# War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes

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* The article reflects the views of the author and not necessarily those of the ICRC. This article is based in some parts on previous publications by the same author: "War Crimes in the Elements of Crimes", in: H. Fischer/ C. Kreß/ S. R. Lüder (eds), *International and National Prosecution of Crimes Under International Law: Current Developments*, 2001, 95 et seq.; "Preparatory Commission for the International Criminal Court: The Elements of War Crimes – Grave breaches and violations of article 3 common to the Geneva Conventions of 12 August 1949", *Int'l Rev. of the Red Cross* 82 (2000), 771 et seq., and "Preparatory Commission for the International Criminal Court: The Elements of War Crimes – Part II: Other serious violations of the laws and customs applicable in international and non-international armed conflicts", *Int'l Rev. of the Red Cross* 83 (2001), 461 et seq.

*A. von Bogdandy and R. Wolfrum (eds.),*
*Max Planck Yearbook of United Nations Law, Volume 7, 2003,* 341-407.

In accordance with the Rome Statute the newly created International Criminal Court (ICC) will have jurisdiction over the crime of aggression, the crime of genocide, crimes against humanity and war crimes (article 5). While the crime of genocide, crimes against humanity and war crimes have been explicitly defined in arts 6-8 of the Statute, it so far does not contain a definition of the crime of aggression. It was decided during the Diplomatic Conference in Rome that the Court will only exercise its jurisdiction over the latter crime once a provision is adopted in accordance with the review procedures in the Rome Statute. Discussions on a definition are still underway at the moment of writing. It is still very hard to foresee whether this exercise will be successful and if so, when. In any case, a review conference, which could adopt a definition, may only be convened seven years after the entry into force of the Rome Statute. This article will only focus on the specifics of war crimes. After a brief discussion of the war crimes definition under article 8 of the Statute (I.), a special emphasis will be put on an analysis of the elements of war crimes as negotiated by a Preparatory Commission and adopted by the Assembly of States Parties (II.-IV.).

## I. War Crimes under the Rome Statute

The Rome Statute distinguishes four categories of war crimes:

- first, grave breaches under the four 1949 Geneva Conventions (GC). The Statute merely repeats the definitions contained in the four Geneva Conventions (arts 50 GC I,[1] 51 GC II,[2] 130 GC III[3] and 147 GC IV[4]). Grave breaches are prohibited acts, which are specifically listed in the four Geneva Conventions, and include conduct such as wilful killing, torture, inhuman treatment, hostage taking or extensive destruction and appropriation of property. Grave breaches must be committed in the context of an international armed conflict, and

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1 Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Geneva 12 August 1949.

2 Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva 12 August 1949.

3 Convention (III) relative to the Treatment of Prisoners of War, Geneva 12 August 1949.

4 Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva 12 August 1949.

against persons or property protected under the Geneva Conventions. Grave breaches are particularly serious violations of international humanitarian law. Independently of the Rome Statute, in accordance with the Geneva Conventions states are obliged to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering the commission of, any of these grave breaches, to search for such persons and to bring them, regardless of their nationality, before their own courts. Alternatively, a state may, if it prefers, hand such persons over for trial to another High Contracting Party.

- The second category of war crimes covers other serious violations of the laws and customs applicable in international armed conflicts. These crimes are derived from various sources. They reproduce to a large extent rules from:
  - the 1907 Hague Convention respecting the Laws and Customs of War on Land,
  - the 1977 Protocol I Additional to the Geneva Conventions,[5]
  - the 1899 Hague Declaration (IV, 3) concerning Expanding Bullets, and
  - the 1925 so called Geneva Gas Protocol.[6]
- The third category introduces serious violations of article 3 common to the Geneva Conventions which applies to non-international armed conflicts. Common article 3 includes a prohibition of acts such as violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.

The last category covers other serious violations of the laws and customs applicable in armed conflicts not of an international character. These crimes are derived from various sources, including the 1907 Hague Regulations and Additional Protocol II to the Geneva Conven-

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5 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva 8 June 1977.

6 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva 17 June 1925.

tions.[7] Most of these crimes mirror those crimes applicable in international armed conflicts as "other serious violations".

Despite the fact that the Rome Statute contains an impressive list of war crimes, not all of the serious violations of international humanitarian law have been included in the definition of war crimes.

The selection of war crimes was based on two different, but closely linked, considerations: first, the norm should be part of customary international law, given that not all treaties of international humanitarian law defining war crimes are universally accepted, and second, the violation of the norm would give rise to individual criminal responsibility under customary international law.[8]

Given that several delegations contested the customary law status of some provisions of Additional Protocol I, certain serious violations were omitted and other prohibitions such as the prohibition on disproportionate attacks and attacks against the natural environment (see article 8 (2) (a)/(b) (iv) ICC Statute) were included only, after a modification of the treaty language.

Regrettably, some war crimes have been excluded from the list adopted in Rome. To name just a few:

- no provisions are to be found on the unjustifiable delay in the repatriation of prisoners of war or of civilians, or
- on the launching of an indiscriminate attack affecting the civilian population or civilian objects (unless one equates such an attack with an attack against the civilian population as such, which is a war crime under the Statute[9]).

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7 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva 8 June 1977.

8 H. von Hebel/ D. Robinson, "Crimes within the jurisdiction of the Court", in: R. S. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute*, 1999, 104.

9 This seems to be the approach of the ICJ, when it equated the use of indiscriminate weapons with a deliberate attack on civilians in stating:
*"The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack* ***and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.****"*

So far, the Statute only covers few war crimes relating to the use of specific weapons. The small number of provisions dealing with the use of particularly cruel weapons is a consequence of the difficulties encountered in reaching consensus, largely due to the desire of some states to include nuclear weapons in the list of prohibited weapons, and the resistance of others to such an inclusion. Excluding nuclear weapons while listing other weapons of mass destruction, namely chemical and biological weapons, was as unacceptable to a number of states. They feared that prohibiting some weapons of mass destruction while remaining silent on nuclear weapons would give tacit approval to the legality of nuclear weapons. The only way out was, therefore, to exclude all weapons of mass destruction from the Statute for the time being. The weapons provisions in the Statute are therefore restricted to those weapons that are most clearly prohibited under international humanitarian law.[10] Those restrictions now appear in paras (xvii) to (xix):

- Employing poison or poisoned weapons;
- Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions, commonly referred to as dum-dum bullets.

In this context, it should be kept in mind that the prohibition on the employment of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, stems primarily from the 1925 Geneva Gas Protocol, which has constantly and consistently been interpreted as proscribing the use of chemical weapons. Despite the fact that an explicit reference to chemical weapons has been deleted, the interpretation of the Rome Statute cannot be construed in a way so as to exclude the use of chemical weapons from this particular crime.

At the same time as an explicit reference to nuclear, biological and chemical weapons was dropped, the use of blinding laser weapons — which is prohibited under the conditions set out in the 1995 Protocol IV on Blinding Laser Weapons to the 1980 Convention on Certain

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Legality of the Use by a State of Nuclear Weapons, ICJ Reports 1996, 226 et seq. (257, para. 78) (emphasis added).

10 Von Hebel/ Robinson, see note 8, 116.

Conventional Weapons[11] — and the use of anti-personnel mines — which is prohibited under the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction — were equally excluded from the Statute. The unresolved debate on these weapons was deferred for discussions at a review conference, and para. (xx) of article 8 of the Rome Statute allows for future expansion of the list of prohibited weapons through an amendment procedure. It is hoped that the list of prohibited weapons will be extended at the first review conference.

It must be emphasised that the Statute contains several war crimes, which cover specific uses of any type of weapon. For example it constitutes a war crime if attacks are intentionally directed against the civilian population as such or individual civilians (article 8 (2) (b) (i) or article 8 (2) (e) (i)). If in such cases anti-personnel mines or biological weapons are used as means of such an attack, this would be a crime under the Statute. The same reasoning would apply if such weapons are used to attack or bombard towns, villages, dwellings or buildings which are undefended and which are not military objectives (see article 8 (2) (b) (v)).

As for war crimes committed in internal armed conflicts the Statute mirrors a large number of war crimes defined for international armed conflicts. However, approximately half of the provisions of article 8 applicable to international armed conflicts were not included in the sections on non-international armed conflicts. The reasons for this are twofold:

- Some of the provisions are by their very nature not applicable to non-international armed conflicts.
- With regard to other provisions, several states took the view that these have not yet reached the status of customary international law and should therefore not be included.

The latter opinion prevailed in relation to the non-inclusion of provisions on the use of prohibited weapons in internal armed conflicts. This view is particularly regrettable when viewed in light of the determination by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic* case that customary law

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11 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva 10 October 1980.

rules prohibiting the use of specific weapons are equally applicable to non-international armed conflicts.

Other "gaps" in the war crimes applicable in internal conflicts are that there is for example no provision on the prohibition of intentionally starving the civilian population.[12]

Nevertheless, it must be emphasised that the major accomplishment of the Rome Conference with regard to war crimes certainly resides in the inclusion of war crimes committed during non-international armed conflicts. Hesitations by some delegations were overcome due to the fact that the Statute for the International Criminal Tribunal for Rwanda included war crimes committed in non-international armed conflict and the ICTY had recognized in its case law the customary nature of individual responsibility for serious violations of international law in such armed conflicts.[13]

The failure to include all serious violations of international humanitarian law in the Rome Statute means, that states must be reminded to respect their obligations under relevant treaties that oblige states to repress such violations, in particular:

- States Parties to AP I must provide for the repression of those grave breaches in arts 11 and 85 of that Protocol, which are not included in the Rome Statute,
- States Parties to the amended Mines Protocol,[14] the Ottawa Treaty and the newly adopted Second Protocol to the 1954 Hague Convention on Cultural Property[15] must implement the provisions relating to the penal repression.

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12 In that regard the ICTY stated that "*what is inhumane and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife*", ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *The Prosecutor v. Dusko Tadic*, IT-94-1-AR72, para. 119.

13 For example ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *The Prosecutor v. Dusko Tadic*, IT-94-1-AR72, paras 128-136.

14 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996).

15 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague 26 March 1999.

Whenever international treaties or customary international law contain stronger definitions of particular crimes than those in the Statute, these definitions must be incorporated into national law.

In the context of war crimes under the ICC Statute, one jurisdictional question merits further attention.

The Rome Statute contains a jurisdictional threshold in so far as it stipulates that the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes. This formulation constitutes a compromise solution. A few states were in favour of a high threshold, which would give the Court jurisdiction over war crimes "only when committed as a part of a plan or policy or as part of a large-scale commission of such crimes."

A clear majority of delegations opposed any threshold provision, but the option adopted as a compromise in the end, which added the words "in particular", was nevertheless considered acceptable. These delegations argued that a safeguard against the exercise of jurisdiction over isolated cases was already contained in the Statute through the principle of complementarity: if isolated war crimes were duly prosecuted by a national court, the ICC would not deal with these crimes. A threshold might, however, have the effect that national courts would not be encouraged to prosecute such isolated cases. In addition, such a threshold would introduce a false distinction between different categories of war crimes — a threshold which cannot be found in any existing legal instrument or under customary international law.[16] It must be emphasised that, for example, the killing of a single prisoner of war or one case of rape committed in an occupied territory can be a war crime.

Under the compromise found, plan, policy, and scale are not elements or jurisdictional prerequisites for war crimes under the Statute; nevertheless they are factors which may be taken into account by the Prosecutor in determining whether or not to begin investigations concerning an alleged war criminal.

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16 The ICTY clearly held "*that a crime need not:* be part of a policy or practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of the war", ICTY, Judgement, *The Prosecutor v. Tihomir Blaskic*, IT-95-14-T, paras 69 et seq. (footnotes omitted) with further references.

## II. Background and the Legal Status of the Elements of Crimes

During the Rome Diplomatic Conference some states felt that specific elements of crimes elaborating upon each crime under the jurisdiction of the ICC should be drafted. It was argued that an Elements of Crimes (EOC) document was necessary in order to provide greater certainty and clarity concerning the content of each crime. A delegation proposed a draft that would have made the EOC binding on the judges of the ICC. The majority at Rome, however, was concerned by the prospect of unduly restricting the judicial discretion accorded to the judges, and rejected the suggested binding character.

Nevertheless, the idea of EOC was not completely rejected in Rome and article 9 of the Statute reflects the compromise that was reached. It stipulates that the EOC *"shall assist the Court in the interpretation and application of articles 6 [genocide], 7 [crimes against humanity] and 8 [war crimes]"*, thereby clearly indicating that the Elements themselves are to be used as an interpretative aid and are not binding upon the judges.[17] The Elements must *"be consistent with this Statute"*. The consistency with the Statute must be determined by the Court.

A Preparatory Commission (PrepCom) was mandated to draft a document on the EOC by 30 June 2000. The instrument negotiated by the PrepCom, which was adopted by the Assembly of States parties without further substantive debate during its first session held at UN headquarters from 3 to 10 September 2002, will be discussed in the following sections in relation to war crimes. This overview of the PrepCom negotiations is not intended to be exhaustive,[18] and the choice of some specific issues for the purpose of this contribution does not imply that the PrepCom has reached 'perfect' solutions in other sections of the elements.

The negotiations of the Working Group on EOC, which started in February 1999, were largely based upon a comprehensive proposal

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17 See also Message [du Conseil fédéral Suisse] relatif au Statut de Rome de la Cour pénale internationale, à la loi fédérale sur la coopération avec la Cour pénale internationale ainsi qu'à une révision du droit pénal du 15 novembre 2000, 458.

18 For a more complete analysis see K. Dörmann (with contributions by L. Doswald-Beck and R. Kolb), *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, 2003.

drafted by the United States,[19] joint Swiss/Hungarian and Swiss/Hungarian/Costa Rican proposals[20] and other proposals, in particular those presented by the Japanese, Spanish and Colombian delegations. The International Committee of the Red Cross (ICRC) prepared a study relating to all war crimes, which was introduced at the request of seven states (Belgium, Costa Rica, Finland, Hungary, Republic of Korea, South Africa and Switzerland). The document, which was submitted in seven parts, presented relevant sources based on extensive research on and analysis of international humanitarian law instruments, the relevant case law of international and national war crimes trials (Leipzig Trials after World War I, post World War II Trials, including the Nuremberg and Tokyo Trials as well as national case law, and decisions from the *ad hoc* Tribunals for the former Yugoslavia and Rwanda), human rights instruments, and the case law of the UN Human Rights Committee, the European Commission and Court of Human Rights and the Inter-American Court of Human Rights.[21]

## III. Elements of War Crimes

### 1. General Introduction adopted by the PrepCom

The relationship between the crimes and general principles of criminal law presented the Working Group on Elements of Crimes with a particularly difficult drafting problem. Long discussions on this issue were therefore held during an intersessional meeting organised by the Government of Italy and the International Institute of Higher Studies in Criminal Sciences in Siracusa (Italy), convened in February 2000 especially for this purpose. The results of the Siracusa meeting provided im-

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19 PCNICC/1999/DP.4/Add.1.

