“Never Again”?  
German Chemical Corporation  
Complicity in the Kurdish Genocide

Michael J. Kelly*

I apologize for the German participation in the Kurdish genocide. The trade of German companies with Saddam’s regime was an illegal act. They should not have done that. Germany has to tell the people of Kurdistan that it was a mistake. Gassing Halabja took place with the help of German companies.¹

—Claudia Roth, co-Chair, German Green Party, July 4, 2012

INTRODUCTION

In several domestic jurisdictions, corporations may be prosecuted for criminal wrongdoing within their home states.² This is certainly true in the United States.³ However, when multinational corporations commit crimes abroad, they often escape prosecution for a variety of reasons—lack of jurisdiction, lack of political will, or lack of well-articulated criminality under international law. The complicity of German chemical corporations in Saddam Hussein’s genocide against Iraq’s Kurdish population falls into all of these categories.

The chemical weapons attacks unleashed on the Kurdish people of Iraq in 1987-1988 were the largest such attacks ever directed against a civilian

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² See, e.g., Criminal Code Act 1995 (Cth) pt 2.5 div 12 (Austl). “A body corporate may be found guilty of any offence, including one punishable by imprisonment.” Id. div 12.1.

population. Mustard gas, VX, SARIN and TABUN formed a lethal cocktail that eliminated 5,000 Kurds in the city of Halabja in a single day. Who supplied Saddam with this devastating technology? German industry—the same German industry that supplied Himmler’s S.S. with the poison gas to eliminate millions of Jews at Auschwitz. This Article explores how German corporations failed to learn the lessons of the Holocaust and considers the parameters of criminal liability for corporate actors who persist in flouting international norms in pursuit of profit.

Part I provides background on corporate responsibility, chemical weapons, the involvement of German industry, and a general background on transshipment to Iraq. Part II establishes the wholesale massacre of Kurdish civilians by Saddam Hussein’s military forces as genocide. Part III describes German corporate complicity in the transfer of equipment and technology to Saddam’s regime to carry out chemical weapons production. Part IV lays out a legal strategy to more clearly articulate the criminal culpability of corporations when they aid and abet genocidaires.

This Article presents a salient case study with respect to the criminal liability of German corporations for the Kurdish genocide. It derives from the author’s previous work establishing a general theory of corporate criminal liability under international law, and a prior case study with respect to the criminal liability of the Chinese National Petroleum Corporation (CNPC/Petro-China) for the genocide in Darfur, Sudan.

4. Chemical and Biological Weapons Threats to America: Are We Prepared?: Hearing Before the S. Judiciary Subcomm. on Tech., Terrorism and Gov’t and the S. Select Comm. on Intelligence, 105th Cong. (1998) (statement of Christine M. Gosden, Professor of Med. Genetics, Univ. of Liverpool) [hereinafter Gosden Congressional Testimony], available at http://www.fas.org/irp/congress/1998_hr/s980422-cg.

5. Id. The gassing of Halabja marked “the first time that chemical weapons had been used on a major civilian population of this size. The victims of the attack included women, children and the elderly.” Id.


I. BACKGROUND: CORPORATE RESPONSIBILITY

Corporations are formed for profit.\(^{11}\) It is from this central motive that corporate activity springs. Corporate governance systems in companies around the world support that motive, whether the companies exist in capitalist, socialist, or neo-communist economic systems. Indeed, members of corporate boards have fiduciary duties to shareholders to increase profits where possible.\(^\text{12}\)

From the Latin corpus for body, corporations have been around since Roman times. They are artificial bodies that engage in business for the mutual benefit of people who share in the wealth they create. As Sir Edward Coke put it, they are “invisible, immortal, & resteth only in and consideration of intendment of Law.”\(^\text{13}\) Classically, corporations were not constrained in their activities while in pursuit of profit even though their hosting governments may have loosely regulated them.

Early on, corporations became involved in the colonization and wartime activities of their home states—ostensibly in support of national aims, but never at a loss.\(^\text{14}\) During the seventeenth and eighteenth centuries, Great Britain left most of the work of colonization and subsequent military repression of indigenous populations to the British East India Company.\(^\text{15}\) In 1827, a contemporary noted with respect to the British East India Company: “a company which carries a sword in one hand and a ledger in the other—which maintains armies and retails tea, is a contradiction.”\(^\text{16}\) The Netherlands followed a similar paradigm via the Dutch East India Company,\(^\text{17}\) which supplemented its Asian labor force with slaves and forced labor from local colonial populations.\(^\text{18}\)

In the United States, corporations profited wildly during the American Civil War—providing armies in the field with everything from weapons to uniforms.\(^\text{19}\) As in the case of modern corporate complicity in atrocities such as genocide, the promise of large profits with little cost and no negative

\(^{12}\) Id.
\(^{13}\) Case of Sutton’s Hospital, (1612) 77 Eng. Rep. 960.
\(^{15}\) LEO J. BLANKEN, RATIONAL EMPIRES: INSTITUTIONAL INCENTIVES AND IMPERIAL EXPANSION 111-38 (2012).
\(^{16}\) Id.
\(^{17}\) See generally, GHULAM A. NADRI, NETWORKS OF EMPIRE: FORCED MIGRATION IN THE DUTCH EAST INDIA COMPANY (2008).
\(^{19}\) Keeney, supra note 14, at 16.
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consequences,\textsuperscript{20} proved too tempting for many companies to resist providing low cost, low quality merchandise:

Profiteering and fraud were the hallmarks of government business during the Civil War. Hasty mobilization, loose enforcement, large-scale emergency buys, and lack of coordination at the federal level led to a situation very attractive to people looking for a quick fortune. J.P. Morgan was one example among many. In 1861, before hostilities broke out, the government auctioned off 5,000 obsolete and dangerous guns. Morgan, through an agent, bought them for $3.50 each. He then turned around and sold them as new to General Fremont in St. Louis for $22 each. When soldiers tried to fire them, they exploded as often as not.\textsuperscript{21}

This tradition of reliance on corporate support for national defense continues today, albeit with better product results. Companies like Halliburton and DynCorp provide both support and security to military operations,\textsuperscript{22} and companies like Raytheon and General Dynamics provide unmatched weaponry.\textsuperscript{23} Yet, President Dwight D. Eisenhower eloquently warned the nation and the world of the perils of a military-industrial complex that could grow, if unchecked, to wield disproportionate influence.\textsuperscript{24} He was describing the emerging Cold War synergy between corporations, the military, and the government. That synergy cemented itself and has long outlasted the conflict it was created to counter.

Perhaps most tragically, this confluence of corporate activity, military need, and government guidance revealed its true terrible potential in Hitler’s Germany during the Second World War. German corporations, like those of other countries, operated within a legal framework sanctioned by their home government—in this case the Third Reich. Consequently, the atrocities they

\textsuperscript{20} See Tyler Marshall, Germany Was Hub of Iraq Arms Network in Europe, L.A. TIMES, Feb. 15, 1991, available at http://articles.latimes.com/1991-02-15/news/mn-1086_1_purchasing-network/2 (“And so it was that a country [Germany] whose government policy bans the export of weapons to areas of tension [Iraq] and whose official statistics show that it shipped only $31 million of the $25 billion in arms imported by Iraq during the 1980s, became the pivotal supplier to the most horrific elements of Hussein’s war machine. The lure of such profits also drew numerous smaller German companies, apparently willing to ignore or deny the reality of their business, for such a onetime economic windfall.”).

\textsuperscript{21} Keeney, supra note 14, at 16 (quoting and citing JAMES F. NAGLE, A HISTORY OF GOVERNMENT CONTRACTING 176-77, 192-93, 198 (2nd ed. 1999); WILLIAM G. LE Duc, THIS BUSINESS OF WAR: RECOLLECTIONS OF A CIVIL WAR QUARTERMASTER 68, 123 (2004); JAMES A. HUSTON, THE SINEWS OF WAR: ARMY LOGISTICS 1775-1953 180 (1966)).


were complicit in perpetrating during the Holocaust were legal under German law at that time. However, they remained reprehensible and violated international law.

At the height of the war, one in every five workers supporting the economy of the Third Reich was a forced laborer. By the beginning of 1944, this amounted to 10 million workers—6.5 million of whom were civilian forced laborers within Germany, 2.2 million were prisoners of war, and 1.3 million were in camps outside of Germany proper. German companies have paid billions of dollars in reparations to victims and survivors as a result.

Most notably, Germany began to pay reparations to Israel soon after the war for the crimes of the Holocaust. More recently, German industry recognized, in the face of large class-action lawsuits, that it must compensate survivors and families of those subjected to forced labor in the German wartime economy. First, in 1998, Volkswagen created a twelve million-dollar fund to compensate slave laborers used in its factories during World War II. Volkswagen’s action was “the first time a German company acknowledged its ‘moral and legal responsibility’ to compensate Nazi-era slave laborers.”

The following year, faced with similar litigation, over 3,500 German companies, including Audi, BMW, Krupp, Leica Camera, Siemens, Daimler Benz, Volkswagen, Hugo Boss, and Bayer, together with a German foundation, paid a massive 4.4 billion-dollar settlement to compensate the victims of their own corporate abuses.

What caused such corporate abuse within states during wartime to jump borders and become a truly international problem? Two dominant dynamics of the twentieth century allowed the problem of corporate involvement in war crimes, crimes against humanity, and genocide to metastasize beyond the borders of their host states. The first dynamic was the emergence of new states.


Emancipation of peoples after World War I and decolonization after World War II led to the formation of many new states. Most were resource rich but economically poor and politically weak. This created fertile ground for abuse by creatures of the second dynamic—multinational corporations (MNCs). Global economic expansion, increased capital flows, and liberalized international trade regimes allowed MNCs to dramatically increase their international operations during the Cold War and afterward. As observed, “[g]lobalization, which has displaced colonialism and then the cold war as the organizing principle of the international system, has reduced the transactional costs of doing business in multiple jurisdictions and, in turn, conferred enormous wealth on multinational corporations.”

These dynamics combined to elevate the MNCs’ role as a key aider and abettor in criminal activity at the domestic level to the international arena. Ostensibly servicing the needs of struggling new states, MNCs essentially did, and continue to do, what any corporation is designed to do—seek profit. In weak states, however, such profit could come at the cost of human rights abuses and even worse.

Two models of corporate human rights abuses predominate: the direct corporate wrongdoing, and the indirect participation. In the direct corporate wrongdoing, a third world government allows a foreign first world corporation to do business in its country with little governmental oversight. This scenario is epitomized by the MNC’s negligent conduct in the course of its operations.

Direct corporate wrongdoing commonly occurs in the area of environmental degradation, like the dumping of sixty tons of mercury into Lake Managua by the Philadelphia-based Pennwalt Corp.’s chlorine-processing plant which operated there until 1991. As observed, “[w]hen the environmental movement began in the United States in the 1960s, companies began exporting their contaminating industries to the Third World.”

This type of wrongdoing often involves human rights abuses, as in the case of foreign petroleum corporations operating in Nigeria or, less commonly, war.

34. Id. (quoting Mauricio Lacayo, a scientist at the Nicaraguan Ministry of the Environment and Natural Resources).
crimes. It would be rare, however, for a corporation to be caught red-handed carrying out an act of genocide. Corporations, after all, are not created to wipe out entire populations. But if another entity is committing genocide and the corporation stands to gain a profit from it, the corporation is unlikely to stop it.

This leads to the second variety of corporate wrongdoing—the indirect participation. International law refers to indirect participation in a criminal act as aiding and abetting, or complicity. The criminal perpetrator does not carry out the final criminal act (e.g., murder or enslavement), but participates by supporting those who do. Here, far more often, we find MNCs lurking in the background when atrocities occur. Indeed, at times an atrocity itself would not have occurred without the impetus provided by corporate presence and its financial rewards. For example, the Chinese National Petroleum Corporation, bent on slaking China’s thirst for oil, drove the Sudanese government to perpetrate genocide in Darfur, Sudan, so the land could be cleared for drilling.

