

'The use of chemical or biological weapons in armed conflict is a serious crime of international concern that should be explicitly prohibited by the Rome Statute.'

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B R I E F

Chemical and biological weapons use in the Rome Statute: a case for change

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“The Rome Statute is the international treaty that established the International Criminal Court, a tribunal with the power to prosecute individuals for crimes against humanity, genocide, and war crimes.”

1. Introduction

The 113,000 tons of chemical agents used during World War I caused 1.3 million casualties.¹ As far back as the 14th century, biological warfare assisted in spreading the Black Death pandemic—one of the deadliest plagues in history.² These are just two examples of the destructive consequences of chemical and biological warfare. It comes as no surprise, then, that these ‘weapons of mass destruction’ (WMD) have been the subject of international treaties and resolutions for over a century.

The Rome Statute is the international treaty that established the International Criminal Court, a tribunal with the power to prosecute individuals for crimes against humanity, genocide, and war crimes. This statute, however, does not contain the words ‘chemical weapon’ or ‘biological weapon.’ Two provisions found in Article 8 of the statute—which defines war crimes—may refer to chemical and biological weapons (CBW) implicitly, but it is unclear whether all chemical weapons are included, and whether biological weapons are included at all. Subparagraph (2)(b)(xvii) bans the use of ‘poison or poisoned weapons’; a prohibition first codified in 1899.³ Subparagraph (2)(b)(xviii), derived from the *Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare* (1925 Geneva Protocol), makes the use of asphyxiating, poisonous or other gases a war crime, but notably not bacteriological weapons.⁴

The Rome Statute is intended to encompass ‘the most serious crimes of concern to the international community.’⁵ International law, custom, and jurisprudence show that CBW use falls within this category. Therefore, as this article argues, an explicit ban on such actions should be included in the Rome Statute.

The continued omission of these activities stems from the inability of delegates during negotiation of the statute to reach consensus on whether nuclear weapons should be included. Once that issue reached deadlock, some turned their attention towards CBW, despite there having been no objection to their inclusion up until that point. Given that nuclear weapons are much harder and more expensive to manufacture than CBW, some delegates felt that the omission of a prohibition on the use of nuclear weapons was unfairly advantageous to countries which had or could develop them. On the final day of negotiations, the proposed draft statute dropped any mention of chemical, biological, and nuclear weapons. This proposal was accepted as there was no time left to debate the issues, and parties did not want to risk the failure of the entire enterprise due to disagreement on one issue.

The issue of CBW inclusion resurfaced prior to the Rome Statute’s ‘First Review Conference’ in 2010. This meeting was the first time amendments to the Rome Statute could be considered. During a pre-conference meeting of parties to the statute, Belgium proposed an amendment which would add chemical and biological weapons to the list of prohibited weapons. Although there was considerable support for the initiative, the amendment ultimately was not submitted to the Review Conference; as there was limited time and a number of issues to consider, only the least controversial amendments were forwarded to the meeting. Some delegates had raised objections to the Belgian amendment. The flaws in the grounds on which these complaints are based suggests, however, that concerns over the ‘nuclear issue’ may have continued to be an influential, albeit underlying, factor.

1 Julian Perry Robinson, *The Problem of Chemical and Biological Warfare, Vol. I: The Rise of CB Weapons*. Stockholm International Peace Research Institute. New York, Humanities Press, 1971. p. 128.

2 *Id.* at 215.

3 International Conferences (The Hague), *Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land*. Article 23(a). The Hague, 29 July 1899.

4 Conference for the Supervision of the International Traffic in Arms (Geneva), *Protocol for the Prohibition of the Use of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare*. Geneva, 17 June 1925.

5 UN General Assembly, *Rome Statute of the International Criminal Court*, Preamble. Rome, 17 July 1998.

The issue of whether to include nuclear weapons in the statute, however, should not be tied to the inclusion of biological and chemical weapons. Nuclear weapons have been treated differently from a legal standpoint. The key treaty involving nuclear weapons—the 1968 Non-Proliferation Treaty (NPT)—does not explicitly ban use, while the most widely known CBW treaties do. In a well-known advisory opinion, the International Court of Justice wrote that using nuclear weapons was not a violation of international law.

Though the ICC has not yet heard a case which involves chemical and biological weapons, there is a clear need to amend the Rome Statute before such a case does come before it. As written, the status of CBW use under the Rome Statute is ambiguous. This lack of clarity creates confusion for parties and court officials, including judges. Technological developments in the chemical and biological fields add urgency to clarifying these ambiguities. CBW use should be explicitly prohibited in the Rome Statute so that the ICC can adjudicate CBW use as a war crime—and should cover both international and non-international conflicts.

2. International law, doctrine, and jurisprudence support the addition of unequivocal CBW use provisions to the Rome Statute

To be included in the Rome Statute, a crime must be both serious and of concern to the international community. This standard is established by Article 1 of the Rome Statute, which gives the ICC jurisdiction ‘over persons for the most serious crimes of international concern.’⁶ Since use of weapons of mass destruction is,

plainly, a serious crime, the issue of CBW inclusion hinges on the extent to which it is a matter ‘of international concern’.

