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

by
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In the September issue of the *Review* the author discussed the outcome of the negotiations of the Preparatory Commission for the International Criminal Court (PrepCom) in relation to that part of the Elements of Crimes (EOC) which deals with grave breaches and violations of Article 3 common to the Geneva Conventions of 12 August 1949.[1] The present article completes the overview of the PrepCom's work and examines the decisions taken regarding other serious violations of the laws and customs applicable in international and non-international armed conflicts.

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At the outset, it is of interest to note that by 31 December 2000 as many as 139 States had signed the Rome Statute, thus well beyond the number of States that voted in Rome in favour of the Statute (120). The number of ratifications steadily increased in the second half of 2000 to 27 States[2] and several States are about to finish their ratification process. These figures are certainly a very encouraging sign that the International Criminal Court may become a reality in the near future.

The following analysis deals with elements of war crimes as defined under Article 8(2)(b) and (e) of the ICC Statute, covering "[o]ther serious violations of the laws and customs applicable in international and non-international armed conflicts". For reasons of space, the analysis is limited to a number of crimes and to certain controversial issues related to them. An account of the mandate of the PrepCom, the role played by the EOC in the context of the Rome Statute and details of the EOC's adoption by the PrepCom on 30 June 2000 is given in the article published in the September 2000 issue of the *Review*.[3]

As was the case for war crimes under Article 8(2)(a) and (c), the PrepCom negotiations on crimes under Article 8(2)(b) and (e) were largely based on proposals by the United States[4] and joint proposals by Switzerland, Hungary and Costa Rica,[5] both of which covered all crimes of the section under review in this article, as well as on other proposals and documents submitted in particular by the Japanese, Spanish and Colombian delegations. The remaining parts of the ICRC study on elements of crimes were, like the other parts, tabled by

1 Knut Dörmann, "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", *IRRC*, No. 839, September 2000, pp. 771-796.

2 Austria, Belgium, Belize, Botswana, Canada, Fiji, Finland, France, Gabon, Germany, Ghana, Iceland, Italy, Lesotho, Luxembourg, Mali, Marshall Islands, New Zealand, Norway, San Marino, Senegal, Sierra Leone, South Africa, Spain, Tajikistan, Trinidad and Tobago, Venezuela.

3 *Op. cit.* (note 1), pp. 771-773.

4 UN Doc. PCNICC/1999/DP.4/Add.1.

5 UN Doc. PCNICC/1999/WGEC/DP.8; UN Doc. PCNICC/1999/WGEC/DP.10; UN Doc. PCNICC/1999/WGEC/DP.11; UN Doc. PCNICC/1999/WGEC/DP.20; UN Doc. PCNICC/1999/WGEC/DP.22; UN Doc. PCNICC/1999/WGEC/DP.37.

Belgium, Costa Rica, Finland, Hungary, the Republic of Korea, South Africa and Switzerland.[6]

Moreover, it should be recalled that the "General Introduction" to the EOC document[7] is also applicable to the war crimes under Article 8(2)(b) and (e) of the ICC Statute.

War crimes under Article 8(2)(b) of the ICC Statute: serious violations committed in international armed conflict

The crimes defined in Article 8(2)(b) cover "[o]ther serious violations of the laws and customs applicable in international armed conflict". They are derived from various sources, in particular the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), the 1907 Regulations respecting the Laws and Customs of War on Land (Hague Regulations) annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land, and various rules prohibiting the use of specific weapons.

Elements common to all crimes under Article 8(2)(b)

The elements for the crimes listed in Article 8(2)(b) comprise two general elements repeated for each crime, describing the material scope of application and the mental element accompanying the objective element:

1. the conduct took place in the context of and was associated with an international armed conflict;
2. the perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The element describing the context and the related mental element are reproduced from the elements for the war crimes listed under Article 8(2)(a). The comments made in the September volume of the *Review* therefore also apply to those elements here.[8]

6 UN Doc. PCNICC/1999/WGEC/INF.2; UN Doc. PCNICC/1999/WGEC/INF.2/Add.1; UN Doc. PCNICC/1999/WGEC/INF.2/Add. 2; UN Doc. PCNICC/1999/WGEC/INF.2/Add. 3.

7 *Op. cit.* (note 1), pp. 774-779.