20 PCNICC/1999/DP.5 and Corr.2,
PCNICC/1999/WGEC/DP.8,
PCNICC/1999/WGEC/DP.10,
PCNICC/1999/WGEC/DP.11,
PCNICC/ 1999/WGEC/DP.20,
PCNICC/1999/WGEC/DP.22, PCNICC/1999/ WGEC/DP.37.

21 PCNICC/1999/WGEC/INF.1,
PCNICC/1999/WGEC/INF.2,
PCNICC/1999/WGEC/INF.2/Add.1,
PCNICC/1999/WGEC/INF.2/Add.2,
PCNICC/1999/WGEC/INF.2/Add.3.

portant guidance for the discussions at the PrepCom.[22] Several of the questions raised during the intersessional meeting are now addressed in a General Introduction applicable to all crimes.[23] The main points will be addressed hereafter:

Paragraph 2 of the General Introduction[24] explains how article 30 ICC Statute,[25] which defines the mental element in general terms ("default rule"), must be applied in the EOC. It indicates the reason why little mention of the accompanying mental element is made in the elements of the various crimes. During the negotiations at the PrepCom the difficulty of adequately reflecting the relationship between article 30 ICC Statute and the definition of the crimes in the EOC document became apparent. The questions of whether the mental element should be defined for every crime, whether article 30 alone was sufficient, or whether the judges should make their own determination were ardently debated. *Inter alia* due to considerable differences in national legal systems it proved to be difficult to address the mental element of war crimes in a consistent manner.

Probably the most difficult question as to the interpretation of article 30 ICC Statute relates to what is meant by "unless otherwise pro-

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22 See report reproduced in PCNICC/2000/WGEC/INF.1*.

23 In the following "General Introduction".

24 *"2. As stated in article 30, unless otherwise provided, 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. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies. Exceptions to the article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below".*

25 Article 30 reads as follows:
*"1. Unless otherwise provided, 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.*
*2. For the purposes of this article, a person has intent where:*
*(a) In relation to conduct, that person means to engage in the conduct;*
*(b) 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.*
*3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly".*

vided", i.e. what other legal sources are of relevance in this context. For example, does this formulation mean that article 30 defines the mental element for every crime exclusively unless the Statute itself otherwise provides, even if it is more restrictive than customary international law? Or does it mean that the mental element might also be specifically defined in the EOC? It appears that, in addition to the different standards explicitly set out in the Statute, most, if not all delegations agreed that a deviation from the rule in article 30 may be required by other sources of international law as defined in article 21 of the Statute,[26] in particular by applicable treaties and established principles of international humanitarian law. In this regard, the case law, in particular that of the *ad hoc* Tribunals for the former Yugoslavia and Rwanda, may provide valuable interpretative insights. For example, in relation to the mental element applicable to the grave breaches of the four Geneva Conventions of 1949, discussed in more detail below, the Trial Chamber of the ICTY held that:

> *"[A]ccording to the Trial Chamber, the mens rea constituting all the violations of article 2 of the Statute [containing the grave breaches] includes both guilty intent and recklessness which may be likened to serious criminal negligence."*[27]

It will be up to the future judges of the ICC to determine how to bring this case law into line with the rule in article 30 ICC Statute. The judges might face a similar problem with the term "wilful", which is used in some of the crimes of article 8, and which has not been repeated in the EOC. The court will have to determine whether, in fact, the standard contained in article 30 and the definition of "wilfulness" in the case law of the *ad hoc* Tribunals coincide.

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26 *"1. The Court shall apply:*
*(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;*
*(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;*
*(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards [...]".*

27 ICTY, Judgement, *The Prosecutor v. Tihomir Blaskic*, IT-95-14-T, para. 152.

The second interpretative problem is related to the notion of "material element". Article 30 provides that *material* elements of a crime must be committed with intent and knowledge, without however clearly indicating what is meant by "material". The provision itself gives some indications in so far as in paras 2 and 3 it mentions three types of non-mental elements (conduct, consequence and circumstance), which might therefore be considered as material elements in the sense of the Statute. However, article 30 itself does not answer the question whether there exist other elements, for example related to the jurisdiction, which would require no accompanying mental element at all. This explains why there was considerable debate over the nature of some non-mental elements, in particular in relation to one specific element in the war crimes section, namely that describing the context in which a crime must be committed in order to be considered a war crime.[28]

For many delegations, the third paragraph of the General Introduction was of particular importance. They considered it necessary to emphasise that the actual knowledge or intent of the perpetrator[29] can generally be inferred from the circumstances and that the prosecutor will not be required to specifically prove these elements in every case. These delegations feared that otherwise some of the mental elements introduced in the EOC would have created an excessively heavy burden of proof for the prosecutor.

Paragraph 4[30] gives some guidance for the judges on how to handle so-called "value judgements". While the Siracusa Report emphasised that *"[t]he issue was whether a statement was required in the Elements of Crimes clarifying that the Prosecutor is not obliged to prove that the*

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28 See below III. 2. a. aa. in more detail.

29 The question of whether the term "accused" should be used, was the subject of intensive discussions in the PrepCom. Until the last session of the PrepCom all Rolling Texts contained this term, despite repeated criticism by several delegations. Basically, they argued that it has specific procedural connotations in the context of the Rules of Procedure and Evidence, therefore it should be avoided. Eventually the term was replaced with "perpetrator". One delegation stated that this choice would conflict with the presumption of innocence. Para. 8 of the General Introduction specifies therefore that *"the term "perpetrator" is neutral as to guilt or innocence"*. The change made during the final reading had no substantive impact.

30 *"4. With respect to mental elements associated with elements involving value judgement, such as those using the terms 'inhumane' or 'severe', it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated".*

*accused personally completed the correct normative evaluation, i.e. that the accused considered his acts 'inhumane' or 'severe'. There was a general view that this proposition was sufficiently evident and that further elaboration in the Elements of Crimes was not required"*,[31] it was, nevertheless, decided by the PrepCom that clarification was needed in order to ensure that the standard of knowledge required by article 30 ICC Statute does not apply to such elements. On the basis of the clarification in the General Introduction the judges need to determine whether a particular conduct can be held to have been, for example, "inhumane" or "severe". The perpetrator does not need to come to the correct normative conclusion. The prosecutor will therefore only be required to demonstrate that the perpetrator knew that harm would occur in the ordinary course of events as the result of his conduct.

Paragraph 6 is one of the most crucial paragraphs of the General Introduction. It states that:

> *"The requirement of 'unlawfulness' found in the Statute or in other parts of international law, in particular international humanitarian law, is generally not specified in the elements of crimes."*

The content is not easy to understand without a closer look at the negotiating history of the EOC. The term "unlawful" does not refer to grounds for excluding criminal responsibility in the sense of the Statute. It was instead intended to act as a "place marker" that refers back to relevant provisions of international humanitarian law. For example, the war crime of deportation (article 8 (2) (a) (vii) ICC Statute) can only occur in situations where article 49 (2) and (3) GC IV, which describe lawful evacuations, are not applicable. The war crime of "destruction and appropriation" in the sense of article 8 (2) (a) (iv) ICC Statute must be read in conjunction with the provisions dealing with different kinds of protected property in the GC.[32] The term "unlawful" serves *grosso modo* the same purpose as the terms "in violation of the relevant provisions of this Protocol" and "in violation of the Conventions or the Protocol" in article 85 (3) and (4) of the 1977 AP I.

The ninth paragraph of the General Introduction deals in very general terms with the problem of overlap of crimes. It indicates that a particular conduct may constitute several crimes. This statement was felt very important especially in relation to sexual crimes which are not only specific crimes under article 7 (1) (g), article 8 (2) (b) (xxii) and ar-

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31 See report reproduced in PCNICC/2000/WGEC/INF.1*.

32 See below III. 2. b.

ticle 8 (2) (e) (vi) of the ICC Statute, but may also fulfil the conditions of torture, inhuman treatment or other more general crimes, such as wilfully causing great suffering, or serious injury to body or health. Given that this is not a unique phenomenon for sexual crimes, the PrepCom decided to include this generic clarification.

## 2. Grave Breaches of the 1949 Geneva Conventions (article 8 (2) (a) ICC Statute)

### a. Elements Common to all Crimes under article 8 (2) (a) of the ICC Statute

War crimes as listed in article 8 (2) (a) of the ICC Statute cover "*grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention*". In accordance with the case law of the ICTY grave breaches of the GC[33] are acts committed in the context of an international armed conflict against persons or property protected under the relevant provisions of the four GC.[34] Two common elements can be derived from this statement: first, the context in which the crimes must be committed and, second, against whom or what the crimes must be committed. They describe the subject matter jurisdiction for war crimes under article 8 (2) (a) of the ICC Statute. Consequently these elements and the corresponding mental elements are drafted in the same way for all the crimes in this section. The common elements for all crimes under article 8 (2) (a) read as follows:

- *Such person or persons/property*[35] *were/was protected under one or more of the Geneva Conventions of 1949.*
- *The perpetrator was aware of the factual circumstances that established that protected status.* [1][2]
- *The conduct took place in the context of and was associated with an international armed conflict.* [3]

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33 See arts 50 GC I, 51 GC II, 130 GC III and 147 GC IV.

34 See ICTY, Judgement, *The Prosecutor v. Zejnil Delalic and others*, IT-96-21-T, para. 201, 76.

35 The protection of property is only relevant in the context of article 8 (2) (a) (iv) of the ICC Statute (see below III. 2. b.). All the other crimes deal with crimes committed against protected persons.

– *The perpetrator was aware of factual circumstances that established the existence of an armed conflict.*

*[1] This mental element recognizes the interplay between articles 30 and 32. This footnote also applies to the corresponding element in each crime under article 8 (2) (a), and to the element in other crimes in article 8 (2) concerning the awareness of factual circumstances that establish the status of persons or property protected under the relevant international law of armed conflict.*

*[2] With respect to nationality, it is understood that the accused needs only to know that the victim belonged to an adverse party to the conflict. This footnote also applies to the corresponding element in each crime under article 8 (2) (a).*

*[3] The term "international armed conflict" includes military occupation. This footnote also applies to the corresponding element in each crime under article 8 (2) (a).*

aa. Elements Describing the Context

The PrepCom, on the basis of the wording of the ICC Statute, followed the approach taken by the Appeals Chamber of the ICTY in the *Tadic* case where it was held that the concept of grave breaches applied only to international armed conflicts.[36] It decided not to define the notion of

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36 ICTY Appeals Chamber, Judgement, *The Prosecutor v. Dusko Tadic*, IT-94-1-A, para. 80; ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *The Prosecutor v. Dusko Tadic*, IT-94-1-AR72, para. 84, 48 (for the reasons see paras 79 et seq.); see also ICTY, Judgement, *The Prosecutor v. Tihomir Blaskic*, IT-95-14-T, para. 74:
*"Within the terms of the Tadic Appeal Decision and Tadic Appeal Judgement, article 2 applies only when the conflict is international. Moreover, the grave breaches must be perpetrated against persons or property covered by the 'protection' of any of the Geneva Conventions of 1949".*
The ICTY Trial Chamber seemed however to take a more progressive approach in the *Delalic* case:
*"While Trial Chamber II in the Tadic case did not initially consider the nature of the armed conflict to be a relevant consideration in applying article 2 of the Statute, the majority of the Appeals Chamber in the Tadic Jurisdiction Decision did find that grave breaches of the Geneva Conventions could only be committed in international armed conflicts and this requirement was thus an integral part of article 2 of the Statute. In his Separate*

an international armed conflict.[37] However, it emphasised in a footnote that the term "international armed conflict" included military occupations. Considerable importance has been given by the PrepCom to describing the nexus which must exist between the conduct of the perpetrator and the international armed conflict as well as to the question of a possible mental element which would be linked to the element describing the context.

The words "in the context of" and "was associated with" an armed conflict are meant to draw the distinction between war crimes and ordinary criminal behaviour. The PrepCom clearly derived this formulation from the case law of the *ad hoc* Tribunals. The words "in the context of" were meant to indicate the concept as developed by the ICTY that:

> *"international humanitarian law applies from the initiation of [...] armed conflicts and extends beyond the cessation of hostilities until a*

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*Opinion, however, Judge Abi-Saab opined that 'a strong case can be made for the application of article 2, even when the incriminated act takes place in an internal conflict'. The majority of the Appeals Chamber did indeed recognise that a change in the customary law scope of the 'grave breaches regime' in this direction may be occurring. This Trial Chamber is also of the view that the possibility that customary law has developed the provisions of the Geneva Conventions since 1949 to constitute an extension of the system of 'grave breaches' to internal armed conflicts should be recognised".*,
ICTY, Judgement, *The Prosecutor v. Zejnil Delalic and others*, IT-96-21-T, para. 202 (footnotes omitted). In the last resort, the Trial Chamber made no finding on the question of whether article 2 of the Statute could only be applied in a situation of international armed conflict, or whether this provision was also applicable in internal armed conflicts (ibid. para. 235), but indicated: *"Recognising that this would entail an extension of the concept of 'grave breaches of the Geneva Conventions' in line with a more teleological interpretation, it is the view of this Trial Chamber that violations of common article 3 of the Geneva Conventions may fall more logically within article 2 of the Statute. Nonetheless, for the present purposes, the more cautious approach has been followed".* (ibid., para. 317).

37 The term "international armed conflict" is defined under common article 2 GC in the following terms:
*"[...] all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.*
*[...] all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance".*

*general conclusion of peace is reached"*[38] *and "that at least some of the provisions of the [Geneva] Conventions apply to the entire territory of the Parties to the conflict, not just the vicinity of actual hostilities. [...] particularly those relating to the protection of prisoners of war and civilians are not so limited".*[39]

The words "was associated with" were meant to reflect the case law of the *ad hoc* Tribunals which states that a sufficient nexus must be established between the offences and the armed conflict.[40] Acts unrelated to an armed conflict, for example, murder for purely personal reasons not related to an armed conflict (e.g. a jealous soldier kills a civilian employee in the barracks because the latter had a relationship with the former's wife), are not considered to be war crimes.[41]

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38 ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-AR72, para. 70.

