

Congress' liability in a nuclear strike on Iran

No more European vacations for our legislators?

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Madrid, Brussels, London, Berlin, Paris, Rome, Vienna, may well be off-limits to US Congressmembers soon. Just as well, they will still be able to enjoy pleasant summer breaks in [Crawford, TX](#) or [Jackson Hole, WY](#), in the best of companies [1], [2]. Certainly preferable to ending up in a European jail for a very long time.

Every one of the 535 members of the 110th Congress is liable to face criminal indictment from the International Criminal Court in The Hague if the US uses nuclear weapons in the [impending conflict with Iran](#).

Following an indictment, every country that is a State Party to the [International Criminal Court](#) (ICC) will be required to take into custody any US Congressmembers that are temporarily on their soil and surrender them to the Court. [None of the Western European State Parties to the ICC](#) have signed bilateral "[Article 98 agreements](#)" with the United States that would give [immunity to US citizens](#).

The reasons why US Congressmembers are liable to face criminal indictment by the ICC in the aftermath of a US nuclear attack on Iran are:

1. The crimes will be in the category of "[most serious crimes of international concern](#)";
2. The US Congress [funded the creation](#) of [the weapons](#) to commit the crimes, and [paid the salaries of the servicemembers](#) that pushed the buttons;
3. The [US Congress was aware](#) that [conditions were such](#) that the crimes could occur [in the ordinary course of events](#);
4. [The US Congress had the authority](#) and ability to prevent the crimes from occurring, and failed to take reasonable measures within its power to do so;
5. At least some US Congressmembers actively aided, abetted and assisted in the commission of the crimes.

[Congress has the constitutional power](#) to [legislate](#) under which conditions [nuclear weapons](#), the most terrible weapons created by mankind, will be used in [military operations](#). By funding the [research, development and manufacture](#) of these weapons, at the rate of [over 6](#)

[billion dollars per year](#), and handing them over to the Executive *without putting any restriction on their use*, Congressmembers have made themselves liable for crimes that may be committed with “their” weapons. And there is the aggravating circumstance that [the Executive announced to Congress](#) that it would use nuclear weapons [under conditions](#) constituting serious violations of the [laws and customs](#) applicable [in armed conflict](#), and that [Congress knew that such conditions](#) were very likely to occur.

The Reach of the International Criminal Court

The [International Criminal Court \(ICC\)](#) “is an independent, permanent court that tries persons accused of the most serious crimes of international concern”. The ICC currently [has 104 member countries](#) (States Parties). The United States has refused to join, and as a consequence its citizens are not automatically subject to the Court’s jurisdiction. However, this does *not* mean that our legislators are beyond its reach. The Court [claims the right to exercise jurisdiction](#) if “[t]he crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court”. Iran is not currently a State Party, however the Court may exercise jurisdiction for a crime that occurred on Iran’s territory provided Iran will “by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question” (Article 12 of the ICC Rome statute).

Furthermore, radioactive fallout from a US nuclear strike against Iran that spreads and kills citizens of an ICC State Party would make US citizens involved in such action subject to the Court’s jurisdiction. [Afghanistan, Tajikistan, Georgia, Cyprus and Jordan are State Parties to the ICC](#) and not far from Iran. According to the [Union of Concerned Scientists](#), a nuclear earth penetrator “[would produce massive amounts of radioactive fallout](#) and potentially kill millions of civilians” spreading “more than a thousand miles”. According to a [report by the National Academy of Sciences](#), “the operational commander could warn of a nuclear attack on an HDBT (hard and deeply buried target) or could time such an attack to take advantage of wind conditions that would reduce expected casualties from acute and latent effects of fallout by factors of up to 100, assuming that the wind conditions were known well enough and were stable”. However, what if wind conditions are not known well enough or are not stable?

[A crime may be referred to the ICC by any State Party](#) (not necessarily the victim state), or the Prosecutor may begin an investigation on his own initiative. Subsequently the ICC would issue an arrest warrant if “there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court”. [Article 59 of the Rome Statute](#) instructs any State Party which has received a request for arrest to “immediately take steps to arrest the person in question”. Then, “the person shall be delivered to the Court as soon as possible”.