8 *Ibid.*, pp. 779-782.

Elements specific to the crimes under Article 8(2)(b)

(a) War crimes derived from the Hague Regulations

The definition of many crimes under Article 8(2)(b) is a textual repetition of rules contained in the Hague Regulations, e.g. Article 8(2)(b)(v), (vi), (xi), (xii) and (xiii). However, Protocol I, adopting "modern" language, reaffirmed and developed some of these rules in 1977. The PrepCom intensively debated to what extent this new language could be used in the drafting of the elements of crimes. Eventually the decision whether to use the language of Protocol I to clarify the elements of crimes was made on a case-by-case basis. The following examples will serve to illustrate the approach taken by the PrepCom.

The crime of "Killing or wounding treacherously individuals belonging to a hostile nation or army" (ICC Statute, Article 8(2)(b)(xi)) as derived from the Hague Regulations is linked to a certain extent with Article 37 of Protocol I on the prohibition of perfidy.[9] The concept of perfidy in Article 37 is both more extensive and narrower. It covers not only the killing or wounding of an adversary by means of perfidy, but also capture. The latter is clearly not included in Article 23(b) of the Hague Regulations. However, the Hague Regulations seem also to cover acts of assassination[10] not included in Article 37 of Protocol I.[11]

9 The relevant part of Protocol I, Art. 37(1), 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."

10 See, for example, Oppenheim/Lauterpacht, *International Law: A Treatise*, Vol. II, London, 1952, p. 342, which gives 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."

11 The impact of Protocol I, Art. 37, on the traditional rule as formulated in the Hague Regulations is not clear. Ipsen, for example, concludes: "The fact 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 Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 3, 1997, p. 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, Article 6, dealing with certain types of booby-traps, and also in its amended form of 1996, Article 7.

After some discussion, the PrepCom decided to use essentially the substance and language of the Article 37 prohibition of perfidy to clarify the meaning of "treachery" for the purposes of this war crime. Under the terms of the ICC Statute, and contrary to Article 37 of Protocol I, the crime is limited to killing or wounding, while the capture of an adversary by resort to perfidy is not covered.

A good example of clarification has been achieved by the text adopted for the elements of killing or wounding a combatant who, no longer having any means of defence, has surrendered at discretion (ICC Statute, Article 8(2)(b)(vi)). The PrepCom agreed that the terminology of Protocol I, Article 41 — its definition of *hors de combat* — is a correct "translation" of the old notion stemming from the Hague Regulations. The concept of *hors de combat* is now given a broad interpretation, which replaces the old Hague language and incorporates, for example, the situations specified in Article 41 of Protocol I[12] and also its Article 42.[13]

In the negotiations relating to the war crime of "Declaring that no quarter will be given" (ICC Statute, Article 8(2)(b)(xii)), the PrepCom paraphrased the concept of *no quarter* by essentially using the modern language from Protocol I, Article 40 ("... there shall be no survivors..."). Rejecting an initial proposal, it was agreed that there was no need for a result (e.g. that in a particular situation no survivors were left), but that a declaration or an order as such would be sufficient for the completion of the crime. Several delegations furthermore took the view that the declaration would not merit the ICC's attention if it was made for no purpose by someone with neither the authority nor the means to enforce it. Therefore, elements 2 and in particular 3 were added, which provide:

> "2. Such declaration or order was given *in order to* threaten an adversary or to conduct hostilities on the basis that there shall be no survivors.

12 Protocol I, Art. 41, reads as follows:

"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."

13 Protocol I, Art. 42(1), reads as follows: "1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent."

3. The perpetrator *was in a position of effective command or control* over the subordinate forces to which the declaration or order was directed." (Emphasis added.)

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" (ICC Statute, Article 8(2)(b)(v)), the PrepCom decided to stick closely to the Hague language (Hague Regulations, Article 25) and not to use the wording of Article 59 of Protocol I, in particular, the conditions set forth in its paragraph 2. It was argued that the scope of application of the Hague Regulations was broader. However, footnote 38 to the Elements of Crimes,[14] which was added, is derived with small modifications from Protocol I, Article 59(3).

