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## Criminalise WMD

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In her recent [column](#) [1] on dismantling the global nuclear infrastructure, Mary Kaldor proposes criminalising the threat or use of nuclear weapons. Just over a decade ago, global civil society actors largely drove the processes leading to the [ban](#) [2] on landmines and the [establishment](#) [3] of the International Criminal Court. But attempts to get the threat or use of weapons of mass destruction defined as a crime under the Rome Statute for an International Criminal Court ( 'the Statute') got nowhere. Procedurally as well as politically, this could be an auspicious time to begin to repair the weakness of the weapons clauses in the International Criminal Court Statute.

Marlies Glasius is a lecturer in international relations at the University of Amsterdam, an editor of the [Global Civil Society Yearbook](#) [4] and author of [The International Criminal Court: A Global Civil Society Achievement](#) [5] 'Now is the time to revive this proposal', writes Kaldor. It is indeed: article 121 of the [ICC Statute](#) [6] allows any state to start making proposals for amendments seven years after the Statute entered into force. That date has elapsed this summer, and states have already begun to make proposals. Moreover, the first [review conference](#) [7] on the Statute is to be held in Kampala, Uganda in June 2010, with a [preparatory session](#) [8] taking place in The Hague in November 2009.

On one reading, the use of weapons of mass destruction (if not necessarily the threat) is already prohibited by international law, as well as a punishable crime under the ICC. The ICC Statute classifies murder, extermination and other inhumane acts intentionally causing great suffering, or serious injury to body or mental or physical health, carried out as part of a widespread or systematic attack directed against any civilian population as crimes against humanity. Wilful killing, wilfully causing great suffering, or serious injury to body or mental or physical health, or intentionally launching an attack in the knowledge that such an attack will cause excessive loss of life or injury to civilians - are all war crimes. It is difficult to see how biological, chemical let alone nuclear weapons could be used without breaching these provisions.

Nonetheless, the failure to define threat or use of weapons of mass destruction as a crime is of important symbolic significance. It may also have practical implications: without explicit criminalization, the Prosecutor may prefer to steer clear of any 'politicised' investigation involving weapons of mass destruction. Or even if a prosecutor took it on, judges might be cautious in their interpretation, as were the judges of the International Court of Justice in their [Advisory Opinion](#) [9] of [1996](#) [10].

**What went wrong at Rome ?**

The heavy civil society presence [11] at the ICC negotiations in 1998 included a small 'peace caucus' whose main objective was the criminalisation of the threat or use of nuclear weapons. However, they had few illusions about getting this explicitly recognised as a crime under the ICC's jurisdiction. All declared nuclear weapons states were resolutely opposed to any such inclusion. The middle powers leading the negotiation process, including Canada, the Netherlands and Australia, believed that no serious treaty was possible without the support of nuclear states Britain and France, and if possible the United States. Finally, among states, anti-nuclear activists had a false friend in India, which was the most vocal proponent of criminalisation, but which had conducted its own nuclear tests just one month before the conference. Even some anti-nuclear activists believed that India's real objective was to wreck the conference, not to outlaw nuclear weapons.

The peace caucus' second-best option, a general clause prohibiting weapons that are 'inherently indiscriminate' or cause 'unnecessary suffering', was not fulfilled either. Instead, the Statute provides lamely that in future, an Annex may be negotiated that lists such weapons. Nor does the Statute call and prohibit biological and chemical weapons by their comprehensive, contemporary names. The only weapons explicitly prohibited are an antiquated list of poison or poisoned weapons, asphyxiating, poisonous or other gases and analogous materials, and expanding bullets, and the clause only applies to international wars.

While it is impossible to determine with hindsight whether and under what circumstances more satisfactory weapons clauses might have been achieved, the failure of the peace caucus does prompt some reflection concerning the dynamics within the civil society community involved in the ICC. For the NGO Coalition and most of its participants, nuclear weapons were an avoided topic, because they were more interested in human rights issues, and because it was seen as a potential conference wrecker. The Coalition's hastily assembled 'Basic Principles' incorporated concerns on gender, children's rights and victims, but nothing at all on weapons of mass destruction.

