HAGUE JUSTICE JOURNAL | JOURNAL JUDICIAIRE DE LA HAYE
VOLUME/VOLUME 2 | NUMBER/ NUMÉRO 1 | 2007

Lessons Learned:

Chemicals Trader Convicted of War Crimes[1]

Santiago Oñate, Brigitta Exterkate, Lisa Tabassi and Erwin van der Borght[2]

"...It has been established that the accused, consciously and solely acting in pursuit of gain, has made an essential contribution to the chemical warfare program of Iraq during the nineteen eighties. His contribution has enabled, or at least facilitated, a great number of attacks with mustard gas on defenseless civilians. These attacks represent very serious war crimes..."[3].

Introduction

On 23 December 2005, the District Court of The Hague, Criminal Law Section, handed down its judgement in the prosecution of Frans van Anraat, a Dutch businessman, finding him guilty, under Dutch law, of complicity in war crimes committed by the former Iraqi regime[4]. The Court determined that Mr van Anraat knowingly and intentionally supplied chemicals to the former Iraqi regime which were used to produce chemical weapons used by Iraq in Iraqi Kurdistan and in the Islamic Republic of Iran during the period 1984-1988. Mr van Anraat was acquitted of a second charge: complicity in genocide. Although the Court determined that the attacks in Iraqi Kurdistan (including the use of chemical weapons) formed part of a genocidal campaign in the period 1985-1988[5], the Court was

[1] In a slightly revised form this article has been published previously in 'Chemical Disarmament', volume 4, number 4, at pp. 19-31.
[2] The authors are, respectively, Legal Adviser, Senior Legal Officer and Legal Officer in the Technical Secretariat of the Organisation for the Prohibition of Chemical Weapons (OPCW), and Project Manager with an international humanitarian non-governmental organisation. The views expressed are the authors' own and cannot be attributed to the OPCW or its members.
[3] Section 17 of Judgement LJN: AX6406, Rechtbank's-Gravenhage, 09/751003-04 English Translation, available at http://www.haguejusticeportal.net/eCache/DEF/4/497.html ("Judgement").
[4] "Saddam Hussein Al-Tikriti and/or Ali Hassan Al-Majid Al-Tikriti and/or (an) other person(s) (who so far has/have remain unknown)" (Judgement, para.2). The Court concluded that the nature of the genocide offence itself implies the involvement of a large group of persons and that under international law the identity of the perpetrators does not need to be established in order to be able to sentence someone for complicity in genocide. (Judgement, subsection 7.9).
[5] Judgement, subsections. 7.4-7.6.

not convinced that the accused had actual knowledge of the genocidal intention of the perpetrators.

The crime occurred prior to the entry into force of the Chemical Weapons Convention[6] (Convention), nevertheless, there are a number of aspects of this case which would be of particular interest to States Parties to the Convention. Among these would be the methods used by Mr van Anraat to circumvent export controls, including transhipment and mis-labelling of chemicals – topics which are of concern in States Parties' non proliferation efforts today. Evidentiary aspects of interest include the discussion on the method used to prove
that the chemicals sold by Van Anraat were the chemicals in the munitions which caused human death and bodily harm, as well as Mr van Anraat's knowledge and intent at the time of the sale. Finally, the prosecution of international crimes in national courts merits a separate discussion of the mutual relationship between the applicable provisions of international and national law and other features uniquely interesting in this case.

Background

During 1984 to 1988, Mr van Anraat, by means of one or more companies either owned by him or in which he had actual control, supplied several shipments of thiodyglycol[7] (TDG), a key component of mustard gas, and trimethyl phosphite[8] (TMP), a component to produce nerve agent, to the State Organisation for Oil Refineries and Gas Industry (SORGI) in Iraq. Initially the chemicals were obtained from producers in Japan via an intermediary. Later, when the exchange rate for the yen was not as advantageous, he obtained them from producers in the United States via the same intermediary.

During this period, Iraq was engaged in armed conflict with the Islamic Republic of Iran, a conflict which lasted from 1980 to 1988. Beginning in 1984, allegations of the use of chemical weapons during that conflict were reported by the media as well as investigated and verified by the United Nations (UN)[9]. Additionally, in 1987-88, settlements in Iraq primarily inhabited by persons of Kurdish descent were attacked with chemical weapons by Iraqi warplanes. The attack on the village of Halabja, in particular, received widespread media coverage, including explicit photographs of the victims.

[6] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Paris, 13 January 1993, entered into force in 1997, UN document A/RES/47/39.
[7] Thiodyglycol has been included on the list of Schedule 2 precursors in the Annex on Chemicals to the Convention.
[8] Trimethyl phosphite has been included on the list of Schedule 3 precursors in the Annex on Chemicals to the Convention.
[9] UN Documents S/16433, dated 26 March 1984, and S/18852, dated 8 May 1987, Add. 1 dated 18 May 1987 and Corr.1, dated 26 May 1987.

Mr van Anraat's ex-wife, who was living with him at the time, testified as a witness that he had an interest in world events and regularly read newspapers and magazines and watched the news on television. Furthermore, they often discussed events in Iraq, "because Iraq had become part of their lives."[10]

From 1984 onwards, in response to the UN findings, a number of governments introduced measures to control the exports of chemicals, including TDG, which could be used for the production of chemical weapons. The measures included licensing and end-use certificates. In the study prepared by the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) on the procurement methods used by Iraq for its chemical weapons programme, UNMOVIC indicated that the measures did not completely stop the flow for the following reasons:

- A network of a chain of brokers, intermediaries, bank accounts and transportation companies enabled goods to be obtained indirectly and false end-use certificates to be issued;
- Procurement was arranged via trading companies operating in third countries where export controls were not introduced, developed or fully implemented;
- Legitimate commercial organisations in Iraq, such as SORGI, were used as front companies to procure the goods;
- To cover the final destination of the goods, brokers arranged for multiple transhipments by freight handlers;
- Goods were delivered to a neighbouring country in the region where they were transported to Iraq by an Iraqi shipping company.[11]

