¶ 196 (Int'l Ct. Justice Feb. 26, 2007), *reprinted in* 46 I.L.M. 185 (2007), *available at* <http://www.icj-cij.org/docket/files/91/13685.pdf>.

dreams; they had struggles, they had sibling rivalries. They had some friends and some enemies; they had some virtues and some vice. The Kurdish people confronted the same range of problems that face all peoples across the planet. The law of genocide says unequivocally that they were entitled to confront their daily human challenges. In the aggregate as a group that shares common links, customs, and practices, the right of individual Kurds to exist as an inalienable human right is extrapolated into the larger right protected by the prohibition against genocide for the identity of the group to which they belong. They did have an inalienable and undeniable right to exist. This is the most fundamental right for both individual persons and for the composite groups they form.

The Kurds of the Northern Bureau were human beings with all of their foibles and folly, and all human beings can relate to them on a variety of levels regardless of race, tribe, ethnicity, religion, or region. Their lives were centered on family and faith and on their hopes for the future. Rather than acknowledging their individuality and their fundamental human right to exist in peace and dignity, the Iraqi officials simply labeled all Kurds in Northern Iraq as "Iranian saboteurs" and "agents of the enemy."

I cannot hope to adequately convey the scope of suffering or the array of experiences suffered during the Anfal campaigns. While the Anfal trial was televised, the Arabic nature of the proceedings obscured its import, and the decisions of the Trial and Cassation Panels are not publicly available at the time of this writing. The investigative judge's report containing the Anfal documents and testimony was 9,312 pages long, and the year-long trial produced a trial opinion that runs to some 963 pages.<sup>15</sup> Thousands of victims who could have come to the trial chamber to swear on the Koran to tell the truth about their suffering are instead buried in the mass graves scattered across Iraq. The facts are plain, yet they defy logic. The numbers can only hint at the enormity of the experience. When the Anfal trial began in Baghdad on August 21, 2006, the Iraqis had prepared a huge map of the Northern Bureau. It was covered with a sea of pins to illustrate the villages destroyed by the Iraqi government. Although the map was large enough to occupy the entire corner of the large room, it looked small from the distant television camera high overhead. Each pin stood as mute testimony the people whose lives were shattered by the concerted power of the Iraqi state. Some of the victims who were lucky enough to survive testified firsthand of what they saw and heard and felt. For example, one man told of being taken to a mass grave along with thirty-one other Kurds. Thirty Iraqi soldiers fired three full magazines each into the group of prisoners. The witness somehow survived. He described what

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15. See Newton, *Inside Look at The Anfal Trial*, *supra* note 3, at 8.



happened to him and gave them the bullet that doctors removed from his leg to the investigator.<sup>16</sup> He knows what Anfal did to the Kurdish people. The cruelty of the regime stripped its Kurdish victims of almost every possible possession. They lost their lives, they lost their property, they lost their families, and they lost their dreams.

Each pin on the map represented a village—a way of life in microcosm—an interconnected pattern of days and generations and struggles to survive. The facts can be stated with clinical precision. Thousands of Kurdish civilians killed (some estimates range as high as 200,000); thousands more disappeared; families were separated and imprisoned for no other reason than that they were Kurds living in Northern Iraq; there were more than fifty documented attacks conducted by chemical weapons against defenseless civilian families. Village after village was emptied of its inhabitants. Villages were burned and bombed with artillery shells, bombs, and chemical weapons. Many villages were then bulldozed to the ground as if the destruction of the population was not enough.<sup>17</sup>

The regime sought to eliminate even the physical vestiges of Kurdish society by destroying the people, their homes, and their businesses. There are aerial photos showing barren landscapes where peaceful villages had been only days before the picture. Village after village after village was destroyed. Day after day after day was filled with death. Thousands of villages were destroyed because of the policy aimed at reshaping the land to show no traces of the social network or Kurdish culture that thrived in that location. Not satisfied with destroying the physical vestiges of Kurdish villages, regime forces also bombed water supplies, or in some instances, blocked them so that Kurds who somehow survived and

16. These are the author's recollections from the Anfal trial. See also Anfal Closing Argument, *supra* note 3 (describing the plight of witnesses to the Anfal atrocities).