(b) War crimes relating to the conduct of hostilities

In general terms, war crimes relating to the conduct of hostilities (ICC Statute, Article 8(2)(b)(i), (ii), (iii), (iv), (ix), (xxiii), (xxiv) and (xxv)) were the subject of some controversy. The most contentious issues are described in the following paragraphs.

With regard to the war crimes under Article 8(2)(b)(i),[15] (ii),[16] (iii),[17] (ix)[18] and (xxiv)[19] dealing with particular types of unlawful attacks against protected persons or objects, the PrepCom debated intensively whether these war crimes require a result, as do the grave

14 "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."

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

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

17 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.

18 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.

19 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.

breaches defined by Article 85(3) and (4)(d) of Protocol I, i.e. causing death or serious injury to body or health and/or extensive destruction. The majority of delegations pointed out that at the Diplomatic Conference in Rome, the requirement that a result be achieved had consciously been left out. They held that the crime would be committed if, e.g. in the case of Article 8(2)(b)(i), an attack was directed against the civilian population or individual civilians, but owing to the failure of the weapon system the intended target was not hit. The other side, however, argued that it had always been implicitly understood that the result requirement of the grave breaches provisions would also apply to those war crimes derived from Protocol I, and that in the event of a weapon failure the conduct should be charged only as an attempted crime. But the PrepCom followed the majority view and refused to require that the attack had to achieve 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), it may be concluded that, compared to the grave breaches 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" referred only 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, for 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 Article 30(2)(a) of the ICC Statute,[20] which stipulates that the perpetrator must have meant to engage in the conduct described, in conjunction with paragraph 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 codified by Article 30. In this particular case the standard defined in subparagraph 2(b) of that provision would apply, i.e. the perpetrator means to cause the intended effect or is aware that it will occur in the ordinary course of events. Given paragraph 2 of the General Introduction to the Elements of Crime, 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 adds more clarity.

In this context it is interesting to have a closer look at the views of the Prosecution expressed in a case before the International Criminal Tribunal for the former Yugoslavia (ICTY), and the findings of the Tribunal 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 that could be likened to serious criminal negligence".[21] Moreover, the following requirements must be met for a charge of unlawful attack:

> "b) the civilian status of the population or individual persons... was known or should have been known;

20 ICC Statute, Art. 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."

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

c) the attack was wilfully directed at the civilian population or individual civilians;".[22]

The Prosecution derived the mental element "wilful" from Article 85(3) of Protocol I and interpreted it as including both intention and recklessness, in accordance with the ICRC *Commentary's* view on that provision.[23] An underlying reason was that Protocol I imposes a wide range of duties on superiors to ensure that their forces comply with the law and that precautions are taken to avoid attacks being directed against civilians.[24] In the aforesaid *Blaskic* case, the ICTY Trial Chamber held that:

"Such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians... were being targeted..."[25]

On the basis of these sources, it is submitted that the required *mens rea* may be inferred from the fact that the necessary precautions (in the sense of Article of 57 Protocol I, 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 concerning an unlawful attack against persons or objects protected against such attacks.

The elements of the other war crimes linked to the conduct of hostilities follow the same structure as that described for war crimes under Article 8(2)(b)(i), with the one exception of the war crime under Article 8(2)(b)(xxiv) which reads: "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." This text keeps the initial structure of the Elements of Crimes as adopted at the first reading.[26] There is

22 Quoted in W. J. Fenrick, "A first attempt to adjudicate conduct of hostilities offences: Comments on aspects of the ICTY Trial decision in the *Prosecutor* v. *Tihomir Blaskic*," in *Leiden Journal of International Law,* 2001 (forthcoming).

23 See Commentary to Art. 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*, ICRC, Geneva, 1987, para. 3474, p. 994.

24 *Op. cit.* (note 22).

25 *Loc. cit.* (note 21), para. 180.

some likelihood that this is the result of a drafting error, since it was maintained that the new structure for war crimes relating to unlawful attacks adopted by the PrepCom after the second reading was considered to be an application of the order as described in the General Introduction.[27] The drafters felt that this restructuring would not affect the substance of the original draft.

This latter war crime is significantly clarified by the EOC. The text adopted essentially reproduces the text of the Rome Statute, 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 wording underscores the fact that a protected status under the Geneva Conventions can also be expressed by other distinctive signs, such as light signals, radio signals or electronic identification.[28] The PrepCom recognized that the essence of this crime is an attack against protected persons or property identifiable by any recognized means of identification.