39 Ibid., para. 68.

40 The addition of the words "in association with" in the EOC was contested by some delegations. It was argued *inter alia* that they were redundant because they were already included in the requirement "in the context of".

41 In one recent judgement the ICTY has given the following additional indication:
*"What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict [...].*
*In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, inter alia, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties".*
ICTY Appeals Chamber, Judgement, *The Prosecutor v. Dragoljub Kunarac and others*, IT-96-23 and IT-96-23/1-A, paras 58 et seq.

The PrepCom discussed very heatedly the question whether a mental element should accompany the element describing the context and if yes, what kind of mental coverage would be required, in particular whether the article 30 ICC Statute standard would be applicable. Applying the full article 30 standard to the element describing the context would have meant probably that the perpetrator would need to be aware of the existence of an armed conflict as well as its character as being international. The later requirement especially was rejected by almost all delegations.

So far the *ad hoc* Tribunals have used an objective test to determine the existence and character of an armed conflict, as well as the nexus between the conduct and the conflict. Taking this approach, the ICTY in particular has apparently treated this element as being merely jurisdictional.[42]

On the basis of that case law, some delegations to the PrepCom argued that the Prosecutor need not demonstrate that the perpetrator had any knowledge of the existence of an armed conflict or its international or non-international character. Other delegations took the view that the cases decided by the Tribunals so far have clearly taken place in the context of an armed conflict and that the requirement of knowledge has never therefore been an issue. They argued that some form of knowledge would be required.

After long and delicate negotiations at the PrepCom, the following package was accepted. First, for each crime the above-mentioned elements are spelled out in the EOC:

*"The conduct took place in the context of and was associated with an international armed conflict.*

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42 For example, in the Tadic Judgement the Trial Chamber held that: *"The existence of an armed conflict or occupation and the applicability of international humanitarian law to the territory is not sufficient to create international jurisdiction over each and every serious crime committed in the territory of the former Yugoslavia.* ***For a crime to fall within the jurisdiction of the International Tribunal a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law".***, ICTY, Judgement, *The Prosecutor v. Dusko Tadic*, IT-94-1-T, para. 572 (emphasis added). See also Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 2nd edition, 2000, 51.

*The perpetrator was aware of factual circumstances that established the existence of an armed conflict."*[43]

Second, these elements are supplemented by further components in an introduction to the whole section on war crimes.[44] It contains the following interpretative clarification, which is intended to be an integral part of the set of elements:

*"With respect to [these] elements listed for each crime:*

*There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;*

*In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;*

*There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms 'took place in the context of and was associated with'".*

The first two paragraphs of the Introduction are drafted in a very straightforward and unambiguous manner. They emphasise that-

- There is no need to prove that the perpetrator made any legal evaluation as to the existence of an armed conflict or of its character as international or non-international; and
- There is no need to prove that the perpetrator was aware of the factual circumstances that made the armed conflict international or non-international.

This view as to the degree of knowledge as to the element describing the context found extensive support and was shared by almost every delegation.

The interplay between and the wording of the mental element and the third paragraph of the Introduction are not easy to understand however. At first sight, the definition of the mental element creates the

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43 The original proposal on the mental element read as follows: "*The accused was aware of **the** factual circumstances that established the existence of an armed conflict*". (emphasis added). The direct article was dropped in order to indicate that the perpetrator needs only to know some factual circumstances, but definitely not all the factual circumstances that would permit a judge to conclude that an armed conflict was going on.

44 In the following "Introduction".

impression that full knowledge of the facts that established an armed conflict is required. This impression, which would contradict the intention of the drafters, is at least attenuated by,

- first, the fact that, contrary to an earlier proposal,[45] the direct article was dropped before the term "factual circumstances" in order to indicate that the perpetrator need only be aware of some factual circumstances, but definitely not all the factual circumstances that would permit a judge to conclude that an armed conflict was going on; and
- second, the third paragraph of the Introduction, i.e. "*There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms 'took place in the context of and was associated with'.*"

On that basis one can only conclude that some form of knowledge is required, which is below the article 30 standard. The formulation in the third paragraph of the Introduction "awareness of the factual circumstances [...] that is implicit in the terms 'took place in the context of and was associated with'" seems to suggest that the perpetrator need only know the nexus. However, what does this mean in practice? Does the perpetrator need only to have some general awareness that his acts are related to a broader context or does the prosecutor need to prove the motives of the accused (personal motives or motives related to an armed conflict) in every case? In order to clarify the intentions of the drafters, it is worthwhile indicating the assumptions underlying the clarification for this part of the package as summarised by the sub-coordinator of the working group on EOC:

As to the awareness of the factual circumstances that make a situation an armed conflict and as to the proof of the nexus, the views were divided into two groups. The majority felt that it needs to be demonstrated that the accused was aware of at least some factual circumstances.[46] Those who held that view agreed that the mental requirement as to those factual circumstances is lower than the article 30 standard and should be "knew or should have known". They recognised that in most situations it would be so obvious that there was an armed conflict that no additional proof as to awareness would be required. There

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45 For the wording see note 25.

46 Some delegations argued that the perpetrator only needs to hear people shooting, others said that it would be enough if the perpetrator knows that people in uniform are around. These examples show that a very low standard of mental coverage was required by certain proponents of this view.

might, however, be some instances where proof of *mens rea* may be required. The other side insisted that no mental element is required at all.

This picture gives at least some guidance in determining the requisite degree of knowledge. There are no indications that the prosecutor must prove a higher degree of knowledge than that which is reflected in the majority view. Moreover, it appears that generally proving the nexus objectively will be sufficient. In such circumstances, an accused cannot argue that he or she did not know of the nexus.

bb. The Acts or Omissions are Committed against Protected Persons

The war crimes as defined in article 8 (2) (a) (i)–(iii) and (v)–(viii) ICC Statute must be committed against persons protected under the GC. While an initial US proposal[47] sought to define the protected persons for each crime under this section, the Swiss-Hungarian[48] and Japanese[49] proposals chose a more generic approach referring to persons protected under the provisions of the relevant GC. Given that protected persons are defined specifically in multiple provisions, in particular in the following provisions of the GC: arts 13, 24, 25 and 26 GC I; arts 13, 36 and 37 GC II; article 4 GC III; arts 4, 13, 20 GC IV,[50] the PrepCom preferred the latter approach.

During the negotiations some delegations would have liked to see the recent case law of the ICTY on protected persons under GC IV specifically reflected in the elements. Article 4 GC IV defines protected persons as *"those who, [...] find themselves [...] in the hands of a Party to the conflict or Occupying Power of which they are not nationals"*. The ICTY held that in the context of present-day inter-ethnic conflicts, article 4 should be given a wider construction so that a person may be accorded protected status, notwithstanding the fact that he or she is of the same nationality as his or her captors.[51] In the *Tadic* Judgement, the Appeals Chamber concluded that *"not only the text and the drafting history of the Convention but also, and more importantly, the Conven-*

47 PCNICC/1999/DP.4/Add.2.

48 PCNICC/1999/DP.5.

49 PCNICC/1999/WGEC/DP.5.

50 ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *The Prosecutor v. Dusko Tadic*, IT-94-1-AR72, para. 81.

51 ICTY Appeals Chamber, Judgement, *The Prosecutor v. Dusko Tadic*, IT-94-1-A, para. 166.

*tion's object and purpose suggest that allegiance to a Party to the conflict and correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test."*[52]

Despite considerable support that this case law be duly reflected, several states remained reluctant. They stressed that the case law concerned only one particular category of protected persons and, therefore, preferred to keep the generic term "protected persons" without any further qualification. After some discussion, the PrepCom decided that no greater refinement of the objective element was necessary. In any event, the views expressed by the ICTY in relation to the status of protected persons under article 4 GC IV will give the ICC further guidance.

There was, however, some fear at the PrepCom that the required mental element reading *"The perpetrator was aware of the factual circumstances that established that protected status"* could create too high a threshold in relation to this particular problem of nationality in the context of article 4 GC IV. Consequently, in relation to the requisite factual knowledge, the PrepCom specified in a footnote that the perpetrator need only know that the victim belonged to an adverse party. Knowledge as to the nationality of the victim or the interpretation of the concept of nationality is not required.

In addition, this mental element recognises the interplay between arts 30 and 32 of the Statute emphasising the general rule that, while ignorance of the facts may be an excuse, ignorance of the law (in this case of the GC and its definitions of protected persons or property) is not. Although one might argue that this explicit statement is self-evident and therefore redundant, the PrepCom felt that such clarification would be useful.

cc. The Acts or Omissions are Committed against Protected Property

In the case of article 8 (2) (a) (iv) of the Statute, the acts or omissions must be committed against property regarded as protected under the GC. "Protected property" is not generally defined in the GC. Instead, the Conventions contain a description of property that cannot be attacked, destroyed or appropriated. In particular the following provi-

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52 Ibid.

sions throughout the GC have to be mentioned: arts 19, 33–35 GC I; arts 22, 24, 25, 27 GC II; and arts 18, 19, 21, 22, 33, 53, 57 GC IV.[53]

### b. Elements Specific to the Crimes under article 8 (2) (a) of the ICC Statute

#### *Wilful Killing*

The crime of "wilful killing" is derived from the four GC of 1949 (arts 50 GC I; 51 GC II; 130 GC III; 147 GC IV). Element 1 (*"The perpetrator killed one or more persons".*) describing the *actus reus* of this crime did not give rise to long discussions. On the basis of the different text proposals, there was some debate as to whether the term "killed" or the term "caused death" or both should be used. The PrepCom did not see any substantive difference and expressed this understanding in a footnote which reads: *"The term 'killed' is interchangeable with the term 'caused death'"*. The term "killed" creates the link to the "title" of the crime, and the term "cause death" was felt necessary to clarify the fact that this crime also covers situations such as the reduction of rations for prisoners of war to such an extent that they starve to death. Both terms are used in the relevant case law of the *ad hoc* Tribunals.[54]

The term "wilful" as contained in the definition of this crime in the Statute is not included in the elements of crimes. There was some discussion as to whether the term "wilful" is identical to the standard set in article 30 of the Rome Statute or whether it has a different meaning. Those who were initially in favour of keeping the term "wilful" accepted the text on the assumption that the article 30 standard would not raise the threshold for this crime.[55]

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53 ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *The Prosecutor v. Dusko Tadic*, IT-94-1-AR72, para. 81.

54 ICTY, Judgement, *The Prosecutor v. Zejnil Delalic and others*, IT-96-21-T, para. 424. See also ICTY, Judgement, *The Prosecutor v. Tihomir Blaskic*, IT-95-14-T, para. 153.

55 The same problem also exists with regard to the following war crimes: article 8 (2) (a) (iii), (vi).
States who were in favour of the inclusion of "wilful" based their proposal on findings by the ICTY. For example, in the *Delalic* case, the ICTY held that:

*Torture*

An especially thorny problem as to specific grave breaches existed with regard to the war crime of torture (article 8 (2) (a) (ii) ICC Statute). Thus, the negotiations mirrored in a way the tension in the jurisprudence of the *ad hoc* Tribunals, which was marked to a certain extent by slightly different approaches in the definition of the elements of torture taken by different Trial Chambers. Torture is defined in the Statute as a crime against humanity (article 7 (2) (e)):

> *"'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions".*

The PrepCom had to decide whether this definition could also be applied to the war crime of torture. As pointed out by several delegations, the *ad hoc* Tribunals, in several judgements rendered at the time of ne-

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*"While different legal systems utilise differing forms of classification of the mental element involved in the crime of murder, it is clear that some form of intention is required. However, this intention may be inferred from the circumstances* [This approach was chosen at several occasions in the *Delalic* case by the ICTY Prosecution when it concluded for example that the necessary intent was necessarily inferred from the severity of the beating, see ICTY, Closing Statement of the Prosecution, *The Prosecutor v. Zejnil Delalic and others*, IT-96-21-T, paras 3.40, 3.52, 3.67, 3.90, 3.98, 3.113, 3.121, 3.132] *whether one approaches the issue from the perspective of the foreseeability of death as a consequence of the acts of the accused, or the taking of an excessive risk which demonstrates recklessness. As has been stated by the Prosecution, the [ICRC] Commentary to the Additional Protocols expressly includes the concept of 'recklessness' within its discussion of the meaning of 'wilful' as a qualifying term in both articles 11 and 85 of Additional Protocol I [...].*

***[T]he Trial Chamber is in no doubt that the necessary intent, meaning*** mens rea, ***required to establish the crimes of wilful killing and murder, as recognised in the Geneva Conventions, is present where there is demonstrated an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life".*** (emphasis added)

ICTY, Judgement, *The Prosecutor v. Zejnil Delalic and others*, IT-96-21-T, paras 437 and 439. A discussion of the approach adopted by different legal systems – common law and civil law – can be found in paras 434 and 435. See also ICTY, Judgement, *The Prosecutor v. Tihomir Blaskic*, IT-95-14-T, para. 153.

gotiations of the PrepCom, based their definition of the war crime of torture on the definition given in the *1984 Convention Against Torture and Other Cruel, Inhuman or Degrading, Treatment or Punishment* (CAT) which they considered not to be limited to the context of the CAT, but to reflect customary international law also for the purposes of international humanitarian law,[56] and defined the elements accordingly.[57] The CAT contains the following elements, which are not included in the ICC Statute:

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56 ICTY, Judgement, *The Prosecutor v. Zejnil Delalic and others*, IT-96-21-T, para. 459. In a judgement rendered after the completion of the PrepCom negotiations the ICTY took a more nuanced approach:
*"Three elements of the definition of torture contained in the Torture Convention are, however, uncontentious and are accepted as representing the status of customary international law on the subject:*
*(i) Torture consists of the infliction, by act or omission, of severe pain or suffering , whether physical or mental.*
*(ii) This act or omission must be intentional.*
*(iii) The act must be instrumental to another purpose, in the sense that the infliction of pain must be aimed at reaching a certain goal.*
*On the other hand, [the following] elements remain contentious:*
*(i) The list of purposes the pursuit of which could be regarded as illegitimate and coming within the realm of the definition of torture.*
*[...]*
*(iii) The requirement, if any, that the act be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*
*The Trial Chamber is satisfied that the following purposes have become part of customary international law: (a) obtaining information or a confession, (b) punishing, intimidating or coercing the victim or a third person, (c) discriminating, on any ground, against the victim or a third person. There are some doubts as to whether other purposes have come to be recognised under customary international law.*
*[...] The Trial Chamber concludes that the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law. In particular, the Trial Chamber is of the view that the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law".*, ICTY, Judgement, *The Prosecutor v. Dragoljub Kunarac and others*, IT-96-23 and IT-96-23/1-T, paras 483-96 (footnotes omitted).