17. See Anfal Closing Argument, *supra* note 3, at 7, 8, 20–22. While using the map as a demonstrative at trial, the prosecution recounted this precision of planning and the scope of destruction:

Each red dot on [the map] refers to the location of an attack carried out against a Kurdish village. [S]o each red dot indicates a village that was attacked by military troops, in many instances with the support of security forces and the Military Intelligence Directorate.

There are a great many more villages that were destroyed, according to witnesses, but these shown on the map are only the ones which been [sic] officially documented by the regime. Estimates indicate that the total number of villages destroyed reaches 4,000.

The manner in which the Anfal campaign was carried out was similarly horrifying in hundreds of villages: houses looted, burned and destroyed, then entire village [sic] demolished with bulldozers and explosives.

*Id.*

managed to return to the vicinity of their village could not even rebuild.

In a return to the Middle Ages (before modern law developed), Iraqi forces poisoned some water supplies in areas to prevent returning Kurdish families from resuming normal life. Prosecutor Munqith al-Faroon explained during his eloquent closing statement that Ali Hassan al-Majid and four other defendants deserved the harshest possible punishment because they did not have mercy on elderly people or women or children—not even animals or plants or the environment.<sup>18</sup> In private conversations, he pointed out poignantly that even the birds suffered during Anfal from the clouds of chemical weapons that blew indiscriminately across the face of northern Iraq.

Family after family was torn apart across the expanse of Iraqi territory subject to the authority of the Northern Bureau. There are accounts that only the caprice of a guard's whim led to the survival of some Kurds, while others suffered in their place. Wives waited in vain for their husbands to return. Parents waited with hope for the return of their sons who had been taken off with by the Security Forces or the military. One witness described being beaten and tortured, then forced to watch his sister raped. Sons were sacrificed to the plans that the government made and carried out during Anfal. Widows grieved for their loved ones, then became themselves the victims of the unrelenting cruelty towards Iraqi people. It took all of the orchestrated power of the Iraqi state to carry out the sustained level of planning and execution needed to commit the Anfal campaigns. The government drove busloads of civilians away never to be seen again—the Iraqi military and Security Forces carried out relentless attacks on civilians, and there was no safe place across the Kurdish Autonomous Province. These people were starved, raped, tortured, and relocated because they were Kurds—but they suffered and died as Iraqis.

You know of the infamy of names from the 20th Century experience: Dachau, Bergen-Belsen, Auschwitz, Celebici, and Treblinka. The Kurds had their own places of suffering and torment to add to the list: Topzawa prison; Dibs; Nugra Salma; the women's

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18. See Anfal Closing Argument, *supra* note 3, at 23.

Finally, the Office of the Public Prosecutor asks your honorable court to inflict the cruelest and most extreme punishment upon the defendants . . . , who did their utmost to corrupt the land, and they destroyed the crops and the cattle, and they had no mercy [on] a single old man, woman, or child. And even other creations of Allah, such as animals, trees, and the natural environment were not spared their brutality and tyranny.

*Id.*

prison at Suleimaneyah; and the list goes on. The names themselves provide stark testimony to the suffering of the Kurds.

An element of sheer luck often provided the razor edge between life and death, hope and tragedy, prosperity or poverty for the Kurdish families of the Northern Bureau. Their fate was often left to the whims of regime officials or military officers. There is one account of an argument between two Army officers over the proper line for one young boy to be in. The kind Lieutenant won the argument that day and the boy was left with his mother, while the other boys were taken away and killed. The families of Sheik Wasan and Balisan and hundreds of other villages had no one to protect them from the power of the regime. The morning after the attacks on the villages, Iraqi soldiers and pro-regime militias entered the villages to loot the homes, and army engineers destroyed the homes with explosives. Like so many other Kurdish villages, Sheik Wasan and Balisan were both bulldozed to the ground after they were attacked, and the people were either killed or fled, leaving nothing to testify that barely twenty four hours earlier two entire villages of Kurdish people had lived and worked in that spot. Somewhere between two hundred and four hundred villagers died in this attack, among them thirty-three children under the age of four, twenty-eight children between the ages of five and fourteen, and many elderly people.

Anfal survivors describe a primal fear and resourcefulness born of sheer desperation. Even as they were rounded up for transportation to what many hoped would be safety, most Kurds realized with a sick lump in their stomach that they were bound for a much worse fate. The people lost everything except their identity and heritage as Kurds.