As in the case of the aforesaid 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 does Article 85(3) of Protocol I for grave breaches. In addition to

26 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."

27 EOC, General Introduction, para. 7: "The elements of crimes are generally structured in accordance with the following principles:

— As the elements of crimes focus on the conduct, consequences and circumstances associated with each crime, they are generally listed in that order;

— When required, a particular mental element is listed after the affected conduct, consequence or circumstance;

— Contextual circumstances are listed last."

28 For identification of medical units or transports, see Protocol I, Annex I, Arts 6-9.

the arguments already mentioned, delegations backing such a requirement claimed that their view is supported by the wording of the Rome Statute. They held that the need for a result is suggested by the words "such attack *will* cause" (emphasis added), and the damage caused must be excessive (this would be a higher threshold than for Protocol 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 owing to the failure of the weapon system the expected excessive incidental injury or damage did not occur. In the end, the PrepCom once again followed the majority view and refused to require that the attack must have a particular result.

Another controversial issue debated by the PrepCom was the adoption of a commentary to the term "concrete and direct overall military advantage", which had already been the subject of arduous negotiations during the Rome Diplomatic Conference. While several delegations at the PrepCom 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 overall military advantage" was incorporated in 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 perpetrator 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, and clarifies several different issues. In essence, the sentence

"[t]he 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 emphasize 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."[29]

The PrepCom's commentary to the term "concrete and direct overall military advantage" stresses that international humanitarian law applies to armed conflicts regardless of the cause of the conflict or the motives of the parties thereto. It draws attention to the distinct nature of *jus ad bellum*, which is irrelevant in this context, and *jus in bello*, which is alone relevant for assessing whether the proportionality requirement is met. These statements are a correct reflection of existing law. The clarification is certainly very valuable.

To say that "[s]uch advantage may or may not be temporally or geographically related to the object of the attack" carries, however, the risk of abusive interpretations of the concept of concrete and direct military advantage. The need for this sentence was highlighted in informal consultations by examples such as that of feigned attacks where the military advantage materializes at a later time and in a different place (reference was made to the landing of the Allied forces in Normandy during the Second World War[30]). The danger of abusive interpretations is counterbalanced to a certain extent by the first sentence of the footnote containing the requirement of foreseeability. It was meant to exclude advantages which are hardly perceptible. Advantages which do not materialize immediately must nevertheless be foreseeable. This interpretation is required by the words "concrete and direct". When Protocol I was negotiated, "... [t]he expression 'concrete and direct' was intended to

29 Commentary to Art. 51, *loc. cit.* (note 23), para. 1979, p. 625.

30 Commentary to Art. 52, in M. Bothe/K. J. Partsch/W.A. Solf, *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff Publishers, The Hague/Boston/London, 1982, pp. 324 ff.

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."[31] Solf develops this view as follows:

> "'Concrete' means specific, not general; perceptible to the senses... 'Direct', on the other hand, means 'without intervening condition of agency'... A remote advantage to be gained at some unknown time in the future would not be a proper consideration to weigh against civilian losses."[32]

Subsequent discussions concerned the evaluation that has to be made with regard to the excessiveness of civilian injury or 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 judgment in light of paragraph 4 of the General Introduction.[33]

These delegations claimed that the perpetrator must personally make a value judgment and come to the conclusion that the civilian casualties or damage would be excessive. Other delegations, however, pointed out that the words "of such an extent as to be", which are not contained in the Statute, but were added to the Elements of Crime were meant — at least in the eyes of those who suggested the insertion — to make it clear that the perpetrator need only know the extent of the injury or damage he or she will cause and the military advantage anticipated. Whether the damage or injury was

31 Commentary to Art. 57, *op. cit.* (note 23), para. 2209, p. 684. It is significant that the commentaries to Protocol I emphasize that the words "concrete and direct" impose stricter conditions on the attacker than those implied in the criteria defining military objectives, which require a "definite" military advantage. *Ibid*, para. 2218, p. 685, and *op. cit.* (note 30), p. 365.

32 *Ibid*., p. 365.

