<u>On the Record for a Criminal Court</u>

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From the AP Editorial Desk

Definition of Crimes: Nuclear Cloud Over War Crimes Debate

ICC Must cover future weapons insists NGO Peace Caucus

Governments that would include the use of chemical and biological weapons under the ICC statute, but exclude nuclear weapons, are "criminalizing the poor man's weapons of mass destruction," according to John Burroughs, an attorney with the NGO Peace Caucus.

Burroughs and other peace activists are pushing delegations at the Rome conference to include the use of nuclear weapons as a war crime under the ICC statute – and running into fierce opposition from the nuclear states. The US has made it clear that this would make it impossible for the US to ratify the statute.

At the same time, however, the US and the other nuclear powers are keen that poison gas, dumdum bullets, biological agents, and chemical weapons are all defined as war crimes and proscribed by the ICC. This, says Burroughs, would mean that the "rich man's weapons of mass destruction, nuclear weapons," are excluded. "Understandably the non-nuclear states are not happy about this."

The last week has revealed a surprising amount of support for including nuclear weapons, even at risk of provoking the nuclear powers. This position would outlaw a list of weapons systems that "cause superfluous injury or unnecessary suffering or which are

inherently indiscriminate." In addition to nuclear weapons, they would include blinding lasers and landmines – and the list is not exhaustive.

In addition to supporting this proposal, the Caucus also wants the ICC amendment and review process to allow for a revision of the list, to adapt to changes in the nature of warfare or technology. "We don't want to get a frozen and archaic statute now, that can't be amended or that is amended by going through virtually impossible procedures," Burroughs said.

Highly destructive weapons may need to be added in the future. They could include computer virus weapons that disable a country's infrastructure, or space-based systems that can launch a non-explosive projectile whose impact on cities would be devastating.

The Peace Caucus is also concerned that exotic explosives using new materials such as metallic hydrogen and anti-matter, as well as directed energy weapons, could be created after the ICC has come into existence, and escape the court's jurisdiction.

The Caucus cites several important precedents, including the Nuclear Non-Proliferation Treaty, which now has 180 signatures. In July 1996, the World Court issued an opinion stating that nuclear weapons are subject to the fundamental rules of humanitarian law, and that the use of nuclear weapons is generally illegal. The Court, however, did not rule on the legality of using nuclear weapons when the survival of a state acting in self-defense is at stake.

John Burroughs is representing the International Association of Lawyers Against Nuclear Arms.

General Principles: Firms Could be Fined for Role in Genocide

The Rome Conference is moving towards a proposal that would extend the ICC's jurisdiction to companies that were used to store weapons or otherwise support acts of genocide or the other core crimes.

The idea, which is sponsored by France and the Solomon Islands, appears to be gathering support, even though it goes against a fundamental principle behind the ICC – that the court would only prosecute "natural persons" – that is, individuals.

One supporter of the proposal explained that the purpose is to prevent firms from profiting from genocide and war crimes. Citing one example given by Tanzania, he recalled how Rwandan Hutu had stored machetes prior to the 1994 genocide in Rwanda. There are also reports that earth-moving firms rented out their bulldozers for the purpose of digging mass graves. Not only is it unacceptable that these firms should profit, believe the sponsors, but their profits should go to the victims and their families.

The proposal contains four safeguards to ensure that any prosecution of such firms – or "juridical persons" – remains contained and narrowly focused.

First, it says, a firm can only be prosecuted if one of its employees – the "natural person" – is also being charged and prosecuted at the same time. Second, the individual must be convicted before any proceedings can start against the firm. Third, the natural person must have been acting as an "agent, representative, or employee" of the firm when the crime was committed. Fourth, the individual must have been acting on behalf of the firm, and with the firm's agreement, when the crime was committed.

Supporters hope that these safeguards would prevent the court from launching a wide-ranging case that could target multinational corporations or subsidiaries that were not directly involved in a crime. Otherwise the proposal could open the way to mischievous and frivolous prosecutions that would confirm all the worst suspicions of American skeptics.