If you can imagine with me what the experience of Anfal was like for so many families, not markedly different perhaps from your family. Iraqi officials come early in the morning. Your village is surrounded. As a father, you would gladly lay down your life to protect your family, but you never get the chance as you are taken to a collection area and then trucked to an area where other men are gathered. The fathers told their young sons to be brave and to take care of their mothers. Mothers cried and tried to think clearly while they panicked inside. Children knew that something big was happening, but could not fathom the reality. The fathers later died without even knowing where their families had been taken. The mothers are told that they have half an hour to prepare to leave. You pack some small food items; you take your identification; you grab your medicines and perhaps a few precious but small items. You tell your children that they can take one small item. Parents tried to be brave and cheerful, even as their hearts ached at the fate awaiting their children. As they left their homes and their gardens and their worldly possessions, parents urged their children to take their most

precious possession. They wanted them to take a reminder of home—a tangible symbol that their lives could be normal again. One such child who will remain nameless for the rest of history was found in the mass grave at Al-Hatra clutching a small ball and lying next to his mother's decaying body.

The theme of this series is "Broken Silence." In a sense, that is ironic to me, because in the chaos of the mass graves and the ouster of Kurdish families from their homes and way of life, the silence of early morning was shattered in so many villages by shouts and shooting and chaos. It was a scene of confusion as a way of life was literally torn apart. The attempted destruction of a protected group in whole or in part is the core of what the law seeks to protect. Even a glance at the map shows that the destruction was widespread and systematic—in other words, it is the paradigmatic instance of what might be termed ethnic cleansing. In the language of the law, this was a crime against humanity because it was conducted pursuant to and in furtherance of the express goals of the Ba'ath Party leadership in the Northern Bureau under the command of Ali Hassan al-Majid. Given the established baseline of criminality, one might reasonably ask, "Why pursue the time and expense of proving the more rigorous constituent elements needed to establish the crime of genocide?" After all, many would argue that judicial efficiency and the overarching need to prosecute as many former Ba'ath Party officials as possible mitigates towards a policy of pragmatic prosecution. Distant observers might ask, "Isn't it sufficient to do justice with convictions and confessions, and the occasional apology?" One of the culpable defendants in the Anfal genocide trial was spared the death penalty presumably because of his sincere apology—isn't that alone a worthwhile contribution to national reconciliation?

In fact, such an approach would have negated the real value of categorizing what happened to the Kurdish people by its rightful legal category: genocide. One of the subtle contributions of the recently concluded Anfal genocide trial has been to refocus analysis on the criteria for establishing the *dolus specialis*<sup>19</sup> of genocide. The international tribunals have been consistent in holding that evidence of genocidal intent can be inferred from the constellation of facts, circumstances, and statements surrounding a complex pattern of genocide.<sup>20</sup> Specifically, relevant facts and circumstances could

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19. The legal term of art *dolus specialis* refers to the mental element of specific intent which is the defining legal principle embedded in the genocide jurisprudence. The specific intent to destroy the victim group in whole or in part applies to all of the material acts constituting genocide, and refers to the degree rather than the scope of the perpetrator's intent. See Payam Akhavan, *The Crime of Genocide in the ICTR Jurisprudence*, 3 J. INT'L CRIM. JUST. 989, 992 (2005).

20. See, e.g., *Rutaganda v. Prosecutor*, Case No. ICTR 96-3-A, Appeals Chamber Judgement, ¶ 525 (May 26, 2003) (concurring with the Trial chamber citation to the *Kayishema/Ruzindana* Appeals Judgement ¶ 160 for the principle that making

include “the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and

anti-Tutsi utterances or being affiliated to an extremist anti-Tutsi group is not a *sine qua non* for establishing *dolus specialis*, but that “establishing such a fact may, nonetheless, facilitate proof of specific intent”). In its opinion, the Trial Chamber wrote as follows:

398. In its findings on the applicable law with respect to the crime of genocide, the Chamber held that, in practice, intent may be determined, on a case by case basis, through a logical inference from the material evidence submitted to it, and which establish a consistent pattern of conduct on the part of the Accused. Quoting a text from the findings in the *Akayesu* Judgement, it holds:

“On the issue of determining the offender’s specific intent, the Chamber considers that the intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the Accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.”