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

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 judgment as described therein. An evaluation of that value judgment 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 judgment must have been made as described in element 3. However, the meaning of the second sentence allows for divergent interpretations. To those who insisted on a more objective evaluation, the formulation "an evaluation of that value judgment" refers to an external evaluation by the Court. The Court would have to make an objective analysis of the judgment "... based on the requisite information available to the perpetrator at the time". To others, the second sentence merely highlights that the value judgment 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 instance of incidental injury or 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 it is compatible with the rule that ignorance of the law is no excuse.

In one respect, there seemed to be agreement between the States that drafted this footnote: they recognized that the content of the footnote should not benefit a reckless perpetrator who knows perfectly well the anticipated military advantage and the expected incidental injury or damage, but gives no thought to evaluating the latter's possible excessiveness. It was argued that by refusing to evaluate the advantage and the injury or damage, he/she does in fact make the requisite value judgment. If the Court finds

that the injury or damage was excessive, the perpetrator will be guilty.

There is probably no doubt that a court will respect judgments that are made reasonably and in good faith, based on international humanitarian law. In any event, an unreasonable judgment or an allegation that no judgment was made would, in a case of death, injury or damage clearly excessive to the military advantage anticipated, simply not be credible. It is submitted that the Court would then — and would be entitled to — 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.

(c) 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 is defined in the Elements of Crimes as follows: "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, such blankets were indispensable for survival owing to the very low temperature in a region. Out of that understanding, a footnote was added to an initial "rolling text" of the Working Group underlining that the intention to starve would also include the broader notion of deprivation of anything necessary for life. This footnote recognized that the ordinary meaning of the word "starvation" may have different contents. In accordance with major dictionaries, it was meant to cover not only the more restrictive meaning of starving as killing by hunger or depriving of nourishment, but also the more general meaning of deprivation or insufficient supply of some essential commodity, of something necessary to live.[34] 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

34 With regard to the different meanings of "starvation", see M. Cottier, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 1999, No. 218, p. 256.

term "objects indispensable to their survival", which would determine the meaning of starvation in element 2 ("The perpetrator intended to starve civilians as a method of warfare.") in a broad sense. 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".

This 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 proposal,[35] the PrepCom agreed that there is no requirement that "as a result of the accused's acts, one or more persons died from starvation".

(d) War crimes involving the use of particular weapons

Owing to the very brief definition of the war crime of "Employing poison or poisoned weapons" by the Rome Statute (Article 8(2)(b)(xvii)), it was necessary for the EOC to explain the elements of 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 word "serious" in "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 in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, which covers chemical weapons. The PrepCom intensively debated the scope of the

35 UN Doc. PCNICC/1999/DP.4/Add. 2.

prohibition in the Geneva Gas Protocol, subsequently reaffirmed 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 should be reflected in the EOC, taking into account the decision by the Diplomatic Conference in Rome to exclude any reference to the 1993 Chemical Weapons Convention.

With regard to riot control agents, some States argued that any use thereof in international armed conflict is prohibited. Among these delegations some took the view that the 1925 Geneva Gas Protocol already prohibited such use, while others argued that the law with regard to riot control agents might not have been completely clear under the 1925 Protocol, but that the 1993 Chemical Weapons Convention confirmed the illegality of their use as a method of warfare.[36] Even among these delegations views diverged 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 settled.

The PrepCom did not define the specific gases, liquids, materials or devices, but chose an approach similar to that adopted for the war crime of "Employing poison or poisoned weapons". By way of a compromise, it was accepted that the gases, substances[37] or devices were defined by reference to their effects, namely causing "... death or serious damage to health in the ordinary course of events".[38] This means 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 emphasizing that the ICC is

36 See Article I(5) of the 1993 Chemical Weapons Convention, which explicitly states that "(e)ach State Party undertakes not to use riot control agents as a method of warfare". Riot control agents are defined as "(a)ny chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure".

37 In the EOC the term "substance" is used to cover both terms "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.

38 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."

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 acts that might be unlawful under other provisions of international law, it was argued by others that all offences "of serious concern" would be within the terms of the elements as drafted. Given the fears of many delegations that the threshold "death or serious damage to health" would have limiting effects on the law governing chemical weapons,[39] a footnote was added 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 ICC Statute and the 1925 Geneva Gas Protocol. While some delegations were in favour of deleting the word "device", others argued that this would entail the risk of limiting the scope of the crime. The PrepCom followed the latter view. This approach seems justified. As pointed out in a commentary to the 1925 Geneva Protocol, including its *travaux préparatoires*: "[The word 'device'] marks once more the intention of the authors to give to their definition a comprehensive and open-ended character", while otherwise "[i]t 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".[40]

39 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:

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.)

