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Bringing increased biological and chemical weapons provisions to the ICC

BY MALCOLM DANDO | 11 NOVEMBER 2009

This month, the States Parties to the [International Criminal Court](#) (ICC) will come together in The Hague to prepare for their review of the Rome Statute, the ICC's governing document, in Uganda in 2010. The primary goal of this meeting is to assess how the ICC and its governing documents can be improved. Although it is rare for biological and chemical weapons to be considered in general discussions about the ICC, Marlies Glasius, an international relations expert at the University of Amsterdam, [recently revisited](#) the potential for these weapons (and more broadly, WMD) to be criminalized within the Rome Statute and whether there was a role for the anti-biological and chemical weapons civil society community in making this happen.

"The concern shouldn't be whether the small community of anti-biological and chemical weapon advocates is aware of the ICC and its potential to enhance BWC and CWC provisions. Instead, it's how to ensure that civil society is present and vocal at the meetings on the ICC's governing statute."

One might argue that this debate is academic--the use of WMD would certainly cause the types of death and injury that should come under the purview of the ICC even without specific mention. But Glasius counters that without explicit criminalization of WMD, a prosecutor might be inclined to steer clear of a "politicized" investigation defined by implicit, rather than explicit, interpretations of the Rome Statute. On this point specifically, she indicates that it may be possible to make progress toward including WMD language in an updated Rome Statute. For example, Belgium and other states have proposed that explicit references be made to the Biological and Toxin Weapons Convention (BWC) and Chemical Weapons Convention (CWC) in the ICC weapons clauses. Furthermore, a the [Coalition for the Criminal Court](#) has suggested that, regardless of the outcome of the Belgian proposal, "the facilitators should consider the creation of a permanent working group on weapons, methods, and means of warfare" in order to cope with the constant developments (e.g., in the life sciences revolution) that require legal attention. Although a number of non-ICC

Member States--China, India, Israel, Pakistan, Russia, and the United States--won't have a vote in these meetings, it's worth noting that they may have observers in Uganda and therefore will be kept in the loop when it comes to negotiations and outcomes.

Gladius's optimism, however, is overshadowed by her analysis of why the criminalization of WMD in the Rome Statute was left out in the first place. As she puts it, although civil society played an important role in establishing the ICC a decade ago, "strong language on biological and chemical weapons was easily deleted . . . simply because no one, either among states or in civil society, was making much of a case for it. *The small anti-biological and chemical weapons community . . . appears to have been largely unaware of the ICC negotiations*" (emphasis added).

In my opinion, the anti-biological and chemical weapons community, while depressingly small, *is* aware of the ICC. A cursory review of the admittedly small literature--particularly the *Chemical and Biological Weapons Conventions Bulletin (CBWC Bulletin)*--produces numerous editorials and articles on the relationship between the two treaties and the ICC.

For example, the 1996 article "[Criminalizing BW](#)" suggested that domestic legislation should be enacted by all states under Article IV of the Biological Weapons Convention in order to make it a crime to develop, produce, acquire, or transfer biological weapons. The same piece concluded, "For the longer term, thought should be given to seeking international agreement that using or knowingly aiding in the production, acquisition, or use of biological weapons is a crime under international law. Those who do such things could then be exposed to the threat of indictment and prosecution by an international court, either an ad hoc tribunal or, should it come into existence, an international criminal court"--in line with Gladius's view.

The message was further promoted in the following years. In December 2001, an [editorial](#) in the *CBWC Bulletin* considered what might be done to reinforce the BWC. Its opinion was in line with earlier work: "As the *Bulletin* has long urged, the acquisition and use of biological and chemical weapons should be criminalized under international law, like aircraft hijacking and torture." More recently, in 2007, Lisa Tabassi, of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, [examined the connections](#) between the ICC and the CWC's Organization for the Prohibition of Chemical Weapons (OPCW) in considerable detail. Her general conclusion was straightforward: "The goals of the two institutions --(a) the complete elimination of chemical weapons by means of, inter alia, the universal penalization of any conduct related to them and (b) the end to impunity for the crimes of serious concern to the international community, including the war crime of the use of chemical weapons in international armed conflict--would seem to converge."

A year earlier, an [article](#) by Tabassi and Erwin van der Borght, of Amnesty International, considered national and international prosecution of genocide and

crimes against humanity and concluded, "Both the jurisprudence of the International Tribunal for the former Yugoslavia and the comprehensive study published by the International Committee of the Red Cross have concluded that customary international law prohibition, binding on all states, on the use of chemical weapons in international armed conflict now extends to the use in non-international armed conflict as well." In other words, the Rome Statute extends to civil war and domestic terrorism as well as international conflict. They went on to suggest that the 2009 ICC Review Conference would provide the opportunity to extend the list of crimes to "the use of chemical weapons in non-international conflict," and to "developing, producing, stockpiling, and transferring chemical weapons."

Of course, with opportunities come potentially adverse implications of the Rome Statute limiting chemical weapons crimes to the language of the Geneva Protocol and inadvertently excluding acts that would be criminal under the CWC--specifically, the use of chemical weapons in non-international conflict. But in a [2004 article](#), Tabassi stressed that the statute didn't define customary international law but instead reflected the degree to which states could agree "to confer jurisdiction upon a permanent international criminal court" at that time. Equally, it would be absurd, as one of the commentators on Glasius's article noted, for anyone to imagine that because the Rome Statute doesn't specifically call out biological weapons, it negates the Geneva Protocol's prohibition on their use.

Nevertheless, a [draft treaty](#) to comprehensively criminalize biological and chemical weapons was published in 1998 and considerable effort had been expended to obtain advice and support from international legal authorities and states. An editorial accompanying this draft clearly stated the reasons why such a treaty was required: "The BWC and CWC do not attempt to make the development, production, possession, or use of biological and chemical weapons an international crime for which states establish jurisdiction over prohibited acts regardless of the place where they are committed or the nationality of the offender, nor do these treaties contain provisions dealing with the extradition of suspects." Widespread adoption of a convention such as this draft treaty, or a similar development of the Rome Statute, would add to the web of preventive policies that help minimize the potential for the development and use of these weapons in the future. Individuals who carried out such activities would do so knowing their actions had international, legal ramifications.

So the concern shouldn't be whether the small community of anti-biological and chemical weapon advocates is aware of the ICC and its potential to enhance BWC and CWC provisions. Instead, it's how to ensure that civil society is present and vocal at the meetings on the Rome Statute in order to demonstrate support for sensible improvements in the ICC governing documents regarding biological and chemical weapons arms control.

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