Potentially insidious in nature, financial incentive by an MNC for a government or gang to carry out atrocities may supply the motive to commit an act. However, companies can also provide means to a perpetrator who is already predisposed with a motive to undertake genocide. The best illustrative case here is that of Saddam Hussein’s massacre of the Kurdish people in northern Iraq. With chemical weapons components supplied to him by foreign MNCs, Hussein was not only empowered to release the largest chemical gas attacks since the First World War in his own war with Iran, but to turn those weapons on his own people in Iraq.

Figure 1, below, was designed in the run-up to the 2003 U.S.-led invasion of Iraq. It depicts the suppliers that Baghdad relied on in the development of its chemical weapons program in the 1980s and breaks down each country by supplier and commodity supplied. Germany figures most prominently in the “equipment” column. This graphic accompanied an article in the New York Times explaining the central dynamic involved in the transfer of chemical weapons technology from Germany to Iraq.

38. In re Tesch (The Zyklon B Case), (1946) 13 Ann. Dig. 250 (Brit. Mil. Ct.).
40. Huisman & van Sliedregt, supra note 37, at 817-18.
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Figure 1

What Iraq Admitted About its Chemical Weapons Program

Alled leaders went to war believing that the chemical agents, equipment and munitions Iraq declared to United Nations weapons inspectors by no means constitute the nation’s entire chemical weapons cache. The declared materials do offer a glimpse at the extent of the program, as well as where Iraq obtained the materials to produce its chemical weapons.

Ingredients

Iraq declared imports of 17,602 tons of sensitive chemicals used for making proscribed weapons, though all of the chemicals also have nonmilitary uses. Below, chemical exports by country, and possible weapon uses.

<table>
<thead>
<tr>
<th>Country</th>
<th>Mustard Gas</th>
<th>Sarin and Mustard Gas</th>
<th>Tear Gases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brazil</td>
<td>100</td>
<td>850</td>
<td>23</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>100</td>
<td>850</td>
<td>23</td>
</tr>
<tr>
<td>Singapore</td>
<td>100</td>
<td>850</td>
<td>23</td>
</tr>
<tr>
<td>Netherlands</td>
<td>100</td>
<td>850</td>
<td>23</td>
</tr>
<tr>
<td>Egypt</td>
<td>100</td>
<td>850</td>
<td>23</td>
</tr>
<tr>
<td>India</td>
<td>100</td>
<td>850</td>
<td>23</td>
</tr>
<tr>
<td>Germany</td>
<td>100</td>
<td>850</td>
<td>23</td>
</tr>
</tbody>
</table>

Equipment

All together, Iraq declared imports of 340 pieces of equipment used for manufacturing chemical weapons. Below, the percentage breakdowns by country of export, and examples of equipment exported.

<table>
<thead>
<tr>
<th>Country</th>
<th>Reactors</th>
<th>Heat Exchangers</th>
<th>Condensers</th>
<th>Tanks and Columns</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>46.3%</td>
<td>21.6%</td>
<td>16.5%</td>
<td>5.3%</td>
</tr>
<tr>
<td>France</td>
<td>1.3%</td>
<td>5.3%</td>
<td>4.4%</td>
<td>0.2%</td>
</tr>
<tr>
<td>Austria</td>
<td>0.1%</td>
<td>0.1%</td>
<td>0.1%</td>
<td>0.1%</td>
</tr>
<tr>
<td>Other</td>
<td>0.1%</td>
<td>0.1%</td>
<td>0.1%</td>
<td>0.1%</td>
</tr>
</tbody>
</table>

Munitions

Iraq declared that between 1983 and 1989, it had imported more 200,000 artillery shells, aerial bombs and rockets designed for delivering chemical weapons. Below, some munitions and origin.

<table>
<thead>
<tr>
<th>Country</th>
<th>Artillery Shells</th>
<th>Aerial Bombs</th>
<th>Rockets</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spain</td>
<td>75,000 rockets</td>
<td>155-mm shells</td>
<td>155-mm shells</td>
</tr>
<tr>
<td>Italy</td>
<td>45,000 rockets</td>
<td>155-mm shells</td>
<td>155-mm shells</td>
</tr>
<tr>
<td>China</td>
<td>28,500 rockets</td>
<td>155-mm shells</td>
<td>155-mm shells</td>
</tr>
<tr>
<td>Egypt</td>
<td>122-mm rockets</td>
<td>155-mm shells</td>
<td>155-mm shells</td>
</tr>
<tr>
<td>Latin America</td>
<td>122-mm rockets</td>
<td>155-mm shells</td>
<td>155-mm shells</td>
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<tr>
<td>India</td>
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</tr>
<tr>
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<td>0.1%</td>
<td>0.1%</td>
</tr>
</tbody>
</table>

Source: Weapons Project
The data reveals that firms in Germany and France outstripped all others in selling the most important thing—specialized chemical-industry equipment that is particularly useful for producing poison gas. Without this equipment, none of the other imports would have been of much use.

Iraq didn’t declare everything it bought, so the data is incomplete. But they can be presumed to be reliable as far as they go. In general, the pattern of Iraqi behavior with United Nations (U.N.) inspectors was to admit buying something only after learning that the inspectors already knew about it. Thus, it seems logical to assume that the admitted imports actually occurred.

Iraq sometimes lied about the quantities of ingredients or munitions to protect suppliers or to conceal stocks remaining in hand. Equipment, on the other hand, was listed in discrete units, so those quantities seem to be reliable.

The countries of origin are compiled based on the exporter, not the manufacturer, because it was the exporter who decided to sell a sensitive item to Iraq. Most of the equipment described in the report is restricted for export today, even though it also has civilian uses, but it was probably not restricted when it was sold in the 1980’s.

While individual items may have had innocuous uses, the usefulness of a combination of items on an order for making poison gas could have tipped off a seller. A former U.N. inspector, citing one case, said: “anyone looking at the order could see that all the chemicals were for sarin.”

It is clear that several multinational companies across Europe, Asia, Latin America, and the Middle East participated in arming the Iraqi regime. However, this Article focuses only on the criminal liability of German corporations because of German corporate complicity in the Holocaust.

Given their central role in perpetrating the greatest crime of the twentieth century, German corporations should be held to a higher standard of care with respect to genocide. When the involvement of German corporations in advancing Saddam Hussein’s chemical weapons program came to light, Wilfried Penner, a member of the Bundestag’s intelligence committee noted, “[w]e have a political and a moral problem . . . We [Germany] should be showing more restraint than other countries due to our inescapable history.”

Even though others contributed to the build-up of Saddam Hussein’s chemical weapons arsenal, “[t]he moral question is especially troubling for Germany . . . [because] Saddam has threatened to attack Israel with chemical weapons. Poison gas was developed and used by the Germans during World War I, and was used to kill Jews in Nazi gas chambers.” Indeed, during the 1991 Persian Gulf War, when Saddam attacked Israel, German officials who knew about the German corporate role in arming Iraq began to foresee the

42. Id.
specter of German gas being used to slaughter Jews all over again. “One German official says he was paralyzed with fear when he first heard Israel was hit with Scud-B missiles. ‘We are so lucky they weren’t carrying poison gas warheads,’ he says. ‘For German technology to again be responsible for Jewish deaths would have been such a tragedy.’”

The history of chemical weapons production in Germany is not state-centered. It was driven by corporate innovation and production from the very beginning. The war ministry did not manufacture chemical weapons. Rather, German chemical companies first proved their capability to produce chemical weapons during World War I. Bayer, BASF, and Höchst worked with the German government to weaponize their large chlorine by-products from dye manufacturing into a gas capable of incapacitating soldiers in the Allied trenches. The first poison gas attack was released in April 1915 at Ypres on the Western Front against British soldiers. Other similar lethal weapons were subsequently engineered, including the dreaded mustard gas.

Though the Allied powers argued such attacks were in violation of the Hague Conventions, Germany rested its interpretation of the provision prohibiting states “to employ poison or poisoned weapons” or “to employ arms, projectiles, or material calculated to cause unnecessary suffering” as a technicality—the treaty language only applied to the use of shells, not to other types of projectiles. Forced into a stand-off, the Allies had no choice but to respond in kind. But for German intransigence, millions of soldiers would have been spared the pain and twisted death wrought by poison gas.

The use of chemical weapons between military combatants was more expressly prohibited by international law following the First World War. Hitler’s own alleged exposure to such attacks when he was a soldier may have

47. Id. at 165.
48. Id.
51. See, e.g., Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 94 L.N.T.S. 66.
52. Interview by Neil Conan, “Talk of the Nation,” National Public Radio with Jonathan Tucker, author—War of Nerves: Chemical Warfare from World War I to Al-Qaeda (2006). (May 8, 2006) (Mr. Tucker: “Hitler, during one of the final battles of World War I, had been exposed to mustard gas and temporarily blinded, which was a deeply traumatic experience. So he had a deep aversion to chemical weapons. And even though members of the Nazi inner circle, such as Goebble, Borman, and Lye(ph), advocated on many occasions for the German use of the nerve agents against the Red Army; Hitler always equivocated, could not make up his mind, I think in part, because of his deep aversion to these weapons.”), available at http://m.npr.org/story/5390710; Barton J. Bernstein,
also contributed to keeping chemical weapons off the European battlefield during World War II. However, the Third Reich preferred the use of poison gas as an execution method during the Holocaust in the extermination camps of German occupied Europe. Once again, a German company led the effort. IG Farben, a conglomerate that included the same German chemical companies that had developed chemical weapons for use against Allied forces in the First World War, worked hand-in-glove with Hitler’s S.S. to produce the lethal Zyklon-B poison gas used to murder prisoners at Auschwitz and other camps.

After World War II, German companies returned to non-weaponized chemical production. Eventually, NATO allies such as the United States began storing chemical weapons in West Germany during the Cold War. Late in the Cold War, German corporations began exporting their chemical weapons expertise. It was during the 1980s that the web of relationships between the German industry and Saddam Hussein’s repressive regime in Iraq began to take shape, as leading German chemical companies yet again turned back to poison gas production.

Saddam Hussein pursued the acquisition of nuclear weapons without success; yet his team had made some progress with the construction of a reactor. However, the 1981 bombing of Iraq’s nuclear reactor at Osirak by the Israeli Air Force shattered that goal. This defeat drove, in part, Saddam’s interest in chemical weapons production.

Saddam had been counting on obtaining the bomb within a matter of months, if not years. With that hope shattered, he had to turn elsewhere for strategic “reach.” He wanted weapons capable of inflicting great damage on Israel. And what could be worse to Holocaust-conscious Jews . . . than poison gas?

After approaching Western powers for assistance, it was the West Germans who proved most willing to help Saddam in this sinister endeavor.


53. Stokes, supra note 8, at 214. The companies that formed the new IG Farbenindustrie Aktiengesellschaft in October 1925 were Agfa, BASF, Bayer, Höchst, Chemische Fabrik Griesheim-Elektron, and Chemische Fabriken vorm. Weiller-ter Meer.

54. Id. at 330.


57. Id.

58. See generally id. at 105 (“Over the next ten years, Germans worked shoulder to shoulder with Iraqi chemists, ballistics engineers, and nuclear scientists to develop one of the most diversified arsenals of unconventional weapons . . . . Senator Jesse Helms . . . called these companies and their cohorts ‘Saddam’s Foreign Legion.’”).
It should be noted that German corporate support for the development of chemical weapons extended beyond just Iraq. German companies also provided chemical weapons capabilities to the repressive regimes of Iran and Libya. The clearest example of support for the Iranian program involved Dusseldorf-based Rheineisen Chemical Products, which attempted to arrange the transport of 257 tons of thionyl chloride (used to produce mustard gas) from India to Iran via Dubai on a German freighter in 1989. With respect to Libya, the United States identified Preussag AG of Hanover, Pilot Plant GmbH of Dreieich, Pen Tsao Materia Medica Center Ltd. of Hamburg, and Ihsan Barbouti International of Frankfurt as key corporate players assisting the Qaddaffi regime in building a poison gas factory at Rabta, south of Tripoli.