UNMOVIC's report showed that over 1,000 tons of chemicals were obtained in this way for the production of chemical warfare agents. Foreign suppliers provided approximately 95 per cent of the precursors used by Iraq to produce chemical weapons. Procurement by this mechanism significantly increased the final cost of the goods.[12]

In 1989, Mr van Anraat was arrested by Italian authorities at the request of the United States government, for violation of US export controls. The initial extradition request was rejected by the Italian court. By the time the Italian Supreme Court overturned that decision, Mr van Anraat had already fled the jurisdiction to Iraq. He remained there until 2003, when he fled to the Netherlands to avoid the invasion of Iraq by US and UK forces. In the Netherlands, he gave a television interview describing his experiences which drew the attention of the National Police Agency. He was placed under investigation and arrested in 2004.[13]

[10] Judgement, subsection 11(o) and 12.8-12.9.
[11] Annex to UN document S/2005/742, dated 29 November 2005, paragraphs 8-11.
[12] Ibid, paragraphs 12-14.
[13] Presentation by the Netherlands Public Prosecution Service and the National Police Agency, International Crimes Unit, at OPCW Headquarters, 13 July 2006.

By that time (2004) the charges against Mr van Anraat in the United States for export control violations were time-barred and had been dropped. However, in a growing number of jurisdictions, including the Netherlands, international crimes such as war crimes and genocide are not subject to a statute of limitations and can be prosecuted regardless of when they were committed.[14] Equally and increasingly, international crimes are considered to be crimes of universal jurisdiction, allowing prosecution regardless of where they were committed or the nationality of the accused or the victims.

In the indictment against him, Mr van Anraat was charged with complicity in war crimes and complicity in genocide.

Procurement through Mr van Anraat

Mr van Anraat told the police investigators during his interrogation that he had first moved to Baghdad in 1978 where the office of "Company 3" was established. When the Iraq-Iran war broke out in 1980, he joined a number of ex-employees of "Company 3" to work for "Company 4" in Rome, later relocated as Director of its office in Singapore and returned to his home in Bissone (on Lake Lugano in Switzerland) in 1985. The first contact with the president of SORGI took place in 1984 when he was contacted to supply four products which he understood to be intended for SORGI. He selected an off-shore company ("Company 5") to draw up his bills of lading for his transactions, all profits of which were exclusively for him. All contacts with Iraq ran via SORGI. The itinerary was from Japan to Trieste, Italy. He said he knew the containers were shipped from Trieste to Aqaba in Jordan and from there another company transported them to Iraq. Although he was not responsible for the final destination, by asking SORGI he received confirmation that the chemicals had arrived.[15] The intermediary in Japan told Mr van Anraat that to transport the chemicals from Italy via Turkey to Iraq, he would need a second Letter of Credit and that the chemicals would have to be reloaded.[16]

When "Company 5" became "Company 6" the same working methods were adopted and the profits "ended up" in an account that was opened in Mr van Anraat's name. In 1986/1987 Mr van Anraat was advised by a director in Iraq to try to get the chemicals from the United States, after which Mr van Anraat asked the intermediary in Japan for the names of contacts in the US.[17]

[14] The Statute of the International Criminal Court, Article 29, delares the non-applicability of any statute of limitation for crimes included in the Statute. States Parties to the Statute must adompt implementing legislation with regard to cooperation with the Court (art 88); there is no formal obligation to ensure that the crimes under the Statute are also punishable under its national jurisdiction, although this would be a logical consequence of a State becoming a party to the Statute, bearing in mind the principle of complementarity.
[15] Judgement, subsections 12.1-12.7.
[16] Judgement, subsection 12.14.
[17] Judgement, subsections 12.

The procurement trail through Van Anraat was also proven based on documentary evidence. Several of the pieces of evidence were quoted in the Judgement. For instance, in an initial transaction in 1984, the arrangements were made as follows:

- The intermediary in Japan sent a telex to Mr van Anraat informing him that the destination of the TMP shipment and its end use would have to be reported to the government because it could be used for the production of poison gas. The intermediary suggested that the substance was going to be used in the production of pesticides, like DDT and informed him, "I am ok that you tell us a necessary lie."[18]
- From Singapore, Mr van Anraat telexed the President of SORGI, requesting the final destination and end use and informing him of the supplier's advice. He added, "My personal advice is to indicate 'fuel additive' like we discussed before, and final destination Trieste, Italy."[19]
- Mr van Anraat received a reply from Iraq informing him that the Letter of Credit would be opened as follows: "From Japan to Italy over sea ... and from Italy to Baghdad ... per truck via Turkey."[20]
- Subsequently Mr van Anraat telexed the intermediary, "End user is not my client, name client is [Company 22] in Switzerland. They seem to have good connections with French/Italian consortium that supplies HF as a substitute for catalytic converters for straight-line Alkyl-benzene factors that they constructed all over the world. So honestly do not exactly know where it goes to, but there appear to be two possibilities (1) Yugoslavia (2) Egypt."[21]
- An undated telex from the intermediary informed Mr van Anraat that for TDG, "... it is necessary to obtain an export license from our government. It is very easy to change this material to make poison gas from it. You should disclose the name of the end user (you can tell me and if it is necessary you can lie to me) and the final destination ... Middle East is not available (acceptable)."[22]
- Letters of Credit submitted as evidence in the case all stated a final destination in Europe. The end use of TMP was listed as "fuel additive" and the end use of TDG as "textile additive."[23]

Mr van Anraat told the investigators in the case that the President of SORGI told him that the TDG was intended for the textile industry. "It is an adhesive agent to fix colours onto fabric. I have to tell you honestly that I don't know if at that time I knew it was an adhesive agent."[24] He also told the investigators that he never went to visit the client/user of TDG, saying, "I don't think they would appreciate it if I would come and have a look."[25]

