

# 1. Introduction

## General background

The establishment of the [International Criminal] Court has at last provided international humanitarian law with an instrument that will remedy the shortcomings of the current system of repression, which is inadequate and all too often ignored. Indeed, the obligation to prosecute war criminals already exists, but frequently remains a dead letter. It is therefore to be hoped that this new institution, which is intended to be complementary to national criminal jurisdictions, will encourage States to adopt the legislation necessary to implement international humanitarian law and to bring violators before their own courts.

(Statement by the International Committee of the Red Cross (ICRC),  
United Nations General Assembly, 53rd session, Sixth Committee, item 153 of the agenda,  
New York, 22 October 1998)

On 17 July 1998 the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) adopted the Rome Statute of the International Criminal Court. The UN General Assembly had first recognised the need for such a court in 1948, in view of the Nuremberg and Tokyo trials that followed the Second World War. Its creation had been under discussion at the UN ever since. The Statute's adoption in 1998 may therefore be seen as the fruit of some fifty years of effort.

As pointed out by the ICRC in the same statement quoted above, '[b]y adopting this treaty the great majority of States clearly demonstrated their resolve to put an end to the impunity enjoyed by the perpetrators of the most heinous crimes, and hence to deter the commission of further violations'.

The Statute entered into force on 1 July 2002. The ICC will have jurisdiction over the crime of genocide, crimes against humanity, war crimes and

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the crime of aggression<sup>1</sup> (Art. 5 of the ICC Statute). It will be complementary to national criminal jurisdictions. Under international law, States have the right and the obligation to prosecute those responsible for war crimes, for crimes against humanity and for genocide. This remains. The Geneva Conventions and their Additional Protocol I specifically lay down an obligation to repress grave breaches of international humanitarian law, which are considered war crimes. For other breaches of the Conventions and of Protocol I, the States Parties must take the measures needed to suppress them. Despite these rules, however, the need remains for an international criminal court since many States have proved unwilling to fulfil their duty to exercise their jurisdiction. Though the States continue to have the primary role to play in prosecuting war criminals, the ICC is being set up precisely to step in for national courts when these are unwilling or genuinely unable to do so. It is then that the ICC will be able to exercise its jurisdiction.

The ICRC was active throughout the process of negotiating the Rome Statute. In particular, it prepared a proposed list of war crimes together with a commentary and submitted a paper on 'State consent regime vs. universal jurisdiction'. It also took an active part in all the preparatory work for the Rome Conference and in the Conference itself.

### **Background to this commentary**

In Arts. 6, 7 and 8, the Rome Statute sets out a list of crimes over which the Court will have jurisdiction: genocide crimes against humanity and war crimes. In order to provide greater certainty and clarity concerning the content of each crime, some States felt that specific texts on Elements of Crimes (EOC) should be drafted.

Eventually Art. 9 was added. It states that the 'Elements of Crimes shall assist the Court in the interpretation and application of Arts. 6, 7, and 8. They shall be adopted by . . . the members of the Assembly of States Parties.' As a general rule, Art. 21 states that 'the Court shall apply . . . the Elements of Crimes'. On the basis of these rules, the EOC will guide the future judges and will therefore be of crucial importance for the work of the ICC in the interpretation of the provisions on crimes. In Rome, it was agreed that a text on the elements of genocide, crimes against humanity and war crimes was to be prepared by a preparatory commission.

<sup>1</sup> The Court may exercise jurisdiction over the crime of aggression only once a provision is adopted in accordance with Articles 121 and 123 of the Statute defining the crime and setting out the conditions under which the Court must exercise jurisdiction with respect to this crime.