However, while Iranian and Libian chemical weapons were not deployed to further genocide, in Iraq, this is exactly what happened. If the oft-repeated mantra emanating from the Holocaust “never again” means anything, it means at a minimum that German corporations cannot be permitted to provide those determined to carry out genocide with the means to do so.

II. THE CRIME: GENOCIDE IN KURDISTAN

Masked by the closing salvos of the long-drawn out Iran-Iraq War, the quiet genocide of the Kurdish people in northern Iraq went unnoticed for many years. But ghosts who perished in such a way do not rest long.

On April 15, 1987, Iraqi aircraft dropped poison gas on the [Kurdistan Democratic Party] headquarters at Zewa Shkan, close to the Turkish border in Dohuk governorate, and the [Patriotic Union of Kurdistan] headquarters in the twin villages of Sergalou and Bergalou, in the governorate of Suleimaniyeh. The following afternoon, they dropped chemicals on the undefended civilian villages of Sheikh Wasan and Balisan, killing well over a hundred people, most of them women and children. Scores of other victims of the attack were abducted from their hospital beds in the city of Erbil, where they had been taken for treatment of their burns and blindness. They have never been seen again. These incidents were the first of at least forty documented chemical attacks on Kurdish targets over the succeeding eighteen months.

59. William Tuohy, Bonn to Probe Charges That Firms Helped Iran with Toxic Weapons, L.A. TIMES, Jan. 30, 1989: See also CONFLICT RECORDS RESEARCH CTR., GENERAL MILITARY INTELLIGENCE DIRECTORATE MEMOS ON IRAN’S CHEMICAL WEAPONS CAPABILITY AND ALLEGED USE (1987-88), available at http://www.ndu.edu/inss/docuploaded/SH-GMID-D-000-898_English.pdf (captured Iraqi military intelligence documents indicating the conviction of Iraqi intelligence that West German companies were actively building and converting chemical plants into factories with poison gas capabilities).


62. Introduction to HUMAN RIGHTS WATCH, GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN
The tragedy that befell the Kurdish people in 1987 and 1988 was a deliberate genocide, executed over a series of military campaigns known collectively as “the Anfals”—or the spoils of war. This term was taken from the Eighth Sura of the Qur’an in “which followers of Mohammed pillage the lands of nonbelievers.” Saddam’s massive movement of Sunni Arabs onto depopulated Kurdish lands ensured that he would gain control over the extensive oil reserves of northern Iraq. In all, Saddam’s savage attacks which sought to wipe out the Kurds in the north of his country cost up to 100,000 lives.

Genocide is the mass elimination of a group of people based upon a shared trait like ethnicity or religion. The paradigmatic genocide was the Holocaust. Jews were targeted for eradication en masse because of the fact that they were Jews. Although earlier genocides occurred, the magnitude and savageness of the Holocaust made it difficult to ignore. Indeed, the Holocaust spurred the world to rally against genocide: the newly formed U.N. passed a resolution condemning it in 1946 and a treaty criminalizing it in 1948. The legal definition contained in the treaty and subsequent statutes creating international criminal tribunals with jurisdiction over genocide is:

[A]ny 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.

Courts in Iraq and abroad have recognized the Anfal campaign against the Kurds as genocide. But what was the context? What led to the Iraqi regime’s determination that it must eradicate the Kurds living in northern Iraq? To answer

64. Id.
69. Id. art. II.
that question, one must understand the sectarian situation in modern Iraq, which cannot be decoupled from its historic origin.

The political borders of Iraq cross many ethno-religious lines, including Shiites in the south and Kurds in the north. Modern Iraq was created from three provinces of the collapsed Ottoman Empire. This blending of Sunni Arabs, Shi‘ite Arabs, and Sunni Kurds was designed by the Foreign Office in London following World War I, but it was not agreed to among the constituent groups. Further, Kurdish and Shi‘ite groups generally opposed the rule of Saddam Hussein who came from the minority Sunni Arab sect.

Thus, after becoming president of Iraq in 1979, Saddam began strengthening his military in order to counteract hostile opposition within Iraq as well as from Iran, Israel, and Syria. Saddam sought weapons from technologically advanced Western states and the Soviet Union. Under Saddam, Iraq developed its chemical and biological weapons programs, coming to possess what some argued to be “the largest, and possibly the most sophisticated chemical weapons program in the Third World” at that time.

During the Iran-Iraq War, Saddam used these weapons of mass destruction against Iran and his own people. In order to assert and maintain his power during the war, Saddam initially used chemical weapons against Kurdish insurgents supporting Iran from within Iraq. It was not until the close of the war that he turned the full force of his arsenal against the Kurdish civilian population. Figure 2 below delineates confirmed chemical weapons attacks by the Baghdad regime against Iranian and Kurdish targets over a five year period.

74. Id.
76. Id.
Saddam’s forces, commanded by General Ali Hassan al-Majid, employed a variety of chemical weapons during the Anfal campaign, including mustard gas (blistering agent) and Sarin (a nerve agent known as GB). Gen. al-Majid’s penchant for this method of extermination earned him the sobriquet “Chemical Ali” and a fearful reputation for brutality almost matching that of Saddam himself. Peter Galbraith, who secured the documentary evidence of chemical weapons use against the Kurds during the Anfal campaign for the U.S. Senate, characterized al-Majid as “almost the Josef Mengele of [the Anfal] operation,” referring to the Nazi doctor who carried out experiments on Jews. “It was a deadly experiment to see which of these weapons were the most effective.”

One survivor of al-Majid’s April 1987 chemical attacks on Kurdish villages in the Balisan valley described the effect of the pink, gray, and yellow gases drifting through the towns:

“It was all dark, covered with darkness, we could not see anything . . . . It was like a fog. And then everyone became blind.” Some vomited. Faces turned black; people experienced painful swellings under the arm, and women under their breasts. Later, a yellow watery discharge would ooze from the eyes and nose. Many of those who survived suffered severe vision disturbances, or total blindness for up to a month . . . . Some villagers ran into the mountains and died.

80. Id.
there. Others, who had been closer to the place of impact of the bombs, died where they stood.\textsuperscript{81}

All told, the Anfal campaign against the Kurds claimed between 50,000 and 100,000 lives by a conservative estimate.\textsuperscript{82} However, no single action accounts for all the casualties. There were multiple mass murders, multiple mass disappearances, forced displacement of hundreds of thousands of noncombatants, destruction of 2,000 villages that were classified in Iraqi government documents as “burned,” “destroyed,” “demolished,” or “purified,” and the razing of a dozen larger Kurdish towns and administrative centers.\textsuperscript{83}

The lethal combination of methods employed against the Kurds during the eight Anfals form the most complete picture of genocide. Although the successive gassings were perhaps the starkest examples of Saddam’s genocidal acts, conventional killings by shooting and bombardments were also employed.\textsuperscript{84} For instance, the regime sent the vast majority of Kurdish “detainees” to the Iraqi army base at Kirkuk known as Topzawa. Here, soldiers registered and segregated them. They loaded the adult and teenage males onto closed trucks and took them to the execution grounds at places, where they lined them up next to large pits and shot them.\textsuperscript{85} Once the trenches were full, they covered the bodies.\textsuperscript{86}

Exposure to the inhumane conditions of the concentration camps was an indirect method of killing, but nonetheless effective. The elderly were mostly bused to a concentration camp at Nuqrat al-Salman in the Iraqi desert, where death rates averaged four to five per day from exposure and infection.\textsuperscript{87} Women and children went elsewhere. They were usually taken to Dibs, a camp close to the Kirkuk-Mosul highway, where many of the children succumbed to dysentery and malnutrition. About half of the women were taken to death pits.\textsuperscript{88}

Forced deportation, typically accompanied by the razing of villages, was also a common feature of the Anfals. By the end of the campaigns, Iraqi forces had forcibly “resettled” 1.5 million Kurds.\textsuperscript{89} This was part of Saddam’s overall scheme to rearrange Kurdistan in northern Iraq, placing more key areas under Arab control. During this process, 60,000 Kurds fled into southeastern Turkey,
exacerbating the refugee problems felt by the anxious government in Ankara at that time.\textsuperscript{90}

The gassing of Halabja, however, was the single most horrific incident during this notorious campaign, accounting for about 5,000 of the approximately 100,000 Anfal deaths.\textsuperscript{91} Halabja has become emblematic of the Kurdish genocide, much as Srebrenica has become so for the Bosnian genocide. Rebel Iraqi Kurds captured Halabja in 1988 with support from Iranian forces; crushing the resistance there became an ultimate priority for Saddam.

According to a 2002 U.S. State Department report, al-Majid’s coldly diabolical approach can be discerned from his methodology of extermination.\textsuperscript{92} Knowing that the gasses he intended to use were heavier than air and would sink, al-Majid opened the March 16, 1988 attack on Halabja with several hours of conventional artillery bombardment to drive the local Kurdish population down into tunnels, cellars, and basements.\textsuperscript{93} Those underground shelters became gas chambers as al-Majid unleashed his bombardment of poison. Aboveground, animals died and birds dropped out of trees. Belowground, humans met their end, trapped. Those who managed to scramble to the surface emerged into thick clouds of chemical gas:

Dead bodies—human and animal—littered the streets, huddled in doorways, slumped over the steering wheels of their cars. Survivors stumbled around, laughing hysterically, before collapsing . . . . Those who had been directly exposed to the gas found that the symptoms worsened as the night wore on. Many children died along the way and were abandoned where they fell.\textsuperscript{94}

As photos of dead children crumpled on steps or lying contorted and bleached in the streets reached the world, the human rights community released an outcry. But the international community of states responded with muted silence.\textsuperscript{95} None could offer much beyond platitudes, as they all had backed Saddam during the Iran–Iraq War with arms and financing. Indeed, Germany is

\textsuperscript{90} Id.; \textsc{Michael M. Gunter, The Kurds of Iraq: Tragedy and Hope} 45 (1992).

\textsuperscript{91} \textsc{Brenda K. Uekert, Rivers of Blood: A Comparative Study of Government Massacres} 71 (1995).

\textsuperscript{92} \textsc{Int’l Info. Programs, U.S. Dep’t of State, Iraq: From Fear to Freedom} 4 (2002).

\textsuperscript{93} Jeffrey Goldberg, \textit{The Great Terror}, \textsc{The New Yorker}, Mar. 25, 2002, at 52.

\textsuperscript{94} \textsc{McDowell, supra note 81, at 358} (quoting \textsc{Human Rights Watch Report, supra note 62, at 106}). Agiza, who was eight years old and out in the fields when her village near Bahdian was gassed, remembered seeing the planes come in and dropping the bombs. She recalled an experience similar to those recounted by survivors of Halabja:

\begin{quote}
It made smoke, yellowish-white smoke. It had a bad smell like DDT, the powder they kill insects with. It had a bitter taste . . . . I saw my parents fall down with my brother after the attack, and they told me they were dead. I looked at their skin and it was black and they weren’t moving. And I was scared and crying and I did not know what to do. I saw their skin turn dark and blood coming out from their mouths and from their noses. I wanted to touch them but they stopped me and I started crying again.
\end{quote}

\textit{Id.} at 359 (quoting \textsc{Robert Mullan Cook-Deegan et al., Physicians for Human Rights, Winds of Death} 3 (1989)).

\textsuperscript{95} \textit{Id.} at 362.
widely considered to have been the industrial origin of the gas used in 1988 by al-Majid during the Anfal campaign.96

Three years after the Anfals, in 1991, the Kurds rose up against Saddam in the wake of his defeat in the Persian Gulf War. But they were crushed by Iraqi armed forces. Ironically, perhaps motivated by guilt for its involvement in the 1988 gassings, Germany argued at the U.N. for military intervention against Saddam’s repression of the 1991 Kurdish uprising: “Germany . . . warned that the treatment of the Kurdish population in northern Iraq in 1991 ‘harbor[ed] the danger of genocide’ as a result of ‘[t]he persecution of this ethnic group’ and argued that ‘the armed repression against it must be stopped.’”97 However, no concerted effort materialized beyond the United States declaring and enforcing a “no-fly zone” over Iraqi Kurdistan to protect the Kurdish people from Saddam’s air power.