Some observers are surprised that the proposal is still alive, let alone gathering support. But it faces stiff opposition from the Nordic countries, Switzerland and the United States.

The Nordics feel that it represents a diversion, and could raise new dilemmas that could detract from bigger make or break items such as the independent prosecutor. Switzerland and the US are understood to be more concerned by the prospect of corporations being heavily fined by the court.

Admissibility: US Pushing Hard to Sustain Challenge Proposal

Proposal on Article 16 would allow states four ways to oppose ICC investigation

The United States appears to be gaining ground in its efforts to allow states to challenge the authority of the ICC prosecutor to start investigations.

According to a new revised American proposal, the prosecutor would have to notify all states parties and any non-state parties that may have jurisdiction over a case that the prosecutor plans to take up. These states would then be given a month to decide whether they are going to take up the case and prosecute it nationally.

Only if the state were "unwilling or unable genuinely to carry out the investigation" would the prosecutor then be able to go the ICC pre-trial chamber and secure permission to start the investigations.

This proposal reflects American concern that the ICC might launch frivolous prosecutions, and the determination of the US to introduce as many safeguards as possible against this happening.

But too many safeguards would prevent the court from ever launching a prosecution. Many governments feel that this American proposal would have precisely this effect. Even if this first challenge is rejected, and the prosecutor continues, a state would still be given a single chance to challenge the admissibility of a prosecution (article 17).

Many governments would like to add a further impediment to prosecution by insisting that states would have to give their consent before the prosecutor went ahead (article 7). In addition, the crime would have to fit the definitions that are being hammered out at the Rome conference.

The US first came up with its proposal (article 16) late in the preparatory discussions, in March of this year. In the view of many governments, the new US revision, introduced on Monday, contains minor improvements, but remains essentially unchanged. Switzerland, Argentina, and Belgium all took issue with details, but only Germany stated bluntly that the proposal was unnecessary. This has long been the view of like-minded governments. But their lack of open opposition may indicate that many feel the US proposal is almost certain to be included, further chipping away at the ICC's powers.

Enforcement: Netherlands and UK Again Clash, This Time Over Detention

British proposal would allow states to withdraw ICC jail offer

Britain has suggested that states should be allowed to offer to take convicts who are sentenced by the ICC, and then withdraw the offer without explanation.

The British proposal is contained in a working paper that was presented to the conference on Thursday afternoon during a debate on enforcement of the ICC sentences. It was immediately and angrily criticized by the Netherlands, which has offered to provide the seat of the ICC in the Hague.

The Dutch are increasingly worried that they will be left to provide jail space for ICC convicts, and that this might be the price to be paid for hosting the new court in the Hague. "Delegates are saying that if we want to be the legal capital of the world, we may also have to be the Alcatraz of the world as well," said one frustrated Dutch delegate.

The British working paper suggests that states parties should indicate a willingness to accept persons accepted by the court after ratifying the treaty. But, it says, a state should then be able to withdraw the offer within 45 days, if asked to take sentenced persons by the ICC. The state would not be required to furnish any explanation. Even if the court finds this unacceptable, it will be able to do nothing more than "notify the State."

This proposal quickly gathered support from other delegations, leaving little doubt that few governments will be willing to take ICC convicts. This would be a bitter pill for the Dutch, who have had enormous trouble finding countries willing to take convicts sentenced by the international criminal tribunal for the former Yugoslavia (ICTY). Norway recently withdrew an offer to take Dusan Tadic, the first convict sentenced by the ICTY. Three states have concluded agreements with the ICTY. Another seven (including Iran and Pakistan) have indicated a willingness to cooperate in enforcing a sentence.

The Dutch feel that if states express a willingness to enforce sentences, they should be held to this in line with the obligation that comes from joining the court. This reflects the Dutch view that the court is an emanation of national judicial systems, with the power to issue binding orders.