That commission (PrepCom), which was mandated by the UN General Assembly, started its activity in February 1999 and, after five sessions, finalised its work on the Elements of Crimes on 30 June 2000. Its text, which was adopted by consensus, will be submitted to the future Assembly of States Parties for adoption. The ICRC was active throughout the negotiating process. In particular, in order to assist the PrepCom, the ICRC prepared a study of existing case law and international humanitarian and human rights law instruments relevant to drafting the elements of war crimes. Since the ICRC's core mandate is limited to developing and spreading knowledge and promoting the implementation of international humanitarian law, the study was confined to an analysis of elements of war crimes. In preparing the study, the ICRC played its internationally recognised role as guardian of international humanitarian law.<sup>2</sup> The aim of the study, which was submitted in seven parts, was to provide the government delegations taking part in the PrepCom with the necessary legal background and to prepare a means of accurately interpreting war crimes as defined in the Rome Statute. The study was a crucial working tool throughout the negotiations. It was repeatedly cited as the reference text that should guide the discussion. The study was officially submitted to the PrepCom at the request of seven States (Belgium, Costa Rica, Finland, Hungary, Republic of Korea, South Africa and Switzerland).<sup>3</sup>

### Working method

The study submitted to the PrepCom was based on an exhaustive analysis of international and national war crimes trials. It reviewed existing case law from the Leipzig trials, from post-Second World War trials, including the Nuremberg and Tokyo trials,<sup>4</sup> as well as national case law and decisions from the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. National case law on war

<sup>2</sup> The formal basis for the ICRC's role in implementing and developing international humanitarian law is to be found in the Statutes of the International Red Cross and Red Crescent Movement. The Movement is comprised of the ICRC, National Red Cross and Red Crescent Societies and their International Federation. It works closely with all States Party to the Geneva Conventions of 1949. By means of the Movement's Statutes, the International Conference of the Red Cross and Red Crescent has assigned the ICRC the task of working 'for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and [preparing] any development thereof' (Art. 5(g) of the Statutes of the International Red Cross and Red Crescent Movement).

<sup>3</sup> PCNICC/1999/WGEC/INE1 of 19 February 1999, PCNICC/1999/WGEC/INE2 of 14 July 1999, PCNICC/1999/WGEC/INE2/Add.1 of 30 July 1999, PCNICC/1999/WGEC/INE2/Add.2 of 4 August 1999 and PCNICC/1999/WGEC/INE2/Add.3 of 24 November 1999.

<sup>4</sup> Much of this material is available in digest form in the *Annual Digest and Reports of Public International Law Cases* (now volumes 1–16 of the *International Law Reports*).

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crimes was studied when it was available in English, French or German. Decisions from international and regional human rights bodies were also analysed to facilitate interpretation of particular offences closely linked to human rights concepts (for example, torture and inhuman or cruel treatment). This approach has also been chosen by the two ad hoc Tribunals in their judgments (for example, in the *Delalic* and *Furundzija* cases).

Those aspects of this case law that were relevant in interpreting war crimes as listed in the Rome Statute were included in the study.<sup>5</sup> The quotations were taken from the original sources. Relevant provisions from treaties of international humanitarian law were also included. This last point was particularly important for crimes such as ‘extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly’. The Geneva Conventions contain specific provisions in various chapters that define the conditions under which property might be lawfully appropriated or destroyed. In order to ensure correct interpretation of the law, it was therefore necessary to indicate these provisions. Where little or no case law was available, reference was also made to commentaries on the relevant instruments, in particular the commentaries published by the ICRC on the Geneva Conventions and their Additional Protocols, military manuals and – to a very minor extent – legal writings.

The study submitted to the PrepCom indicated the results that emerged from the analysis of the sources mentioned above. These results were used by Costa Rica, Hungary and Switzerland to present their own text proposals for EOC during the PrepCom negotiations. The ICRC’s work was greatly appreciated by an overwhelming number of delegations and considerably influenced the outcome of the negotiations. Several delegations indicated in particular that the sources quoted in the study would be of enormous assistance to future judges, not only those of the ICC but, more importantly, national judges who will have to apply international humanitarian law under their national legislation. The ICRC was repeatedly encouraged to publish the study.

Against this background, we began preparing the present commentary, which – with regard to the sources quoted – is essentially an update of the study submitted to the PrepCom.<sup>6</sup> The commentary also includes some new sections: the outcome of the PrepCom (the elements of war crimes as

<sup>5</sup> The various sources were selected in an objective manner based on their relevance to a particular crime. They were not intended as a reflection of any particular view or position.