Although they were clearly aware of Saddam’s animus toward the Kurds in 1991, were the Germans aware of his intent to destroy the Kurds in the 1980s? Saddam clearly possessed the requisite intent to destroy the Kurdish people “in whole or in part” as required to prove the crime of genocide.98 Eyewitness

96.  Id. at 363. TIMMERMAN, supra note 56, at 293.
98.  See Gosden Congressional Testimony, supra note 4.

There is something else that sets Halabja apart from other known chemical weapons attacks—including the Aum Shinrikyo attack on the Tokyo subway in 1995. The Halabja attack involved multiple chemical agents—including mustard gas, and the nerve agents SARIN, TABUN and VX. Some sources report that cyanide was also used. It may be that an impure form of TABUN, which has a cyanide residue, released the cyanide compound. Most attempts directed to developing strategies against chemical or biological weapons have been directed towards a single threat. The attack on Halabja illustrates the importance of careful tactical planning directed towards more than one agent, and specific knowledge about the effects of each of the agents.

Exposed civilians are particularly at risk if a war strategy aims to produce civilian casualties on a large scale. Developing medical treatment regimes for trained military personnel, who are generally young, healthy and of approximately the same weight and size, is challenging enough. But the demands of developing effective treatment regimes for children, the elderly and infirmed (sic.) is even more daunting. And the task is ever more daunting when having to treat a chemical weapons “cocktail.”

Saddam Hussein clearly intended to complicate the task of treating the Halabja victims. At a minimum, he was using Halabja as part of the Iraqi CW test program. Handbooks for doctors in Iraqi military show sophisticated medical knowledge of the effects of CW. The Iraqi military used mustard gas in the “cocktail,” for which there is no defense or antidote. And it is also worth noting that Saddam did NOT use the nerve agent SOMAN, but instead used TABUN, SARIN and VX, as I said above. This is noteworthy because it shows that Hussein’s experts were also well aware that pyridostigmine bromide—one of the chief treatments against nerve agent—is relatively ineffective against TABUN, SARIN and VX, but highly effective against SOMAN, the only agent he DID NOT use.
testimony established that Saddam possessed specific intent to commit genocide against the Kurds:

One of the president’s bodyguards brought 30 prisoners out. They were Kurds. The president himself shot them one after another with a Browning pistol. Another 30 prisoners were brought and the process was repeated. Saddam Hussein was laughing and obviously enjoying himself. There was blood everywhere—it was like an abattoir . . . .99

More specifically, further testimony established that Saddam intended to commit genocide by employing chemical weapons:

[W]e monitored . . . radio communications between the political and military leadership . . . . Saddam Hussein briefed the assembled commanders that there would be a chemical attack on Halabja and that soldiers should wear protective clothing . . . . I heard a telephone conversation between Saddam Hussein and Ali Hassan al-Majid. Saddam ordered him to form a working group. . . . After the meeting Ali Hassan al-Majid returned to the area HQ . . . . Aerial pictures of Halabja after the attack were shown to Saddam Hussein and other members of the Revolutionary Command Council.100

With Saddam’s intent established, it must be shown that the Germans were cognizant of what would occur. Once the genocidaire’s intent is established, it can then be transferred via knowledge to those who support him; thus, proving the separate specific intent of the accomplices is not required. The extent of knowledge and complicity by German chemical corporations is discussed in next part.

III.
THE ACCOMPlices: GERMAn CORPORATE COMPlicity

German corporations are guilty of criminal acts for their complicity in arming Saddam Hussein to carry out his genocide against Iraqi Kurds, even though their complicity did not violate two of the most important chemical weapons treaties. The trade in chemical weapons technology that these companies conducted was not a violation of international chemical weapons law. The 1925 Geneva Convention only prohibited the use of chemical weapons (CW), not their possession.101 The more comprehensive Chemical Weapons Convention,102 which outlawed CW possession entered into force in 1997—well after the technology was transferred from Germany to Iraq.


These transfers, however, were a violation of domestic German law. But the German bureaucracy charged with enforcing the law prohibiting the export of weapons technology to areas of tension (such as Iraq) was lax.\textsuperscript{103} Consequently, even though export laws may have been in place to restrict the kind of trade German chemical companies sought to undertake, they were easily evaded. “German export controls were . . . weak. The German Federal Economic Authority in Eschborn, responsible for enforcing what controls did exist, was a poor stepchild of the Economics Ministry. Hopelessly understaffed, its performance was rated in Bonn more by its ability to process license applications quickly than to catch potential offenders.”\textsuperscript{104}

Chancellor Helmut Kohl initially reacted to American diplomats’ numerous reports of export violations by West German companies by denying the accusations.\textsuperscript{105} However, overwhelming evidence to the contrary continued to pile up and forced the government in Bonn to open investigations.\textsuperscript{106} Eventually, German prosecutors brought cases against German companies for breaching export laws in their trade with Iraq, but these cases were largely unsuccessful.

Indeed, German companies were very careful to carry on trade with Iraq in a manner that would skirt German law. A 1991 report for the Middle East Research and Information Project describes some of the methods used to do so. Prominent firms, such as MBB, now owned by Daimler-Benz, or Degussa, are important to the process, but they work hard to never make an appearance.\textsuperscript{107}

Whether with rocket projects or the superbomb for Iraq, MBB only researches and develops; the murderous hardware itself is sent by NATO allies to foreign countries. The dirty work in Iraq is mainly done by firms which are run by former MBB people; the company itself remains outwardly clean.

There are various ways of doing this. In some cases, arms are exported to another country, such as France, and then re-exported to Germany. MBB exported BK-116 and BO-105 helicopters to Iraq using US, British or Spanish intermediaries. Another technique is for MBB employees to leave and set up new firms with the contacts and technology originally developed by MBB. A third

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103. See Marshall, supra note 20.

104. Id. (“Senior officials at the Eschborn authority . . . believe that even some of the country’s most respected companies knowingly falsified information on export license applications, apparently confident that it would not be followed up. The authority, for example, routinely issued export approvals to the prestigious Gildemeister machine-tool company, prime contractor for the $1-billion Saad 16 project at Mosul, 175 miles north of Baghdad, accepting the company’s description of the facility as a university research center. Saad 16 was later assessed to be the most ambitious weapons testing and research center in the Arab world. ‘It’s my conviction that the company knew what it was doing,’ said Hans-Dieter Corvinus, director of the export-control division at Eschborn.’”) (emphasis added).

105. TIMMERMAN, supra note 56, at 186.

106. Id. at 187.

technique is to co-produce weapons with a foreign company that is not under the same restrictions as companies in Germany. Iraq has bought 5,000 HOT anti-tank missiles and 166 launchers, plus more than 4,500 Milan missiles. In addition, Iraq ordered 1050 Roland anti-aircraft missiles. This arms trade, which would be illegal in Germany, was carried out through the France-based Euromissile company, which is 50 percent owned by MBB. 108

Beyond the violations of national law, an even greater implication here is the violation of international criminal law. While the sale of chemical weapons technology by German companies to Iraq was neither a breach of the 1925 Geneva Protocol nor a war crime, Saddam’s use of those weapons against Iranian troops was both. Similarly, while those transactions were, in and of themselves, neither crimes against humanity nor genocide, Saddam’s use of chemical weapons against the civilian population of Kurdistan was both. German corporations supplied him the means to commit all of these crimes.

What is the appropriate knowledge standard that should be used to prosecute corporations for genocide? As stated earlier, the nature of corporate involvement in genocide is such that a company is unlikely to commit overt acts such as direct killings. Instead, the company’s actions would be indirect—in the form of support for the genocidaire. Thus, complicity or aiding and abetting would be the appropriate tool for prosecuting corporations.

While there is a general agreement about the elements involved with the theories of complicity and aiding and abetting, some interpretive disconnect still exists among international courts. Consequently, the International Court of Justice (ICJ), in deciding that states could be complicit in genocide by failing to prevent it, and the ad hoc criminal tribunals, ruling on the actual commission of the crime, have rendered decisions that should be read together. Both the ICTY and the ICTR view complicity of an accomplice as depending on a predicate offence. The ICJ, though, defines complicity only with aiding and abetting. 109

108. Id.
109. Amabelle C. Asuncion, Pulling the Stops on Genocide: The State or the Individual?, 20 EUR. J. INT’L L. 1195, 1214-15 (2009). The nuances of the reading of these decisions together can lead to higher or lower proof standards for knowledge depending upon which line of reasoning is followed:

Still, the elements are not exactly the same. Individuals can be liable for aiding and abetting genocide if they: (i) render practical assistance, encouragement, or moral support to the principal which had substantial effect on the commission of the crime; (ii) knowing that the acts assisted in the commission of the specific crime; and (iii) knowing that the crime was committed with specific intent. On the other hand, the ICJ inquires into the following elements: (i) furnishing aid or assistance with knowledge of the perpetrators’ specific intent; and (ii) that the act is wrongful. Notably, the ICJ does not elaborate on the type of aid or assistance. Case law shows, however, that while the ICTY and the ICTR construe ‘assistance’ to include encouragement and moral support, the ICJ limits it to political, military, and financial aid.

Another significant difference is the value of the assistance to the perpetration of the act. To the ad hoc tribunals, the assistance must be substantial but need not be a condition precedent for the perpetration of the crime, and it may occur before, during, or after the crime. It may include a commander permitting the use of resources under
“[T]he ad hoc tribunals recognize three forms: procuring means used to commit genocide, aiding or abetting a perpetrator of genocide, and instigation. All three tribunals agree, however, that the abettor need not possess genocidal intent, but rather must only know that he is aiding genocide.”

Under either the “aiding or abetting” or “complicity” rubrics, German corporations could be prosecuted for genocide. The main difference yielded by the competing interpretations of theories of liability involves the proof of knowledge required. Attempts to defeat proof of knowledge would certainly include the defense of ignorance. For example, a high official of Germany’s federal customs office explained in an interview that “98 percent of arms exports are shipped in parts, making them difficult to track. Many goods also fall in the

his control. Conversely, substantiality of support was insufficient to engage the [Federal Republic of Yugoslavia’s (FRY)] responsibility. Despite the ICJ’s finding that the FRY’s military and financial support for the Republika Srpska was so considerable that its withdrawal would have compromised the latter’s operations, the FRY’s responsibility turned on two questions: whether the acts of the Republika Srpska and its organs were attributable to the FRY; and whether the FRY had knowledge of the Republika Srpska’s intent.

The first issue appears to require ‘control’ over the organs benefiting from the aid, which the ICJ interprets to mean ‘complete dependence’. Assistance unaccompanied by this control will not imply responsibility. The second issue presents an alternative theory for state responsibility based on rendering assistance, and that is knowingly extending assistance for the commission of genocide. This theory relies on the factual appreciation of the element of ‘knowledge’, and the ICJ requires ‘full awareness’ that the aid supplied would be used for genocide. The ICJ thus ruled that it was not established beyond doubt that the FRY was clearly aware that genocide was about to be committed because the decision to commit the same was not brought to the FRY’s attention. Yet, in a later paragraph, the ICJ admits that despite the absence of actual knowledge, the circumstances could suggest intent to commit genocide:

Nevertheless, given all the international concern about what looked likely to happen at Srebrenica, given Milosević’s own observations to Mladić, which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica.

In contrast, the ICTR inferred Blagojević’s knowledge of the perpetrators’ intent from the surrounding circumstances: the evacuation of the entire Bosnian Muslim population from Srebrenica; the separation of Bosnian Muslim men from the rest of the population; the forcible transfer of women and children; and the detention of Bosnian Muslim men in inhumane conditions. Although knowledge is an important element in aiding and abetting, the ICTR appreciates that it is to a certain extent a mental state like intent, so it also applied the inference theory. The ICJ, however, chose to apply a strict standard of proof such that the FRY was held free of responsibility for financing the Republika Srpska’s operations.