40 SIPRI (ed.), *The Problem of Chemical and Biological Warfare III*, 1973, p. 45.

(e) Sexual crimes

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 exists on this issue to date, and even where it does exist it is not always uniform. For example, the ad hoc Tribunals for Rwanda (ICTR) and the former Yugoslavia defined the elements 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:

> "(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."[41]

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.[42]

The delicate compromise found in the EOC incorporates aspects from both judgments and 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

41 ICTY, Judgment, *The Prosecutor* v. *Furundzija*, IT-95-17/1-T, para. 185. See also the definition by the ICTY Prosecution quoted in that judgment (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.)

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

> 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".

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..."[43]

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 were encountered with regard to the war crime of sexual violence, owing to the formulation found in the ICC Statute: "...also constituting a grave breach of the Geneva Conventions". While some delegations argued that this formulation only indicates 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

43 *Ibid.*

named grave breaches under the Geneva Conventions — 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 that introduces a specific threshold. Therefore, the compromise text 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 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. (...)"

Element 1 essentially covers two types of situation: first, situations in which the perpetrator commits the sexual acts against the victim, and second, those in which the victim is forced or coerced to perform the sexual acts. The latter were included in the elements to cover cases of forced nudity as well if the threshold of gravity in element 2 is reached.

(f) 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

This war crime, defined in Article 8(2)(b)(viii), gave rise to the most difficult negotiations of all. The crime consists of two alternatives: first, the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, and second, the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory. The first alternative, in particular, caused major controversy. The main points on which opinions diverged sharply 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 large-scale transfers of the population?
— Must the economic situation of the local population be worsened and their separate identity be endangered by the transfer?
— What link must there be between the perpetrator and the Occupying Power?

After intensive informal negotiations which, because of 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 first alternative of the crime requires that the perpetrator "transferred, directly or indirectly, parts of its own population into the territory it occupies". The addition of a footnote concerning 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 Court.

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 establishing any link with the Occupying Power. In order to solve this latter issue, Switzerland orally amended its written proposal and suggested the following text: "... [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 drawn from the original Costa Rican/Hungarian/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 for fear that any change of wording might jeopardize the sensitive compromise reached, or is a deliberate departure from the statutory language.

War crimes under Article 8(2)(e) of the ICC Statute: serious violations committed in non-international armed conflict

In addition to the war crimes as defined in the ICC Statute's Article 8(2)(c) applicable in non-international armed conflicts — violations of Article 3 common to the four Geneva Conventions — the definitions of crimes in Article 8(2)(e) cover "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character". As in the case of all the crimes listed under Article 8(2)(b), they are derived from various sources.

Elements common to all crimes under Article 8(2)(e)

The elements for the crimes listed in Article 8(2)(e) contain two general elements which are repeated for each crime: the material scope of application and the mental element accompanying the objective ("contextual") 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 in the September volume of the *Review* therefore also apply to these elements.[44]

Elements specific to the crimes under Article 8(2)(e)

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

In this context, however, it is worth highlighting that by reproducing the specific elements of Article 8(2)(b)(xxiv)[45] — "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" — for the

44 *Op. cit.* (note 1), pp. 791 ff.

45 *Supra*, 1(b) War crimes relating to the conduct of hostilities.

corresponding war crime under Article 8(2)(e)(ii), the PrepCom recognized after some debate that, in a non-international armed conflict, directing attacks against persons or objects using the signals of the revised Annex I of 1993 to the 1977 Protocol I 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 personnel, material, units, transports and installations protected under the Geneva Conventions.[46] If the perpetrator directs an attack against such persons or objects it is irrelevant by what means these persons or objects were identifiable for the perpetrator.