The intermediary testified to the Japanese police authorities that when he started negotiations with Mr van Anraat in 1984, Mr van Anraat told him the final destination

[18] Judgement, subsection 11(a).
[19] Judgement, subsection 11(b).
[20] Judgement, subsection 11(c).
[21] Judgement, subsection 11(d).
[22] Judgement, subsections 11(e) and 12.15.
[23] Judgement, subsection 11(f).
[24] Judgement, subsection 11(h).
[25] Ibid.

would be Baghdad and asked him to keep it a secret. The intermediary thought that the chemicals would be used for the production of chemical weapons and asked about the end use. When Mr van Anraat explained that they would be used for consumer goods like textile and leather, the intermediary thought he was lying but participated anyway because the business conditions were favourable. The intermediary did not ask again and his contract was to export the goods from Japan to Italy. "The condition set by the accused, a commission of 15% to 20% of the freight rate, was very nice compared to the commission of 3% for the export of iron and steel. ... Even if [Mr van Anraat] had told me the truth, being that the chemicals would be used for the production of chemical weapons, I would have continued my negotiations with him."[26]

The first shipment – 80 metric tons of TMP from "Company 11" in 1984 – were sold to "Company 10" which sold it to "Company 9" which exported them. The Letter of Credit was issued by a bank in Switzerland in the name of Mr van Anraat of "Company 12" listed at his home address, a luxury apartment in Milan. The intermediary thought it was a fake company.[27]

The intermediary also testified that Mr van Anraat visited Japan twice and met with the chemical producers. During the first visit in 1984, "Company 11" asked him, "These chemicals can easily be converted into poison gas, but can we trust the end user?" He answered, "It is impossible that they are converted into poison gas because they will be used for textile and leather in Italy." In 1985 he met with three producers which asked the same question and he gave the same response.[28]

The last shipment from Japan was in 1986. The exchange rate for the yen had increased and a sales price could not be agreed on further shipments from Japan.[29] Mr van Anraat told the investigators that he showed an offer to the president of SORGI who thought it was much too high. "I was then told by a certain [name deleted], who was the director of [Company 7] from Iraq [and of the Muthanna State Establishment (Iraq's chemical weapons production facility), the court established], that it would be better to try and get the products from the United States."[30] The intermediary in Japan testified that he was asked by Mr van Anraat to locate a producer in the United States. Through his iron and steel contact he located one in Maryland and one in North Carolina. They visited both these companies together in 1987. The shipments of TDG to Belgium were negotiated and quickly concluded. The export details were discussed separately with Mr van Anraat. The delivery documents show that the TDG was exported via Rotterdam and Antwerp to Aqaba. The intermediary in Japan received "Finder's fees" in a total amount of US$ 30,000 to US$ 35,000 for six transactions. On each occasion the fee was transferred by

[26] Judgement, subsection 12.14.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Judgement, subsection 11(1).

"Company 12" to his account in Japan. His iron and steel contact also received a commission.[31]

Another trader in Japan stated to Japanese police authorities that during 1985-1986 a total of 13 shipments of TDG were arranged for Mr van Anraat in the following manner: "Company 9" ordered the chemicals from the trader. The chemicals were obtained from "Company 13" and delivered by "Company 10" to "Company 9" as a domestic sale. "Company 9" had the shipments handled and loaded by a customs forwarding agent and "Company 9" exported the shipments abroad. The trader said he always thought the chemicals were going to Italy. Neither the intermediary in Japan nor Mr van Anraat ever gave a clear answer about the end use and that is one of the reasons why he terminated doing business with them.[32]

The Export Manager of the producer in Baltimore stated to Netherlands police authorities that the first consignment was shipped in drums and the second one in containers. A meeting was held once in respect to the large quantities. Mr van Anraat, the intermediary in Japan, and the iron and steel contact were present. They were warned that TDG could be used to produce mustard gas. The TDG supplied was referred to by trade name, simply called Thiodiglycol, or referred to as "textile additives." "Company 5" was Mr van Anraat's company, "Company 20" was the client, and "Company 21" was the forwarding company of Mr van Anraat's to declare the goods to the customs authorities on his side.[33]

In a telex dated 1987 to "Company 4" in Rome, Mr van Anraat stated, "We can assure you our efforts are continuous and [Company 4]'s name is with regular insistence circulating within the oil-ministry's related companies. It is also clear that any business generated or contacts for or on behalf of foreign companies are very much personalized in Iraq and therefore any real opportunity coming up under the present circumstances will let our prospective client immediately think about [Company 4]. Mostly because of the fact that notwithstanding Iraq's enormous difficulty, [Company 4] has in that period continuously demonstrated to be interested to do business and did not, as many others obviously did, disappear from the scene. I would like to comment that [Mr van Anraat's initials] contacts are at the highest level you can ever reach."[34]

Proving the knowledge and intent of Mr van Anraat

From the evidence before it, the court considered it proven that Mr van Anraat, at least prior to the first TDG shipment in 1985, was aware that:

[31] Ibid. subsections 12.14 and 12.15.
[32] Judgement, Subsection 12.16.
[33] Judgement, Subsection 12.17.
[34] Judgement, Subsection 12.29.

1. "the Japanese government had ordered restrictions concerning the export of TDG to countries in the Middle-East, among them Iraq, while the accused was on the supposition that such restrictions also applied to the export of TMP;
2. the final destination of the chemicals that were to be supplied through his intervention, among them TDG, was Iraq while apart from entering an incorrect final destination the accused or someone on his behalf had intentionally written a false end use on the transport documents;
3. all chemicals to be supplied through his intervention, among them TDG, could be used for the production of poison gas, and seen the mutual relationship of the knowledge as stated under 1, 2, and 3, these chemicals would indeed be used for the production of poison gas;
4. the Republic of Iraq deployed poison gas during the Iran-Iraq war."[35]

The Court also considered it to be "completely implausible for the accused to realize that such a high commission would be paid for the import of an adhesive agent to fix colours onto fabric."[36] From the ex-wife's testimony, the Court concluded that before the first TDG shipment Mr van Anraat must have been aware of the fact that Iraq was using chemical weapons in the war against Iran.[37] Given the above, the Court considered that the "intent in relation to complicity, as well as the intent in relation to the facts found on war crimes, to be legally and convincingly proven."[38]

Proving causality, part one

The second aspect to be proven to the Court was causality – that the chemicals sold by Mr van Anraat to Iraq were present in the chemical weapons used by Iraq in violation of the law of armed conflict.