The prohibition on CBW use in both international and non-international armed conflicts has reached the status of customary international law, implying an international condemnation of such practices. Furthermore, the widespread practice by states of implementing national legislation that criminalizes CBW use as a war crime shows that many countries favour the extension of this prohibition to individuals. Several international legal instruments also require this extension, as explored further below. The pervasiveness of this condemnation constitutes the level of ‘international concern’ required for inclusion in the Rome Statute. Use of chemical and biological weapons should be explicitly criminalized by the Rome Statute because they are widely recognized in the international community as serious crimes.

Customary international law consists of the ‘general and consistent practice of states followed by them from a sense of legal obligation.’⁷ Simple custom, therefore, is insufficient: a state must feel legally obligated to follow the practice, a belief which has been termed *opinio juris*.

Though there is no universal definition of customary international law, this definition has been widely accepted by the international community.⁸ There is no prescribed method for determining *opinio juris*, but the history of legal prohibitions of a given practice may be some reflection of the degree to which avoidance of that practice is perceived as legally obligatory. In addition, studies of practice, custom, and legislation have developed proposals as to the composition of customary international law. The extent to which courts refer to a practice as customary international law is also

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⁶ *Supra* note 5, Article 1.

⁷ American Law Institute. *Restatement of the Law, Third, the Foreign Relations Law of the United States*. St. Paul, Minn.: American Law Institute Publishers, 1987. §102(2).

⁸ *Id.* at §102, Reporters’ Notes, 2.

“It was in the 1925 Geneva Protocol that biological weapons were for the first time addressed distinctly from chemical weapons.”

indicative of its status as such. In terms of CBW, all three of these criteria are met to such a degree that it is very likely both chemical and biological weapons use are prohibited by customary international law. Indeed, a review of literature on the subject shows that most commentators regard it as given that CBW use is against international customary law.

Chemical weapons, in particular, have long been prohibited by international law. The phrase ‘poison or poisoned weapons, and asphyxiating gases,’ which is generally understood to include chemical weapons,⁹ has been prohibited by a number of legal documents. Two examples of these are the 1899 and 1907 *Hague Regulations*, which comprise part of the First and Second Hague Conventions, respectively.¹⁰ The conventions were a product of the First Hague Peace Conference, which was intended to ratify laws and customs of war.¹¹ Both regulations have ‘the force of a rule of international customary law,’¹² and are generally understood to ban chemical warfare.¹³ The 1925 Geneva Protocol, which bans both biological and chemical warfare, was drafted partly in response to the extensive use of chemical weapons during World War I.¹⁴ This protocol has 137 parties.¹⁵ The Chemical Weapons Convention (CWC), which opened for signature in 1993, bans the use of chemical weapons, among other prohibitions. This treaty has 188 parties, meaning nearly all states have agreed to its terms.¹⁶ This near unanimous membership displays a widespread view by the international community that use of chemical weapons is a crime, and reinforces over a century of condemnation.

A range of bodies have concluded that chemical warfare is prohibited by customary international law, thereby bolstering the prohibitions enshrined in the above

agreements. For example, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has treated the 1925 Geneva Protocol as customary international law.¹⁷ An ICTY appellate chamber noted in an opinion that ‘there undisputedly emerged a general consensus in the international community on the principle that the use of [chemical] weapons is also prohibited in internal armed conflicts.’¹⁸ In a 1971 study of CBW, the Stockholm International Peace Research Institute (SIPRI) noted that ‘the majority of international lawyers today concur. . . that a customary prohibition of CBW is indeed part of international law.’¹⁹ And in 2005, the International Committee of the Red Cross (ICRC) published two volumes defining the rules of customary international humanitarian law, which included a ban on the use of chemical weapons.²⁰

The use of biological weapons has a less extensive history of international condemnation. There are several reasons for this difference. Though biological weapons were most likely used before chemical weapons had been developed, the history of biological warfare is not as well-documented since its use against human beings ‘is so particularly odious that most governments are reluctant to say much about their preparations [for use], even in defence against it.’²¹ Given that biological weapons can cause afflictions which occur naturally, it is very difficult to determine when a biological weapon has been used if a government does not admit to it. When governments have admitted to using biological warfare, it has historically been in the context of sabotage attempts against animals.²² It was in the 1925 Geneva Protocol that biological weapons were for the first time addressed distinctly from chemical weapons. The Polish delegation

9 Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law, Vol. I: Rules*. International Committee of the Red Cross, Cambridge, Cambridge University Press, 2005, pp. 251–254; see Anders Boserup, *The Problem of Chemical and Biological Warfare, Vol. III: CBW and the Law of War*. Stockholm International Peace Research Institute, New York, Humanities Press, 1971, pp. 93–96.

10 International Committee of the Red Cross, *International Humanitarian Law – Treaties and Documents. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*. The Hague, October 1907. Introduction (written by ICRC). Available at <http://www.icrc.org/ihl.nsf/INTRO/1952?OpenDocument>.

11 *Id.*

12 Boserup, *supra* note 9, at 93.

13 *Supra* notes 3 and 10.

14 *Supra* note 1, at 18.

15 United Nations Office of Disarmament Affairs, *Status of Multilateral Arms Regulation and Disarmament Agreements: 1925 Geneva Protocol*. November 2010, available at [http://unhq-appspub-01.un.org/JUNODA/TreatyStatus.nsf/1925%20Geneva%20Protocol%20\(in%20alphabetical%20order\)](http://unhq-appspub-01.un.org/JUNODA/TreatyStatus.nsf/1925%20Geneva%20Protocol%20(in%20alphabetical%20order)).