399. The Chamber notes that many corroborating testimonies presented at trial show that the Accused actively participated in the widespread attacks and killings committed against the Tutsi group. The Chamber is satisfied that the Accused, who held a position of authority because of his social standing, the reputation of his father and, above all, his position within the Interahamwe, ordered and abetted in the commission of crimes against members of the Tutsi group. He also directly participated in committing crimes against Tutsis. The victims were systematically selected because they belonged to the Tutsi group and for the very fact that they belonged to the said group. As a result, the Chamber is satisfied beyond any reasonable doubt that, at the time of commission of all the above-mentioned acts which in its opinion are proven, the Accused had indeed the intent to destroy the Tutsi group as such.

400. Moreover, on the basis of evidence proffered at trial and discussed in this Judgement under the section on the general allegations, the Chamber finds that, at the time of the events referred to in the Indictment, numerous atrocities were committed against Tutsis in Rwanda. From the widespread nature of such atrocities, throughout the Rwandan territory, and the fact that the victims were systematically and deliberately selected owing to their being members of the Tutsi group, to the exclusion of individuals who were not members of the said group, the Chamber is able to infer a general context within which acts aimed at destroying the Tutsi group were perpetrated. Consequently, the Chamber notes that such acts as are charged against the Accused were part of an overall context.

Prosecutor v. Rutaganda, Case No. ICTR 96-3-T, Judgment, ¶ 398–400 (Dec. 6, 1999).

discriminatory acts.”<sup>21</sup> Furthermore, the Iraqi Trial Chamber would not be breaking new jurisprudential ground by finding that Ba’ath Party officials could be held accountable for genocidal acts based on a theory of superior responsibility where they exercised effective control over the organizations and persons actually conducting the genocidal acts.<sup>22</sup>

Here is where I find the theme of this lecture series, “Broken Silence,” to be betrayed by the evidence on the ground. It is true that the mass graves became silent after the government forces moved away, and the bodies began to suponify. However, the voices of victims figuratively echoed in the stories of relatives. The Kurdish national identity was shaped by the addition of a new verb—Anfalized. In a stark irony, the mass graves themselves spoke with thundering clarity as the trial proceeded. United States Army officers from the 101st Airborne (Air Assault) Division reported that as they approached the mass grave at Hatra, they could immediately see that something was terribly wrong.<sup>23</sup> The earth itself testified to the Anfal tragedy because the mass grave covered by a barren circle of earth with no grass, flowers, or any other vegetation over the site. Even if local Kurds had not informed the American soldiers where to find the mass graves, the terrain was a visual indicator that this was where the remains of an estimated ten thousand Kurds could be found.<sup>24</sup>

The determination of the *dolus specialis* necessary to support the genocide convictions was buttressed by the clarity of the forensic evidence that “spoke” to the acts of the defendants. The tendency of the mass grave evidence to indicate genocidal intent was thundering to trial observers and the bench itself as it deliberated. One factor indicating genocide was the uniformity of clothing (i.e., Kurdish dress). Another was the uniformity of the victims by region and

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21. See Prosecutor v Goran Jelusic, Case No. IT-95-10-A, Appeals Judgement, ¶ 47 (July 5, 2001), available at <http://www.un.org/icty/jelusic/appeal/judgement/index.htm>. Paragraphs 53–77 of the Appeals Judgement consist of a lengthy recitation of the facts adduced at trial, followed by the finding that the Trial Chamber erred in failing to infer the *dolus specialis* from the evidence, although the appeals chamber declined to order a retrial on grounds of judicial economy. See *id.* ¶¶ 53–77.

22. See Prosecutor v. Nahimana, Barayagwiza, and Ngeze, Case No. ICTR-99-52-T, Judgement, ¶ 976 (Dec. 3, 2003) (imposing responsibility on Rwandan political leaders because “to the extent that members of a political party act in accordance with the dictates of the party, or otherwise under its instruction, those issuing such dictates or instructions can and should be held accountable for their implementation”).

23. TUCKER, *supra* note 1, at 93 (documenting the first impressions of Lieutenant Colonel Randal Kendall as he helped to supervise the early forensics work in only one of the six known mass graves at Hatra). It is worth remembering as a matter of historical record that the 101st Airborne division also had a leading role in entering and liberating the camps in Nazi Germany in the latter days of the struggle to overthrow Hitler’s regime.