110. Asuncion, supra note 109.
‘dual-use’ category, allowing companies to claim they did not know their equipment was destined for military use . . .”

However, modern multinational corporations cannot deny knowledge of either their operations, destination of their products, or character of their trading partners. Specifically, German corporations that supplied Saddam Hussein with components that could be used in a chemical weapons program knew that he was in fact doing exactly that. Iraq’s use of chemical weapons against Iran during the 1980-88 Iran-Iraq War (outlined in Figure 2 above) was widely reported in the international press.

[The United Nations reported [in 1986] . . . that Iraq had used chemical weapons “on many occasions” against Iranian forces in the Persian Gulf war. Mustard gas

111. Nesa Starcevich, Many German Firms Helped Build Iraqi Arsenal, AP NEWS, Oct. 29, 1990, available at http://www.apnewsarchive.com/1990/Many-German-Firms-Helped-Build-Iraqi-Arsenal/id-92b14b92d9adca36724138a6a9efebb9 (“‘Made in Germany’ appears on much of Iraq’s mighty arsenal, from missiles to poison gas, rocket fuel to helicopters. Six Iraqi poison gas plants were built with German help.”).

112. See THOMAS L. FRIEDMAN, THE WORLD IS FLAT 357-58 (2005). Thomas Friedman deftly pointed out in his interview with IBM’s vice president for business consulting services, Laurie Tropiano, that MNCs are aware of what business they are doing:

What Tropiano and her team at IBM do is basically X-ray your company and break down every component of your business and then put it up on a wall-size screen so you can study your corporate skeleton. Every department, every function, is broken out and put in a box and identified as to whether it is a cost for the company or a source of income, or a little of both, and whether it is a unique core competency of the company or some vanilla function that anyone else could do possibly cheaper and better.

“A typical company has forty to fifty components,” Tropiano explained . . ., as she displayed a corporate skeleton up on her screen, “so what we do is identify and isolate these forty to fifty components and then sit down and ask [the company], ‘How much money are you spending in each component? Where are you best in class? Where are you differentiated? What are the totally nondifferentiated components of your business? Where do you think you have capabilities but are not sure you are ever going to be great there because you’d have to put more money in than you want?’”

When you are done, said Tropiano, you basically have an X-ray of the company, identifying four or five “hot spots.” One or two might be core competencies; others might be skills that the company wasn’t fully aware that it even had and that should be built up. Other hot spots on the X-ray, though, might be components where five different departments are duplicating the same functions or services that others outside the company could do better and more cheaply and so should be outsourced . . .

113. See, e.g., Bernard Gwertzman, U.S. Restricts Sale of 5 Chemicals to Iraq After Poison Gas Report, N.Y. TIMES, Mar. 31, 1984, at A1 (“[T]he State Department confirmed a report in The New York Times today that quoted American intelligence officials as saying they had evidence that Iraq had used nerve gas against Iran. Earlier the United States said it was convinced that Iraq had also used mustard gas, a blistering agent.”). Claude van England, Iraq’s Strategies Get a Desperate Edge, CHRISTIAN SCIENCE MONITOR, Apr. 4, 1984, at 18 (“[A]ccusations that the Iraqis are using chemical weapons have multiplied. Iraq denies employing any such nerve or mustard gas, but a United Nations investigation team confirmed that chemical weapons had been used in the war. And doctors in Europe, where some Iranian casualties have been treated, confirmed that the soldiers were suffering from toxic poisoning.”); Paul Keel, Victim of Gulf War Gas Burns Critical in London Hospital, THE GUARDIAN, Mar. 28, 1985.
was the agent most commonly used by the Iraqis, but nerve gas was also used . . . "[T]he use of chemical weapons appears to be more extensive than in 1984."114

Indeed, by 1985, five years into the Iran-Iraq War, "150 German companies had opened offices in Baghdad, and scores of them would later be cited for their involvement in building Iraq’s growing arsenal of unconventional weapons."115

So by the time of Saddam’s gassing of the Kurdish population in 1988, the entire international community, including German MNCs, knew of his chemical capabilities and, given his widely known disdain for the Kurds, could surmise his specific intent to eliminate them if he had the chance. At a bare minimum, the companies would have known of his intent to pursue chemical weapons production. According to Gary Milhollin, Director of the Wisconsin Project, a Washington-based research group on weapons proliferation, “[i]f you look at the scale and frequency of the exports of some of these companies, it’s clear that they were deeply involved in Iraq’s chemical weapons program. . . . They must have known what was going on.”116

It may thus be inferred that the German companies had at least one of two levels of knowledge. Broadly, the German companies certainly knew from the compounds used in Iraq’s gas attacks against Iran that their technology would be employed for chemical warfare. But the companies also had more particularized knowledge about their own operations. The experience of Germany’s Thyssen Rheininstalh Technology provides but one example. Much of the circumstantial evidence of what went on with Thyssen’s main project in Iraq makes it difficult for the company to deny knowledge of what it was doing:

Contract documents showed that the “Diyala Chemical Laboratory” that Thyssen built in Salman Park . . . was fitted out with specialized manufacturing equipment capable of handling the most toxic substances. One of the chemicals manufactured at the laboratory was phosphorus pentachloride. According to . . . a West German chemical engineer . . . the production line was unusual because phosphorus pentachloride “is a starting chemical for organic phosphorus chemical agents. There is no reason for such a special layout in normal laboratories,” he concluded. From the start, Salman Park was designed as a nerve gas plant. . . .

[F]rom the day ground was broken at the plant in late 1981, the site was heavily guarded by Iraqi soldiers, and Soviet-built SA-2 missile batteries were installed to protect against air attack . . . . A further warning signal should have gone off when the Thyssen employees contemplated a project specification that called for an expensive air cleaning plant for the laboratories . . . . The Iraqis were not known for caring about environmental protection. The only reason for such an elaborate air cleaning system was to prevent the highly volatile compounds from poisoning workers and the local population.

If that was still not enough to arouse suspicion among Germans working at

115. TIMMERMAN, supra note 56, at 189.
the site, then the “animal house,” where beagles and other test animals were kept, should have been. Once production began at Salman Park, the beagles were used to test the lethality of the nerve agents. Their cadavers were thrown out on a garbage dump in plain view.117

The companies that are implicated in supporting Saddam’s chemical weapon program have come to light via self-reporting by Saddam’s regime. Following the 1991 Gulf War, the U.N. passed sixteen resolutions instructing Iraq to dismantle and destroy its weapons of mass destruction.118 But U.N. member states, reacting to Iraq’s continued thwarting of the U.N. weapons inspections regime, continuously voiced their frustration with Iraq’s disregard for the U.N. resolutions.119 On November 8, 2002, the U.N. Security Council (UNSC) unanimously adopted Resolution 1441 providing Saddam “a final opportunity to comply with its disarmament obligations.”120

In December 2002, Iraq produced a 12,000-page weapons declaration which claimed it no longer had weapons of mass destruction. It also included a list of the companies which supplied Saddam with chemicals used to create and maintain Iraq’s chemical weapons program.121 The permanent members of the UNSC retained a copy of this document and distributed an edited version to its non-permanent members.122 While the complete declaration has never been released to the public, several individuals have obtained and released information on foreign companies who supplied Saddam with materials for his chemical weapons arsenal.123

The report implicated three German companies in building, in whole or in part, Iraq’s chemical warfare agent facilities: Preussag AG, Heberger Bau, and Karl Kolb. Preussag AG was identified as one of the main producers of nerve gas for Saddam’s regime.124 It is still in business and currently focuses on steel,

117. TIMMERMAN, supra note 56, at 106-107.
120. S.C. Res. 1441, supra note 118.
123. See Pitts Apr. 25 Letter, supra note 121.
crude oil, and natural gas production. Heberger Bau is a German-based company with additional offices throughout Europe. During the Iran-Iraq War, it constructed bunkers and “a ‘scrubbing’ unit at the Samarra poison gas works . . . an integral part of the Tabun production lines. . . . [Although] sales of an air filtration system and four poison gas scrubbers to Iraq were forbidden by export control laws . . . Heberger Bau exported them with no inquiry.” The company is still in business, specializing in civil engineering, construction, infrastructure, and renovation services.

Karl Kolb is based in Germany but has offices worldwide. The company is still in business, and produces instruments and equipment for educational and industrial laboratories. Karl Kolb assisted in building much of Iraq’s chemical weapons infrastructure. Specifically, the company built six chemical weapons manufacturing lines at the massive Samarra compound—one of the largest chemical weapons production facilities in the world in the mid-1980s. “These plants made everything from mustard gas and prussic acid to the nerve gas compounds Sarin and Tabun. The plant was designed so that the poisons were fumneled . . . to an underground packing plant, where they were put into artillery shells, rockets, and other munitions.”

To mask its actions, Karl Kolb’s management set up a subsidiary called Pilot Plant to serve as a front to execute all of the Samarra contracts with Iraq, although the same person—Helmut Maier—served as managing director for both companies. The case of Karl Kolb probably best represents the sheer determination of a modern German corporation to seek out profit, maximize its potential, and then relentlessly pursue business despite any moral or regulatory misgivings:

Despite the years of war and UN inspections, Karl Kolb GmbH, the German company that designed and built Iraq’s main CW production plants in the 1980s, never really left Baghdad. Prosecuted in Germany in 1984 for having delivered CW gear to Iraq, the company won its case, then turned around and successfully sued the German government for libel. In 1999, when the German government sent its first official trade mission to Iraq since the 1991 gulf war, Karl Kolb official Michael Fraenzel went along for the ride. That mission led to fresh business for the German chemical-equipment

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127. **TIMMERMAN, supra note 56, at 134**.
130. See **Erikson, supra note 124**.
131. **TIMMERMAN, supra note 56, at 112**.
132. **Id**.
133. Id. at 111.
broker. In 1999 and 2000, it submitted five requests to the UN Sanctions Committee to sell close to $2 million in chemical—and possibly biological—weapons-production gear. The equipment Karl Kolb wanted to sell included a $271,000 “incubator,” which was on a list of proscribed equipment because of potential weapons use. All five requests from Karl Kolb were put on hold by the U.S. government. Undeterred, Karl Kolb went back in 2001 as a prominent participant in the Baghdad International Fair.

The report also implicated four additional German companies in supplying Iraq with chemical warfare agent production or related materials: Ceilcote, Klockner Industrie, Hoechst, and Schott Glass. Ceilcote supplied Saddam with chemical warfare agency production or related materials. The company was sold to a Dutch company, Akzo Nobel, in 2007. Klockner Industrie, which also built a plant in Iraq, currently operates under the name Klockner and Co, and it produces and distributes steel and metal products. Hoechst Group supplied chemicals used to manufacture nerve gas. It is still in business working with pharmaceutical, agricultural, and chemical companies. Schott Glass supplied Iraq with chemical warfare agent production equipment or related material. It is still in business, specializing in glass and glass materials, and has subsidiaries worldwide.

Additionally, two German companies, Martin Merkel and Lewa Hebert, supplied Saddam with lab equipment, pumps, Teflon pipes, etc. Martin Merkel is still in business and produces sealant. Lewa Hebert is also still in business and produces fluid pumps and metering systems. Several more German corporations were also implicated in contributing to Saddam’s chemical weapons arsenal but they are either out of business or the extent of their contribution is unknown.