57 ICTY, Judgement, *The Prosecutor v. Zejnil Delalic and others*, IT-96-21-T, ibid. and para. 494:

*"[the] pain or suffering, [must be] inflicted on a person for such purposes as obtaining [...] information or a confession, punishing [...], or intimidating or coercing [...], or for any reason based on discrimination of any kind",*

and the *"pain or suffering [must be] inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".*

Some delegations to the PrepCom felt that either the purposive element or the element of official capacity or both were necessary in order to distinguish torture from the crime of inhuman treatment. Others argued that in line with case law of the European Court of Human Rights, it is the severity of the pain or suffering inflicted that should be used to draw a distinction between the two crimes.[58]

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*"(i) There must be an act or omission that causes severe pain or suffering, whether mental or physical,*
*(ii) which is inflicted intentionally,*
*(iii) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind,*
*(iv) and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity".*

In a later judgement, the ICTY described some specific elements that pertain to torture as *"considered from the specific viewpoint of international criminal law relating to armed conflicts".* Thus, the Trial Chamber considers that the elements of torture in an armed conflict require that torture:

*"(i) consists of the infliction by act or omission of severe pain or suffering, whether physical or mental; in addition*
*(ii) this act or omission must be intentional;*
*(iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person; or at discriminating, on any ground, against the victim or a third person;*
*(iv) it must be linked to an armed conflict;*
*(v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity".,*

ICTY, Judgement, *The Prosecutor v. Furundzija*, IT-95-17/1-T, para. 162.

58 The European Court of Human Rights found in the *Ireland v. The United Kingdom Case* that the *"distinction [between 'torture', 'inhuman treatment' and 'degrading treatment' within the meaning of article 3 European Convention on Human Rights] derives principally from a difference in the in-*

The compromise found at the end of the discussion of the issue in the PrepCom follows, to a large extent, the case law of the *ad hoc* Tribunals available at the time, and is consistent with the most recent judgement by the Appeals Chamber in the *Kunarac and others* case. It drops the reference to official capacity and incorporates the purposive element by repeating the list of the CAT.[59] The approach taken after the first reading of the elements, which included a more narrow list of pro-

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*tensity of the suffering inflicted"*, European Court of Human Rights, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, Volume 25, 1978, 66. In the *Greek* case, Yearbook of the Convention on Human Rights, 1972, 186, the Commission found that *"'torture' [...] is generally an aggravated form of inhuman treatment"*. The European Court of Human Rights also stated that 'torture' presupposes a *"deliberate inhuman treatment causing very serious and cruel suffering"*, European Court of Human Rights, *Case of Ireland v. The United Kingdom*, ibid., 66; European Court of Human Rights, *Aksoy v. Turkey*, Reports of Judgments and Decisions, 1996-VI, 2279. See however European Commission of Human Rights, The *Greek Case*, Yearbook of the Convention on Human Rights, 1972, 186: *"the word 'torture' is often used to describe inhuman treatment, which has a purpose [...] and it is generally an aggravated form of inhuman treatment"*. In its more recent judgements, the Court endorsed the definition of the Torture Convention, expressly including the purposive element. In doing so it stressed this element's relevance in distinguishing between 'torture' on the one hand and 'inhuman and degrading' treatment on the other, European Court of Human Rights, *Ilhan v. Turkey*, Judgement of 27 June 2000, http://www. echr.coe. int/Eng/Judgments.htm, para. 85; European Court of Human Rights, *Salman v. Turkey*, Judgment of 27 June 2000, http://www.echr.coe.int/Eng/Judgments.htm, para. 114; European Court of Human Rights, *Akkoc v. Turkey*, Judgment of 10 October 2000, http://www.echr.coe.int/Eng/Judgments.htm, para. 115.

59 In this regard, the ICTY held that: *"[t]he use of the words "for such purposes" in the customary definition of torture [the definition contained in the Torture Convention], indicate that the various listed purposes do not constitute an exhaustive list, and should be regarded as merely representative"*., ICTY, Judgement, *The Prosecutor v. Zejnil Delalic and others*, IT-96-21-T, para. 470. However, the ICTR seemed to suggest an exhaustive list by formulating *"for one or more of the following purposes"*, ICTR, Judgement, *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4, para. 594. In the *Musema* judgement it defined torture along the lines of the Torture Convention with a non-exhaustive list, ICTR, Judgement, *The Prosecutor v. Alfred Musema*, ICTR-96-13, para. 285.

hibited purposes,[60] was abandoned in favour of the illustrative approach of the CAT. This was because of a compromise between one group of states which thought that torture even if committed for purely sadistic reasons would be a war crime, and the other group of states which felt that an illustrative list would conflict with the principle of legality.

The elements as drafted do not preclude that further clarification given by the ICTY may be taken into consideration. With regard to the purposive element the ICTY emphasised that:

> *"there is no requirement that the conduct must be solely perpetrated for a prohibited purpose. Thus, in order for this requirement to be met, the prohibited purpose must simply be part of the motivation behind the conduct and need not to be the predominant or sole purpose".*[61]

Given that the list of prohibited purposes in the EOC is not exhaustive, the fact that the purpose of "humiliating", as suggested by the ICTY in the *Furundzija* case,[62] has not been added, is not detrimental.

With regard to the omission of the element of official capacity, the PrepCom went a step further than the *ad hoc* Tribunals at the time of the negotiations, but clearly followed the trend set by them, which had

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60 *"The accused inflicted the pain or suffering for the purpose of: obtaining information or a confession, punishment, intimidation or coercion, or obtaining any other similar purpose."* (PCNICC/1999/WEGC/RT.2).

61 ICTY, Judgement, *The Prosecutor v. Zejnil Delalic and others*, IT-96-21-T, para. 470. See also ICTY Appeals Chamber, Judgement, *The Prosecutor v. Dragoljub Kunarac and others*, IT-96-23 and IT-96-23/1-A, para. 155.

62 With respect to the addition of the purpose "humiliating" under (iii) of the indicated elements, the ICTY held in the *Furundzija* case that it is:

> *"warranted by the general spirit of international humanitarian law; the primary purpose of this body of law is to safeguard human dignity. The proposition is also supported by some general provisions of such international treaties as the Geneva Conventions and Additional Protocols, which consistently aim at protecting persons not taking part, or no longer taking part, in the hostilities from "outrages upon personal dignity". The notion of humiliation is, in any event close to the notion of intimidation, which is explicitly referred to in the Torture Convention's definition of torture".*

ICTY, *The Prosecutor v. Furundzija*, Judgement, IT-95-17/1-T, para. 163; ICTY, Judgement, *The Prosecutor v. Miroslav Kvocka and others*, IT-98-30/1-T, para. 140. See however the more cautious approach taken in ICTY, Judgement, *The Prosecutor v. Dragoljub Kunarac and others*, IT-96-23 and IT-96-23/1-T, para. 485, which was rejected in *re Kvocka and others*.

already softened the standard contained in the CAT to a certain extent. In the *Delalic* case the ICTY held:

> *"Traditionally, an act of torture must be committed by, or at the instigation of, or with the consent or acquiescence of, a public official or person acting in an official capacity. In the context of international humanitarian law, this requirement must be interpreted to include officials of non-State parties to a conflict, in order for the prohibition to retain significance in situations of internal armed conflicts or international conflicts involving some non-State entities".*[63]

In the *Kunarac* case, the ICTY Appeals Chamber has now come to the conclusion "that the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention",[64] and, thus, albeit without saying so, has implicitly approved the view taken by the PrepCom.

If one compares the elements of torture and inhuman/cruel treatment in the EOC, the element of purpose is the only distinguishing feature. Thus, the elements do not follow the *ad hoc* Tribunals' case law, in which it is consistently indicated that "the degree of suffering required to prove cruel or inhuman treatment was not as high as that required to sustain a charge of torture".[65] The *ad hoc* Tribunals refer to "severe" pain or suffering for the crime of torture and "serious" pain or suffering for the crimes of inhuman/cruel treatment.[66]

*Inhuman Treatment*

The negotiations on the elements of "inhuman treatment" (article 8 (2) (a) (ii) ICC Statute) were also rather problematic. Some delegations expressed the view that the criminal conduct should not be limited to the infliction of severe physical or mental pain, but should also include conduct constituting "a serious attack on human dignity". This opinion

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63 ICTY, Judgement, *The Prosecutor v. Zejnil Delalic and others*, IT-96-21-T, para. 473.

64 ICTY Appeals Chamber, Judgement, *The Prosecutor v. Dragoljub Kunarac and others*, IT-96-23 and IT-96-23/1-A, para. 148.

65 For example ICTY, Judgement, *The Prosecutor v. Zejnil Delalic and others*, IT-96-21-T, para. 510; ICTY, Judgement, *The Prosecutor v. Miroslav Kvocka and others*, IT-98-30/1-T, para. 161.

66 See for example ICTY, Judgement, *The Prosecutor v. Zejnil Delalic and others*, IT-96-21-T, para. 543.

is largely based on the consistent case law of the ICTY which has recognised that serious attacks on human dignity may constitute inhuman treatment.[67] In the end, the PrepCom decided not to include attacks on human dignity in the definition of acts constituting inhuman treatment because the crime of "outrages upon personal dignity, in particular humiliating and degrading treatment" would cover such conduct. This interpretation is not problematic in the context of the ICC, but may have unintended implications for the interpretation of the GC. If serious attacks on human dignity are included in the concept of inhuman treatment then the grave breaches regime and mandatory universal jurisdiction will apply — this means that states are obliged to search for and prosecute alleged perpetrators regardless of their nationality and of where the act has been committed. If, however, such attacks are only covered by the crime of "outrages upon personal dignity", the concept of permissive universal jurisdiction applies and states are only obliged to suppress such conduct on their territory or by their nationals.

*Extensive Destruction and Appropriation of Property*

The discussions on article 8 (2) (a) (iv) ICC Statute in relation to the crime of "extensive destruction and appropriation of property" have been very significant for the negotiations on crimes derived from the grave breaches provisions of the GC.

Article 8 (2) (a) repeats established language from the GC, but nevertheless, it proved sometimes difficult to draft the elements of this crime. This might have been the case because the grave breaches provisions refer back to various articles of the GC which establish different levels of protection. In the case of appropriation or destruction the GC define distinct standards for specific protected property.[68] This may be illustrated with respect to the protection of civilian hospitals on the one hand and property in occupied territories on the other:

Article 18 GC IV defines the protection of civilian hospitals against attacks, i.e. against destruction, in the following terms:

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67 ICTY Appeals Chamber, Judgement, *The Prosecutor v. Zejnil Delalic and others*, IT-96-21-A, para. 424; ICTY, Judgement, *The Prosecutor v. Zejnil Delalic and others*, IT-96-21-T, para. 544; ICTY, Judgement, *The Prosecutor v. Tihomir Blaskic*, IT-95-14-T, para. 155; ICTY, Judgement, *The Prosecutor v. Miroslav Kvocka and others*, IT-98-30/1-T, para. 159.

68 See for example ICTY, Judgement, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 336.

> *"Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict [...]".*

Article 19 GC IV lays down the stringent conditions under which such civilian hospitals may nevertheless be attacked:

> *"The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded".*

Article 53 GC IV defines the protection of property in occupied territory in a different manner:

> *"**Any destruction** by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, **is prohibited, except where such destruction is rendered absolutely necessary by military operations**".* (emphasis added).

Considering these examples, the drafting of EOC had to be done in a way that properly reflected these standards. It was decided to adopt a generic approach, without spelling out the specific standards. The Elements are therefore derived directly from article 8 (2) (a) (iv), following the structure as indicated in the General Introduction, without giving further clarification. The meaning of "not justified by military necessity" as contained in article 8 (2) (a) (iv) ICC Statute is therefore crucial in this regard. It is important to indicate that military necessity covers only conduct that is lawful in accordance with the laws and customs of war. Consequently, a rule of law of armed conflict cannot be derogated from by invoking military necessity unless this possibility is explicitly provided for by the rule in question. This means that in the above-mentioned example of civilian hospitals military necessity cannot be invoked to justify an attack against such a civilian hospital in violation of arts 18 and 19 GC IV. It would have been desirable to clearly express this understanding of military necessity in the EOC.

*Compelling a Prisoner of War or other Protected Person to serve in the Forces of a hostile Power*

For the war crime of "Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power" the PrepCom decided

to combine the language of the grave breaches provisions of the GC with article 23 of the 1907 Hague Regulations. The prohibited conduct is thus described as: *"The perpetrator coerced one or more persons [protected under one or more of the Geneva Conventions], by act or threat, to take part in military operations against that person's own country or forces or otherwise serve in the forces of a hostile power"*. The word "otherwise" indicates that the aspect dealt with in the Hague Regulations — "to take part in the forces of a hostile power" — is just one particular example of the prohibited conduct described in the GC — "serve in the forces of a hostile power". This approach shows that there is a large overlap between the grave breaches crime defined in article 8 (2) (a) (v) ICC Statute and the crime defined in article 8 (2) (b) (xv) ICC Statute,[69] which is solely based on article 23 of the 1907 Hague Regulations. Some delegations wanted a clear indication that the crime under article 8 (2) (a) (v) ICC Statute is not limited to compelling a protected person to act against his/her own country or forces, but also against other countries or forces, in particular allied countries and forces. In the end the PrepCom felt that this particular case would be covered by *"otherwise serve in the forces of a hostile power"*.[70]

*Wilfully depriving a Prisoner of War or other Protected Person of the Rights of Fair and Regular Trial*

With regard to the crime "Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial" in article 8 (2) (a) (vi) the prohibited conduct is defined as *"The perpetrator deprived one or more persons of a fair and regular trial by denying judicial guarantees as defined, in particular, in the third and fourth Geneva Convention of 1949."* This element defines what is meant by a deprivation of the rights of a fair and regular trial, namely the denial of judicial guarantees. It must be emphasised that a clear majority of states supported the view that the crime may also be committed if judicial guarantees other than those explicitly defined in the GC (for example the presumption of in-

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69 The specific elements of this war crime read as follows: *"1. The perpetrator coerced one or more persons by act or threat to take part in military operations against that person's own country or forces. 2. Such person or persons were nationals of a hostile party"*.