The list of 23 European countries that could take custody of visiting Congressmembers indicted by the International Criminal Court [is given here](#), to assist Congressmembers in their travel planning. And don’t forget the [22 Latin American and Caribbean states](#).

“Most serious crimes of international concern”

Is there any doubt that a US nuclear strike against a non-nuclear-weapon country [and its foreseeable consequences](#) would qualify as a “serious crime of international concern”?

[The Rome Statute of the ICC](#) does not mention nuclear weapons explicitly. However it includes (Article 8) under punishable “war crimes” “*serious violations of the laws and customs applicable in international armed conflict*“. [The International Court of Justice](#), the principal judicial organ of the United Nations, [has ruled that](#) “the threat or use of nuclear weapons would generally be *contrary to the rules of international law applicable in armed conflict*, and in particular the principles and rules of humanitarian law”.

The specific points of Article 8 that would be applicable in indictments of Congressmembers are:

- Article 8. 2. (a) (iii) “Wilfully causing great suffering, or serious injury to body or health”
- *ibid* (iv) “Extensive destruction... not justified by military necessity...”
- *ibid* (b) (iv) “Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment...”
- *ibid* (xvii) “Employing poison or poisoned weapons”
- *ibid* (xx) “Employing weapons, projectiles and materials and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering...”

Furthermore, the court may take the broad view that the individuals responsible for breaking the 60-year old taboo against the use of nuclear weapons bear direct responsibility for the longer-term consequences of such action. Those are likely to be: (1) Demise of the Nuclear Non-Proliferation Treaty resulting from the US use of nuclear weapons against a non-nuclear-weapon-country party to the NPT; this will lead to many more countries acquiring nuclear weapons in the coming years and to heightened global instability; (2) Likelihood that other countries will follow the US example and use nuclear weapons in regional conflicts for military expediency; (3) Escalation of regional nuclear conflicts into global nuclear war, leading to casualties in the hundreds of millions and potentially to the destruction of civilization.

As we enter the brave new world where use of nuclear weapons is commonplace, there will be plenty of time (while there is still human life on the planet) to initiate Court proceedings against Congressmembers. “The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations” (article 29).

Congress provided the weapons

Article 25 of the [International Criminal Court Statute](#) holds anybody that “aids, abets or otherwise assists” in the commission of a war crime criminally responsible, “*including providing the means for its commission*“. Article 27 explicitly includes “a member of a Government or parliament”.

According to the US constitution, it is [Congress’ responsibility](#) “To raise and support

Armies”, and to “provide for the common Defence”. Accordingly, every year Congress discusses and then enacts the [Defense Authorization Act](#), providing the funds for the [expenditures of the Department of Defense](#). One [section of the Act funds](#) the [National Nuclear Security Administration](#), that is responsible for the US nuclear weapons stockpile, in particular [“including the ability to design, produce, and test \[nuclear weapons\], in order to meet national security requirements”](#). The Act also specifies the salaries to be paid to personnel involved with nuclear weapons and [“nuclear career annual incentive bonus”](#).

In the latest fiscal year, [Congress provided \\$6,433,936,000](#) for nuclear weapons activities.

[In previous years](#), Congress funded the research, development and deployment of the [B61-11 nuclear earth penetrator](#) that [was incorporated in the stockpile](#) as a standard weapon in September 2001. There has been widespread speculation that B61-11’s will be used to target Iranian underground facilities [\[1\]](#), [\[2\]](#), [\[3\]](#).

The nuclear weapons that will be used in a nuclear strike against Iran are *Congress’ nuclear weapons*. They will be launched by members of the Armed Forces whose salaries are paid by Congress, and whose activities Congress is supposed to regulate.

The uniqueness of the current threat

Nuclear weapons have been around for over 60 years, and it has always been [solely the President’s prerogative](#) to decide on their use. However, nuclear weapons were always considered [weapons of last resort](#), to deter, respond or preempt a devastating attack from a *nuclear country*. It is only during the Bush administration that these nuclear policies [have been radically changed](#) to make US nuclear weapons [“another tool in the toolbox”](#).