135. Pitts Apr. 25 Letter, supra note 121.
136. Id.
138. TIMMERMAN, supra note 56, at 233.
140. Pitts Apr. 25 Letter, supra note 121.
142. Pitts Apr. 25 Letter, supra note 121.
144. Pitts Apr. 25 Letter, supra note 121.
Although both the United States and the U.N. were reluctant to release the entire 12,000-page Iraqi weapons declaration, the American government recognized that Saddam had used chemical weapons against the Kurdish population. A group of attorneys representing Gulf War veterans who were exposed to Saddam’s chemical weapons obtained a copy of the weapons declaration from the Iraqi Government itself. In a letter published on a website devoted to the lawsuit, the attorneys list the companies behind the supply of chemical agents and equipment, including thirty-three companies from Europe, the United States, India, Egypt, Singapore, and Dubai. Additionally, the letter lists eighteen other companies that are either out of business or whose locations are unknown.

The thirty-three companies are broken down into four categories: (1) companies that built Iraq’s chemical warfare agent facilities in whole or in part; (2) companies that supplied chemical warfare agent production or related materials; (3) companies that supplied chemical warfare agent precursors; and (4) companies that supplied lab equipment, pumps, or Teflon pipes, etc. Of the thirty-three companies that were known suppliers, fourteen were from Germany. The remaining European corporations were based in the Netherlands, Switzerland, Austria, France, and the United Kingdom. Since the list was compiled and published, some of the companies have been bought or merged with other European corporations.

The tables in Figure 3 below stratify these corporations by type of contribution to Iraq’s chemical weapons program and their current status. Some companies identified in Figure 3 are also identified independently in the Appendix to this Article.

147. Shenon, supra note 116; Pitts Apr. 25 Letter, supra note 121.
149. Pitts Apr. 25 Letter, supra note 121.
150. Id.
151. Id.
Figure 3

<table>
<thead>
<tr>
<th>Company</th>
<th>Location</th>
<th>Status</th>
<th>Specialty</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Herberger (Heberger) Bau</td>
<td>Based in Germany but has additional offices</td>
<td>Still in</td>
<td>Specializes in civil engineering, construction, infrastructure and</td>
</tr>
<tr>
<td></td>
<td>throughout Europe</td>
<td>business</td>
<td>renovation services</td>
</tr>
<tr>
<td>2. Karl Kolb</td>
<td>Based in Germany but has additional offices</td>
<td>Still in</td>
<td>Plans and equips scientific, educational, and industrial laboratories</td>
</tr>
<tr>
<td></td>
<td>worldwide</td>
<td>business</td>
<td></td>
</tr>
<tr>
<td>3. Ludwig-Hammer</td>
<td>Based in Germany</td>
<td>Still in</td>
<td>Specializes in installation of boilers, HVAC, plumbing, pipelaying,</td>
</tr>
<tr>
<td></td>
<td></td>
<td>business</td>
<td>gas-fitting, electrical and sanitation</td>
</tr>
</tbody>
</table>
### B) Key Corporations that Supplied Chemical Warfare Agent Production Equipment or Related Material to Iraq

<table>
<thead>
<tr>
<th>Company</th>
<th>Location</th>
<th>Status</th>
<th>Specialty</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Ceilcote</td>
<td>Listed as a German corporation, AkzoNobel has its headquarters in the Netherlands</td>
<td>Still in business—part of International Protective Coatings owned by AkzoNobel</td>
<td>Develops high-build chemical resistant mortars, linings and coatings, etc.</td>
</tr>
<tr>
<td>2. De Dietrich</td>
<td>Based in France with offices worldwide</td>
<td>Still in business</td>
<td>Provides process equipment, engineered systems, and process solutions for fine chemical, chemical, and pharmaceutical industries</td>
</tr>
<tr>
<td>3. Euromac</td>
<td>Listed as Netherlands corporation, but has its headquarters in Italy and a Dutch subsidiary “Tuwi”</td>
<td>Still in business</td>
<td>Supplies machines for sheet metal working—information unavailable whether the Dutch “Tuwi” has similar activities</td>
</tr>
<tr>
<td>4. Georg Fischer</td>
<td>Based in Switzerland with offices worldwide</td>
<td>Still in business</td>
<td>Specializes in piping systems, automotive materials/processes, and electric discharge/milling machines</td>
</tr>
<tr>
<td>5. Gig</td>
<td>Based in Austria, has offices in the United Kingdom and United States.</td>
<td>Still in business</td>
<td>Specializes in facades, green buildings, glass constructions, etc.</td>
</tr>
<tr>
<td>6. Horseley Bridge</td>
<td>Based in the United Kingdom.</td>
<td>Still in business—owned by Balmoral Tanks</td>
<td>Manufactures hot press steel water tanks</td>
</tr>
<tr>
<td>7. Karl Kolb</td>
<td>See above at A.2</td>
<td>See above at A.2</td>
<td>See above at A.2</td>
</tr>
<tr>
<td>8. Klockner Industrie</td>
<td>Based in Germany</td>
<td>Still in business as Klockner &amp; Co.</td>
<td>Produces and distributes steel and metal products</td>
</tr>
<tr>
<td>9. Lenhardt—bought by Swiss Tegula AG</td>
<td>Based in Switzerland</td>
<td>Possibly still in business owned by Conzzeta</td>
<td>Owns companies that produce sheet metal and glass processing systems, foam materials, graphic coatings, etc.</td>
</tr>
<tr>
<td>10. Schott Glass</td>
<td>Based in Germany, with subsidiaries worldwide</td>
<td>Still in business</td>
<td>Specializes in specialty glass and glass materials</td>
</tr>
<tr>
<td>11. Sulzer</td>
<td>Based in Switzerland with offices worldwide</td>
<td>Still in business</td>
<td>Specializes in industrial machining and equipment, surface technology, and rotating equipment maintenance</td>
</tr>
</tbody>
</table>
### C. Key Corporations that Supplied Chemical Warfare Agent Precursors to Iraq

<table>
<thead>
<tr>
<th>Company</th>
<th>Location</th>
<th>Status</th>
<th>Specialty</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Fluka Chemie</td>
<td>Listed as a Swiss corporation, but owned by Sigma-Aldrich in the U.S.</td>
<td>Still in business owned by Sigma Aldrich</td>
<td>Produces and sells chemical and biochemical products</td>
</tr>
<tr>
<td>2. Hoechst (nerve gas)</td>
<td>Now owned by French corp Sanofi Aventis</td>
<td>Still in business owned by Sanofi-Aventis</td>
<td>Researches, develops, markets and manufactures pharmaceutical products</td>
</tr>
<tr>
<td>3. KBS-Netherlands (nerve and mustard gas)</td>
<td>Based in the Netherlands</td>
<td>Appears to still be in business, but no additional information available</td>
<td></td>
</tr>
<tr>
<td>4. Melchemie (nerve gas and mustard gas)</td>
<td>Based in the Netherlands</td>
<td>Appears to still be in business, but the companies’ website is unavailable</td>
<td>Manufactures chemicals</td>
</tr>
<tr>
<td>5. Preussag (nerve gas)</td>
<td>Based in Germany</td>
<td>Now owned by TUI AG</td>
<td>Used to be a mining corporation, now part of a travel company</td>
</tr>
<tr>
<td>6. Reininghaus Chemie (nerve gas and mustard gas)</td>
<td>Based in Germany</td>
<td>Still in business</td>
<td>Chemical company</td>
</tr>
<tr>
<td>7. Tafisa (mustard gas)</td>
<td>Listed as a German corporation, now based in Portugal</td>
<td>Now owned by Sonae Industries</td>
<td>Produces wood-based panel and laminate/resin</td>
</tr>
<tr>
<td>8. Weco (nerve gas)</td>
<td>Based in Germany with offices worldwide</td>
<td>Still in business</td>
<td>Appears to be an electronic component manufacturing corporation</td>
</tr>
</tbody>
</table>
D. Corporations that Supplied Lab Equipment, Pumps, or Teflon Pipes, etc.

<table>
<thead>
<tr>
<th>Company</th>
<th>Location</th>
<th>Status</th>
<th>Specialty</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. BDH</td>
<td>Listed as a U.K. corporation, now owned by VRW based in the United States</td>
<td>Acquired by Merck, now owned by VWR</td>
<td>Chemical/laboratory supply and distribution company</td>
</tr>
<tr>
<td>2. Martin Merkel</td>
<td>Based in Germany, operates factories in Denmark, France, Ireland, Italy, and Malaysia</td>
<td>Still in business</td>
<td>Manufactures hydraulic and specialty seals</td>
</tr>
<tr>
<td>3. Gallenkamp</td>
<td>Based in the United Kingdom</td>
<td>Still in business</td>
<td>Builds, designs, and maintains testing chambers and controlled environments</td>
</tr>
<tr>
<td>4. Hauke</td>
<td>Based in Austria</td>
<td>Still in business</td>
<td>Produces pumps and pump accessories</td>
</tr>
<tr>
<td>5. Lewa Hebert</td>
<td>Based in Austria</td>
<td>Still in business</td>
<td>Produces pumps and pump systems</td>
</tr>
<tr>
<td>6. Oxoid</td>
<td>Based in the United Kingdom</td>
<td>Still in business</td>
<td>Specializes in microbiology products</td>
</tr>
<tr>
<td>7. Pullen Pumps</td>
<td>Based in the United Kingdom</td>
<td>Now owned by Armstrong, also in the United Kingdom</td>
<td>Produces pumps and booster sets</td>
</tr>
<tr>
<td>8. Weir</td>
<td>Based in the United Kingdom</td>
<td>Still in business</td>
<td>Engineering solutions business</td>
</tr>
</tbody>
</table>

Most of the companies involved in arming Saddam’s regime are still in business either as they were constituted at the time or in a new form through mergers, acquisitions, or reorganizations. Although some may no longer engage in the type of conduct they did in the 1980s, they remain culpable for that conduct. There is no statute of limitations on genocide.

IV.
THE STRATEGY: PROSECUTION V. LITIGATION

Civil litigation has its merits. Large class action lawsuits can yield significant cash settlements or judgments, as in the case of German corporate reparations for slave and forced labor employed during the Third Reich.152 This

152. See EIZENSTAT, supra note 27.
type of litigation, however, often does not succeed. For example, personal injury class action lawsuits were attempted in the 1990s against German corporations on behalf of American Gulf War veterans who were exposed to chemical weapons in Iraq “in a joint effort of discouraging companies to sell dictators the means to have weapons of mass destruction.”\footnote{Letter from Gary Pitts, Pitts & Associates, to Gulf War Veteran Clients (Mar. 23, 2012), available at http://www.gulfwarvetlawsuit.com/march_23_2012_status-update_report.pdf.} These efforts failed due to lack of jurisdiction in the United States and the unwillingness of foreign counsel to partner in the civil litigation.\footnote{Id.}

When pressure from class action lawsuits does succeed, settlement is the typical outcome. The reparations gained from such a settlement can be important for victims.\footnote{John C.P. Goldberg, The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs, 115 YALE L.J. 524, 544 (2005) (“Locke’s social contract theory claims that victims of wrongs possess a natural right to reparations from wrongdoers.”).} Compensation is the core commodity in civil litigation. Thus, companies can pay the cost of their negligence or complicity and move on. But when the underlying crime is genocide, should complicit multinational corporations be permitted to simply write a check and move on?