16 Statistics obtained from www.opcw.org.

17 *Prosecutor v. Tadić*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-I-AR72, 2 October 1995, ¶¶ 96–127.

18 *Id.* at ¶ 14.

19 Boserup, *supra* note 9, at 126.

20 Henckaerts, *supra* note 9, at 259.

21 *Supra* note 1, at 111.

22 *Id.*

to the negotiations on the protocol first introduced the idea, proposing that ‘inasmuch as the materials used for bacteriological warfare constitute an arm that is discreditable to modern civilization. . . any decisions taken by the Conference concerning the materials used for chemical warfare should apply equally to the materials used for bacteriological warfare.’²³ Subsequently, the protocol was broadened to extend the commitment of its parties to prohibiting the use in war of bacteriological weapons.²⁴

Agreements made since then signal a continued commitment to preventing the use of biological weapons. The 1972 Biological Weapons Convention (BWC), which now has 163 parties, prohibits the ‘development, production, stockpiling, acquiring or retention of biological weapons.’²⁵ The 1996 Fourth Review Conference of the BWC affirmed that the use by parties, in any way and under any circumstances, of microbial or other biological agents or toxins, that is not consistent with prophylactic, protective or other peaceful purposes, is effectively a violation of Article I of the convention.²⁶ Several UN General Assembly resolutions encouraging observance of the BWC have helped to reinforce this principle.²⁷ Regional organizations, such as the Organization of American States, have also adopted resolutions prohibiting biological warfare.²⁸

The considerable body of treaties, national legislation, state and international practice and official statements, demonstrates that the use of biological weapons is of considerable concern to the international community. And, mirroring their conclusions on the legal status of bans on chemical warfare, the ICRC concluded that biological warfare is prohibited under customary international law,²⁹ an opinion

also supported by SIPRI. The status of CBW use as customary international law is significant inasmuch as it shows that CBW use by a state is a crime of international concern. One can infer, then, that use by an individual is also a crime of international concern.

There is also more direct evidence of a wide consensus that the prohibition on both chemical and biological weapons use extends to individual criminal liability. The ICRC has noted, with regards to Article 8, subparagraphs (2)(b)(xvii) and (2)(b)(xviii), ‘there is ample evidence that such prohibitions entail individual responsibility.’³⁰ Many states concur with this assessment, having declared CBW use by individuals a crime. Indeed, according to an internal analysis by VERTIC, a third of BWC parties have criminalized individuals’ use of biological weapons and many others criminalize the intentional infection or intoxication of humans, plants or animals with disease-causing agents or toxins. And at the Fourth Review Conference of the BWC, an understanding was reached that individuals are covered by the convention’s prohibitions.³¹ In addition, many non-parties to the BWC have prohibited individual use. Many countries have some legislation dealing with biological weapons, or at least the intentional infliction of disease, in some way.³² There is also a clear prohibition on the use of chemical weapons by individuals; Article VII of the CWC explicitly prohibits use by individuals.³³ As of 2010, 126 parties have reported taking legislative and administrative measures to implement the CWC, while 182 ‘National Authorities’ have been established to implement it.³⁴ Moreover, the UN Security Council has made clear its opinion on individual use of both chemical and biological weapons; the Council’s ‘Resolution

23 Malcolm R Dando and Kathryn Nixdorff, *An Introduction to Biological Weapons*. In: Kathryn McLaughlin and Kathryn Nixdorff (eds.), *BioWeapons Prevention Project Biological Weapons Reader*. Geneva, 2009, p. 13.

24 *Supra* note 4. The first part of the declaration states: ‘That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting [the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices], accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration.’

25 *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*. London, Moscow, Washington, D.C., 10 April 1972.

26 Final Declaration, BWC/CONF/IV/9 Part II.

27 Henckaerts, *supra* note 9, at 258; see UN Security Council, *Security Council resolution 1540 (2004)* [Non-proliferation of weapons of mass destruction].

28 April 2004, S/RES/1540(2004); see also UN Security Council, *Security Council resolution 1810 (2008)*. 25 April 2008, S/RES/1810(2008).

28 Organization of American States, *The Americas as a Biological and Chemical Weapons Free Region*, 10 June 2003, AG/RES.1966(XXXIII-O/03); see also Organization for African Unity, *African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources*. Algeria, 2000; *The Joint Declaration on the Complete Prohibition of Chemical and Biological Weapons (The Mendoza Accord)*, Mendoza, 5 September 1991; European Union: Council of the European Union, *Council Regulation (EC) No 3381/94 of 19 December 1994 Setting Up a Community Regime for the Control of Exports of Dual-Use Goods*, 19 December 1994, 3381/94; European Union: Council of the European Union, *Council Regulation (EC) No 1334/2000 of 22 June 2000 Setting Up a Community Regime for the Control of Exports of Dual-Use Items and Technology*, 22 June 2000, 1334/2000.

29 Henckaerts, *supra* note 9, at 256.

30 International Committee of the Red Cross, *The weapons amendment (Article 8.2 letter e) of the ICC Statute*. 22 April 2010, available at http://www.iccnw.org/documents/ICRC_The_weapons_amendment.22april10.1755.pdf.

31 *Supra* note 26.

32 VERTIC, *Biological Weapons Convention Legislation Database*, available at <http://www.vertic.org/pages/homepage/databases/bwc-legislation-database/introduction.php>.