70 This interpretation seems to be well founded under the GC, see H.P. Gasser, "Protection of the Civilian Population", in: D. Fleck (ed.), *The Handbook of Humanitarian Law*, 1995, 264.

nocence and other guarantees contained only in the 1977 Additional Protocols) are denied. This view is reflected in the use of the words "in particular".

*Unlawful Deportation or Transfer*

Concerning the crime "Unlawful deportation or transfer" (article 8 (2) (a) (vii)) the PrepCom adopted the interpretation that article 147 GC IV, which must be read in conjunction with article 49 GC IV, prohibits all forcible transfers, including those within an occupied territory, as well as deportations of protected persons from occupied territory.[71]

*Unlawful Confinement*

In relation to the crime of "Unlawful confinement" (article 8 (2) (a) (vii)) one point, which was clarified in the EOC, should be mentioned. The prohibited conduct is defined as: *"The perpetrator confined or continued to confine one or more persons to a certain location"*. The words "continued to confine" are intended to cover cases where a protected person has been lawfully confined in accordance with in particular arts 27, 42 and 78 GC IV, but whose confinement becomes unlawful at a certain moment. Pursuant to the ICTY in the *Delalic* case, confinement only remains lawful if certain procedural rights, which may be found in article 43 GC IV, are granted to the persons detained. Since GC IV leaves a great deal to the discretion of the party to the conflict concerning the initiation of such measures of confinement, the Tribunal concluded that:

> *"the [detaining] party's decision that [internment or placing in assigned residence of an individual are] required must be 'reconsidered as soon as possible by an appropriate court or administrative board'"*.[72]

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71 The relevant element reads as follows: *"The perpetrator deported or transferred one or more persons to another State or* ***to another location****"*. (emphasis added). See in this regard B. Zimmermann, "Article 85", in: Y. Sandoz/ C. Swinarski/ B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987, No. 3502, especially note 28.

72 ICTY, Judgement, *The Prosecutor v. Zejnil Delalic and others*, IT-96-21-T, para. 580.

It added that the judicial or administrative body must bear in mind that such measures of detention should only be taken if absolutely necessary for security reasons. If this was initially not the case, the body would be bound to rescind them. The Tribunal concluded that:

> *"the fundamental consideration must be that no civilian should be kept in assigned residence or in an internment camp for a longer time than the security of the detaining party absolutely requires".*[73]

Referring to article 78 GC IV relative to the confinement of civilians in occupied territory, which safeguards the basic procedural rights of the persons concerned, the Tribunal found that *"respect for these procedural rights is a fundamental principle of the convention as a whole".*[74]

Therefore, *"[a]n initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in article 43 GC IV"*[75] or in the case of confinement of civilians in occupied territory, as prescribed in article 78 GC IV.

These considerations as expressed by the ICTY in the *Delalic* case are now clearly covered in the EOC.

*Taking of Hostages*

With regard to the war crime of "Taking of hostages" (article 8 (2) (a) (viii) ICC Statute) it is worth noting that the elements of this offence are largely based on the definition taken from the 1979 International Convention against the Taking of Hostages, which is not an international humanitarian law treaty and was drafted in a different legal context. However, as in the case of the crime of torture, the definition of the crime of hostage-taking was adapted by the Working Group to the context of the law of armed conflict. The Hostage Convention defines hostage-taking in article 1.1 as:

> *"any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (the "hostage") in order to compel a third party, namely a State, an international intergovernmental or-*

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73 Ibid., para. 581.

74 Ibid., para. 582.

75 Ibid., para. 583. This view was confirmed by the ICTY, Appeals Chamber, Judgement, *The Prosecutor v. Zejnil Delalic and others*, IT-96-21-A, para. 322.

*ganisation, a natural or judicial person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage ...*"

Taking into account the case law from World War II, this definition was considered to be too narrow. The text in the EOC, therefore, defines the specific mental element in the following terms, adding the emphasised element:

*"The perpetrator intended to compel a State, an international organisation, a natural or legal person or a group of persons, to act or refrain from acting as an explicit or implicit condition for* ***the safety or*** *the release of such person or persons".* [76]

## 3. War Crimes under article 8 (2) (b) ICC Statute

The crimes defined in article 8 (2) (b) ICC Statute cover "other serious violations of the laws and customs applicable in international armed conflict". They are derived from various sources, in particular the 1907 Hague Regulations, Additional Protocol I and various provisions prohibiting the use of specific weapons.

### a. Elements Common to all Crimes under article 8 (2) (b) of the ICC Statute

The elements for the crimes listed in article 8 (2) (b) contain two general elements repeated for each crime describing the material scope of application as well as the mental element accompanying the objective element:

- *The conduct took place in the context of and was associated with an international armed conflict.*

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[76] In the *Blaskic* case the ICTY has been less specific and defined the crime in the following terms: "*Within the meaning of article 2 of the Statute [listing the grave breaches of the GC], civilian hostages are persons unlawfully deprived of their freedom, often arbitrarily and sometimes under threat of death. However [...] detention may be lawful in some circumstances, inter alia to protect civilians or when security reasons so impel. The Prosecution must establish that, at the time of the supposed detention, the allegedly censurable act was perpetrated in order to obtain a concession or gain an advantage*", ICTY, Judgement, *The Prosecutor v. Tihomir Blaskic*, IT-95-14-T, para. 158.

– *The perpetrator was aware of factual circumstances that established the existence of an armed conflict.*

This element describing the context and the related mental element are reproduced from the elements for the war crimes under article 8 (2) (a). The comments already made therefore also apply in this case.

### b. Elements Specific to the Crimes under article 8 (2) (b) of the ICC Statute

*War Crimes derived from the Hague Regulations*

Particular problems existed with regard to those war crimes that reproduce language from the Hague Regulations (e.g. article 8 (2) (b) (v), (vi), (xi), (xii), (xiii)) when AP I contains "modern" language. The PrepCom had to determine to what extent this new language could be used in the drafting of EOC.

For example the crime of "killing or wounding treacherously individuals belonging to a hostile nation or army" as derived from the Hague Regulations is linked to a certain extent with article 37 AP I on the prohibition of perfidy.[77] The concept of perfidy in article 37 is both more extensive and narrower at the same time. Article 37 AP I covers not only the killing or wounding, but also the capture of an adversary by means of perfidy. The latter is clearly not included in article 23 (b) of the Hague Regulations. However, the Hague Regulations seem to also cover acts of assassination[78] not included in article 37 AP I.[79]

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77 The relevant part of article 37 (1) AP I reads as follows: "*It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy*".

78 See for example H. Lauterpacht, *Oppenheim, International Law, A Treatise*, Volume II, 7th edition 1952, 342, who indicates the following examples of treacherous conduct: "*no assassin must be hired, and no assassination of combatants be committed; a price may not be put on the head of an enemy individual; proscription and outlawing are prohibited; no treacherous request for quarter must be made; no treacherous simulation of sickness or wounds is permitted*".

79 The impact of article 37 AP I on the traditional rule as formulated in the Hague Regulations is not clear. Ipsen, for example, concludes: "*The fact*

After some discussions the PrepCom decided to use essentially the substance and language of the article 37 AP I prohibition of perfidy to clarify the meaning of "treachery" for the purposes of this war crime. On the basis of the terms of the Statute, contrary to article 37 AP I, the crime is limited to killing or wounding, and the capture of an adversary by resorting to perfidy is excluded.

With regard to other crimes derived from the Hague Regulations the Working Group decided whether to use the language of AP I to clarify the EOC on a case by case basis. One positive example in this regard is the text adopted for the elements of killing or wounding a combatant who, having no longer means of defence, has surrendered at discretion (article 8 (2) (b) (vi) ICC Statute). The PrepCom agreed that the terminology of article 41 AP I (*"hors de combat"*) would be a correct "translation" of the old language stemming from the Hague Regulations. The concept of *"hors de combat"* was understood in a broad manner, which replaces the old Hague language and incorporates, for example, the situations defined in article 41 AP I[80] and also article 42 AP I.[81]

For the war crime of "Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives" (article 8 (2) (b) (v) ICC Statute) the PrepCom decided to stick closely to the Hague language (article 25 Hague Regulations) and not to use the wording of article 59 of AP I, and, in particular, the conditions set forth in its para. 2. It was argued that the scope of application of the Hague Regulations would be

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*that Art. 37 has been accepted by the vast majority of States indicates that there is no customary international law prohibition of perfidy with a wider scope than that of Art. 37"*, K. Ipsen, 'Perfidy', in: R. Bernhardt (ed.), *EPIL* 3 (1997), 978 et seq. (980).
However, both terms are used on an equal footing in the original 1980 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices in article 6 dealing with certain types of booby traps and in its amended form of 1996 in article 7.

80 *"2. A person is hors de combat if:*
*(a) he is in the power of an adverse Party;*
*(b) he clearly expresses an intention to surrender; or*
*(c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;*
*provided that in any of these cases he abstains from any hostile act and does not attempt to escape".*

81 *"1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent".*

broader. However, footnote 38 to the EOC,[82] which was added, is derived with small modifications from article 59 (3) AP I.

*Conduct of Hostilities War Crimes*

In general terms the conduct of hostilities war crimes (article 8 (2) (b) (i), (ii), (iii), (iv), (ix), (xxiii), (xxiv) and (xxv)) were subject of heated discussion.

With regard to the war crimes under article 8 (2) (b) (i),[83] (ii),[84] (iii),[85] (ix)[86] and (xxiv)[87] dealing with particular types of unlawful attacks against persons or objects protected, the PrepCom debated intensively whether these war crimes require a result as is the case with article 85 (3) and article 85 (4) (d) AP I regarding the grave breaches of AP I defined therein, i.e. on the one hand causing death or serious injury to body or health, and on the other hand extensive destruction. The majority of delegations pointed out that in Rome during the negotiations at the Diplomatic Conference a result requirement was consciously left out. The crimes would also be committed if, in the case of article 8 (2) (b) (i) ICC Statute for example, an attack was directed against the civilian population or individual civilians, but, due to the failure of the weapon system the intended target was not hit. The other side, how-

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82 *"The presence in the locality of persons specially protected under the Geneva Conventions of 1949 or of police forces retained for the sole purpose of maintaining law and order does not by itself render the locality a military objective".*

83 Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.

84 Intentionally directing attacks against civilian objects, that is, objects which are not military objectives.

85 Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

86 Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.

87 Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law.

ever, argued that it had been always the implicit understanding that the consequence required by the grave breaches provisions would be applicable with regard to those war crimes derived from the grave breaches of AP I. If there is a weapon failure the conduct should only be charged as an attempt. The PrepCom, however, followed the majority view and refused to require that the attack had to have a particular result. In this context it is significant to note that the wording of the Rome Statute supports this approach. Since a result requirement has been explicitly added elsewhere in the Statute, namely in article 8 (2) (b) (vii) (*"Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions,* ***resulting in death or serious personal injury***", (emphasis added), one may conclude that, compared to the grave breach provisions, a lower threshold was chosen on purpose.

Another contentious issue was how to interpret the term "intentionally directing an attack against" persons or objects defined in the respective crimes. It was debated whether the term "intentionally" was only related to the directing of an attack or also to the object of the attack. In the end the PrepCom adopted the latter approach. For example, in the case of the war crime of attacking civilians (article 8 (2) (b) (i)), the relevant elements now read as follows:

> *"1. The perpetrator directed an attack. 2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities. 3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack".*

The crime thus requires that the perpetrator intended to direct an attack (this follows from the application of article 30 (2) (a) ICC Statute, which requires that the perpetrator meant to engage in the conduct described, in conjunction with para. 2 of the General Introduction) and that he or she intended civilians to be the object of the attack. The latter intent requirement explicitly stated in the elements also appears to be an application of the default rule contained in article 30. In this particular case the standard applies, which is defined in subpara. 2 (b) of that article, i.e. the perpetrator means to cause the consequence or is aware that it will occur in the ordinary course of events. On the basis of para. 2 of the General Introduction to the EOC the insertion of element 3 seems to be unnecessary, but it was justified *inter alia* by the fact that the term "intentionally" is contained in the Statute and the insertion would add more clarity.

In this context it is interesting to have a closer look at the views expressed by the ICTY Prosecution and the findings of the ICTY with regard to war crimes involving unlawful attacks.

In the *Blaskic* case the Prosecution *"maintained that the mens rea which characterises all the violations of article 3 of the Statute [relevant to the unlawful attack charges], [...] is the intentionality of the acts or omissions, a concept containing both guilty intent and recklessness likeable to serious criminal negligence".*[88] and more specifically for the unlawful attack charge:

> *"b.) the civilian status of the population or individual persons [...] was known or should have been known;*
>
> *c.) the attack was wilfully directed at the civilian population or individual civilians;*
>
> *[...]"*[89]

The Prosecution derived the mental element "wilful" from article 85 (3) AP I and like the ICRC Commentary to that provision, interpreted it as including both intention and recklessness. An underlying reason was that AP I imposes a wide range of duties on superiors to ensure their forces comply with the law and to ensure precautions are taken to avoid attacks being directed against civilians.[90]

In the above-mentioned *Blaskic* case, the Trial Chamber of the ICTY held:

> *"Such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians [...] were being targeted [...]".*[91]

Based on these sources it is submitted that the required *mens rea* may be inferred from the fact that the necessary precautions (e.g. the use of available intelligence to identify the target) were not taken before and during an attack. This would apply to all the above mentioned war crimes relating to an unlawful attack against persons or objects protected against such attacks.

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88 ICTY, Judgement, *The Prosecutor v. Tihomir Blaskic*, IT-95-14-T, para. 179.

89 Quoted in W. Fenrick, "A First Attempt to Adjudicate Conduct of Hostilities Offences: Comments on Aspects of the ICTY Trial Decision in the Prosecutor v. Tihomir Blaskic", *LJIL* 13 (2000), 931 et seq. (939).

90 Ibid., 940.

91 ICTY, Judgement, *The Prosecutor v. Tihomir Blaskic*, IT-95-14-T, para. 180.

The elements of these other conduct of hostilities war crimes follow the same structure as that described for the war crime under article 8 (2) (b) (i) with the one exception of the war crime under article 8 (2) (b) (xxiv) – Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law –, where the initial structure after the first drafting of the EOC was kept.[92] There is some likelihood that this was just a drafting error, given that it was claimed that the structure after the second reading was considered to apply the Siracusa structure reflected in the General Introduction. In the view of the drafters this restructuring would not affect the substance of the original draft.