Starting with the [Nuclear Posture Review of 2001](#), the US has changed both [its nuclear policy](#) and its [nuclear force structure](#) to serve the purpose of [defeating any potential adversary](#), whether or not it possesses nuclear weapons or any other kinds of weapons for that matter. For example, [Pentagon guidelines](#) now [encourage military commanders](#) to [seek presidential authorization](#) to use nuclear weapons “for rapid and favorable war termination on US terms”, “to ensure success of US and multinational operations”, and “to demonstrate US intent and capability to use nuclear weapons”. Nuclear and conventional capabilities have been [“integrated”](#) within the [U.S. Strategic Command structure](#) for [“the most efficient use of force”](#).

The [radical nature of these changes](#) in policy and force structure can [hardly be overemphasized](#). The firewall that always existed between nuclear and non-nuclear weapons has been obliterated without leaving any trace, singlehandedly by the Executive, without consulting either Congress or the American people. Congress should have *demand*ed its right to approve or reject and thereby reverse these changes, but has not.

And the reason why the firewall should be there still exists, as towering as ever. Nuclear weapons are weight for weight [million-fold more powerful than conventional weapons](#), and the [existing nuclear arsenals](#) can wipe out humanity many times over. Once we start using nuclear weapons again, there will be no return.

Congress cannot claim ignorance

[Article 30 the ICC Statute](#) states that “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are

committed with intent and knowledge". Furthermore, it states "In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events".

It will be impossible for Congressmembers to argue that they funded the buildup a [6 trillion dollar nuclear arsenal](#) (including [over 6 billion for the last fiscal year](#)) without the "intent" of using it against non-nuclear countries, after the aforementioned changes in US nuclear policies and force structure. These policies were announced in the [Nuclear Posture Review](#) delivered to Congress in December 2001, in the [Pentagon Doctrine for Joint Nuclear Operations of 2005](#) and in a variety of [speeches](#) and other documents. The [press has reported extensively](#) about these developments. These changes are analyzed in detail in the [Congressional Research Service Report for Congress of August 10, 2006](#), on "US Nuclear Weapons: Changes in Policy and Force Structure", that states for example "[t]he emphasis on the development of penetrating nuclear weapons that can destroy hardened and deeply buried targets, along with the "capabilities" based approach that states the United States will seek the ability to destroy threatening capabilities possessed by any potential adversary, are a part of this new strategy".

[Congress is well aware of the increasingly tense situation with Iran](#) and the [buildup of US military power in the Persian Gulf](#) being carried out by the administration at this time. Hence it knows that war may break out "in the ordinary course of events", and that given the new US nuclear weapon policies and force structure the administration [is likely to order their use](#) in a military conflict with Iran "in the ordinary course of events".

Congress' failure to regulate

Article 28 of the Rome Statute states that "a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates". More specifically if "the superior failed to take all *necessary and reasonable measures* within his or her power to prevent or repress their commission...".

The constitution assigns Congress the responsibility to [regulate](#) the Armed Forces ([Article 1, Sect. 8, Clause 14](#)). In that sense Congress is a "superior" to the Armed Forces, and has the duty to regulate and forbid certain behaviors, and is therefore liable if it fails to exercise proper control.

Congress [exercised](#) this responsibility [by banning the practice of torture](#) by the US Armed Forces. It [outlawed the production and use of chemical weapons](#) under any circumstances. It has so far abdicated its responsibility to even discuss, let alone legislate, over the use of nuclear weapons by the United States.

Congress can pass [legislation making it illegal](#) for the US to use nuclear weapons against non-nuclear-weapon states. This would prevent the Executive, who is sworn to uphold the law, to order their use against Iran. If the President would nonetheless order the use of nuclear weapons he would be subject to impeachment, but Congress would not be liable.