33 *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention)*, Article I, Article VII(1). Paris, 13 January, 1993.

34 Organisation for the Prohibition of Chemical Weapons, *CWC National Authorities*, available at <http://www.opcw.org/about-opcw/member-states/national-authorities/>.

1540', adopted in 2004, requires states to implement national measures to prevent non-state actors from using CBW.³⁵

3. History of CBW use and the Rome Statute

Despite its history of legal condemnation, CBW use is not explicitly included in the Rome Statute. During negotiations on the statute, WMD attracted so much attention that one observer commented that its inclusion was 'one of the most controversial issues' in the discussions.³⁶ The source of the controversy, however, was not CBW. The debate was rather focused on whether to include nuclear weapons or not. At a late stage in the conference, nuclear weapons were dropped from the draft statute. Consequently, delegations which had supported the inclusion of a prohibition on nuclear weapons, shifted their attention to opposing a prohibition on CBW, since they felt that this would lead to an inequitable situation in which 'wealthy' nuclear-equipped states were not prohibited from having these weapons, while states that could not afford this technology were restricted from having the more affordable alternative. Essentially, they felt there was a lack of reciprocity and balance. By that stage, however, there was little time left to resolve any new debates. In the interest of proposing a draft which stood the best chance of ratification, no mention of any WMD was included in the final package.

The disappearance of an explicit reference to CBW was, at first glance, baffling. Initially, the inclusion of CBW use seemed unquestioned. A review of the 'Summary Records' of both the plenary and Bureau of the Committee of the Whole (BCOW) meetings shows that, throughout the conference, delegates did not openly object to

listing CBW use as a war crime. Observers corroborate this finding.³⁷ In fact, there is very little discussion of CBW in the records—aside from dismay at their ultimate removal from both the international and non-international conflicts sections.³⁸ Up until the last day of the conference, CBW use had been included in the draft text. Indeed, even the penultimate draft proposal contained a prohibition on the use of CBW.³⁹

The abrupt removal of any reference to CBW may be partly attributable to the lack of time governments and their delegates had to consider the draft document. Three years before the conference, the UN General Assembly had established the 'Preparatory Committee on the Establishment of an International Criminal Court' to create a draft for the conference.⁴⁰ The original draft statute contained approximately 1,400 brackets (which represent alternative formulations in UN negotiating texts).⁴¹ The Rome Conference lasted from 15 June until 17 July, 1998, a short time to address so many alternatives.⁴² Moreover, towards the end of the conference, some states became increasingly unwilling to compromise⁴³ in an attempt to influence the final version.⁴⁴

The primary reason for the deletion, however, was the omission of nuclear weapons in the Rome Statute. An option in the original draft listed nuclear weapons use as prohibited.⁴⁵ States that favoured this option considered the use of nuclear weapons to be prohibited by customary international law.⁴⁶ They felt that since nuclear weapons are WMD, they should be included in the Rome Statute.⁴⁷ Those opposed argued that nuclear weapons were distinct from other WMD in that their use was not prohibited by international law,⁴⁸ making inclusion in the Rome

35 Security Council resolution 1540 (2004) [Non-proliferation of weapons of mass destruction], 28 April 2004, S/RES/1540 (2004):'2. Decides also that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them.'

36 Michael Cottier, *War Crimes: Article 5*. In: Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd edition. Oxford, Hart Publishing, 2008. p. 415.

37 *Id.* at 412.

38 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary Record of 9th Plenary Meeting*, A/CONF.183/SR.9, 17 July 1998, ¶ 48; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Committee of the Whole, Summary Records of the 4th Meeting*, A/CONF.183/C.1/SR.4, 17 June 1998, ¶ 74; *Committee of the Whole, Summary Records of the 33rd Meeting*, A/CONF.183/C.1/SR.33, 13 July 1998, ¶ 33, 75; *Committee of the Whole, Summary Records of the 34th Meeting*, A/CONF.183/C.1/SR.34, 13 July 1998, ¶ 4.

39 Committee of the Whole, *Bureau Proposal*, A/CONF.183/C.1/L.59, 10 July 1998.

40 United Nations, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 1998*, available at <http://untreaty.un.org/cod/diplomatic-conferences/icc-1998/icc-1998.html>.

41 Philippe Kirsch and John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 Am. J. Int'l L. 2, 3 (January 1999).

42 *Id.* at 3.

43 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Committee of the Whole, Summary Records of the 34th Meeting*, A/CONF.183/C.1/SR.34, 13 July 1998, ¶ 1.

44 *Supra* note 41, at 6.

45 Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court. Addendum*.

Part 1. Draft Statute for the International Criminal Court, A/CONF.183/2/Add.1, 14 April 1998. Article 5(B)(o) Option 4.

46 Roger S. Clark, *Building on Article 8(2) (B)(xx) of the Rome Statute of the International Criminal Court: Weapons and Methods of Warfare*, 12 New Crim. L. Rev. 366, 368 (2009).

47 *Supra* note 41, at FN 32.

48 *Supra* note 41, at 7.