With regard to this latter war crime the EOC contain significant clarification. The text adopted essentially reproduces the Rome Statute text with the addition of *"or other method of identification indicating protection"* in element 1, which requires that the perpetrator attacked an object or place *"using, in conformity with international law, a distinctive emblem or other method of identification indicating protection under the Geneva Conventions"*. This added language reflects the fact that the protection accorded by the GC also can be indicated by other distinctive signals such as light signals, radio signals or electronic identification as valid means of identification for medical units or transports (AP I, Annex I, Chapter III, arts 6–9). The PrepCom recognized that the essence of this crime is an attack against protected persons or property identifiable by any recognized means of identification.

It is worth highlighting that, by reproducing the specific elements of article 8 (2) (b) (xxiv) for the war crime under article 8 (2) (e) (ii), the PrepCom recognized after some debate that directing attacks against persons or objects, using in a non-international armed conflict the signals as contained in the revised Annex I of 1993 to AP I in conformity with the rules constituting protected status also falls within the scope of this war crime. This understanding was acceptable to all because the provisions of the Annex do not enlarge the protection of persons or objects. They are only intended to facilitate the identification of per-

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92 The relevant elements read as follows: *"1. The perpetrator attacked one or more persons, buildings, medical units or transports or other objects using, in conformity with international law, a distinctive emblem or other method of identification indicating protection under the Geneva Conventions.*
*2. The perpetrator intended such persons, buildings, units or transports or other objects so using such identification to be the object of the attack"*.

sonnel, material, units, transports and installations protected under the GC and the Protocol.[93] If the perpetrator directs an attack against such persons or objects it does not make a difference by what means these persons or objects were identifiable for the perpetrator.

As in the case of the aforementioned war crimes the PrepCom also debated whether the war crime of "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 which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" (article 8 (2) (b) (iv)) required a result as article 85 (3) AP I does for the grave breaches of AP I defined in that provision. In addition to the above-mentioned arguments, delegations that were in favour of such a result requirement claimed that their view would be supported by the wording of the Rome Statute. The words "such attack **will** cause" (emphasis added) would suggest that a result is needed, and that even the damage needs to be excessive as described in the Statute (which would be a higher threshold than for AP I, which requires only that death or serious injury to body or health occurs without demanding a particular quantity). However, the majority of delegations argued that the crime would be committed even if, for example, an attack was launched against a military objective, but, due to the failure of the weapon system the expected excessive incidental damage did not occur. In the end, the PrepCom once again followed the majority view and refused to require that the attack has a particular result.

Another controversial issue debated by the PrepCom concerned the inclusion and content of a commentary to the term "concrete and direct overall military advantage". While several delegations stated that they would prefer not to include any commentary, other delegations wished to retain some kind of explanatory footnote. In the end, after difficult informal consultations, the following definition of "concrete and direct

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93 See also in this regard Y. Sandoz, "Article 8", in: Sandoz/ Swinarski/ Zimmermann, see note 71, No. 404:
*"It had already become clear, even during the first session of the Conference of Government Experts in 1971, that the problem of the security of medical transports could only be resolved by finding solutions adapted to 'modern means of marking, pinpointing and identification'. In fact it is no longer possible today to base effective protection solely on a visual distinctive emblem".* (footnote omitted).

overall military advantage" was incorporated into the final text for the elements of this war crime:

> *"The expression 'concrete and direct overall military advantage' refers to a military advantage that is foreseeable by the accused at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to jus ad bellum. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict".*

This text reflects a compromise in particular between the interests of two sides which did not necessarily relate to the same aspects. This package therefore clarifies several different issues. In essence, the sentence *"The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict"* is meant to emphasise that:

> *"[i]n order to comply with the conditions, the attack must be directed against a military objective with means which are not disproportionate in relation to the objective, but are suited to destroying only that objective, and the effects of the attacks must be limited in the way required by the Protocol; moreover, even after those conditions are fulfilled, the incidental civilian losses and damages must not be excessive".*[94]

The sentences *"It does not address justifications for war or other rules related to jus ad bellum. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict"* clarify both the fact that international humanitarian law applies to armed conflicts regardless of the cause of the conflict or the motives of the parties thereto and the distinct nature of the *ius ad bellum*, which is irrelevant in this context, and the *ius in bello*, which is relevant, in assessing the proportionality requirement of this crime. These statements are a correct reflection of existing law and should be clear even without saying. The clarification is nevertheless very valuable.

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[94] See C. Pilloud/ J. Pictet, "Article 51", in: Sandoz/ Swinarski/ Zimmermann, see note 71, No. 1979.

The sentence *"Such advantage may or may not be temporally or geographically related to the object of the attack"* may however invite abusive interpretations of the concept of concrete and direct military advantage. The need for this sentence was highlighted in informal consultations only on the basis of examples, such as feigned attacks where the military advantage materialises at later time and in a different place (reference was made to the landing of the allied forces in the Normandy during World War II[95]). The first sentence, containing the requirement of foreseeability, was meant to exclude advantages which are vague and, more importantly, to exclude reliance on *ex post facto* justifications. It emphasises that the evaluation of whether the collateral damage or injury is likely to be excessive must be undertaken **before** the decision to launch the attack. Therefore, launching one or more attacks on the blithe assumption that at the end of the day the collateral damage or injury will not be excessive would not respect the law. This interpretation is required by the words "concrete and direct". When the AP I was negotiated, *"[t]he expression 'concrete and direct' was intended to show that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded".*[96]

Several delegations emphasised that the term "overall" could not refer to long-term political advantages or the winning of a war *per se*.

Subsequent discussions concerned the evaluation that has to be made with regard to the excessiveness of civilian damage. Some delegations felt that element 3 of this crime (*"The perpetrator knew that the attack would cause incidental death, injury or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct military advantage".*) needed to be re-evaluated to clarify the relevant value judgement in light of the General Introduction para. 4.

These delegations claimed that the perpetrator must personally make a value judgement and come to the conclusion that the civilian damage would be excessive. Saying this, these delegations questioned an understanding seemingly reached during informal consultations which led to the first reading text. The words "of such an extent as to be",

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95 See W. Solf, "Article 52", in: M. Bothe/ K.J. Partsch/ W. Solf, *New Rules for Victims of Armed Conflicts, Commentary*, 1982, 324 et seq.

96 C. Pilloud/ J. Pictet, "Article 57", in: Sandoz/ Swinarski/ Zimmermann, see note 71, No. 2209.

which are not contained in the Statute, were added initially — at least in the eyes of those who made the proposal — in order to make it clear that the perpetrator need only know the extent of the damage he or she will cause and the military advantage anticipated. Whether the damage was excessive should be determined by the Court on an objective basis from the perspective of a reasonable commander. Almost at the end of the PrepCom, without intensive discussions in the formal Working Group or informal consultations on its rationale, the following footnote was inserted to overcome the divergent views:

> *"As opposed to the general rule set forth in paragraph 4 of the General Introduction, this knowledge element requires that the perpetrator make the value judgement as described therein. An evaluation of that value judgement must be based on the requisite information available to the perpetrator at the time".*

This footnote left some ambiguities, which was probably the reason why it was accepted as a compromise. The first sentence seems to be clear: a value judgement must have been made as described in element 3. The judges will need to decide what is required by the description in that element and in particular the consequences to be drawn from the addition of the words "of such an extent as to be". The meaning of the second sentence allows for diverging interpretations. To those who insisted on a more objective evaluation, the formulation "an evaluation of that value judgement" refers to an external evaluation by the Court. The Court would have to make an objective analysis of the judgement "based on the requisite information available to the perpetrator at the time". To others, the second sentence merely highlights that the value judgement must be made on the basis of the information available at the time. In the view of a few delegations, which favoured a more subjective approach, the footnote would probably exclude criminal responsibility not only for a perpetrator who believes that a particular incidental damage would not be excessive, even if he or she is wrong, but also for those who did not know that an evaluation of the excessiveness has to be made. As to the latter one might question whether this is compatible with the rule that ignorance of the law is no excuse.

In one respect, there seemed to be agreement between states that drafted this footnote: They recognized that this footnote should not lead to exonerating a reckless perpetrator who knows perfectly well the anticipated military advantage and the expected incidental damage, but gives no thought to evaluate the excessiveness. It was argued that by refusing to evaluate the advantage and the damage he/she makes the

requisite value judgement. If the Court finds that the damage would be excessive, the perpetrator will be guilty.

There is probably no doubt that a court will respect judgements that are made reasonably and in good faith on the basis of the requirements of international humanitarian law. In any case, an unreasonable judgement or an allegation that no judgement was made, in a case of death, injury or damage clearly excessive to the military advantage anticipated, would simply not be credible. It is submitted that the Court would then, and it would be entitled to do so, infer the mental element based on that lack of credibility. As indicated in the footnote, the Court must decide such matters on the basis of the information available to the perpetrator at the time.

*Intentionally using Starvation of Civilians as a Method of Warfare by depriving them of Objects indispensable to their Survival, including wilfully impeding Relief Supplies as provided for under the Geneva Conventions*

The prohibited conduct of this war crime is defined in the elements as "*The perpetrator deprived civilians of objects indispensable to their survival*". Delegations agreed that the deprivation of not only food and drink, but for example also medicine or in certain circumstances blankets could be covered by this crime, if in the latter case these were indispensable to the survival due to the very low temperature in a region. Coming from that understanding, in an initial Rolling Text of the Working Group a footnote was inserted to underline that the intention to starve would also include the broader approach of deprivation of something necessary to live. Although the substance of the footnote was not contested (only one delegation expressed some doubts), the majority eventually considered it to be redundant and covered by the term "objects indispensable to their survival". The footnote was therefore dropped in the final version.

For similar reasons, delegations refrained from inserting the example given by the Statute ("impeding relief supplies as provided for under the Geneva Conventions"). It was felt that as one example of prohibited conduct it did not constitute a separate element and was covered by the general term of "deprivation."

The war crime does not cover every deprivation, but as stated in element 2 only those effected by the perpetrator with the intention of starving civilians as a method of warfare. Contrary to an initial pro-

posal,[97] the PrepCom agreed that there is no requirement that *"as a result of the accused's acts, one or more persons died from starvation"*.

*War Crimes involving the Use of Particular Weapons*

Due to the very brief wording of the Rome Statute for the war crime of "Employing poison or poisoned weapons" (article 8 (2) (b) (xvii)), it was necessary for the EOC to explain the requirements under this crime in more detail. However, in order to avoid the difficult task of negotiating a definition of poison, the text adopted includes a specific threshold with regard to the effects of the substance: *"The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties"*. These effects must be the consequence of the toxic features of the substance. A number of delegations opposed the threshold requiring "serious damage to health", but eventually joined the consensus.

The war crime "Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices" (article 8 (2) (b) (xviii)) is derived from the 1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare and covers chemical weapons. The PrepCom intensively debated the scope of the prohibition in the Geneva Gas Protocol, as reaffirmed subsequently on several occasions, and, in particular, the question of whether the prohibition also covered riot control agents. In this context it was also debated how far developments in the law relating to chemical warfare since 1925 could be reflected in the elements, taking into account the decision in Rome to exclude a reference to the 1993 Chemical Weapons Convention.

With regard to riot control agents, some states argued that any use of such agents in international armed conflict is prohibited. Among these delegations some took the view that the initial 1925 so called Geneva Gas Protocol already prohibited such use, others argued that the law with regard to riot control agents might not have been completely clear under the Gas Protocol, but that the adoption of the 1993 Chemical Weapons Convention had confirmed the prohibition, if riot control agents are used as a method of warfare.[98] Even amongst these delega-

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97 PCNICC/1999/DP.4/Add.2.

98 See article I (5) of the Convention, which explicitly states that *"[e]ach State Party undertakes not to use riot control agents as a method of warfare."* Riot control agents (RCAs) are defined as *"[a]ny chemical not listed in a*

tions there were diverging views as to the meaning of the notion of "method of warfare". At the other end of the spectrum a few delegations considered that the use of these agents was permitted. In the end the controversy was not entirely solved. The PrepCom did not define the specific gases, liquids, materials or devices, but chose a similar approach as for the war crime of "Employing poison or poisoned weapons".

As a compromise, it was accepted that the gases, substances[99] or devices covered were defined by reference to their effects, namely as causing *"death or serious damage to health in the ordinary course of events"*.[100] This would mean that the use of riot control agents in most circumstances would not be covered by this effect-oriented definition. Delegations in favour of this compromise justified it by emphasising that the ICC is designed to deal only with *"the most serious crimes of concern to the international community as a whole"*. Whilst many took the view that these elements would prevent the prosecution of some actions that might be unlawful under other provisions of international law, all offences "of serious concern" would be within the terms of the elements as drafted. Given that many delegations feared that the threshold "death or serious damage to health" would have limiting effects on the law governing chemical weapons,[101] a footnote was added

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*Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure."*

99 In the EOC the term "substance" is used to cover both "liquids" and "materials" as contained in the statutory language. It was not the intention of the drafters to limit in any way the scope of application by this change.

100 The specific elements read as follows: *"1. The perpetrator employed a gas or other analogous substance or device. 2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties".*

101 See article II of the 1993 Chemical Weapons Convention:
*"1. "Chemical Weapons" means the following, together or separately:*
*(a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;*
*(b) Munitions and devices, specifically designed to* ***cause death or other harm through the toxic properties of those toxic chemicals*** *specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices; [...]*
*2. "Toxic Chemical" means:*

to ensure that the elements were to be considered as specific to the war crime in the ICC Statute and not to be interpreted as limiting or prejudicing in any way existing or developing rules of international law with respect to development, production, stockpiling and use of chemical weapons.

In addition to this controversy there was some discussion about the need to reproduce in the EOC the word "device" contained in both the terms of the ICC Statute and the 1925 Geneva Gas Protocol. While some delegations were in favour of deleting the word "device", others argued that this would give rise to the risk of limiting the scope of the crime. The PrepCom followed the latter view. This approach seems to be justified. As pointed out in a commentary to the Geneva Gas Protocol, including its *travaux préparatoires*: *"[The term 'device'] marks once more the intention of the authors to give to their definition a comprehensive and open-ended character" and "It could be claimed, for instance, that [...] an aerosol, which is a suspension of solid particles or liquid droplets in air, is neither a gas nor a liquid, a material or a substance".*[102]

### *Sexual Crimes*[103]

Much time was devoted by the PrepCom to the gender crimes defined in article 8 (2) (b) (xxii). The task was quite difficult because little case law existed on this issue at the time of negotiations, and even where case law exists it is not always uniform. For example, the *ad hoc* Tribunals for Rwanda and the former Yugoslavia defined the EOC of rape in different ways.