One witness (the UNSCOM witness) testified to the court about his work for the United Nations Special Commission (UNSCOM)[39] in 1992-1993 concerning the checking of Iraq's Full Final and Complete Disclosure (FFCD) to the United Nations. He stated that:

- the 1995 version of the FFCD gave a clear picture of the former Iraqi regime's weapon program in relation to mustard gas, sarin and tabun.
- UNSCOM "...made a complete study of the entire chemical industry in Iraq. The inspectors visited literally every factory. ... [P]ractically all chemical plants in Iraq were imported and assembled by the suppliers... This implies that the raw materials for those factories, like printing ink for the textile industry, were purchased ... close

[35] Judgement, section 11.
[36] Judgement, Subsection 11, Sub. 3.
[37] Judgement, Subsection 11, Sub. 4.
[38] Judgement, Subsection 11, in fine.
[39] Established by UN Security Council resolution 687, dated 8 April 1991, to carry out on-site inspection and destruction of Iraq's biological and chemical weapons, agent and facilities and ballistic missiles during the period 1991-1999.

to the end product. Iraq did ... combine raw materials... At that time Iraq itself was technically not capable of producing ink by using TDG. I must add that this would not have been useful from an economical point of view. Iraq had a small textile industry. So it was much cheaper to import this product completely. By the way, with 200 litres of TDG you can produce a warehouse full of textile.... It is completely inconceivable that in the eighties TDG would be used in Iraq as 'textile additive.'"

- "Approximately 70% of [global TDG] production is used directly by the manufacturers to produce an end product like printing ink. There are also some other minor application possibilities if exported, but in quantities less than a hundred metric tons a year... In 1988 there were an estimated 10 TDG producers in the United States, three in Japan and two in Germany. Approximately 100 companies depleted a maximum of one metric ton per year. About 30 companies a total of 1-10 metric tons a year. Only a few companies would use more than 10 metric tons a year..."
- "We did not encounter one factory in Iraq that was equipped for the production of textile dye or printing ink. These substances would always be imported ... You must understand there was no private initiative in Iraq; everything was arranged at government level ... Iraq had a substantial textile industry, but no dye-houses ... It is impossible that there were industries using TDG."
- "In Iraq mustard gas was produced in two ways. They started by making a combination of TDG and SOCL2 (Thionylchloride). Later on SOCL2 was also used for the production of sarin and VX. This chemical was saved for that purpose and then they switched to PCL3 (phosphoroxychloride)... The mustard gas had a high quality, especially when they started using PCL3 ... around 1984/1985... From the beginning of the 80's Al-Muthanna State Establishment was the only production plant for mustard gas. MSE was north of Baghdad..."[40]

An expert witness testified to the Court:

- The involvement of the Iraqi government with respect to delivery orders and usage took place at two levels. "The first, lower level was in charge of the preparation and made use of typed documents. Subsequently these documents would be passed on to the second level, where they would only use handwritten documents, of which only 2 or 3 were discovered. Furthermore at this level a lot of communications were passed on by telephone. So the documents found often only related to the preparations, but they do show the control of the government over the entire procedure."
- "You tell me that a certain percentage of the chemicals were not converted into mustard gas. Well, either they were wasted or destroyed..."
- In "calculating production losses, [t]here are two sorts of losses, being the loss because Iraq used mechanical pumps in the production process and the loss caused by polymerization as a consequence of the production method."
- "... The bombs had to be deployed at once, because otherwise they would polymerize..."[41]

[40] Judgement, subsection 12.30.
[41] Judgement, subsection 12.31.

Based on 1995 FFCD and letters of credit, an expert report concluded that:

- "the total quantity of TDG supplied in partial shipments by [accused] to Iraq amounted to a minimum of 1116 tons. The annual quantities have been divided as follows: 193 tons of TDG in 1985; 193 tons of TDG in 1986; 267 tons in 1987 and 364 tons in 1988..."
- "The conclusion is that of the total of 1400 tons of TDG mentioned in the 1995 FFCD as being TDG that had been supplied in or after 1989 by [accused], it has been established in any case that a minimum of 1116 tons of TDG were supplied by [accused] to Iraq between June 1985 and March 1988..."
- "... it can be concluded that in the extreme model the 1550 tons of usable mustard gas produced with TDG from other suppliers, and filled with usable ammunition, had been depleted at the latest around July 1987 and that after that date only mustard gas is used that was produced with TDG supplied by [accused]. The moment that they started to only use ammunition on the battlefield filled with mustard gas produced with TDG supplied by [accused], must have been at the latest somewhere in the first half of December 1987. The other conclusion is that both the TDG produced in Japan as well as part of the TDG produced in the United States, that both formed part of the supplies made by [accused], ended up on the battlefield, because a minimum of 800 tons of TDG supplied by [accused] finally ended up on the battlefield."[42]

Another expert report concluded that, from the documents:

- "...the TDG that was left after the war cannot have been supplied by [accused], because [accused] never made deliveries in 25 kg barrels. Then that leads to the conclusion that the TDG supplied by the [accused] must have been used up in the mustard gas production, as far as it concerned the TDG that had arrived before the end of the hostilities..."[43]

The head of the team that set up the FFCD and former employee of Muthanna State Establishment testified:

- "You ask about the minimum shelf life of mustard gas. We did not just produce mustard gas. It was only made to order ... mustard gas that was produced also was used quickly ... The production of mustard gas does not take more than one day. Filling the ammunition takes a bit longer because it has to be done by hand. ... filling the grenades takes about a week. Filling aerial bombs is quicker…"
- "All mustard gas that was produced with SOCL2 had been used for filling in 1986 at the latest ... Mustard gas that had been produced with PCL3 was finished in 1987..."
- "I tell you it wasn't me who gave the order for the deployment of chemical weapons. It was the regime that gave the order. Most of the time there were no

[42] Judgement, subsection 12.33.
[43] Judgement, subsection 12.34.

documents because the orders were mostly given by telephone."