Genocide is the “crime of crimes.”\footnote{Grant Dawson & Rachel Boynton, Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations Ad Hoc Tribunals, 21 HARV. HUM. RTS. J. 241, 269 (2008) (citing Prosecutor v. Stakic, Case No. IT-97-24-T, Judgment, ¶ 502 (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2003)).} Because of the insidious nature of hatred motivating perpetrators to wipe out an entire race, thereby making the successful completion of genocide an existential question for the victims, it is the most heinous of crimes. When genocide was outlawed by treaty in the wake of the Holocaust, the idea of a perpetrator being allowed to skirt prosecution for this crime was deemed abhorrent. As the British delegate to the Genocide Convention negotiations observed in 1948: “If genocide were committed, no restitution or compensation would redress the wrong. The convention would be rendered valueless if it were couched in terms which might allow criminals who committed acts of genocide to escape punishment by paying compensation.”\footnote{Hirad Abtahi & Philippa Webb, 2 THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES 1778 (2008). Other delegates agreed. For example, the representative from the Philippines said, “An award of damages would not be an adequate substitute for the punishment of the individual criminal.” Id.}

Both the Genocide Convention text and the travaux preparatoires are ambiguous about whether corporations may be prosecuted for committing the ultimate crime of genocide.\footnote{See Michael J. Kelly, The Status of Corporations in the Travaux Préparatoires of the Genocide Convention: The Search for Personhood, 43 CASE W. RES. J. INT’L L. 483 (2010).} The term “person” is used throughout, without clarification, and could be read to include both natural and juridical persons. The current Legal Advisor to the U.S. State Department believes that corporations are included within the definition of “person” and may, therefore, be
prosecuted.159 Later international criminal law treaties and tribunal statutes, however, specifically exclude corporations from criminal jurisdiction.160 Nevertheless, the Genocide Convention does not. Thus, the possibility of prosecuting corporations for genocide is not precluded.161 Indeed, more recent efforts at codifying crimes against humanity in a single treaty have specifically recognized corporate criminal liability.162

This interpretation problem as it relates to the Genocide Convention may be remedied by the ICJ. Article XI of the Genocide Convention identifies the ICJ as the authoritative interpretive body with respect to ambiguities within the treaty. Consequently, it is the ICJ’s job to settle the question of whether corporations can be prosecuted for committing genocide. In the wake of the ICJ’s recent decision that states can be held accountable for committing genocide,163 a similar outcome with respect to corporations is not beyond the realm of possibility.

But in order to enable the ICJ to clarify the status of corporations under the Genocide Convention, the ICJ’s jurisdiction must be triggered. This can be accomplished in three ways: by one of the ICJ State Parties requesting clarification, by two states bringing a contentious case before the Court in litigation, or by an approved U.N. body seeking an advisory opinion on the matter. Of these options, a question referred to the ICJ by the U.N. General Assembly would carry the most political and moral weight.

Once the ICJ recognized corporations as potential perpetrators of genocide, an amendment of the Rome Statute would still be necessary in order to prosecute corporations in the International Criminal Court (ICC). Currently, like other modern international criminal tribunals, the Rome Statute excludes corporations from its jurisdiction. This was not an oversight at the negotiating conference, neither was the exclusion well-considered. Rather, the conference was pressed for time and the matter was deemed too fraught to settle quickly. The drafters at the Rome Conference also famously dodged the difficult question of defining the crime of aggression by inserting a placeholder in the treaty and promising to come back in later years to address it.

161. Kelly, supra note 158.
163. Application of the Genocide Convention (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, ¶ 140 (Feb. 26). While prior ICJ decisions have held states accountable for punishing those who commit genocide, this was the first time the ICJ had confirmed that states could themselves be liable for committing genocide.
Because the Rome Statute employs the precise definition of genocide contained in the Genocide Convention, as do all the other statutes establishing international criminal tribunals with jurisdiction over the crime of genocide, great weight would be given to an ICJ opinion placing corporations within the class of perpetrators who can commit genocide. State parties to the Rome Statute would then be under pressure to consider amending the ICC’s jurisdiction to allow prosecuting corporations.

CONCLUSION

Although “social responsibility” has become a theme of corporate culture in some societies, social callousness is unfortunately a theme for German corporations that pervaded their operations throughout the twentieth century. Though the same may be said about companies in other countries, the extent and severity of examples offered by Germany’s private sector are stark. Indeed, the sheer gravity of German corporate complicity to atrocities and human rights abuses places the German corporate sector in a category all by itself.

From the invention, development, production, and deployment of chemical weapons during the First World War to direct participation in the Holocaust and the deployment of poison gas capabilities to Saddam Hussein during the Iran-Iraq War, German corporations have caused widespread human suffering on a horrific scale. This disregard for life in pursuit of profit manifests itself repeatedly. Inexplicably, German companies seem unable to learn the lessons of the past as they continue to engage in egregious conduct.

Emblematic of such callousness is the reaction of the German corporation Chemie Grünenthal during the 1960s to victims of one of its biggest selling drugs—thalidomide:

[By] early 1959, reports started to surface that the drug was toxic, with scores of adults suffering from peripheral neuritis damaging the nervous system. As profits kept rolling in, however, Chemie Grünenthal suppressed that information, bribing doctors and pressuring critics and medical journals for years. Even after an Australian doctor connected thalidomide with deformed births in 1961, it took four months for the company to withdraw the drug. By then, it is estimated to have affected 100,000 pregnant women, causing at least 90,000 miscarriages and thousands of deformities to the babies who survived.164

Within Germany and abroad, thalidomide was widely prescribed by doctors to pregnant women for morning sickness. Babies who survived thalidomide suffered often irreparable internal injuries in addition to the heart-wrenching external deformities that came to characterize the tragedy: missing appendages or other body parts such as ears, truncated limbs, two-fingered claws instead of

164. Roger Williams and Jonathan Stone, The Nazis at the Heart of the Worst Drug Scandal of All Time, NEWSWEEK, Sept. 17, 2012 (“Despite the overwhelming evidence that thalidomide caused miscarriages and birth defects, Chemie Grünenthal for years fought to resist paying the necessary compensation required for a lifetime of care—and still does.”).
hands or feet, thalidomide “flippers” instead of arms and legs.165 Chemie Grünenthal shunned full responsibility until 2012 when, after fifty years, it offered a corporate apology for the suffering it needlessly caused and covered up.166 Nevertheless, the company’s reckless infliction of harm on women and unborn children for profit drew serious criticism. For example, former Sunday Times of London editor Sir Harold Evans publicly accused Chemie Grünenthal of committing a crime against humanity.167

The complicity of German chemical companies in the development of Saddam Hussein’s chemical weapons war machine is a more recent case in point. The chemical weapons were initially created to counterbalance Iran’s numerical troop advantage during the 1980-88 Iran-Iraq War. But Saddam then unleashed his chemical arsenal against the Kurdish population of northern Iraq in a premeditated genocide.

Saddam’s German suppliers knew of his militarization of the materials they provided him, were aware of his use of those weapons against Iran, and were certainly cognizant of his efforts to quash Kurdish support for Iran during the war.168 Thus, it would have been no surprise that Saddam deployed the same weapons he had used against Iran against Iran’s allies within Iraq—Kurdish insurgents. Saddam’s targeting of the Kurdish civilian population would have been even more predictable since he was already in the process of removing them from strategic cities in northern Iraq en masse—itself a genocidal act.169 Gassing them with the weapons at his disposal was a foreseeable next step. Yet the very German corporations that enabled Saddam to carry out the worst genocide of the 1980s continued doing business with him after he committed this crime.170

Domestic German authorities’ lack of enthusiasm for prosecuting MNCs for atrocities committed abroad offers little incentive for companies to refrain from such conduct. The inability to prosecute corporations at an international level offers even less incentive. A reexamination of the 1948 Genocide Convention by the ICJ would alter this calculus since it is the authoritative interpretive body of this treaty. If the ICJ found companies capable of committing genocide, as they have recently found states, then the sense of impunity MNCs feel with respect to their international operations would be seriously blunted.

168. See supra Part III.
169. Genocide Convention, supra note 68, art. 2(c).
170. TIMMERMAN, supra note 56.
Such a ruling would build pressure to define juridical persons, such as corporations, as prosecutable within the purview of tribunals such as the ICC. While the ICC would not be able to try perpetrators of the Kurdish genocide due to temporal restrictions on their jurisdiction, an international criminal tribunal empowered to investigate the conduct of such companies going forward would offer a significant incentive for corporations to refrain from such conduct in the first place. Moreover, national authorities might be more prone to open cases against those companies if given the legitimizing mantle of a supportive ICJ opinion.

The rights and privileges accorded to MNCs during the age of globalization and free trade have been enormous. German companies have been at the forefront of leveraging these advantages for massive profits. The cost of doing so has, in cases like the Kurdish genocide, been high and has not been borne by the companies or Germans themselves. The time has come for corporations like those in Germany to take on the obligations that should accompany the rights they already enjoy. An obligation to refrain from participating in the commission of genocide is not a particularly heavy burden.
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APPENDIX

UNCLASSIFIED LIST OF GERMAN CORPORATIONS IMPLICATED IN DEVELOPING IRAQ’S CHEMICAL WEAPONS PROGRAM

[The text continues with the list of German corporations implicated in developing Iraq's chemical weapons program.]

GERMANY

Report Names Firms Involved With Iraqi Arms

Government Investigations Detailed

[Further details on government investigations into the involvement of German firms in Iraq's chemical weapons program.]
were tightened when it became known that some special vehicles, for instance, up to then did not fall under the embargo.

Even in the case of the Kdf-Kohl connection, matters are proceeding only slowly. The prosecutor's investigation took seven years, and it will take several more weeks until it is decided whether initiation of mass proceedings will be applied for.

The hand-to-hand between legal and illegal transactions is obviously unclear: the investigators are moving on very difficult ground. They are focusing on three groups: First, it is relatively easy to monitor participants in large projects, for on the basis of the necessary knowledge of how only a handful of first-class industries come into consideration. These, however, frequently send medium-sized subsidiaries or companies controlled by subsidiaries into the field, or deliver supplies via foreign partners. Second, also readily ascertainable is the small group of mercenaries who do not flinch from doing business involving biological and chemical weapons. Third and last, the investigations are trying to shed some light on the sentiments surrounding the group of mercenary agents who arranged Husay's business deals.

1. No Findings

ABB Acra Brown Boveri AG, Mannheim—Electrical engineering (sales: 6.1 billion German marks [DEM] 34,100 employees). Allegation: Electrical equipment for smelting furnaces in gun factory. Status of the case: "Review by Main Finance Administration in Mannheim shows only exports of general electrical equipment exempt from licensing. In addition, delivery of smelting furnaces exempt from licensing."

AEAG AG, Berlin and Frankfurt/Main—Electrical engineering (sales: DEM 7.2 billion, 85,600 employees). Majority shareholder is Daimler-Benz (approximately 60 percent), the rest are scattered holdings. Allegation: Production line for weapons and armaments. Status of the case: "Customs Criminal Investigation has no findings relevant to Iraq. Clear correlation to facts and circumstances on the basis of DER SPIEGEL data not possible. (Domestic auxiliary supplies to the actual exporter?)."


Bilsan Maschinenbau GmbH, Hamburg—Production and marketing of grinding machines. The parent company (100 percent) is Koeber AG (engineering sales: DEM 1.1 billion, 6,400 employees), Hamburg, Allegation: Computer-directed grinding installations for missile research establishments. Status of the case: "Land Office of Criminal Investigation in Darmstadt found no indications of illegal exports."

CBV Blankenfelde Fahrzeug GmbH & Co. KG, Wuppertal—High-capacity cars, low-weight platforms and dumping wagons, chassis for containers and superstructures (sales DM45 million, 220 employees). Allegation: Special transporters were exempt from licensing, obligation to obtain a permit being introduced."


Dovpas AG, Frankfurt/Main—Precious metals (sales: DM14.4 billion, 32,400 employees in the corporation). Parent company of Leybold AG. Minor shareholdes (with 35 percent) of Dovpas is GfS Goldschmidtt AG Chemiewerke mbh, Dusseldorf (Hensel family, Dresdner Bank, Muenchener Ruckversicherungs, 45,000 free shareholders). Allegation: Equipment for chemical weapons factory. Status of the case: "Customs Criminal Investigation has no findings relevant to Iraq. Clear correlation to facts and circumstances on the basis of DER SPIEGEL data not possible. (Domestic auxiliary deliveries to other exporters?)."

Drahtgieh AG, Hamburg—& Oil (sales: DM11.5 billion, 3,100 employees). Allegation: "Military equipment." Status of the case: "Customs Criminal Investigation has no findings relevant to Iraq."


Infrakraft—Alligation: installations for the preparation of chemical production. Status of the case: "The Cologne Customs Criminal Investigation Office has no findings.