In the *Furundzija* case the Trial Chamber of the ICTY found that the following may be accepted as the objective elements of rape:

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*Any chemical which through its chemical action on life processes can* ***cause death, temporary incapacitation or permanent harm*** *to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere".* (emphasis added).

102 SIPRI (ed.), *The Problem of Chemical and Biological Warfare*, Volume III, CBW and the Law of War, 1973, 45.

103 The negotiations for sexual crimes were to a very large extent identical in the war crimes section and in the crimes against humanity section. Delegations agreed that the elements should therefore be drafted essentially in the same way in both sections. This analysis will focus only on some issues.

*"(i) the sexual penetration, however slight:*

*(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or*

*(b) of the mouth of the victim by the penis of the perpetrator;*

*(ii) by coercion or force or threat of force against the victim or a third person".*[104]

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104 ICTY, Judgement, *The Prosecutor v. Furundzija*, IT-95-17/1-T, para. 185. See also the definition by the ICTY Prosecution quoted in that judgement (para. 174): *"rape is a forcible act: this means that the act is 'accomplished by force or threats of force against the victim or a third person, such threats being express or implied and must place the victim in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression'. This act is the penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by other object. In this context, it includes penetration, however slight, of the vulva, anus or oral cavity, by the penis and sexual penetration of the vulva or anus is not limited to the penis".* (Footnote omitted).
In the *Kunarac and others* case, which was decided after the end of the PrepCom negotiations, the ICTY confirmed this view generally. It felt, however, a need to clarify its understanding of Element (ii) of the *Furundzija* definition:
*"The Trial Chamber considers that the Furundzija definition, although appropriate to the circumstances of that case, is in one respect more narrowly stated than is required by international law. In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the Furundzija definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim, which [...] is in the opinion of this Trial Chamber the accurate scope of this aspect of the definition in international law".*
ICTY, Judgement, *The Prosecutor v. Dragoljub Kunarac and others*, IT-96-23 and IT-96-23/1-T, para. 438. On the basis of the relevant law in force in different national jurisdictions, it identified the following three broad categories of factors that qualify the relevant sexual acts (as defined in the *Furundzija* case) as the crime of rape:
*"(i) the sexual activity is accompanied by force or threat of force to the victim or a third party; (ii) the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or*
*(iii) the sexual activity occurs without the consent of the victim".*
Ibid., para. 442. *"Consent for this purpose must be given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances."*, ibid., para. 460.

However, the Trial Chamber of the ICTR defined rape in the *Akayesu* case as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.[105]

The delicate compromise found in the EOC incorporates aspects from both judgements and should not be in conflict with the more recent ICTY case law in *re Kunarac and others*.[106] It now reads as follows:

> *"1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.*
>
> *2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent*
>
> *[...]".*

A footnote to element 2 clarifies that *"[i]t is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity".*

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The Appeals Chamber upheld this view and gave the following additional explanation:
*"[...] in explaining its focus on the absence of consent as the conditio sine qua non of rape, the Trial Chamber did not disavow the Tribunal's earlier jurisprudence, but instead sought to explain the relationship between force and consent. Force or threat of force provides clear evidence of non-consent, but force is not an element per se of rape. In particular, the Trial Chamber wished to explain that there are "factors [other than force] which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim". A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force".*
ICTY Appeals Chamber, Judgement, *The Prosecutor v. Dragoljub Kunarac and others*, IT-96-23 and IT-96-23/1-A, para. 129.

105 ICTR, Judgement, *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, para. 688.

106 See note 104.

The formulation "invaded [...] by conduct resulting in penetration" in element 2 was chosen in order to draft the elements in a gender-neutral way and also to cover rape committed by women. Element 2, including the above-cited footnote, largely reflects the findings of the ICTR in the *Akayesu* case taking into account the effect of special circumstances of an armed conflict on the victims' will:

> *"[C]oercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence [...]".*[107]

Another point of major controversy in this cluster of crimes was how to distinguish enforced prostitution from sexual slavery, and especially whether the fact that the *"perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature"* was an element of enforced prostitution or not. After long debates states answered in the affirmative. The addition of "or other advantage" was made in order to achieve a compromise between the group of delegations that objected to the requirement of pecuniary advantage and the group that insisted on it.

Finally, considerable difficulties existed with regard to the war crime of sexual violence due to the formulation found in the Statute *"also constituting a grave breach of the Geneva Conventions"*. While some delegations argued that this formulation should only indicate that gender crimes could already be prosecuted as grave breaches, others thought that the conduct must constitute one of the crimes defined in article 8 (2) (a) — the specifically named grave breaches of the GC — and in addition involve violent acts of a sexual nature. The majority of delegations, in an attempt to reconcile the wording of the Statute with its aim, considered the formulation as an element of the crime that introduces a specific threshold. Therefore, the compromise reads as follows:

> *"1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another*

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[107] Ibid.

*person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.*

*2. The conduct was of a gravity comparable to that of a grave breach of the Geneva Conventions*

*[...]".*

*The Transfer, directly or indirectly, by the Occupying Power of Parts of its own Civilian Population into the Territory it occupies, or the Deportation or Transfer of all or parts of the Population of the Occupied Territory within or outside this Territory*

The most difficult negotiations concerned the war crime of "transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory" as defined in article 8 (2) (b) (viii). The alternative of transferring, directly or indirectly, by the Occupying Power parts of its own civilian population into the territory it occupies especially caused important controversy. The main points of controversy were the following:

- Is this crime limited to forcible transfers, although the Statute uses the formulation "transfer, directly or indirectly"?
- Is this crime limited to transfer of population on a large scale?
- Must the economic situation of the local population be worsened and their separate identity be endangered by the transfer?
- What link must be between the perpetrator and the Occupying Power?

After intensive informal negotiations, which, due to the sensitivity of the issue, were almost exclusively conducted between interested delegations behind closed doors, agreement was reached. By and large, the elements reproduce the statutory language. The *actus reus* of this alternative of the crime requires that the perpetrator "transferred, directly or indirectly, parts of its own population into the territory it occupies". A footnote added to the term "transferred" eventually broke the deadlock. It simply indicates that the "term 'transfer' needs to be interpreted in accordance with the relevant provisions of international humanitarian law". The footnote states the obvious, without giving any further clarification. Consequently the main points of controversy were left open for interpretation by the future judges.

The text adopted, which is largely based on an initial Costa Rican/Hungarian/Swiss proposal, requires that the perpetrator *"transferred, directly or indirectly, parts of its own population into the territory it occupies"*. This element omits the words *"by the Occupying Power"* contained in the Statute. Instead the words *"its own population"* refer back to the perpetrator only, without clarifying a link to the Occupying Power. In order to solve this latter issue, Switzerland orally amended its written proposal, by suggesting *"[t]he perpetrator, transferred, [...], parts of the population of the occupying power [...]"*. This suggestion was however not included in the final text. The PrepCom decided to retain the somewhat ambiguous formulation coming from the Swiss proposal.

It is not entirely clear whether the omission of the word "civilian" before "population" is an unintended drafting error, which was not corrected due to the fear that any change of wording would reopen the sensitive compromise arrived at, or a deliberate departure from statutory language. Given that the EOC must be consistent with the Statute (article 9 (3)) the former seems to be more likely.

## 4. War Crimes under article 8 (2) (c) ICC Statute

The crimes defined in article 8 (2) (c) ICC Statute cover serious violations of article 3 common to the four Geneva Conventions of 12 August 1949.

### a. Elements Common to all Crimes under article 8 (2) (c) of the ICC Statute

The elements for the crimes listed in article 8 (2) (c) contain four general elements repeated for each crime describing the material and personal scope of application as well as the mental elements accompanying the objective elements. Both objective elements are derived from the chapeau of article 8 (2) (c) ICC Statute: *"In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause"*.

The first common element reads as follows: *"The conduct took place in the context of and was associated with an armed conflict not of an international character"*.

The notion of an "armed conflict not of an international character" is not further elaborated. The Introduction to the war crimes section of the EOC document contains however the following statement:

> *"The elements for war crimes under article 8, paragraph 2 (c) and (e), are subject to the limitations addressed in article 8, paragraph 2 (d) and (f), which are not elements of crimes"*.

This paragraph emphasises that the content of article 8 (2) (d) and (f) provides limitations to the Court's jurisdiction. Several interested delegations wanted to make sure that whenever the threshold for a non-international armed conflict is not reached the Court would not examine conduct taking place within a country. Therefore, this paragraph was added to the Introduction. Given that the PrepCom did not consider the limitations as elements of crimes the PrepCom did not discuss the content.

As in the case of article 8 (2) (a), the mental element *"The perpetrator was aware of factual circumstances that established the existence of an armed conflict"* is added as the second common element. The Introduction to the war crimes section relating to the required knowledge of the perpetrator is also applicable as described above.[108]

The third and fourth common elements are drafted in the following way: *"Such person or persons were either hors de combat, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities. The perpetrator was aware of the factual circumstances that established this status."* These elements define those who may be victims of a war crime for the purposes of article 8 (2) (c) ICC Statute and the related knowledge of the perpetrator. The wording as to the victims differs from that of common article 3 GC and the chapeau of article 8 (2) (c) ICC Statute. However, several states took the view that the wording of common article 3 GC is "*ambiguous*" and needed clarification in the EOC document. In their view — which prevailed after long negotiations — the formulation chosen reflects the correct interpretation of common article 3 GC and avoids ambiguity. Many delegations were quite hesitant to accept this compromise because they feared that persons protected might be left out of the definition in this reformulation exercise. In contrast to common article 3 GC, the notion

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[108] See under III. 2. a. aa.

of "hors de combat" is not further clarified by the addition of examples. However it was the understanding of the drafters in informal consultations that the term "hors de combat" should not be interpreted in a narrow sense. In addition to the examples contained in common article 3 GC, reference was also made to the content of arts 41 and 42 of AP I.

### b. Elements Specific to the Crimes under article 8 (2) (c) of the ICC Statute

The specific elements of most war crimes under article 8 (2) (c) are defined more or less in the same manner as those in article 8 (2) (a) ICC Statute. It was the view of states that there can be no difference between wilful killing and murder, between inhuman and cruel treatment, between torture or the taking of hostages in international or in non-international armed conflicts. This approach is in conformity with the case law of the ICTY.[109]

With regard to article 8 (2) (c) (iv) ICC Statute it is worthwhile indicating that the drafting of the elements of this crime was largely influ-

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[109] The ICTY concluded – with regard to any difference between the notions of "wilful killing" in the context of an international armed conflict on the one hand, and "murder" in the context of a non-international armed conflict on the other hand – that there *"can be no line drawn between "wilful killing" and "murder" which affect their content"*, ICTY, Judgement, *The Prosecutor v. Zejnil Delalic and others*, IT-96-21-T, paras 422 and 423. According to the Tribunal, *"cruel treatment constitutes an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. As such, it carries an equivalent meaning and therefore the same residual function for the purpose of common article 3 of the Statute, as inhuman treatment does in relation to grave breaches of the Geneva Conventions"*, ibid., para. 552. Concerning any difference between the notion of "torture" in the context of an international armed conflict on the one hand, and in the context of a non-international armed conflict on the other hand, the ICTY concluded that *"[t]he characteristics of the offence of torture under common article 3 and under the 'grave breaches' provisions of the Geneva Conventions, do not differ"*, ibid., paras 443. As to taking of hostages in an international armed conflict the ICTY held: *"The elements of the offence are similar to those of article 3 (b) of the Geneva Conventions covered under article 3 of the Statute"*, ICTY, Judgement, *The Prosecutor v. Tihomir Blaskic*, IT-95-14-T, para. 158.

enced by the content of article 6 (2) AP II. The specific elements in the text read now as follows:

> ***"article 8 (2) (c) (vi): War crime of sentencing or execution without due process***
>
> *1. The perpetrator passed sentence or executed one or more persons. [...]*
>
> *4. There was no previous judgment pronounced by a court, or the court that rendered judgment was "not regularly constituted", that is it did not afford the essential guarantees of independence and impartiality, or the court that rendered judgment did not afford all other guarantees generally recognized as indispensable under international law.*
>
> *5. The perpetrator was aware of the absence of a previous judgment or of the denial of relevant guarantees and the fact that they are essential or indispensable to a fair trial [...]".*

On the basis of article 6 AP II the term "regularly constituted court" as contained in common article 3 and thus article 8 (2) (c) (iv) ICC Statute is defined as a court that affords the essential guarantees of independence and impartiality. The issue of whether a list of fair trial guarantees should be included as suggested in the Swiss/Hungarian/Costa Rican proposal has been controversial.[110] Some states feared that even an illustrative list would suggest that rights omitted were not indispensable, others feared that there could be a discrepancy between this list of fair trial guarantees and those contained in the Statute, and a third group took the view that a violation of only one right would not necessarily amount to a war crime. Instead of weakening the value of such a list of fair trial guarantees by an introductory paragraph defining what is to be considered indispensable, states preferred not to include such a list. In addition, the concerns of the third group of states are reflected in a footnote which reads as follows:

> *"With respect to elements 4 and 5, the Court should consider whether, in the light of all relevant circumstances, the cumulative effect of factors with respect to guarantees deprived the person or persons of a fair trial".*

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[110] PCNICC/1999/WGEC/DP.10.

## 5. War Crimes under article 8 (2) (e) ICC Statute

The crimes defined in article 8 (2) (e) ICC Statute cover other serious violations of the laws and customs applicable in armed conflicts not of an international character.

### a. Elements Common to all Crimes under article 8 (2) (e) of the ICC Statute

The elements for the crimes listed in article 8 (2) (e) contain two general elements repeated for each crime, describing the material scope of application as well as the mental element accompanying the objective element. The "contextual" element and the accompanying mental element are copied from the set of elements for the war crimes under article 8 (2) (c). The comments already made therefore apply also in this case.

### b. Specific Elements to the Crimes under article 8 (2) (e) of the ICC Statute

The specific elements of most war crimes under article 8 (2) (e) are defined more or less in the same manner as the corresponding crimes in article 8 (2) (b) ICC Statute. It was the view of states that there is no difference in substance between the elements of crimes in an international armed conflict and those in a non-international armed conflict.