<sup>6</sup> Since completion of the initial study for the PrepCom, substantial jurisprudence has emerged from the ad hoc Tribunals for the former Yugoslavia and Rwanda.

they were adopted) and a summary of the PrepCom's *travaux préparatoires*, including an explanation of certain understandings apparent within the Commission on its way to adopting the final text.<sup>7</sup> On this basis, the commentary follows the same structure for each war crime under the Rome Statute:

1. text adopted (this section replaced the original section entitled 'Results from the sources');
2. *travaux préparatoires*/ understandings of the PrepCom (new section); and
3. legal sources relating to particular war crimes under the heading 'Legal basis of the war crime' (updated section including the review of existing case law and relevant instruments of international humanitarian law).

The section on the *travaux préparatoires* explains in detail the decisions taken by the PrepCom. For persons not involved in diplomatic negotiations but who have to work with the legal texts that emerge from such negotiations, it is often not apparent why certain words have been chosen and for what purpose. This section also endeavours to present the relevant context of the negotiations to those who will have to use the texts in the future. Since the ICRC representatives were invited to participate as experts in almost all formal and informal negotiation sessions on war crimes, we are in a position to give a full account of the *travaux préparatoires*.

Given that the Elements of Crimes cannot provide all the detail needed to interpret the law on war crimes as defined in the Rome Statute, the judges, prosecutors and lawyers will have to consult additional sources. These sources are presented in the third section of the commentary on each war crime, which is an update of the ICRC's original study. They include, in particular, the case law of the ad hoc Tribunals for the former Yugoslavia and Rwanda subsequent to the PrepCom negotiations up to 31 August 2001.

It is important to note that the present commentary does not deal with the responsibilities of commanders, superiors and subordinates (Art. 28 ICC Statute) or questions concerning crimes committed by attempt, incitement, conspiracy or other forms of assistance (Art. 25 ICC Statute).

<sup>7</sup> The term 'understanding' in this context should not be confused with the technical term in Art. 31 of the Vienna Convention on the Law of Treaties. For the purposes of the present commentary, it describes the understandings of the negotiating delegations as we perceived them during the deliberations.

### **This commentary's purpose**

The purpose of this commentary is to provide judges, prosecutors and lawyers with the background information needed to implement international humanitarian law properly in the future prosecution of war crimes under the Rome Statute. In order to serve the interests of justice, it is important that the legal basis of the crimes is well known and implemented. Lack of knowledge of the issues in international humanitarian law, so often a feature of national trials, demonstrates the need for something of this kind. Since the ICC is only complementary to national jurisdictions, reference texts like the present commentary will be an important tool for lawyers at the national level. It is interesting to note that the International Criminal Tribunal for the former Yugoslavia referred to the initial ICRC study in one of its judgments (*Aleksovski*).

Neither the definition of the crimes in the Rome Statute nor the document on EOC as adopted by the PrepCom provides a complete picture, which is necessary for an accurate and faithful interpretation of the crimes. For example, both the Statute and the EOC use certain legal terms (such as 'attack', 'military objective' or 'civilian population') without further defining them. However, the treaties of international humanitarian law, from which the crimes involving these terms are derived, do contain specific definitions. Judges, prosecutors and defence lawyers will therefore have to look to these treaties of international humanitarian law to identify the relevant provisions. The present commentary indicates these provisions. In addition, there are cases in which the treaties do not provide specific definitions, but in which clarification has been provided by existing case law. This case law is quoted in the commentary. Finally, certain controversial issues remained unresolved by the PrepCom for a number of reasons and the EOC therefore amount to more or less a reproduction of the Statute's wording, making it necessary to consult other sources. The second (*Travaux préparatoires/understandings of the PrepCom*) and third ('Legal basis of the war crime') sections of the commentary on each crime should provide judges, prosecutors and defence lawyers at both international and national levels with a tool to apply international humanitarian law correctly.