- "[Accused] already had a business relationship with SORGI since 1982. During the 80's SEPP got the tip from SORGI that if they needed material that wasn't easy to come by, the best they could do was to engage [accused] ... I heard this in 1995 from [witness 112] who was head of SORGI at the time. He told me about his contacts with Al-Muthanna. He said that goods would come in as if they were for SORGI."
- "...from conversation with the [accused] it appeared to me that he was aware of the fact that SORGI was a code-name... From 1987 we even used the code-name SORGI at MSE. It was us who contacted [accused] and who made the payments..."
- "TDG can also be used for civil purposes but only in negligible quantities. When you speak about tons of TDG, then only one application is possible, i.e. mustard gas. The textile industry uses 1 barrel per year at the most, i.e., 200 kilograms."
- "[Accused] also knew that he could ask much more for the goods because they were hard to come by. It was a profitable business. He could ask threefold the usual price."[44]

Proving causality, part two

The next stage is to examine where and why the chemical munitions containing the chemicals supplied by Mr van Anraat were used, as well as the effects. This was done to determine whether the use resulted in death and grievous bodily harm in violation of customary international law, the Geneva Protocol 1925 and Article 147 of the Fourth Geneva Convention 1949, as well as, in the case of the Iraqi villages, common article 3 of the Geneva Conventions 1949.

One witness, who had assisted in the command room of the Iraqi army on the morning of the attack on Halabja on 16 March 1988, gave a statement to Belgian investigating officers:

- "Upon arrival I heard that one hour before Saddam Hussein had personally given the order for a counter attack with chemical weapons."
- "In general the order to use chemical weapons came from Saddam Hussein himself, or in some cases from the Minister of Defense... during the entire war the Iraqis used chemical weapons on a large scale. Because of the specific kind of 'special ammunition' as it was called, the decision came from the Directorate Chemical Warfare. The High Military Command and Saddam Hussein knew that the use of chemical weapons would not be very useful against the Iranian troops. In this later stage of the war the Iranian army had become better prepared and there were less casualties during chemical attacks by the Iraqis. The Iraqi Army knew this and they used it mostly to break the morale of Iran. In my opinion the purpose of the chemical attack was to punish the Kurdish population, who was viewed by Saddam Hussein as the ally of Iran, and to frighten the people. We knew immediately that

[44] Judgement, subsection 12.36.

the bombings had resulted in the death of thousands of Kurds.

- "Saddam Hussain had passed on the command over the Northern region to Ali Hassan Al-Majid. He had total control over the region, politically as well as military... It is unthinkable that a request for the use of chemical weapons would have reached the President without Ali Hassan Al-Majid knowing about it and having given his permission for it...[45]"

Another witness testified to the Court:

- "I used to be a lieutenant-colonel in the Iraqi army and a member of the Ba'ath party. If the front commander expected that he couldn't fight appropriately using conventional weapons he would mention this to the head of his military unit. Subsequently the request for chemical weapons was discussed by the general army command. There the decision was made about the deployment. The general army command existed of, amongst others, Saddam Hussein Al-Tikrit, Ali Hassan Al-Majid Al-Tikrit and Hussein Kamal Hassan Al-Majid. I know this from my army education and from my experience as an officer in the army."[46]

In addition to this, the Court examined the witness statements and heard the testimony of witnesses to and surviving victims of chemical attacks in Zewa (5-6 June 1987 and August 1988), Halabja (16 March 1988), Goktapa (3 May 1988) and Birjinni (25 August 1988) in Iraq as well as those on the surroundings of Abadan (13-14 and 27 February 1986), Khorramshahr (10¬11 April 1987), Alut (16 and 21 April 1987), Sardasht (28 June 1987), Rash Harmeh 28 June 1987), Zardeh (22 July 1988) and Oshnaviyeh (2 August 1988) in the Islamic Republic of Iran.

Summaries of the witness statements of 65 witnesses are reproduced in the judgement.[47] Some of the testimony is that of medical doctors certifying that the wounds treated could only have been caused by chemical weapons. The bulk of the testimony is heart-rending accounts of pain, nausea, blindness and horror with the onset of symptoms and the immediate death or deterioration in the health of spouses, children, other family and friends during the chaos after the attacks. Horrific as well are the accounts of what it is like to live with such injuries on a continuing basis over the succeeding two decades. Victims described breathing that becomes even more difficult as the weather cools and blisters that return as the weather warms. They also described the lifelong prospect of the need for treatment, injections, medication and inhalers to cope with lung tissue that is stuck together, not to mention the damage to their nervous systems and their own mental state as well as that of their caregivers.

[45] Judgement, subsection 12.37.
[46] Judgement, subsection 12.39.
[47] Judgement, subsections 12.40-12.105.

The Court's findings

In general three basic requirements need to be fulfilled for an accused to be convicted for complicity to a war crime: 'a war crime ... must have been committed; the accomplice must have contributed in a material way to the crime; the accomplice must have intended that the crime be committed or have been reckless as to its commission.'[48]

The determination of whether a conflict was international and/or internal is not that relevant under Dutch law as the accused is being prosecuted for violations of the laws and customs of war of the Wartime Offences Act.[49] Even so the Court held that an international armed conflict had taken place between Iran and Iraq, from 22 September 1980 until 20 August 1988. Moreover, an armed conflict not of an international character existed between Iraqi government forces and Kurdish armed opposition groups during the period the alleged crimes were committed. Even though the Kurdish armed opposition groups collaborated with the Iranian troops they pursued their own objectives and were not under the control of the Iranian armed forces, therefore, the conflict was internal. The existence of an internal armed conflict was established by looking at the scale of the operations between government forces and armed opposition groups, the type of weapons used, the fact that the armed opposition groups were able to conduct military operations from areas under their control and the level of organisation of the armed opposition.