Statute tantamount to new legislation.⁴⁹ When it became evident the debate was not reaching resolution, BCOW proposed a draft text that omitted any reference to nuclear weapons. The inclusion of these weapons had met with too much objection to remain in the statute. The removal of the prohibition on nuclear weapons led some delegations that had opposed its deletion—and had no nuclear weapons of their own—to call for the removal of the ban on CBW.⁵⁰ This position evolved from a view that ‘if nuclear weapons were not to be included, then the poor person’s weapons of mass destruction, chemical and biological weapons, should not be either.’⁵¹

At that point, the draft statute was in a precarious position. The support of both sides, now seemingly lacking, was essential for the conference to have any concrete outcome. If a majority of states were not party to the treaty, the jurisdiction of the ICC would be ineffective. Trying to arrange a second round of negotiations might fail. With these issues in mind the BCOW offered, on the final day of the conference,⁵² a package designed to appeal to both groups.⁵³ This package omitted any explicit mention of WMD.⁵⁴ Article 8, subparagraphs (2)(b)(xvii) and (2)(b)(xviii) used the language about poisons and poisonous gases that had been included in drafts throughout the conference. Article 8(2)(b)(xx), which allowed the possibility of weapons being added in the future, was included with the intention of appeasing ‘the vast majority of delegations’ who were displeased with the newly shortened list.⁵⁵ This package was debated on the final day of the conference.⁵⁶ Although another amendment was proposed that day to include chemical, biological, and nuclear weapons use, it was not successful.⁵⁷ Norway proposed ‘no action’ on the grounds that

it was ‘essential to maintain the integrity of the package offered in order to avoid destroying the balance achieved with such difficulty and making it impossible to achieve the ultimate goal of an independent, effective and credible international court.’⁵⁸ Several delegates expressed continuing reservations about leaving WMD out of the Rome Statute,⁵⁹ but the time for negotiating had come to an end.

The history of the Rome Conference shows that CBW use was not excluded for reasons specific to chemical and biological weapons themselves, it rather resulted from an external driver, namely, delegates’ inability to agree on the inclusion of a nuclear weapons use prohibition. These issues, however, should be debated separately.

Nuclear weapons differ from CBW from a legal standpoint. In 1993, the World Health Organisation requested an advisory opinion from the International Court of Justice (ICJ) on whether the use of nuclear weapons was a crime.⁶⁰ The ICJ’s advisory opinion noted that state practice with regards to WMD has been to declare their use illegal in a specific document, citing the prohibitions contained in the CWC and BWC in contrast to the absence of any such international provisions on nuclear weapons.⁶¹ The NPT is qualitatively different from both the CWC and BWC. The CWC clearly prohibits possession and use, while the BWC prohibits possession, and is now understood by its parties to prohibit use as well. The NPT prohibits nuclear weapon possession for all states except those which manufactured and tested a nuclear weapon or other nuclear explosive device before 1 January 1967.⁶² Notably, it does not contain a prohibition on use.

Ultimately, the ICJ concluded that there was ‘in neither customary nor con-

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49 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Committee of the Whole, Summary Records of the 4th Meeting*, A/CONF.183/C.1/SR.4, 17 June 1998, ¶ 53.

50 *Supra* note 36, at 412.

51 *Supra* note 46, at 376.

52 *Supra* note 46, at 376.

53 *Supra* note 41, at 10.

54 *Supra* note 41, at FN 32.

55 *Supra* note 36, at 412.

56 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Committee of the Whole, Draft, Part 2. Jurisdiction, Admissibility and Applicable Law*, A/CONF.183/C.1/L.76/Add.2, 16 July 1998; see also United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Committee of the Whole, Summary Record of the 42nd Meeting*, A/CONF.183/C.1/SR.42, 17 July 1998.

57 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Committee of the Whole, Amendments to A/CONF.183/C.1/L.76/Add.2 Proposed by India*, A/CONF.183/C.1/L.94, 17 July 1998.

58 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Committee of the Whole, Summary Record of the 42nd Meeting*, A/CONF.183/C.1/SR.42, 17 July 1998 ¶ 9.

59 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Committee of the Whole, Summary Record of the 42nd Meeting*, A/CONF.183/C.1/SR.42, 17 July 1998, ¶¶ 32–34.

60 Request for advisory opinion made by the World Health Organization. The Hague: International Court of Justice, 1993-09-03. Available at <http://www.icj-cj.org/docket/files/93/10309.pdf>.

61 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, International Court of Justice (ICJ), 8 July 1996 ¶ 57.

62 *Treaty on the Non-Proliferation of Nuclear Weapons*. New York, 1 July 1968. Article IX(3).

ventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons.⁶³ Though states had refrained from using nuclear weapons since 1945, the Court held that there was no *opinio juris* since this forbearance could have been the result of circumstances rather than motivated by a sense of legal obligation.⁶⁴

Although the inclusion of nuclear weapons use in the Rome Statute is indisputably an important and contentious issue, the decision over whether to list the use of CBW as a crime in the Rome Statute should not depend on the outcome of the nuclear weapons debate.

4. CBW use and the First Review Conference

The CBW prohibition issue was revived in the period preceding the First Review Conference of the Rome Statute in 2010. Article 121 of the Rome Statute, which specifies how the document may be amended, prohibited the consideration of amendments until that year.⁶⁵ Belgium—which had first-hand experience of the fatal consequences of chemical warfare during World War I—proposed an amendment to add provisions rendering CBW use a war crime in both international and non-international armed conflicts. The amendment referred to language from the CWC and the BWC.⁶⁶ Another amendment tabled by Belgium proposed extending the prohibitions in Article 8, subparagraphs (2)(b)(xvii) and (xviii) on poisons and poisonous gases to non-international armed conflicts.⁶⁷ This amendment was adopted, but the CBW amendment was ultimately not considered at the Review Conference. This omission resulted from insufficient time for countries to consider the proposed

amendment, along with an objection to referencing the CWC and BWC.