In the case of non-nuclear adversaries there is no extreme urgency associated with response or preemption of nuclear attack, hence there is no need for the Executive to have full discretion to order the use of nuclear weapons without input from Congress. Congress can reserve the right to designate any state to be a nuclear-weapon state, not subject to

this restriction, for example if it judges that a state is on the verge of acquiring nuclear weapons. It can also designate by statute any state that it decides should be subject to US nuclear attack, for example a state that possesses large arsenals of chemical or biological weapons and threatens to use them.

The [American Physical Society issued last year](#) a statement of “deep concern” about the “possible use of nuclear weapons against non-nuclear states and for pre-emptive counterproliferation purposes”. A [group of eminent US physicists](#) including Nobel laureates and present and past presidents of the American Physical Society and of [the Union of Concerned Scientists](#) has [urged Congress](#) “to [pass binding legislation](#) to forbid the use of nuclear weapons by the United States against countries which do not possess nuclear weapons, except with explicit prior Congressional authorization for such action”. The physicists state “Nuclear weapons are unique among weapons of mass destruction. Employment of nuclear weapons would kill untold number of innocent civilians in the target area, and the associated radioactive fallout could kill many thousands in other countries very far from the target. There are no sharp lines between small “tactical” nuclear weapons and large ones, nor between nuclear weapons targeting facilities and those targeting armies or cities”. “A decision that would have a major impact on the course of history and could ultimately threaten the survival of civilization should not be in the sole hands of the President unless absolutely unavoidable.”

[Physicists created nuclear weapons](#) and they ought to know what they are talking about. Passing a law to restrict the President’s authority to order the use of nuclear weapons, unless under attack or imminent attack by a nuclear nation, would be a “*necessary and reasonable measure*” that legislators should take to extricate themselves from complicity in nuclear crimes against non-nuclear-weapon countries.

Individual liability of Congressmembers

Each of the 535 current Congressmembers will be individually liable if the US uses nuclear weapons against Iran. One may even argue that all members of Congress that voted on Defense Authorization Acts (that always include funds for nuclear weapons and personnel) after the Nuclear Posture Review was delivered to Congress in December 2001 will be liable. That includes essentially all members of the 109th, 108th and 107th Congress as well.

Some Congressmembers have sent letters to the President [\[1\]](#), [\[2\]](#), [\[3\]](#), asking him not to use nuclear weapons, some have written articles [\[1\]](#), [\[2\]](#), [\[3\]](#), and given speeches [\[1\]](#), [\[2\]](#), [\[3\]](#) opposing the use of nuclear weapons. However, these efforts do not discharge these Congressmembers’ responsibility nor do they even constitute mitigating factors, because they know that letters, articles and speeches have no effect in constraining the President’s actions.

Some Congressmembers may face aggravating circumstances. For example, it is likely that [selected members](#) of Congress [were briefed](#) by the administration on the [deployment of tactical nuclear weapons in the Persian Gulf region](#). By having added knowledge and not acting to prevent it, these Congressmembers will have added culpability if the US uses nuclear weapons against Iran. Similarly, Congressmembers that actively support US military action against Iran will face added responsibility because they must know that such action is highly likely to lead to the use of nuclear weapons.

Some members of Congress may be under the mistaken impression that discussing and

passing legislation on the use of nuclear weapons that implicitly or explicitly allows their use in some circumstances would make them liable if the weapons are used in those circumstances. However, it is the other way around: they are maximally liable now, and passing binding legislation (as opposed to “sense of Congress resolutions”) to limit the circumstances under which nuclear weapons may be used would reduce their liability.

How Congressmembers can discharge responsibility

Article 25 of the ICC Statute reads: “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court” for several reasons, one of them (f) is: “Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.”

It may be argued that the fact that Congress has funded nuclear weapons and so far has refused to exert any control on potential criminal uses of those weapons by the Executive constitutes “taking action that commences its execution by means of a substantial step”. To the extent that individual Congressmembers engage in bona-fide efforts to restrict the authority of the Executive to order the use of those weapons, and especially if they succeed in passing legislation to that effect, they would be “abandon[ing] the effort to commit the crime or otherwise prevent[] the completion of the crime” and they would no longer be “liable for punishment”.