On the other hand, anti-weapons activists themselves bear some responsibility for the disappearance of the clauses on landmines and on biological and chemical weapons from the final Statute. Six months after the Ottawa Convention, the International Coalition [12] to Ban Landmines might have shamed the ICC Chair, Canada, into championing a prohibition on at least the use of anti-personnel mines, but its core members were not present at the Rome conference. Strong language on biological and chemical weapons was easily deleted on the basis of objections of Arab states which were not even expected to ratify the ICC Statute 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 [13] appears to have been largely unaware of the ICC negotiations.

### **Why prospects are better now**

Between President Obama [14] and the awakened conscience of a group of elder statesmen, perceptions of nuclear weapons may be shifting from where they were a decade ago. Mary Kaldor is undoubtedly right to point out that the Global Zero [15] campaign is still rooted in a logic that does not question the right of states to barter with weapons of mass destruction. But the endorsement of the global zero option by a raft of former and still-serving statesmen has changed the connotations of anti-nuclear activism. The anti-nuclear activist may no longer be perceived as an unworldly zealot chaining herself to a warhead. If nuclear disarmament is endorsed [16] by Henry Kissinger, then the further step of criminalising threat or use can begin to be taken

seriously as a civil society demand. This perception of being idealistic but respectable, matches exactly how human rights issues, and the human rights activists who propelled the ICC negotiations, were seen by liberal-minded diplomats in the nineteen nineties.

This is one reason why the anti-nuclear cause may be given less of a cold shoulder by states and by the NGO Coalition at the Review Conference in Kampala. Another equally important reason is that the Court is now in existence, and cannot be undone. Thus there need be no fear among its supporters that the nuclear issue could scupper the treaty. This conference is considered to be about fixing the flaws in the Statute.

Related to this is an important difference in composition of the states present at the review conference: these are the states that have become party to the ICC. Thus, China, India, Israel, Pakistan, Russia and the United States were at Rome, but will not be in Kampala as full participants, although at least some representatives of these states will be in attendance as observers. Even though some of 'the observing' can be quite heavy-handed, their lack of a vote will change the tone of exchanges between states, and between states and civil society participants, who will be there in numbers. Finally, there are now proposals on the table from states that are more credible anti-nuclear brokers than India was in 1998.

### **What is on the table and what is to be done?**

Weapons of mass destruction are not (yet) at the top of the agenda for Kampala, but the main topic of discussion is likely to be the related topic of the crime of aggression. This is included in the ICC Statute, but left undefined. There are hopes that it may now be possible to agree a definition, for many of the same reasons that are improving the chances of weapons clauses.

There are also some concrete proposals on weapons clauses. Mexico has recently proposed adding 'employing nuclear weapons or threatening to employ nuclear weapons' to the list of war crimes under the ICC. Belgium, joined by Austria, Argentina, Burundi, Samoa and Slovenia, has set about fixing the other weapons clauses with three different proposals. The first, most modest proposal only suggests extending the purview of the current weapons clause to non-international armed conflicts. The second proposal is to include explicit references to up-to-date, widely ratified weapons treaties, namely the Biological Weapons Convention of 1972, the Chemical Weapons Convention of 1993 and the Landmines Ban of 1997. The third proposal is to bring non-detectable fragments and blinding laser weapons under the purview of the ICC. Cluster munitions, prohibited by a brand new Oslo Convention, signed in 2008 and not yet in force, are not yet the subject of any proposal.

But Mexico has not yet been joined by other states, and it has been confidentially advised not to push the proposal. Even the very modest and reasonable Belgian proposals are already being privately resisted by powerful states. Moreover, while any state is free to make proposals, the procedure for getting them to attain force of law is arduous. Adoption of amendments needs to be done by two-third majority (or better, consensus), but before they actually enter into force they need to be ratified (which in most states requires parliamentary consent) by seven-eighths of states.