Initially, the proposed amendment on CBW use had garnered strong support. It was co-sponsored by 13 other states⁶⁸ who considered the recommendation to be justified on the basis that such prohibitions were thought to be customary international law by many states.⁶⁹ Progress was halted, however, at the penultimate stage of the amendment process. Any proposed amendment to the Rome Statute must be considered at a meeting of the Assembly of States Parties (ASP)—the management oversight and administrative body for the ICC—before it can be adopted or considered at a Review Conference.⁷⁰ Belgium's amendments were submitted to the eighth session of the ASP,⁷¹ with the caveat by Belgium it would only submit amendments to the Review Conference which received 'overwhelming support'⁷² at the ASP meeting.⁷³

The CBW amendment, despite substantial support, met with some opposition.⁷⁴ With multiple amendments being proposed, it was feared there might not be sufficient time to consider each of them adequately.⁷⁵ Some insisted that an extensive examination was needed because only amendments which enhanced the universality of the Rome Statute should be added.⁷⁶ In addition, because the Review Conference would only provide sufficient time to review a few proposals and, since other proposed amendments were considered more important than the CBW amendment, it was dropped. Another objection posited that utilizing language from the BWC and CWC would have the effect of 'compulsory universalization' of those treaties.⁷⁷ Delegates were concerned that states that had not yet become parties to the Rome Statute would hesitate to join if they had the impression they were also acceding to

63 *Supra* note 61, at ¶105 (2)B.

64 *Supra* note 61 at ¶166.

65 *Supra* note 5, at Article 121, Part 1.

66 Belgium, *Draft Amendments to the Rome Statute on War Crimes, Amendment 2*, 29 September 2009. The provisions of the amendment which pertain to CBW read: 'xxvii) Using the agents, toxins, weapons, equipment and means of delivery as defined by and in violation of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, London, Moscow and Washington, 10 April 1972' and 'xxviii) Using or engaging in any military preparations to use chemical weapons as defined by and in violation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Paris, 13 January 1993.'

67 Belgium, *Draft Amendments to the Rome Statute on War Crimes, Amendment 1*, 29 September 2009; see Resolution RC/Res.5 Amendments to Article 8 of the Rome Statute, 16 June 2010 for the final resolution adopting the amendment.

68 Argentina, Bolivia, Burundi, Cambodia, Cyprus, Ireland, Latvia, Luxembourg, Mauritius, Mexico, Romania, Samoa, and Slovenia proposed the amendment along with Belgium.

69 *Supra* note 66.

70 The ASP was established by Article 112 of the Rome Statute. See note 6, at Article 121 part 2 for procedural requirements.

71 Assembly of States Parties, 8th Session, The Hague, 18–26 November 2009, see <http://www.iccnw.org/?mod=asp8>.

72 Assembly of States Parties, Eighth Session, *Report of the Bureau on the Review Conference, Addendum, Annex I: Belgium: Proposal of amendments*, ICC-ASP/8/43/Add. 1, 10 November 2009, p. 3.

73 Assembly of States Parties, Eighth Session, *Report of the Bureau on the Review Conference*, ICC-ASP/8/43, 15 November 2009, ¶33.

74 In addition to the adopted Belgian amendment, delegates at the Review Conference also adopted an amendment which added the crime of aggression to the Rome Statute. See Resolution RC/Res.6, *The crime of aggression*, 11 June 2010.

75 *Supra* note 73, at ¶34; Assembly of States Parties, Eighth Session, *Annex II, Report of the Working Group on the Review Conference*, ¶30, available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/WGRC-ENG.pdf.

76 *Supra* note 73, at ¶34.

77 *Supra* note 73, at ¶36.

the BWC and CWC. Though some 139 countries have become parties to the statute, many outliers remain.

The first concern does not exclude a CBW use amendment in the future. The Rome Statute is a legal document used to prosecute international crimes. Every important deficient area should be considered and changed if necessary, not just those deemed to need alteration most urgently. Now that the seven year procedural bar on amendments has passed, a state may propose an amendment at any time.⁷⁸

As for the second concern, incorporating language from the BWC and CWC would not imply universalization of either. The Belgian amendment called for Article 8, subparagraph 2(b) of the Rome Statute to include:

‘xxvii) Using the agents, toxins, weapons, equipment and means of delivery as defined in the [BWC];
xxviii) Using chemical weapons or engaging in any military preparations to use chemical weapons as defined by and in violation of the [CWC].’⁷⁹

Other prohibitions in those treaties, such as developing or stockpiling CBW, are not included. Belgium chose the language above to expedite discussion of terminology and the scope of the biological and chemical weapons provisions.⁸⁰ Furthermore, a CBW use amendment need not utilise the language of either treaty. One alternative is to use the original Rome Conference draft language. The draft prohibited employing ‘Bacteriological (biological) agents or toxins for hostile purposes or in armed conflict’⁸¹ and similarly using chemical weapons, ‘as defined in and prohibited by the [CWC].’⁸² Given that none of the delegates objected to this terminology

during the Rome Conference, however, it is likely it would still be acceptable now.