Regarding causality, the Court stated that "The court assumes that complicity in this court case can only be proven if it can be determined that the deliveries, to which the accused has contributed, have furthered or facilitated the execution of the proven attacks, during the period from 11 April 1987 through 2 August 1988.[50] In this context the reports of the expert witness are of importance. Since an expert witness was able to establish a link between the supply of chemical material by the accused and the attacks with chemical weapons by Iraqi government forces between 11 April 1987 and 2 August 1988, the Court ruled that the accused was therefore an accomplice to war crimes,[51] as he had made the attacks with chemical weapons possible, or at least facilitated these attacks, and that the acts resulted in the death of and serious bodily injury of numerous persons. The Court therefore considered that the contribution of the accused to the war crimes had been

[48] WA Schabas, 'Enforcing International Humanitarian Law: Catching the Accomplices' (2001) 83 Intl Rev of the Red Cross 439, 446.
[49] It would therefore be sufficient to establish that an act constituted a violation of an international customary rule in armed conflict. As a refeerence, Iraq became partly to the Geneva Conventions of 12 August 1949 on 14 February 1956 through accession. It has not signed or ratified the Additional Protocols to the Geneva Conventions. Iraq also became, on 8 September 1931, a party to the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (adopted 17 June 1925, entered into force 8 February 1928) 94 LNTS 65.
[50] Judgement, subsection 13.
[51] The Court refered to violations of international customray law as codified in common art 3 of the 1949 Geneva Conventions; art 147 of the 1949 Geneva Conventions (IV); the Protocal for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of 17 June 1925.

substantial.[52] Moreover, the accused knew that the provided chemical material would be used for the production of chemical weapons. The three requirements, mentioned above, to be convicted as an accomplice to a war crime had therefore, according to the Court, been met.

Regarding the finding of fact, the Court came to the "firm conviction that it has been legally proven that the accused has committed the offences set out in the charges" relating to violations of the laws and practices of war.[53]

In setting the penalty, the following was particularly taken into account:

- "It has been established that the accused, consciously and solely acting in pursuit of gain, has made an essential contribution to the chemical warfare program of Iraq during the 1980's. His contribution has enabled, or at least facilitated, a great number of attacks with mustard gas on defenceless civilians. These attacks represent very serious war crimes. Of course the accused cannot get away from his complicity to these kinds of war crimes neither by relying on the fact that it was not his decision to have these chemical attacks executed, nor by relying on the fact that these crimes would also have occurred without his contribution, because someone else would certainly have made the contribution."
- The attacks have caused the death of many people and have inflicted much harm on those who survived, including the loss of dead children, husbands, wives and family members, as well as causing serious health problems, in many cases worsening as time passes by. The survivors have had to suffer this grief continuously for many years and will have to do so for the rest of their lives."
- "It is the opinion of the court that the proven facts and the consequences thereof are serious to the extent that even imposing the maximum penalty will not do sufficient justice to the victims. The question whether the accused has supplied or has wanted to supply the Iraqi regime with substances for the production of poison gases after the attack on Halabja, is not relevant herein. The court considers unnecessarily that this has not been proven conclusively, but the fact that the accused, almost immediately after seeing the images of the victims of the attack on Halabja, wanted to continue his trade in TDG (renamed Fixsol) and the fact that he was already back in Baghdad on or around 28 July 1988, telling an employee in Europe not to mention to anybody where he was, do not show any remorse or repentance, to put it mildly. The court has not experienced any remorse, repentance or compassion from the accused at all, for that matter."
- "The months which the accused spent in custody pending extradition in Italy will not be deducted from the penalty to be imposed. After all, this detention was not

[52] *Tadic* (Opinion and Judgment, ICTY) IT-94-1-T (7 May 1997) [688] ('the substantial contribution requirement calls for a contribution that in fact has an effect on the commission of the crime'). *Furundzija* (Judgment, ICTY) (IT-95-17/1-T) (10 December 1998) [209] ('assistance need not constitute an indispensable element').

[53] Judgement, section 14. The Court refers in this section to international customary law (including the prohibition on the use of chemical weapons), stipulations of the Geneva Gas Protocal (1925), Artricle 147 of the Geneva Convention on the Protection of Civilian Persons in Time of War (Fourth Geneva Convention, 1949) and the stipulations of the 'common' article 3 of the Geneva Conventions of 12 August 1949.

> related to the proven facts, but to the violation of the American export regulations."[54]

The accused was sentenced to 15 years imprisonment, as requested by the prosecutor, even though he was acquitted of the charge of complicity in genocide. The Court considered that there was order of rank between genocide and war crimes and felt that the maximum penalty was appropriate.[55] The accused appealed against the sentence of the Court and the appeal case is expected to be concluded by the end of 2006.

Compensation paid to the victims

In the Netherlands criminal law system, aggrieved parties can submit a claim for compensation in the criminal proceedings. In the Van Anraat case this was done by 15 victims of the chemical weapons attacks.

In determining the substantive law to be applied, the Court determined that the Netherlands law in respect of compensation could not be applied because neither the perpetrator nor the victims lived in the Netherlands at the time the crimes were committed. The Court decided that Iraqi law would be applicable to the victims of the Iraqi attacks on Iraq and Iranian law would be applicable to the victims of the Iraqi attacks on Iran. In examining those laws, the Court found that Mr van Anraat's acts were unlawful under those laws as well and that he is liable for reparation for the damages.