24. *Id.* at 95.

ethnic identity (i.e., Kurds from Northern Iraq). In fact, the evidence from mass graves served to corroborate many of the details of the planning and the implementation of the genocide that were attested to in open court by live witnesses because victims from the same villages would be found in the same graves having been transported large distances. The consistency of the Kurdish artifacts and jewelry also preserved the uniform ethnic identity of the victims; likewise with the identification cards with cities destroyed during the respective Anfal campaigns, and the occasional date on the medicine bottle to definitively establish the temporal frame. The concrete evidence from the mass graves spoke in chorus to corroborate the evidence of the live witnesses and the available documentary evidence. The mass graves themselves helped to break the silence of the dead.

I am left with the conclusion that the Anfal campaigns were genocide in its classic form. A sensible discussion of the role of the bench in proving and punishing the genocide committed against the Kurds must nevertheless proceed from a baseline understanding of the origins and context for the development of genocide as a distinct legal discipline. It is against that backdrop that the long-term legal utility of the trial will be evaluated by the international community and established in history. Before I close, I want to comment on two important aspects of this trial that I believe will make the Anfal genocide trial one of the hallmarks of modern genocide jurisprudence.

Raphael Lemkin's seminal work on genocide was published in 1944 and entitled *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*.<sup>25</sup> Lemkin is today remembered, as many of you no doubt know, as the progenitor of the Genocide Convention and the originator of the neologism "genocide." The distinct phrase genocide was first used in open court on September 29, 1947, in the Einsatzgruppen trial by a young American prosecutor named Benjamin Ferencz.<sup>26</sup> Ferencz used the phrase in open court partially because it accurately captured the

25. See RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* (Carnegie Endowment for International Peace, 1944).

26. Video: Einsatzgruppen trial: U.S. prosecution condemns genocide (National Archives 1947), available at <http://www.ushmm.org/lcmedia/viewer/wlc/film.php?RefId=DFP0668E>. In his opening statement, Ferencz described the acts of Nazi officials implementing party policies as being "the methodical execution of long-range plans to destroy ethnic, national, political, and religious groups which stood condemned in the Nazi mind. Genocide, the extermination of whole categories of human beings, was a foremost instrument of the Nazi doctrine." *USA v. Otto Ohlendorf et. al* (Einsatzgruppen Case), 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 30-31 (1949). For a description of this case and its opinion rendered on April 8, 1949, see MARJORIE M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW 907-910* (United States Department of State 1968).

essence of the criminal acts of those defendants, but also because Lemkin was persistent and persuasive in advocating its incorporation into the legal argument. As a passing note, Lemkin's subtitle highlighted the right to redress for victims of genocide. One of the most heated exchanges during the recently concluded Anfal trial occurred when the judge informed defendants that their material goods would be forfeited pursuant to the provision of the Iraqi Tribunal Statute permitting the forfeiture of property or assets derived directly or indirectly from the proceeds of a crime.<sup>27</sup>

In Lemkin's classic analysis, he expressly observed that his conception of genocide encompassed a broader set of goals than the physical destruction of a group. In his view, genocide involved a "coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves."<sup>28</sup> He explained how genocide consisted of two phases: first, acts aimed at the disintegration of the political and social institutions of the victimized group, such as their language, culture, national identity, religion, and economic relationships; second, the destruction of the liberty, security, and lives of the individual victims.<sup>29</sup> The attempted arabization of Kurdish lands and language certainly fits this pattern. The Ba'ath Party policy sought to destroy all aspects of Kurdish existence—political, social, biological, physical, religious, and moral. In his summation of the scope of genocidal acts, the prosecutor included the

[d]estruction of the economy and infrastructure of rural Kurdistan, similar to what was done in Nazi Germany. The defendants covered their evil actions with euphemism. Whereas Nazi officials spoke of "implementation procedures", "special movements", and "settlement in the east", the defendants talked about "mass procedures", "returning to the national ranks", "modern villages", and "settlement in the south."<sup>30</sup>

Although the legal scope of genocide as a crime is defined exclusively as the acts seeking the physical destruction of a "national, ethnical, racial, or religious group," its moral component endures as the subtext of our condemnation of genocide. Lemkin's broader definition of genocide, the one that extended beyond mass murder to include political, social, religious, and moral measures to efface group identity, embodied a broader normative concern for the diversity of the human animal. The defense and protection of multiple minority national identities was Lemkin's original objective.

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27. Statute of the Iraqi High Criminal Court, *supra* note 9, art 24 (Sixth) (providing that "[t]he Criminal Court may order the forfeiture of proceeds, property or assets derived directly or indirectly from a crime, without prejudice to the rights of the *bona fide* third parties").