The discussion above suggests that both the failure to address CBW at the Review Conference and the original omission of an explicit CBW use prohibition in the Rome Statute may not have arisen from a belief that CBW use is permissible. Given the current views of the international community, the explicit inclusion of a prohibition on CBW use should not discourage non-parties to the Rome Statute from joining.

5. Critique of the current provisions

The preceding discussion has shown that the use of chemical and biological weapons does fall under ICC jurisdiction as defined by the Rome Statute, and the continued omission of an explicit prohibition on this is consequently not valid. The following discussion will show why the statute requires an unequivocal treatment of CBW use.

The lack of clear provisions prohibiting CBW use is highly problematic. Clearly defining crimes is of crucial importance, both for parties and judiciary officials. In its current state, the Rome Statute does not prohibit the use of biological weapons and the provisions regarding chemical weapons may not include all chemical weapons. Recent technical advancements have added urgency to the need to clarify these ambiguities.

From the outset of the Rome Conference, the International Committee of Jurists stressed the importance of defining crimes clearly because vague provisions could create difficulties. For example, a state official or other individual falling under the jurisdiction of the Rome Statute might unknowingly violate the law, or plead ignorance when they do.⁸³

“The lack of clear provisions prohibiting CBW use is highly problematic. Clearly defining crimes is of crucial importance, both for parties and judiciary officials.”

78 *Supra* note 5, at Article 121 Part 1: ‘After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto.’

79 *Supra* note 62.

80 *Supra* note 73, at ¶ 37.

81 Committee of the Whole, *Bureau Proposal*, A/CONF.183/C.1/L.59, 10 July 1998.

82 *Supra* note 45, at Article 5(B)(o) Option 1 prohibits use of: ‘chemical weapons as defined in and prohibited by the [CWC].’

83 International Commission of Jurists, *Definition of Crimes*, ICJ Brief No. 1 to the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, June 1998, p 3.

“The failure to explicitly prohibit CBW use, however, is a flaw that should now be remedied.”

Moreover, crimes must be clearly defined to be effectively adjudicated; lawyers and judges need a clear legal instrument to perform their functions effectively.⁸⁴ The ambiguity in the Rome Statute with regards to CBW might lead prosecutors to avoid charges which involve CBW and have a similar chilling effect on judges—resulting in overly cautious interpretations.⁸⁵ It is especially important that the war crimes portion of the Rome Statute is unambiguous, because these determine when cases may be brought, and when offences have been committed. If the parameters of a crime are not clearly defined, the resulting ambiguity can lead to judicial inconsistencies.

The vagueness of Article 8, subparagraphs 2(b)(xvii) and 2(b)(xviii) has already created a significant ambiguity over biological weapons. The language ‘asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices’ in subparagraph 2(b)(xviii) is taken from the 1925 Geneva Protocol; yet one of the purposes of this treaty, to extend these prohibitions to ‘the use of bacteriological methods of warfare,’ is not part of the Rome Statute. Some commentators have remarked that this omission means biological weapons are not included.⁸⁶ Others assume as a given that biological weapons are included,⁸⁷ on the premise that the poisoned weapons term is ‘the first prohibition’ of both chemical and biological weapons.⁸⁸

An examination of the terminology, however, indicates that the word ‘poison’ does not include biological weapons. The ‘Elements of Crimes’ addition to the Rome Statute defines a poison as a substance which causes death or serious damage to health in the ordinary course of events because of its toxic properties.⁸⁹ Biological weapons are microorganisms with the

ability to inflict damage or cause disease, which are not used for prophylactic, protective or other peaceful purposes.⁹⁰ Toxins are poisonous substances produced by a living being.⁹¹ Therefore, toxin weapons are either toxins or chemicals.⁹² The BWC prohibits the misuse of ‘microbial or other biological agents, *or* toxins,’ implying these are distinct categories.⁹³ Since biological weapons are named distinctly from toxin weapons, the term ‘toxin’ excludes biological weapons by implication.⁹⁴ Being neither toxins nor chemicals, biological weapons do not fall under the category of ‘poison.’

The terms ‘poisons’ and ‘poisonous gases’ might also exclude at least some types of chemical weapon. At one extreme, some interpret the Rome Statute, which includes both terms, to exclude both chemical and biological weapons.⁹⁵ Further, the negotiating history, in which delegates refused to ratify a treaty with CBW, has led some commentators to conclude that the statute must be interpreted to exclude them.⁹⁶ The less extreme view posits that only some kinds of chemical weapons are excluded. Though ‘asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices’ has widely been interpreted to include some chemical weapons, other chemical agents, such as irritants, may not be included since⁹⁷ they are not poisons. Regardless of which side is correct, this lack of consensus reflects a need for clarification.

6. Conclusion

Drafting the Rome Statute was a challenging task which was not executed flawlessly. The failure to explicitly prohibit CBW use, however, is a flaw that should now be remedied. Prohibitions on CBW use are widely recognized as customary interna-

84 *Id.*: ‘... the crimes within the ICC jurisdiction should be defined with clarity and precision not only to avoid ignorance in the law and to provide a useful tool to the practitioner, but for the provision of adequate instructions to the judges, prosecutor, and the defence.’

85 Marijns Glasius, *Criminalise WMD*, 3 September 2009, available at <http://www.opendemocracy.net/article/email/criminalise-wmd>.