As a result, the Court awarded the aggrieved parties the maximum amount under Dutch law, currently 680.67 euros per claim, plus of 100 euros per claim – a total of 10,210.05 euros plus 1,500 euros in costs.

The prosecution of international crimes in national courts

'International crimes are breaches of international rules entailing the personal criminal liability of the individuals concerned'.[56] Some of the crimes under international law are considered to be violations of jus cogens, peremptory norms that 'have a rank and status superior to those of all the other rules of the international community' and which cannot be set aside by states, through for example a treaty.[57] Although there is not necessarily a

[54] Judgement, section 17.
[55] Criminal Code art 49 (2) (if the maximum sentence for a crime is a life sentence an accomplice to that crime will reveive a prison sentence of maximum 15 years).
[56] A cassese, International Criminal Law (Oxford University Press Oxford 2003) 23.
[57] A cassese, International Criminal Law (2nd ed Oxford University Press Oxford 2005) 199. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 53.

consensus on a definite list of crimes under international law it is widely accepted that it would certainly include war crimes and genocide.

Individuals responsible for crimes under international law can be prosecuted once the jurisdiction of the state, which initiates the prosecution, has been asserted. A number of principles exist, under international law, to determine the legal grounds for jurisdiction. These include primarily the principle of territoriality (the crime has been committed on the territory of the state which intends to prosecute); the principle of active nationality (the perpetrator of the crime is a national of the state which is initiating prosecution); the principle of passive nationality (the victim of the crime is a national of the state which is initiating prosecution); the principle of protection (fundamental (security) interests of the state are affected) and the universality principle (no specific connection exists between the state which is initiating the prosecution and the offender). The Netherlands therefore exercised jurisdiction in the Van Anraat case under the principle of active nationality.

The Netherlands could be commended for the fact that criminal proceedings were initiated against a businessman for complicity in war crimes and genocide. Until now economic actors have been largely shielded from such criminal charges, even though their role with regard to gross violations of international human rights and humanitarian law has been raised repeatedly.[58] The Van Anraat case has many similarities with the Zyklon B case in which German industrialists were charged, and convicted, for war crimes during World War II for the supply of poison gas, used for the extermination of allied nationals interned in concentration camps, knowing that the gas was to be used for that purpose.[59]

The amended indictment charged the accused with a violation of article 1 of the Genocide Convention Implementation Act as well as violations of the laws and customs of war under article 8 of the Wartime Offences Act, both in conjunction with article 48 of the Dutch Criminal Code (complicity).[60]

The accused challenged the jurisdiction of the Court for a number of reasons, arguing namely: that the Court did not have jurisdiction to prosecute the principle offences so it could not prosecute accomplices to those crimes; that the Court had no authority to provide an opinion on the culpability of the government of another country; and that Iraq would be the most suitable jurisdiction to prosecute the war crimes and genocide charges. The Court

[58] United Nations 'Commentary on the Norms on the Responsibilities of Transnationl Corporations and Other Business Enterprises with Regard to Human Rights' (26 August 2003) UN Doc E/CN.4/Sub.2/2003/38/Rev.2 ('Transnational corporations and other business enterprises shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other internationl crimes against the human person as defined by international law, in particular human rights and humanitarian law'.).

[59] *Zyklon B* (Trial of Bruno Tesch et al) (British Military Court Hamburg) (March 1946) Law Reports of Trials of War Criminals, The United Nations War Crimes Commission, Vol I London HMSO (1947) at 93.

[60] The Genocide Convention Implementation Act (1964) Staatsblad No 243. The Wartime Offences Act (1952) Staatsblad No 408. Criminal Code (As Amended) (1881).

rejected all of these challenges to its jurisdiction and stated that complicity to a crime constitutes an independent criminal act and that the Dutch Court had jurisdiction under the active personality principle as stated in article 5 of the Criminal Code. Moreover, with regard to international crimes the Court mentioned that it would often happen that different jurisdictions are involved in the prosecution of the various defendants. Although the Court could indeed provide an opinion on the acts of a foreign government it would not be involved in holding government officials criminally responsible and therefore the question of immunity was not an issue. In addition the Court re-iterated the fact that former government officials could not invoke immunity for crimes under international law committed during the performance of their duties. Finally, the Court held that under international law Iraq did not have exclusive jurisdiction and that therefore the accused could be tried in the Netherlands. The accused also challenged the admissibility of the case before the Dutch Court on different grounds but these were also dismissed by the Court.

The Netherlands government, in its Explanatory Memorandum to the International Crimes Act, confirmed that general principles of criminal law, as stipulated in the Rome Statute, would be applicable if these principles would be significantly different from what exists under municipal law.[61] In the same Memorandum the government clearly indicated that courts in the Netherlands should base themselves, with regard to the actus reus and mens rea of the crimes, on international law and jurisprudence.[62] The Court therefore referred extensively to the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY), once more underlining the importance of the jurisprudence of both international criminal tribunals in relation to (international) criminal law.

Conclusion

What are the lessons learned from this case? In considering the investigation and prosecution of the Van Anraat case, a number of significant aspects stand out that may be relevant to States Parties to the Convention today.

First, in a State Party that has enacted comprehensive implementing legislation, creating the full range of criminal offences for acts prohibited by the Convention, the prosecutor will have an easier time proving the case. In the Van Anraat case, causality was difficult to prove since the prosecutor had to establish that:

- the chemicals Mr van Anraat sold were the same chemicals Iraq used to produce chemical weapons agent;
- the chemical weapons agent produced from Mr van Anraat's chemicals was used to

[61] Tweede Kamer der Staten Generaal 'Explanatory Memorandum to the International Crimes Act' (2001-2002) 28337 No 3 at 29.
[62] Ibid at 27.

fill the munitions that were used in Iraqi attacks on Iran and Kurdistan during the period in question;
- the attacks on Iran and Kurdistan, using those weapons, caused the death or injury for which the prosecutor had witness testimony or other evidence corroborating the death or injury; and
- the use of chemical weapons during attacks on Iran and Kurdistan violated the laws and customs of war.