The only war crime under Article 8(2)(e) which does not have its parallel in Article 8(2)(b) of the ICC Statute is the war crime 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 and not someone who simply carries out the displacement. The latter may, however, be held responsible for participating in the commission of the crime, in accordance with Article 25 of the ICC Statute, which deals with other forms of individual criminal responsibility. The wording was changed to "a civilian population", as opposed to "one or more civilians" in the elements of Article 8(2)(a)(vii) ("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

46 Commentary to Art. 8, *op. cit.* (note 23), para. 404, p. 135: "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.)

of the whole civilian population. The situation in between these two extremes was not further discussed and therefore not defined.

Element 2 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 EOC Working Group when the proposed text was introduced with that explanation — that the following formulation would refer to both a *de jure* and a *de facto* authority carrying out the order, so that the crime would cover the individual who, for example, has effective control of a situation by sheer force: "The perpetrator was in a position to effect such displacement by giving such order".

Element 3 is based on the Statute's wording, which is derived from the first sentence of Article 17(1) of Protocol II additional to the Geneva Conventions. Although it might be argued that the element could be considered superfluous in view of paragraph 6 of the General Introduction to the EOC relating to the concept of "unlawfulness", the PrepCom decided to mention that "[s]uch order was not justified by the security of the civilians involved or by military necessity". This departure from the approach taken in other situations[47] was warranted by the fact that the requirement is explicitly mentioned in the Statute and should therefore be repeated.

Quite surprisingly, the elements of this crime do not contain additional clarification which can be found in the definition of it in the Statute. The 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 of Protocol II, nor are they by Article 8(2)(e)(viii) of the ICC Statute.

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

47 For example, in the case of Article 8(2)(a)(vii)-1 — Unlawful deportation in case of international armed conflict — Art. 49(2) of the 4th Convention allows evacuations/displacements for exactly the same reasons, namely if justified for the security of the population or by imperative military reasons. However, these situations (which exclude 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 obligations are not mentioned in the EOC, the judges will need to analyse them on the basis of paragraph 6 of the General Introduction relating to the concept of "unlawfulness".

Conclusions

The negotiations of the PrepCom on the Elements of Crimes were not always easy. On the contrary, conflicting views sometimes seemed to make a satisfactory compromise unreachable. But the energy and the conviction of all delegations eventually led to a successful conclusion within the time frame given to the PrepCom. By and large, despite certain shortcomings mentioned in our two articles, the outcome of the debates is quite positive. Several issues have been clarified, and sometimes even rather progressive views were adopted in the EOC. In other fields some participants might have expected or hoped for more, but in the end the lowest common denominator prevailed, as is inherent in proceedings where a text has to be adopted by consensus.

In most parts the PrepCom managed to draft a document that is more specific than the definitions of the crimes given by the ICC Statute, but which does not unduly tie the hands of the judges or reduce the scope of their judicial discretion. There are — without any doubt — a few problematic and contentious issues which require further consideration, in particular certain cases where ambiguous formulations were adopted in order to reach a compromise or where issues have been intentionally left open. This consideration will have to be given to them by the judges themselves, using the EOC for guidance. In this regard it must be recalled that the Elements of Crimes are meant to assist the judges in their interpretation of the provisions listing the crimes under the jurisdiction of the ICC Statute. They are, however, not binding upon the judges.

●

Résumé

Commission préparatoire de la Cour pénale internationale : les éléments des crimes de guerre Partie II — Autres violations graves des lois et coutumes applicables aux conflits armés internationaux et non internationaux

par KNUT DÖRMANN

Dans un article publié dans le numéro de septembre 2000 de la Revue[1]*, l'auteur examinait les résultats des travaux de la Commission préparatoire de la Cour pénale internationale chargée d'élaborer les éléments des crimes de guerre qui compléteront les dispositions du Statut de Rome et se rapportent aux violations graves des Conventions de Genève et de son Protocole additionnel I. La présente contribution continue l'analyse des travaux de la Commission et porte plus particulièrement sur les éléments des autres violations graves des lois et coutumes applicables aux conflits armés, de caractère international ou non international. Se référant à l'ensemble des travaux de la Commission préparatoire, l'auteur rappelle que les «éléments des crimes» ne créent pas un nouveau droit mais constituent plutôt un instrument qui aidera les juges dans l'interprétation du droit en vigueur. Compris dans ce sens, le résultat est positif.*

1 Knut Dörmann, "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", *RICR*, n° 839, septembre 2000, pp. 771-796.