28. LEMKIN, *supra* note 24, at 79.

29. *Id.*

30. Anfal Closing Argument, *supra* note 3, at 3.



From my personal observations, I believe that the Iraqi jurists trying Anfal felt the moral weight of their duty as well as its legal import. They felt a keen sense of obligation to Iraqi society as a whole, and the larger pattern of civilized interactions across society. The Trial Chamber took a major step in sustaining a unified and whole Iraqi identity with the convictions in this case. When it becomes publicly available, I should not be in the least surprised to find that the language of the opinion is laced with the moral outrage and indignation needed to lend color to merely technical, textbook descriptions of crime. The Anfal genocide was directed at the very essence of a people. The Kurds felt its force, and the Judgment should document the societal and personal effects even as it documents its legal conclusions.

The Anfal trial also documented another important, but often neglected, aspect of this field. Lemkin's original text is largely a compendium of descriptions of the administrative and legal rules whereby Germany administered the various states and territories that it occupied all over Europe, together with a 400-page appendix of translations of those legal rules. Genocide, it seemed to Lemkin, originated in law. Students of the history of Germany have long known that the so-called NS-Unrechtsstaat ("National Socialist State of Injustice") was really a welter of the formalisms of administrative and regulatory law. One need not enter the argument about the role of legal positivism in solidifying support for National Socialist rule to observe that bureaucratic administration of vast conquered territories, as well as of organized industrial mass murder, requires regularity and rules, classifications and categories; and law and lawyers are inevitably implicated in such processes.

Rather than representing an aberrational imposition of lawlessness, the most chilling and deliberative genocide is that which is perpetrated pursuant to law. The precise documentation of the machinery for conceiving and implementing genocide will be one of the major contributions of the Anfal Trial Judgment. In the Iraqi experience, the specific legal and policy authority of these defendants in the Northern Bureau derived from Revolutionary Command Council Decree Number 160. Saddam issued Decree Number 160 on March 29, 1987. Decree Number 160 gave Chemical Ali the powers comparable to the President himself when operating in Northern Iraq. The official position conveyed by Decree 160 to Ali Hassan al-Majid was termed the "Secretary General of the Northern Bureau," with power in the Northern Bureau that could be limited only by Saddam Hussein himself. There was a direct and unbroken line of authority from Saddam to Chemical Ali. Decree 160 spelled out that Ali Hassan Al Majid would serve as Secretary General of the Northern Bureau to execute the policies of the Ba'ath Party and the Revolutionary Command Council. Along with other evidence, this language from Decree 160 shows that Anfal was carried out with the

specific intent and planning of regime officials, and that the attacks directed against civilians and their villages were undertaken based on a specific policy of the regime.<sup>31</sup>

During Anfal, the policy became chillingly clear to the Kurdish people—they were to be killed, and the land of the Northern Bureau was to be stripped clear of their villages and their families. Decree 160 specifically gave Ali Hassan Al-Majid full “authority over all the state’s civil, military and security apparatuses.”<sup>32</sup> Just as the line of authority from Saddam to Chemical Ali was direct and clear, so too Ali’s authority and responsibility was unchallenged over the conduct of all the Ba’ath party officials, the Military Intelligence Directorate [Istikhbarat] Iraqi Intelligence Service [Mukhabarat], Internal Security Service, Commanders of the Popular Army, and all local political officials in the Northern Bureau. Because the military consistently bombed villages in the Northern Bureau and attacked civilians in hundreds of villages, it is especially important to note that Decree 160 specifically said that all military commanders in the Northern Bureau must abide by the commands given by Ali Hassan Al-Majid.<sup>33</sup>

Barely two weeks after receiving the power from Saddam in Decree 160, regime forces in the Northern Bureau launched the attacks on the villagers of Sheik Wasan and Balisan. The testimony is clear about what happened in those villages during the evening hours of April 16, 1987. These attacks took place eleven months before Halabja, and were the early phases of the full Anfal campaign. The villagers heard about a dozen aircraft fly overhead; then, sometime later, over thirty Iraqi military helicopters flew overhead and the villagers heard muffled explosions. The effects of this attack became evident very soon. Apart from the chemical burns, people were blinded by the fog. Faces turned black and some people vomited, while almost every survivor of the initial assault experienced painful swelling. Victims experienced thick yellow goo that came from their noses and eyes. Doctors in Irbil were able to treat a very few of the villagers before a local Ba’ath official came and ordered all treatment to cease. The doctors found that the chemicals had dried out their eyes and glued them closed. According to the file, the Ba’ath official forcibly took the patients away from the civilian hospital on the pretext that they were being transferred to the