At the same time, the Dutch also recognize that circumstances could arise where a state offers jail space, without being able to ensure proper detention facilities. The Dutch feel that any offer should be able to guarantee the same minimum standards of detention contained in the European Convention on Human Rights, the Geneva Convention on the Treatment of Prisoners of War, and the International Covenant on Civil and Political Rights.

They do not, however, include the UN's minimum rules on detention, which the Dutch feel are unrealistically strict. The Dutch delegate noted that these rules require that convicts have access to a library of their own language at least once a week. Only six or seven countries in the world can meet these standards, he said.

Final Clauses: Too Many Ratifications Would Delay ICC'S Entry Into Force, Say NGOs

"Swiss Cheese" warning on reservations

Supporters of the ICC are concerned that the number of states required to ratify the ICC statute will be so high that it may not enter into force for several years.

As discussion begins on the final clauses of the statute, the conference is divided between those who favor a high number of ratifications on the grounds that this would make the court more universal, and those who would like to see the court enter into force as soon as possible – even if this means a relatively low number of members.

Positions are also beginning to firm up on reservations and amendments. Most governments are strongly in favour of including reservations, but many nongovernmental groups fear this would open a Pandora's box and turn the ICC into a "Swiss cheese."

It is somewhat ironic to find governments discussing reservations before the statute has even been drafted. But this is a critical part of the broader strategy. Ratifications, amendments, and reservations offer governments a fall-back position in the event that the Rome conference produces a court that is not to their liking.

Most governments want to postpone a detailed discussion until they have a clearer picture of the court. But Syria, Israel and Mexico argued strongly for between 60 and 65 ratifications – equivalent to about a third of the UN membership. They feel this would ensure that the ICC will be of truly universal character.

Nongovernmental organizations, and supporters of a strong ICC, respond that the court would never attract this many ratifications, and that it could take years to come into force.

In a recent report, the Geneva-based International Commission of Jurists (ICJ) has analyzed the adherence to the main UN human rights treaties and concluded that no more than 20 to 25 ratifications should be required for the ICC. The ICJ points out that only six ratifications were required for the 1951 Convention on Refugees, twenty for the 1948 Genocide Convention, and twenty for the Torture Convention.

In a similar vein, the Spanish delegation has analyzed the membership of five international treaties that have a judicial element similar to those of a court, and based on this they speculate which states could thus be expected to ratify the ICC. In a meeting with NGOs on June 29, Spanish delegates said that only 14 governments have ratified all five conventions. Forty-three states parties have ratified three out of the five.

The five treaties include the Optional Protocol to the International Covenant on Civil and Political Rights, the International Fact Finding Commission established in accordance with Additional Protocol I to the Geneva Conventions, and the Committee established according to article 22 of the Convention against Torture.

This in the view of Spain and NGOs, is another strong argument for keeping the required number of ratifications low, so as to ensure the ICC's early entry into force. No matter how many compromises are hammered out elsewhere in the debate, they will mean little if the ICC never starts work.

Profile: From Nuclear Whizz-Kid to Pacifist: Commander Robert Green
by Rochelle Jackson

Robert Green is something of a novelty. He is the first and only retired British Naval Commander with nuclear experience to speak out against the use of nuclear weapons. "What we need is a reality check on nuclear weapons," he said.

He admits that he has not always been this publicly vocal. In fact, he spent 20 years with the British Navy as a navigator and weapons systems specialist. From 1968 to 1972, he was involved in the Buccaneer, a British navy nuclear strike-jet project.

Green was eventually assigned to anti-submarine helicopters, which carried nuclear weapons. "It was when I was first in an anti-submarine helicopter that I began to think about the consequences of being in a situation where I literally did have my finger on the button and I like to remind political leaders who claim that they would press the button, that they never would," he said in an interview with On the Record. "It is the military that has to do the dirty work and see more clearly the effects."