If those same facts could be prosecuted under comprehensive legislation to implement the Convention, the sales contract alone between the two parties (Mr van Anraat knowingly agreeing to supply chemical weapon precursors to the agent of a State which had been documented by the United Nations investigation as using chemical weapons) could have been sufficient evidence to prove the offences of assisting with the (1) direct transfer; (2) development; (3) production; (4) stockpiling; (5) retention; (6) use; and (7) military preparations to use, chemical weapons. Furthermore, he could also be charged with the offences of transferring a Schedule 2 chemical to a State not party and transferring a Schedule 3 chemical to a State not party under a false end-use certificate. Even if the shipment were seized and never caused any damages, he could have been convicted of violation of export controls and the inchoate offence of attempting or conspiring to commit the other crimes.

Secondly, the investigation of the case required significant international cooperation. From the judgement it is clear that the following countries cooperated with the investigation: the Islamic Republic of Iran (witness testimony), Iraq (witness testimony and documentary evidence), Japan (witness testimony and documentary evidence), Belgium (witness testimony), the United Kingdom (documentary evidence), and the United States (witness testimony and documentary evidence). In the evidence compiled by the United States authorities in investigating the export control violations in the 1980's, which it handed over to the Netherlands, Italy and Switzerland cooperated with the US authorities by conducting searches and seizures in Mr van Anraat's residences and Italy by arresting him and eventually agreeing to his extradition before he escaped. Presumably, all those countries have in place the legal basis to cooperate with each other, probably in the form of treaties on mutual legal assistance (which was required by the Convention under Article VII, paragraph 2, when it entered into force). Procedurally, it is interesting how the cooperation and legal assistance was, in practice, provided. The Netherlands prosecutor ran a two-track process in which the formal request was transmitted from the Minister of Justice through the Ministry of Foreign Affairs to the Netherlands Embassy in the country concerned and delivered to the Minister of Foreign Affairs in the requested States which submitted it to the Minister of Justice for approval. The reply travelled back on the same route. In parallel, once the formal procedure was underway, in some instances the Netherlands police contacted their counterparts in the requested country and obtained the evidence within the time frame the Court had set for completing that part of the discovery phase. The Court set a hearing every 90 days in which the prosecution was required to demonstrate progress in

the investigation.[63] Even so, certain obstacles to effective cooperation will persist: it is assumed that the Netherlands is not assisting the prosecution of former Iraqi president Saddam Hussein and others being tried for genocide by the Iraqi Special Tribunal in Baghdad[64] since, if convicted, they could face the death penalty. In accordance with the jurisprudence of the European Court of Human Rights, parties to the European Convention on Human Rights (Netherlands included) are prevented from cooperating in death penalty cases.

Thirdly, the resources allocated by the State to investigate and prosecute the case were considerable. As a matter of policy, the Netherlands attaches great importance to the investigation and prosecution of genocide, war crimes and crimes against humanity. It hosts the International Criminal Court in The Hague and it has adopted legislation, directives and strategies, operational and structural, to ensure that the Netherlands will be a leader in this field. The objective is to prevent the Netherlands from becoming a haven for war criminals. To this end a National War Crimes Team has been created in the Unit Central Netherlands of the Netherlands National Crime Squad, which conducts the investigations in cooperation with the National Public Prosecutor's Office.[65] "Effective criminal investigation can change the 'not in my backyard' policy, which is based on refusing admission, into a 'no safe haven' reality.[66] Once the prosecutor decided to proceed with the case, no ceiling was placed on the budget for the case although there were of course various checks on expenses, especially major costs.[67]

Finally, would the export controls enforced today by States Parties under the Chemical Weapons Convention be more effective than those in force at the time Van Anraat was supplying Iraq? As concluded by UNMOVIC in its study of Iraq's procurement methods during the period 1970-2002:

- Despite Iraq's extensive concealment policy and practices, it was still possible to find procurement activity as an indicator of an undeclared programme;
- The introduction of export licensing by States significantly slowed down and limited Iraq's procurement efforts but did not stop them. Licensing of exports on the grounds of end user certificates without on-site verification was not able to solve fully the problem of possible shipments of dual use materials to Iraq;
- The ability to make adjustments and modifications to procurement techniques to overcome trade restrictions "demonstrates that a combination of effective export control measures taken by all potential suppliers, coupled with an international

[63] Presentation by the Netherlands Public Prosecution Service and the National Police Agency, International Crimes Unit, at OPCW Headquarters, 13 july 2006.
[64] Associated Press 'Saddam Accused of Genocide on New Charges' (4 April 2006) ; BBC News 'Saddam to Face Genocide Charges' (4 April 2006) available at http://news.bbs.co.uk/2/hi/middle_east/4875678.stm.
[65] MPA van de Beek and JGM Bijen, Vision Document Dutch National Crime Squad: Genocide, War crimes, Crimes against Humanity, (Korps Landelijke Politiediensten, Dienst Nationale Recherche, Driebergen, June 2005), pp 7-9.
[66] Ibid, at 9.
[67] Presentation by the Netherlands Public Prosecution Service and the National Police Agency, International Crimes Unit, at OPCW Headquarters, 13 July 2006.

> mechanism for export/import notifications of dual-use items ... and on-site verification is required in order to provide a sufficient degree of confidence that dual-use items and materials will not be used for proscribed purposes."[68]

The Chemical Weapons Convention and the OPCW's Plan of Action on the Implementation of Article VII Obligations are designed to do just that: ensure that the necessary criminal legislation is in force; ensure that the necessary administrative measures to enforce that legislation are in place; and ensure that an effective National Authority is fully functioning. Only in this way can the objective of Article VII, paragraph 1(b), be met: that each State Party shall "not permit in any place under its control any activity prohibited" under the Convention.

[68] Annex to UN document S/2005/742, sections 34-36