At the time of this writing, no Congressmember has taken any meaningful action to prevent commission of nuclear crimes. By virtue of their position and their lack of action, and the surrounding circumstances discussed above, the situation is no different than if Congress had [unanimously voted in favor](#) of using nuclear weapons against Iran.

Can the ICC act on the threat alone?

The [International Court of Justice has ruled](#) that not only the use, but also the *threat of use* of nuclear weapons is “contrary to the rules of international law applicable in armed conflict”.

President Bush has *threatened* to use nuclear weapons against Iran, when, in response to the question “Sir, when you talk about Iran, and you talk about how you have diplomatic efforts, you also say all options are on the table. [Does that include the possibility of a nuclear strike?](#) Is that something that your administration will plan for?” he answered “[All options are on the table](#)”.

If Bush is threatening to use Congress’ nuclear weapons in an illegal way, and Congress does not make any move to rein in the authority of Bush to do so, it follows that Congressmembers are implicitly aiding, abetting and assisting in the threat.

Does a threat rise to the level of gravity needed for consideration by the International Criminal Court (Article 17 (d))? John Bolton in his role as US ambassador to the United Nations [has called on the ICC](#) to charge Ahmadinejad for [his “threats” against Israel](#). The European Jewish Congress is said to be preparing to file [a complaint with the ICC against](#)

[Ahmadinejad](#) for that reason.

A [group of physicists](#) has [written to President Bush](#) to voice their objection to both “using or even merely threatening to use a nuclear weapon preemptively against a nonnuclear adversary” and urging him to take the nuclear option against Iran off the table, on the grounds that “[i]t is gravely irresponsible for the U.S. as the greatest superpower to consider courses of action that could eventually lead to the widespread destruction of life on the planet”.

ICC Prosecutor Luis Moreno Ocampo [stated in his acceptance speech](#) that “the creation of the International Criminal Court will help us to *prevent* those atrocities from being repeated in the future”. He furthermore stated that “The primary responsibility to *prevent*, control, and prosecute those atrocious crimes belong to the states in which jurisdictions they are committed. The principle of complementarity established by the Statute compels the prosecutor’s office to collaborate with national jurisdictions in order to help them improve their efficiency”. It logically follows that if national jurisdictions fail to act to prevent atrocious crimes, the entire responsibility to try to prevent the crimes lies with the ICC.

The ICC has jurisdiction over situations in any State where the situation is referred by the United Nations (UN) Security Council acting under Chapter VII of the UN Charter, in case of [“the existence of any threat to the peace,...”](#). Presumably, where the “threat to the peace” involves a [veto-wielding member of the UNSC](#), the entire responsibility to act on threats to peace lies with the ICC.

The ICC Prosecutor has full authority to [“initiate investigations proprio motu”](#). The ICC Statute says “Under the Rome Statute, individuals or organizations may submit to the Prosecutor information on crimes within the jurisdiction of the Court (“communications”). The Prosecutor shall analyse the information to determine whether there is a basis to launch an investigation”.

Unlike any other country in the world and unlike any other time in history, the United States under the Bush administration has openly and publicly claimed for itself the right to use nuclear weapons against non-nuclear-weapon countries at the sole discretion of one person, the President, and [has engaged in preparations to that effect](#). If a large enough number of concerned individuals and organizations provide input to the ICC Prosecutor and ask him to launch an investigation on the threat of nuclear weapons use by the United States that could ultimately lead to widespread nuclear genocide, Dr. Luis Moreno Ocampo may be inclined to act on the matter and indict US Congressmembers for their failure to legislate, thereby prompting these legislators to come to their senses and act before it is too late.

The [ICC Office of the Prosecutor](#) email address is otp.informationdesk@icc-cpi.int , tel.: +31 70 515 85 15, fax 31 70 5158555, postal: International Criminal Court Office of the Prosecutor, Post Office Box 19519, 2500 CM The Hague, The Netherlands.

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