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31. See Robert G. Rabil, *Operation “Termination of Traitors”: The Iraqi Regime through Its Documents*, 6 MIDDLE E. REV. OF INT’L AFF. 3, 19–20 (2002), available at <http://meria.idc.ac.il/journal/2002/issue3/rabil.pdf>; Human Rights Watch, *Genocide in Iraq: The Anfal Campaign against the Kurds*, chapter 2, <http://hrw.org/reports/1993/iraqanfal/ANFAL2.htm> (last visited Nov. 16, 2007).

32. Human Rights Watch, *Genocide in Iraq: The Anfal Campaign against the Kurds*, Appendix, Document 13, p. 1, <http://www.hrw.org/reports/1994/iraq/APPENDIX.htm> (last visited Nov. 16, 2007) (reproducing Decree 160).

33. See *id.*

military hospital. When doctors later called the military hospital to ask about the welfare of their patients, they were told that no patients had been transferred. Some of those who had been receiving medical treatment were taken to the Amn jail where many later died as the result of untreated injuries.<sup>34</sup>

Other villagers were very fortunate. Though Anfal showed that those who participated in the cruelty of the Northern Bureau campaign could commit terrible cruelty, it also allowed the best of some people to shine through. Even in the early stages, the planning and systematic implementation of the Northern Bureau was evident to those who lived in the areas affected by Anfal. Some of the villagers who were taken to another hospital were warned by the medical staff that Security Forces would come to take them away. The medical staff took the civilian victims home to feed and care for them until it was safe to provide additional medical care in the hospital.

So tonight we stand in the near-term shadow of the lengthy trial and its decision, which has not even been read publicly as I speak tonight. The defendants tried to reduce Anfal to a military strategy—they tried to minimize its implications as nothing more than dedicated bureaucrats striving to protect the sovereign entity of Iraq. The Anfal genocide ultimately was based on race, religion, ethnicity, and culture. That is the truth, but it is not the whole truth. More than anything, this genocide was about power and greed. It was about the megalomania of leaders who would brook no challenge to their authority. It was about the Ba'athist regime headed by Saddam Hussein that concealed a deep insecurity beneath the bluster and threats and unbridled cruelty. The regime could tolerate no corner of Iraq where its will was thwarted. This was genocide in its classic sense, and it is a testimony to the spirit of a people that the Kurdish identity survives to represent one of the most promising aspects of the rebirth of a revitalized Iraqi entity.

The West did not intervene inside Iraq to prevent the Anfal genocide. The trial itself has served as a window into the experiences of the Iraqi people under Ba'athist rule. Looking back at the record of the trial as its final scenes play out over the coming months, the jurisprudential value of the legal proceeding will merely add to the larger constellation of case law. Having heard these testimonies, however, our moral outrage and indignation are exponential. Henceforth, we will be able to look to the Judgment and to the televised proceedings as the definitive moment when the societal silence about Anfal was forever shattered. We add our voices to those who testified at trial and those whose presence was felt from the

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34. See generally Anfal Closing Argument, *supra* note 3, at 16 (describing the attacks).

mass graves. In our condemnation and commemoration of genocide, we concur with a great cloud of witnesses: from the merciless ovens of Auschwitz, they declare “schuldig;” from the hill country of Bosnia, “krivje;” from the bloody riverbeds of Rwanda, “coupable;” and from the arid deserts of Darfur, “musnib.” From the courtroom in Baghdad, they call the defendants by their earned names: Saddam and his co-defendants were genocidaires—“Mufsiduun”, evil doers, sinners.<sup>35</sup> They committed the crime of crimes. That pronouncement will echo through the region and be memorialized in the jurisprudence of the world as one of its hallmarks.

Thank you for your time and attention.

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35. See Jim Guirard, *Three Mini Glossaries to Fellow Word Warriors* (Updated), definition of “mufsiduun,” <http://www.truespeak.org/content.php?id=threeminiglossariesupdated> (last visited Nov. 16, 2007).

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