The only war crime under article 8 (2) (e), which does not have a parallel crime in article 8 (2) (b), is the war crime under (viii) of "Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand". The PrepCom decided to introduce the following clarification in the elements of this crime:

Element 1 defines the *actus reus* of this war crime, namely that the *"perpetrator ordered a displacement of a civilian population"*. This implicates the individual giving the order, but not someone who simply carries out the displacement (this fact does not exclude that the person carrying out the displacement can be held individually responsible for example for the participation in the commission of the crime, see article 25 of the ICC Statute dealing with other forms of individual criminal responsibility). The wording was changed to "a civilian population" as opposed to "one or more civilians" as contained in the elements of article 8 (2) (a) (vii)-1 – unlawful deportation. The drafters of the proposed

text, which was eventually adopted by the PrepCom, felt that the displacement of one person would not constitute this crime. At the same time, the term "a population" as opposed to the formulation of the Statute "the population" clarifies that the perpetrator does not need to order the displacement of the whole civilian population. The situation in between these two extremes was not further discussed and therefore not defined.

Element 2 is based on the statutory language, which is derived from the first sentence of article 17 (1) AP II. Despite the fact that one might argue that the element could be superfluous on the basis of para. 6 of the General Introduction to the EOC relating to the concept of "unlawfulness", the PrepCom decided to state that *"Such order was not justified by the security of the civilians involved or by military necessity"*. This departure from the approach taken in other cases[111] was justified by the fact that this requirement is explicitly mentioned in the Statute and should therefore be repeated.

Element 3 clarifies that the perpetrator needs to have the authority or power to carry out the displacement. The drafters agreed — and this view was not contested by the Working Group on EOC when the proposed text was introduced with that explanation — that the formulation *"The perpetrator was in a position to effect such displacement by giving such order"* would cover both *de jure* and *de facto* authority to carry out the order, so that the crime would cover the individual who, for example, has effective control of a situation by sheer strength of force.

Quite surprisingly the elements of this crime do not contain additional clarification which can be found in the definition of this war crime in the Statute: this offence prohibits only displacements "for reasons related to the conflict". In fact, displacement may prove to be necessary in certain cases of epidemics or natural disasters such as floods or earthquakes. Such circumstances are not covered by article 17 AP II, and thus in article 8 (2) (e) (viii) of the ICC Statute.

An additional element for determining the lawfulness neither mentioned in the Statute nor in the EOC may be found in the second sentence of article 17 (1) AP II. In accordance with that provision

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111 For example in the case of article 8 (2) (a) (vii)-1: Unlawful deportation article 49 (2) GC IV allows evacuations/displacements justified for exactly the same reasons, namely if justified for the security of the population or by imperative military reasons. However these situations excluding the unlawfulness are not mentioned in the EOC adopted.

*"[...] all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition".*

Despite the fact that these limitations are not included in the EOC the future judges will need to analyse them on the basis of para. 6 of the General Introduction relating to the concept of "unlawfulness".

## IV. Conclusions on the Work Related to Elements of War Crimes

The PrepCom had an enormous task to accomplish over the two years it took to finalise a document on EOC. The document had to be more specific than the definitions of the crimes themselves, without unduly tying the hands of the judges or reducing the scope of their judicial discretion. Trying to be as specific as possible and providing useful guidance always involves the risk of leaving something out. This risk is most pertinent in relation to international humanitarian law. As has been shown in this article concerning the example of "Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly", the grave breaches provisions refer back to various provisions in the Geneva Conventions which establish a different level of protection and define different standards for specific protected property. In contrast to crimes against humanity, which now have been defined for the first time in the ICC Statute, the relevant international humanitarian law texts, and in particular the Geneva Conventions, provide the necessary framework to enable the judges to "find the law".

In spite of the shortcomings raised in this article, it can be said that the EOC discussed in this contribution appear to a very large extent to be drafted in accordance with existing international humanitarian law. Nevertheless, there are some problematic and contentious issues which might need further reflection, in particular cases where ambiguous formulations were adopted in order to reach a compromise. This reflection will have to be performed by the judges themselves, using the EOC for guidance. These should not be an absolute strait-jacket for judges, who will still need to look at the relevant legal instruments of international humanitarian law and to analyse the state practice and *opinio iuris* in order to determine existing rules of customary international law; a task

that the judges of the *ad hoc* Tribunals have accomplished so far even without a document entitled "elements of crimes".

Notwithstanding various diverging views, which sometimes have been quite important, it should be stressed that the negotiations were conducted in an extremely cooperative and constructive atmosphere determined by the wish to achieve the common goal of completing the mandate of the PrepCom with regard to the EOC.

## V. *Addendum:* The Use of the Elements of Crimes at the National Level

While article 9 of the ICC Statute only defines the role of the EOC for the ICC, the EOC may also have an influence on the crimes' interpretation by national courts. Interestingly, since the negotiation of the EOC, a number of states made reference to the EOC in their implementing legislation of the Rome Statute. The approaches chosen in the legislation at our disposal may be distinguished as follows:

(1) A simple cross-reference is made to the EOC as adopted by the Assembly of States Parties. They are generally described as one of the tools for interpretation of the corresponding crimes' provisions.

In the United Kingdom, Scotland and Malta, the court *"shall take [them] into account"*;[112] and in Italy — in accordance with its proposed

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112 United Kingdom, International Criminal Court Act 2001, Chapter 17, 26, No. 50:

*"(2) In interpreting and applying the provisions of those articles [articles 6, 7 and 8 (2) of the ICC Statute] the court shall take into account –*
*(a) any relevant Elements of Crimes adopted in accordance with article 9 [ICC Statute], and*
*(b) until such time as Elements of Crimes are adopted under that article, any relevant Elements of Crimes contained in the report of the Preparatory Commission for the International Criminal Court adopted on 30th June 2000.*
*(3) The Secretary of State shall set out in regulations the text of the Elements of Crimes referred to in subsection (2), as amended from time to time.*
*The regulations shall be made by statutory instrument which shall be laid before Parliament after being made. [...]*

draft law, it is stated that *"Nella interpretazione della presente legge si tiene in particolare conto dell'esigenza di una uniforme applicazione del diritto penale internazionale, con specifico riferimento allo Statuto ed*

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*(5) In interpreting and applying the provisions of the articles referred to in subsection (1) the court shall take into account any relevant judgment or decision of the ICC.*
*Account may also be taken of any other relevant international jurisprudence."*

Scotland, The International Criminal Court (Scotland) Act 2001 (Commencement) Order 2001, (coming into force 17 December 2001):

*"1 Genocide, crimes against humanity and war crimes (1) It shall be an offence to commit genocide, a crime against humanity or a war crime. ... (4) In subsection (1) above –*
*'war crime' means a war crime as defined in article 8.2 [ICC Statute].*
*[...] 9 Application of principles of the law of Scotland, construction etc. [...] (2) In interpreting and applying the provisions of the articles mentioned in section 1(4) of this Act the court shall take into account any relevant Elements of Crimes.*
*28 Interpretation [...] 'Elements of Crimes' means the Elements of Crimes set out in regulations made under section 50(3) of the 2001 Act."*

In the Explanatory Notes to International Criminal Court (Scotland) Act, 2001 ASP 13 it is more affirmatively stated:

*"20. The courts must take into account the Elements of Crimes when interpreting and applying articles 6, 7 and 8.2. The Elements of Crimes will be adopted by the ICC when it is established, but are likely to be similar to those adopted by the Preparatory Commission for the ICC on 30 June 2000. When they have been adopted the UK Act provides that the text will be set out in regulations which will be made by statutory instrument. These articles must also be construed subject to and in accordance with any reservations or declarations made by the UK Government and certified by Order in Council made under the UK Act".*

Malta, International Criminal Court Act, Act XXIV of 2002, http://www.docs.justice.gov.mt/lom/legislation/english/leg/vol_14/chapt453.pdf

*"(4) In interpreting and applying the provisions of articles 54B [Genocide], 54C [Crimes against humanity] and 54 D [War crimes], [...] the court shall take into account –*
*(a) any relevant Elements of Crimes adopted in accordance with article 9 of the ICC Treaty, and*
*(b) until such time as Elements of Crimes are adopted under that article, any relevant Elements of Crimes contained in the report of the Preparatory Commission for the International Criminal Court adopted on 30th June, 2000".*

*agli elementi costitutivi dei crimini.*"[113] Thus, in these cases, the national legislation made the EOC *one* of the obligatory sources for the interpretation of the crimes. As far as the United Kingdom legislation is concerned, it seems that the judge must consider the Elements but he or she could refuse to apply a particular part of them, since they are a means of 'interpreting and applying' arts 6, 7 and 8 of the Statute. Should he or she do this, reasons would be expected. If the judge disregarded a particular relevant Element which was considered to be against the interests of the accused, it would be imaginable that an appeal would be brought to the Court of Appeal.[114]

New Zealand however accorded less weight to the EOC by regulating that the court "may have regard to" them.[115] Denmark foresees the possibility that "The Minister for Foreign Affairs may decide that the following provisions shall apply in this country: [...] 2) The recommended descriptions of the content of crimes and amendments thereto, cf. article 9 of the Statutes."[116] No such decision has been taken at the time of writing.

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113 Italy, Camera Dei Deputati, XIV Legislatura, Proposta di legge, presentata il 9 maggio 2002, see article 5. Article 3 specifies *"1. Ai fini della presente legge: [...] c) per "elementi costitutivi dei crimini" si intende il testo degli elementi dei delitti di genocidio, dei delitti contro l'umanità e dei crimini di guerra predisposto dal Comitato preparatorio per la creazione della Corte penale internazionale ed approvato dall'Assemblea degli Stati parte ai sensi dell'articolo 9 dello Statuto".*

114 Comments by Professor Peter Rowe, Lancaster University, given to the author on 28 March 2003.

115 New Zealand, International Crimes and International Criminal Court Act 2000, Public Act 2000 No. 26, date of assent 6 September 2000:

*"12 General principles of criminal law [...] (4) For the purposes of interpreting and applying articles 6 to 8 of the Statute in proceedings for an offence against section 9 [genocide] or section 10 [crimes against humanity] or section 11 [war crimes], -*

*(a) the New Zealand Court exercising jurisdiction in the proceedings may have regard to any elements of crimes adopted or amended in accordance with article 9 of the Statute".*

116 Denmark, Lov om Den Internationale Straffedomstol, LOV nr. 342 af 16/05/2001 (Gaeldende):

*"§ 1. The Statute of the International Criminal Court [...] shall apply in this country.*

*Para. 2: The Minister for Foreign Affairs may decide that the following provisions shall apply in this country:*

(2) The EOC served as a basis for the drafting of elements of crimes to be applied by the national courts.

Australia took this approach in its Act to Amend the *Criminal Code Act of 1995* and certain other Acts.[117] It enacted elements of crimes with binding force, which are largely based on those adopted by the Assembly of States Parties. However, they sometimes contain differences in relation to the mental element required, but also in relation to the *actus reus* (for example for the war crime of transfer of population as defined in article 8 (2) (b) (viii) ICC Statute and the sexual crimes as defined in article 8 (2) (b) (xxii) ICC Statute). Without trying to be exhaustive, the following discrepancies shall be mentioned: by restricting property protected from destruction or seizure to property mentioned in articles 18 GC III, 53 GC IV and 54 AP I, the Act limits the war crime under article 8 (2) (b) (xiii) ICC Statute considerably. Contrary to the view taken at the PrepCom the Australian elements contain a limited list of prohibited purposes for the war crime of torture. Other differences are due to the fact that Australia is party to AP I, thus the grave breaches can also be committed against persons or property protected by AP I. While referring not only to the use of the distinctive emblem in conformity with the GC, but also to the use in conformity with the APs, Australia takes into account its obligations under the APs, but it does not include other methods of identification indicating protection as foreseen in the EOC adopted for the ICC. Explanatory footnotes, which were often part of the deal during negotiations at the PrepCom, are generally not included.

(3) No mention of the EOC is made in the national legislation. In a number of countries the crimes contained in the ICC Statute are only defined by referring to arts 6–8 or by reproducing their or a similar formulation.[118]

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*[...] 2) The recommended descriptions of the content of crimes and amendments thereto, cf. article 9 of the Statutes".* (translation)

117 Australia, International Criminal Court (Consequential Amendments) Act 2002, No. 42, 2002, An Act to Amend the *Criminal Code Act of 1995* and certain other Acts in consequence of the enactment of the International Criminal Court Act 2002, and for other purposes [Assented to 27 June 2002].

118 See for example South Africa, Government Gazette, Volume 445 Cape Town 18 July 2002, No. 23642, "No. 27 of 2002: Implementation of the Rome Statute of the International Criminal Court Act, 2002", 6, 8, 38-46; Germany, "Gesetz zur Einführung des Völkerstrafgesetzbuches vom 26.

In its message concerning the ICC Statute, the Swiss Federal Council described the role of the EOC at the Swiss national level as follows:

> *"Les 'éléments des crimes' ne sont pas des éléments constitutifs d'une infraction au sens du droit pénal suisse. [...] il s'agit plutôt d'une sorte de mode d'emploi à l'attention de la Cour [i.e. the ICC]. Les 'éléments des crimes' n'ont pas d'effet juridique obligatoire. [...] La valeur normative des 'éléments des crimes' se limite donc à offrir à la Cour [i.e. the ICC] une source d'inspiration et d'information dans l'interprétation et l'application du Statut. [...] Pour les tribunaux nationaux, ces éléments représenteront vraisemblablement aussi un soutien pour établir le droit, mais ils n'ont en aucune manière un effet obligatoire pour eux lorsqu'ils doivent trancher un cas. Les 'éléments des crimes ont été conçus exclusivement aux fins de faciliter l'interprétation et l'application du Statut par la Cour [i.e. the ICC].*
>
> *Dans la pratique des tribunaux, ces éléments pourraient prendre de l'importance s'ils venaient à être acceptés de façon générale par les Etats Parties et à refléter le droit des gens en vigueur".*[119]

Thus, Switzerland stresses the subsidiary character of the EOC for the ICC in the interpretation of the crimes under its jurisdiction as well as the fact that they will not have an immediate — and certainly not a binding — effect for Swiss tribunals. It is, however, not absolutely excluded that they may assist national courts in the interpretation.

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Juni 2002, BGBl. 2002, Teil I Nr. 42"; Canada, "International Criminal Court Act 2001", Statutes of Canada 2000, Chapter 24, An Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts [Assented to 29 June, 2000]):

> *"(3) [...] 'war crime' means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.*
>
> *(4) For greater certainty, crimes described in articles 6, 7 and paragraph 2 of article 8 of the Rome Statute are, as of July 14, 1998, crimes according to customary international law. This does not limit or prejudice in any way the application of existing or developing rules of international law".*

119 Message [du Conseil fédéral Suisse] relatif au Statut de Rome de la Cour pénale internationale, à la loi fédérale sur la coopération avec la Cour pénale internationale ainsi qu'à une révision du droit pénal du 15 novembre 2000, 458.