He describes the "nuclear death bomb" as "nonsense" in terms of military justification. The bombs had a minimum yield of 5 kilotons and a maximum of 20 kilotons, and could have been used by Green to "take out" submarines threatening his aircraft carrier. During and prior to these missions, he had been told that he was the final defense of Great Britain, its freedom and its way of life. "I realized that if I had to go and drop one of these

things, it would take me out as well. So it was a suicide mission. It would also escalate World War III to a nuclear holocaust," he said.

By 1979 Green had been promoted to Personal Staff Officer to the Assistant Chief of Naval Staff Policy in London's Ministry of Defense. Margaret Thatcher (who he describes as a "nuclear junkie") took office. It was around this time that he began to question the military competence of his leaders, and their respect for law.

But it was not until the height of the Cold War that Green found himself actively involved in the nuclear armament debate. Britain began talks on whether it should purchase the Trident weapon system. With 16 ballistic missiles each equipped with up to six 100 kiloton of thermonuclear warheads, one Trident warhead carried a force almost eight times the equivalent of the Hiroshima bomb. This was escalation on a grand scale.

Green's superior recommended against the Trident system, but was overruled by Thatcher. Ironically, these events coincided with the beginning of the Falklands War. It was at this point that Green decided to leave the military. "I decided that I didn't want to have anything to do with nuclear weapons after I left the British Navy," Green said.

After the war, Green – like the rest of the world – became more aware of the dangers of possessing nuclear weapons. The only thing that reassured him was his conviction that Britain's military commanders would sooner have faced a court martial than give the orders to launch the Trident.

"The next thing that happened was Chernobyl, where I saw the horrors of nuclear power." Chernobyl was, after all, producing the raw materials for the bomb. By now Green was actively campaigning against nuclear power. With the thawing of the Cold War and the crumbling of the Berlin Wall, an opportunity emerged.

Pivotal for him, however, was the Gulf War. "This was not going to be a containment operation... this was going to be a punitive expedition ... and here was a really dangerous scenario for the use of nuclear weapons." Like many others, Green feared that Saddam Hussein would be pushed into attacking with nuclear weapons. "So that pushed me to speak out against nuclear weapons. I found myself speaking to about 20,000 anti-Gulf War demonstrators."

He describes this experience as traumatic precisely because it felt so much like treason. The Official Secrets Act and a kind of "tribal loyalty" made his task all the more difficult. "So I found myself very alone and I actually looked for NGOs to go to." Quite by chance, Green discovered the World Court Project (UK) in October 1991 when it was just beginning.

Green has now taken his cause to the world. He chairs the World Court Project, which began in New Zealand and has mushroomed into an international citizen's network of over 700 organizations. The Project was successful in getting the International Court of Justice to issue an Advisory Opinion on the issue of the legal status nuclear weapons. The

ICJ issued its Opinion on July 8, 1996, stating that the threat or use of such weapons would generally violate international humanitarian law. In fact, the Court could find no lawful circumstance for the threat or use of nuclear weapons. Additionally, the ICJ confirmed that there existed an obligation to negotiate for the elimination of nuclear weapons. Essentially, until now, some states have argued that their nuclear policy is legitimate. The ICJ's opinion firmly refutes this assertion. This is a major step forward.

For Green the "nuclear tide" has risen and is now crashing against nuclear weapon states. He would like to see an ICC statute that recognizes the use of nuclear weapons as a war crime and insists that there must be language which describes the use of nuclear weapons as a war crime, otherwise the court's credibility will be damaged.

The recent nuclear tests in India and Pakistan have vindicated Green. He feels that Pakistan – much smaller than India – views nuclear weapons as an equalizer. Ironically, this is the same argument once used by NATO to justify its ownership of nuclear weapons. Russia also appears to retreating back in to the nuclear language, claiming that Russian conventional military has collapsed. "It is a nightmare come true... They thought they had it under control. The hypocrisy has been exposed and their whole game plan is in ruins. They need to rethink their approach to nuclear disarmament and the way they present their case."

"My hope is nuclear weapons will be consigned to the scrap-heap as an aberration in history."