At present, the Mexican proposal is believed to have very little chance of being adopted, and the Belgian proposals only a little more. What these proposals have already achieved is to keep weapons on the agenda. But without a civil society campaign, Belgium and Mexico may do little more than go through the motions. Bringing weapons to the top of the agenda and getting threat or use included in the

ICC Statute will require a much broader, more bottom-up, and possibly much longer battle.

The NGO Coalition, previously wary of nuclear weapons and indifferent to others, has already proposed <sup>[17]</sup> that 'regardless of the outcome of the discussions at the Review Conference in relation to the Belgian proposal, the facilitators should consider the creation of a permanent working group on weapons, methods and means of warfare' to take into account the 'constant evolution of the legal regime governing the use of weapons'.

But for such a campaign to be feasible and eventually successful, anti-weapons activists must learn from the fiasco in 1998. First, they must be aware of the relevance of the ICC Statute and come to the negotiation venues in much greater numbers. Now is the time to get organised to be in The Hague in November 2009 and Kampala in 2010, as well as beginning to lobby with states at the national level.

Secondly, there must be much more communication, collaboration and solidarity between activist/experts on different types of weapons systems. In the negotiations on the Rome Statute, while other civil society actors like the gender caucus made remarkable headway, the weapons clauses fell victim to the lack of attention and cohesion between different types of weapons activists. This is a second chance for anti-nuclear veterans, landmine activists, biological and chemical weapons specialists and the venerable experts of the Red Cross to get to know and respect each other, actually support each other's proposals and develop joint ones, and alert each other to opportunities and threats, and potential allies or opponents among states. The relatively young Cluster Munition Coalition <sup>[18]</sup> should also join in.

Finally, while the climate is much more favorable to good relations between a new anti-weapons caucus (or indeed a 'peace caucus', comprehending the issue of aggression) and the NGO Coalition for an ICC <sup>[19]</sup>, the onus is still on the anti-weapons activists to cultivate contacts with those civil society actors who have over the past fifteen years developed a very close relationship with state supporters of the ICC, to make criminalisation of weapons into a new focal point.

Bereft of *raisons d'etat*, the criminality of using weapons of mass destruction is as obvious as the criminality of mass rape, killing or abduction of children, for which suspects are awaiting trial in The Hague. The challenge is to make it law.

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[7] <http://www.iccnw.org/?mod=review>

[8] <http://www.icc-cpi.int/nr/exeres/b3bcd3ae-3fde-4d56-a696-990da194d978.htm>

[9] <http://www.icj-cij.org/docket/files/95/7495.pdf>

[10]

[http://en.wikipedia.org/wiki/International\\_Court\\_of\\_Justice\\_advisory\\_opinion\\_on\\_the\\_Legality\\_of\\_the\\_Threa](http://en.wikipedia.org/wiki/International_Court_of_Justice_advisory_opinion_on_the_Legality_of_the_Threa)

[11] <http://www.lse.ac.uk/Depts/global/Publications/Yearbooks/2002/2002chapter6.pdf>

[12] <http://www.icbl.org/>

[13] <http://www.lse.ac.uk/Depts/global/Publications/Yearbooks/2003/2003Chapter5.pdf>

[14] [http://www.whitehouse.gov/the\\_press\\_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered/](http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered/)

[15] <http://www.globalzero.org/>

[16] [http://www.fcni.org/issues/item.php?item\\_id=2252&issue\\_id=54](http://www.fcni.org/issues/item.php?item_id=2252&issue_id=54)

[17]

[http://www.iccnw.org/documents/CICC\\_Review\\_Conference\\_Team\\_Statement\\_to\\_NYWG\\_140409.pdf](http://www.iccnw.org/documents/CICC_Review_Conference_Team_Statement_to_NYWG_140409.pdf)

[18] <http://www.stopclustermunitions.org/>

[19] <http://www.iccnw.org/>