86 Markus Wagner, *The ICC and its Jurisdiction—Myths, Misperceptions and Realities*, 8 April 2003. In: A. von Bogdandy and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, Vol. 7. The Netherlands, Koninklijke Brill N.V., 2003, p. 460.

87 *Supra* note 23, at 2.

88 *Supra* note 36, at 413.

89 Assembly of States Parties, *Elements of Crimes, Article 8(2)(b)(xvii) War Crime of Employing poison or poisoned weapons*, ICC-ASP/1/3, 9 September 2002, p. 139.

90 *Supra* note 20, at 8; see UN General Assembly, *Resolution 2603(XXIV) A Question of chemical and bacteriological (biological) weapons*, 16 December 1969, A/RES/2603(XXIV)A.

91 *Supra* note 23, at 9.

92 *Supra* note 36, at 420.

93 *Supra* note 25, at Article 1, emphasis added. The fact that the title of the Convention itself treats the terms biological and toxin as separate categories is also significant.

94 *Supra* note 36, at 414.

95 *Supra* note 36, at 415. Some delegates at the Rome Conference were unaware that this language was understood to include chemical weapons.

96 Gerhard Werle, *Principles of International Criminal Law*. The Hague, T.M.C. Asser Press, 2005, p. 371.

97 Boserup, *supra* note 9, at 41.

tional law and apply to states as well as to individuals. Therefore, the use of chemical or biological weapons in armed conflict is a serious crime of international concern that should be prohibited by the Rome Statute.

The Rome Conference could not accommodate the inclusion of CBW use in a more explicit manner due to the unresolved debate about nuclear weapons. The removal of a prohibition on nuclear weapons use created opposition to a ban on biological and chemical weapons use. Since the issue could not be resolved in the time allotted to the conference, the drafters chose instead to omit any mention of all three. However, there is no question that the use of chemical and biological weapons is treated differently in international law to the use of nuclear weapons; the NPT does not ban use, unlike the BWC and CWC, which do.

The Review Conference did not address the CBW question. This omission may be partly attributable to the nuclear issue. Certainly, the openly expressed concerns could be easily addressed. Fears about universalization of the CWC and BWC are unmerited given that an amendment would only incorporate definitions of terms, rather than operational language.

Moreover, the Review Conference was the first meeting in which amendments to the Rome Statute could be considered. Naturally, an influx of proposed amendments would accrue over a 12 year period. This initial period has ended, however, leaving time to consider afresh an explicit prohibition in the Rome Statute on CBW use in international and non-international armed conflict. The ICC has not yet had a case of CBW use before it, but it is crucial that the Rome Statute which guides it is unequivocal before that circumstance occurs.

Such a change is particularly pressing in light of recent technological advancements

which have increased the availability and effectiveness of CBW. In 2005, the ICRC issued a cautionary statement warning of the increased risk of biological warfare in light of recent biotechnological developments.⁹⁸ The Chair of the Sixth Review Conference of the BWC remarked that technological advances mean biological weapons are less costly to make, more powerful, and harder to detect.⁹⁹ The rise of dual-use technology, i.e. technology that can be used for both military and civilian purposes, has added to the risk of CBW use. For example, the common chemical chlorine has been used as a chemical weapon.¹⁰⁰ There is also a growing fear that terrorists might use published scientific reports to develop biological or chemical weapons.¹⁰¹ Dual-use technology has become more available and access to information has widened, making it increasingly important to have clear legal controls on it.

This paper recommends that a new amendment which explicitly prohibits CBW use in both international and non-international conflicts should be proposed to the Assembly of States Parties.

"This paper recommends that a new amendment which explicitly prohibits CBW use in both international and non-international conflicts should be proposed to the Assembly of States Parties."

98 Jacques Forster, *Preventing the use of biological and chemical weapons: 80 years on*, ICRC, Official Statement.

10 June 2005, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/gas-protocol-100605>. See also an ICRC Statement to the same effect from 2002. ICRC, Official Statement, *Appeal on Biotechnology, Weapons and Humanity*, 25 September 2002, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/5EAMTT>.

99 Ambassador Masood Khan (Pakistan), *Opening Statement by the President of the Sixth Review Conference of the Biological Weapons Convention*, 20 November 2006, available at [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/B3815E96CB8D2000C125722C003A59C9/\\$file/BWC-6RC-Statement-061120-President.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/B3815E96CB8D2000C125722C003A59C9/$file/BWC-6RC-Statement-061120-President.pdf).

100 Organisation for the Prohibition of Chemical Weapons, *Brief Description of Chemical Weapons*, available at <http://www.opcw.org/about-chemical-weapons/what-is-a-chemical-weapon>.

101 Parliamentary Office of Science and Technology, *The Dual-Use Dilemma*, postnote, No. 340, July 2009, p 1, available at <http://www.parliament.uk/documents/post/postpn340.pdf>.

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About this paper

The Rome Statute is intended to encompass 'the most serious crimes of concern to the international community.' International law, custom, and jurisprudence show that the use of chemical and biological weapons falls within this category. However, the treaty does not contain a clear ban on the use of either type of weapon. This brief examines why this omission occurred and argues that an explicit prohibition on such actions should be incorporated into the statute.

By Kara Allen with Scott Spence, VERTIC Senior Legal Officer, and Rocío Escauriaza Leal, VERTIC Legal Officer.

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