### **Acknowledgements**

Both the present commentary and the study submitted to the PrepCom were written by Mr Knut Dörmann, Legal Advisor at the ICRC's Legal Division. Ms Louise Doswald-Beck, former head of the organisation's Legal

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Sources and Commentary

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Excerpt

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Division, supervised the project and contributed to the text with her advice. Both represented the ICRC at the diplomatic negotiations that led to the adoption of the EOC document by the PrepCom. Much of the research into the sources – in particular the Leipzig trials, the post-Second World War trials and decisions and reports from human rights bodies – was undertaken by Mr Robert Kolb who worked at that time as a researcher for the ICRC.

Several other persons working for the ICRC – Fabrizio Carboni, Isabelle Daoust, Thomas Graditzki, Michelle Mack, Jean Perrenoud and Baptiste Rolle – contributed with their research and Sarah Avrillaud, Edith Bérard, Martha Grenzeback and Rod Miller helped with administration, language and proof-reading. We would like to express our sincere gratitude for their work.

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## 2. Legal value of the elements of crimes

During the diplomatic conference in Rome, some States argued that a document on elements of crimes was needed to provide greater certainty and clarity regarding the content of each crime. One delegation suggested making the elements binding on the judges of the ICC. However, the majority of States were concerned at the prospect of unduly restricting judicial discretion and felt that it would be unacceptable to make the elements binding. In particular it was pointed out that all the war crimes in the Statute are derived from existing instruments of international humanitarian law, which provide the necessary framework for interpretation of the law on the crimes and secure the principle of legality.

Nevertheless, the idea of a document outlining the elements of crimes was not completely rejected in Rome, and Art. 9 of the Statute reflects the compromise that was reached. It stipulates that the Elements of Crimes 'shall assist the Court in the interpretation and application of articles 6 (genocide), 7 (crimes against humanity) and 8 (war crimes)' and thus clearly indicates that the elements themselves are to be used as an interpretative aid and are not binding upon the judges. The elements must 'be consistent with this Statute' and it should be emphasised that consistency with the Statute must be determined by the Court. Article 9 appears to be the *lex specialis* with regard to Art. 21(1) which states that '[t]he Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence . . .'



### 3. General Introduction adopted by the PrepCom

During the negotiations it became apparent that there are certain issues that arise in all crimes and are worth clarifying. But these do not necessarily qualify as elements. Therefore the PrepCom decided that a general introduction applicable to all crimes<sup>1</sup> should precede the section on the elements of particular crimes.

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 held during an intersessional meeting convened for this purpose by the government of Italy and the International Institute of Higher Studies in Criminal Sciences, in Siracusa, Italy. The results of the Siracusa meeting provided a useful basis for the discussions at the March 2000 session of the PrepCom,<sup>2</sup> which tentatively agreed on the General Introduction. This text was confirmed with slight modifications during the final session of the PrepCom in June 2000. It reads as follows:<sup>3</sup>

1. Pursuant to article 9, the following Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8, consistent with the Statute. The provisions of the Statute, including article 21, and the general principles set out in Part 3 are applicable to the Elements of Crimes.

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

<sup>1</sup> Henceforth 'General Introduction'.

<sup>2</sup> See report reproduced in PCNICC/2000/WGEC/INE1\* of 10 March 2000.

<sup>3</sup> The finalised draft text is reproduced in PCNICC/2000/1/Add.2 of 2 November 2000.

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.

3. Existence of intent and knowledge can be inferred from relevant facts and circumstances.

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.

5. Grounds for excluding criminal responsibility or the absence thereof are generally not specified in the elements of crimes listed under each crime. . . .

6. 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.

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.

8. As used in the Elements of Crimes, the term ‘perpetrator’ is neutral as to guilt or innocence. The elements, including the appropriate mental elements, apply *mutatis mutandis* to all those whose criminal responsibility may fall under articles 25 and 28 of the Statute.

9. A particular conduct may constitute one or more crimes.

10. The use of short titles for the crimes has no legal effect.

The following remarks may be made regarding the content of this General Introduction.

The first paragraph stresses the non-binding character of the EOC derived from Art. 9(3) of the Rome Statute and clarifies the relationship between the EOC and the Statute’s provisions, i.e. the general provisions of the Statute remain applicable even without explicit reference to the elements of a particular crime. Article 21 and Part 3 on general principles of criminal law are mentioned because they are the most relevant rules in this context.