Iveco Magirus AG, Ulm—Medium-sized and heavy trucks (sales: DM2.5 billion, 6,800 employees). Allegation: carrier vehicles for mobile toxicological laboratories. Status of the case: "Exports of eight vehicles with laboratory installations by the Rhein-Bayern firm was carried out with negative certificate."

KWG—division of Siemens AG, Munich, until business year 1980/81 Kraftwerk Union AG, Maschinenfabrik Augsburg-Nurnberg. Allegation: nuclear technologies. Status of the
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case. "There supposedly were negotiations with Iraqi authorities between 1978 and 1981. No contract was concluded."


MAN-Roland Druckausleger AG, Offenbach—98.1 percent owned by MAN AG, Munchen. Allegation: transport equipment. Status of the case: "MAN-Roland produces dancing machines. Probably mistaken for the Roland antisnake missile, which was delivered to Iraq by the MBB joint enterprise, Eurosturm."


Mannofab GmbH, Munich—financial services (staff of 400). The Leitz firm was sold meanwhile, we have Leitz. Allegation: Leizu. Status of the case: "Mentioned only as owners of Lezio."

MBB-Messerschmitt-Berliet-Blohm GmbH, Ottobrunn—development, production, and sale of products of aviation and space technology, defense technology, naval technology, of machine, vehicle and equipment engineering, electrical and electronics technology; for example, helicopters, Torpedo jet fighters. Status of the case: "Examine under foreign trade law (AWP); subcontract for the chemical weapons factory."

Metalvaux-aux-Roses. France. Hot and Roland system; electronics and test equipment for Condor 2 missiles; laboratory equipment. Status of the case: "FAB-bomb delivery of project studies to AGB was exempt from licensing according to the prosecutor of the Land Court, Munich II, since they were not manufacturing records. As to SAAD 11, Condor, electronics, and test for Condor 2, laboratory equipment—the prosecution of the Land Court Munich II has not initiated formal investigations due to lack of sufficient indications of illegal exports (domestic transactions with Consem subsidiary, FGB). Helicopters—as far as no unauthorized exports were found."

Heinrich Mueller-Machinenfabrik GmbH, Pforzheim—founded in 1908, ordinary capital DM400,000. 80 employees. Allegation: technical improvement of the Scud B missile. Status of the case: "The exports carried out were exempt from licensing. Meanwhile the injection nozzle now requires an export license."

Plato-Kasino (Josef Kaslin), Neustadt an der Isar. Allegation: basics. Status of the case: "Delivery of the small quantities of sensors (but not the full producing them) was exempt from licensing."

Schinner-Platte-Steilmann, Krefeld. Allegation: production plant for weapons and ammunition. Status of the case: "Reviewed by Main Finance Administration in Dusseldorf: the exports were exempt from licensing."

Schiitl, Kraus & Co. GmbH, Vebro—mining equipment, lead extraction devices, pumps, and compressors, suction and dust removal (200 employees). Allegation: authorization needed for material testing. Status of the case: "Revise. The Custom's Office in Dusseldorf had no finds concerning foreign trade regulations."

Siemens AG, Berlin-Munich—third-largest German industrial enterprise (sales 1989: DM1.1 billion, 385,000 employees, 53,000 shareholders), electrical products. Allegation: parent company of Interpol GmbH in Berchtesgaden (nuclear technology), computer guidance system for gas factories, echo-sounder for mine research. Status of the case: "According to the Customs Criminal Institute, there are no findings relevant to Iraq. The basis of the SIPEGL data they cannot be correlated to concrete states of affairs. (Probably they were normal domestic auxiliary delivery to other firms, which were exporters.)"

Sigma Chemie, Oberhaching. Allegation: chemical biological raw materials. Status of the case: "It could never be ascertained whether delivery actually took place. Furthermore, because of the extremely small quantities of the chemicals (not the full producing them) they would have been exempt from licensing."

WEST EUROPE

Faes AG, Lauf, headquarters Nuremburg—commercial vehicles, defense technology, Allegation transport vehicles for tanks. Status of the case: “Main Finance Administration in Nuremburg is investigating.”

Ferrestag AG, Ens—international trade in iron and steel, industrial plants, equipment, forgings, infrastructure projects (sales: DM44.3 billion; 725 employees; sole shareholder is MAN AG, Munich. Allegation: general contractor for the construction of a gas factory. Universal Forges. Status of the case: “Customs Investigation Office in Duiseldorf and Bochum prosecutors are investigating (Project Taj)”.

Grasser GmbH, Fließbach/Höss—partner is Rami Al Khatib, Allegation: business arrangement for a plant to construct a gas factory. Allegation of business deals, investigations still ongoing.”


Hitachi AG, Ens—leading German construction enterprise (sales: DM5.5 billion; 26,400 employees). Allegation: construction of the foundation of a gas factory. Status of the case: “Included in the investigations of the Customs Criminal Institute in Duiseldorf and the Bochum prosecution regarding Taj.”

Jürgen, Frankfurt/Main. Allegation: construction service for chemical weapons factory. Status of the case: “Located further south, since the owner (Barbour) went abroad and has meanwhile been murdered.”


Interaton GmbH, Bergisch Gladbach—planning, building and putting into operation of, among other things, breeder reactors, high-temperature reaction and
research reactor; uranium enrichment plants; superconductor magnets (sales: DM142 million; 1,370 employees), subsidiary of Siemens AG, Munich. Allegation: nuclear technology. Status of the case: “Investigations underway. Under pressure by the federal government, Siemens has terminated training program for Iraqis and will not deliver shop for building pipelines.”


Leybold AG, Hannover (no longer included in latest list)— vacuum technology, coating installations (sales: DM1 billion; 5,600 employees), old shareholder in Degen AG, Frankfurt, compete there. Allegation: there is a coating installation for gas production. Status of the case: “According to DERR SPIEGEL of 6 August 1991, delivery of three coating installations for Taj (also, see Ferrousal), according to DERR SPIEGEL of 13 August 1991, delivery of auto-firing installation of the firm of Schmitt, Kranz & Co. with export licence.”

LOI Essen Industrieunterlagen GmbH, Essen— super components for steel production. Status of the case: “Included in the investigation of the Customs Investigation Office in Duiseldorf and Bochum prosecution regarding Taj.”

Mannesmann Demag AG, Duisburg—machine and plant construction (sales: DM1.1 billion; 19,800 employees), subsidiary of Mannesmann AG, Duiseldorf. Allegation: production of nuclear technology components for gas factories. Status of the case: “Included in the investigation of the Customs Investigation Office in Duiseldorf and Bochum prosecution regarding Taj.”


Müller-Benz Flugzeugbau GmbH & Co KG, Kaufbeuren—head manager: Anton Eynle (mentioned separately by Bremen), special vehicle of army, household, workshop, ambulance and radio vehicles (sales: DM24 million; 20 employees). Allegation: mobile radiological laboratory. Status of the case: “Main Finance Administration in Munich has not found unauthorized exports. There were merely accidental deliveries to Juwa-Magna Deutz. Main Finance Administration in Munich continues investigations.”


SMS Haenelwerk GmbH, Duiseldorf—machines and complete installations for the forging and metal extrusion industry (sales: DM144 million; 435 employees), subsidiary of SMS Schirrmann-Schnepp AG, Duiseldorf. Allegation: forging presses for gas factory. Status of the case: “Included in investigations by the Customs Investigation Office in Duiseldorf and Bochum prosecution regarding Taj.”

Tatra Tiefbauhandel GmbH, Dettingen (no longer included in the list)—drilling equipment for gas factory. Status of the case: “Included in investigations by Bochum prosecution of the Taj complex, as well as investigations by Bremen prosecution in the break proceedings.”
3. Deliveries via Foreign Countries

Assa Abloy AB (Sweden):—90 percent of shares owned by ABB. Assa Abloy AB, Umeå, Sweden. Allegation: Equipment for security systems, including doors, locks, and other security devices for buildings. Status of the case: “Investigations underway at the Swedish prosecutor’s office.”


4. Criminal Proceedings Initiated


GPA (Wienercenter Austria). Allegation: “Concerted activities” of chemical companies. Status of the case: “Criminal proceedings initiated by the Austrian prosecutor.”


5. The Karl Kohl Connection

Karl Kohl GmbH & Co. KG, Dresdner-Buchholz—military technology. Allegation: Equipment for the production of chemicals, explosives, and other substances. Status of the case: “Criminal proceedings against responsible parties underway at the German prosecutor’s office.”

Laubig, Hannover—equipment for armament factories. Status of the case: “Criminal proceedings against responsible parties.”


Proos AG, Hannover—conclusion of the Kohl enterprise. Status of the case: “Criminal proceedings underway at the German prosecutor’s office.”

Quint: Allegation: “Concerted activities” of chemical companies. Status of the case: “Criminal proceedings initiated by the German prosecutor.”

Rhein-Laboratorium, Allegation: “Concerted activities” of chemical companies. Status of the case: “Criminal proceedings initiated by the German prosecutor.”


Carl Zeiss, Jena—equipment for the production of chemicals, explosives, and other substances. Status of the case: “Criminal proceedings against responsible parties.”

Was auxiliary supplier of Karl Kohl.”
6. Status of the Case: **"**


Georg Fischer AG, Schaffhausen—mechanical engineering (sales DM3.3 billion). Allegation: equipment for gas factories. Status of the case: “It is a Swiss enterprise in Schaffhausen; ancillary delivery to Tajikistan.”

Industrie-Werke Karlheinz Angerbüh AG, Karlsruhe—regulating technology, welding engineering, defense technology, packaging, and trade services (sales: DM-1.4 billion; 4,000 employees). Allegation: machine tools. Status of the case: “**”

Mannesmann-Recnort—a one of the more than 250 subsidiaries and associated companies of the Mannesmann corporation at home and abroad. Allegation: gun components. Status of the case: “This concerns the Belgian Mannesmann subsidiary, O.I. Records NV SA. Transit of parts which the firm intended to deliver for the 'big gun war' were held up in Frankfurt.”


**Companies Deny Charges

GEORGE and Dunn DZELT in a German 15 Feb 1991 p 12


[Test] The interim report to the Federal Government on the investigation by German authorities of those suspected of illegal arms exports to Iraq, published recently by DIE WELT (“Saddam Hussein’s German Business Partners,” DIE WELT, 11 February) notes with a lively report several radio and television stations aired contributions. Daily newspapers published excerpts. Managers of companies mentioned on the list of U.S. Senator Helms sent comments to DIE WELT. In the following, the replies by the companies are printed in their exact wording.

Dynamit Nobel AG, Triningen: “The list also mentions our company, accusing Dynamit Nobel of having delivered a production plant for arms and ammunition. The Office of the Public Prosecutor in Bonn is said to be investigating. Concerning that, it may be stated that Dynamit Nobel did not deliver any production plant for arms and ammunition to Iraq, and also did not in any other way participate in building such a plant. It is also not correct that the office of the Public Prosecutor in Bonn is conducting investigations of it.”

Eltron GmbH, Gräfelfeld near Stahlburch, Heidelberg: “You write that Eltron GmbH in Heidelberg is suspected of having bad deals with Saddam Hussein. This accusation is false. Investigations by the public prosecutor into that were halted on 8 February.”

On 6 February the Office of the Public Prosecutor in Heidelberg informed Eltron: “Regarding preliminary proceedings for violation of the Military Weapons Control Law and the Foreign Trade Law. Dear Ladies and Gentlemen, the investigation pending in the Office of the Public Prosecutor in Heidelberg was stopped as of today in accordance with Article 76, Section 2, of the Code of Criminal Procedure.”

Gildemeister Projekt GmbH, Bad Vöslau, 1. Gildemeister Projekten delivered and installed laboratory and workshop facilities for universal applications for the SAAO 10 project. That project does not involve an industrial plant, but rather laboratories and workshops, comparable to facilities at universities, technical educational establishments, and testing institutes, that is to say, facilities which are not specifically built for military purposes. The equipment delivered is not suitable for the development or production of NBC [Nuclear Biological Chemical] weapons. Development know-how was not included in the framework of the order. Half of the order