

# Elements of War Crimes

under the Rome Statute of the  
International Criminal Court

Sources and Commentary

KNUT DÖRMANN

*with contributions by*  
Louise Doswald-Beck  
and Robert Kolb



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### Sources and Commentary

The Elements of Crimes are intended to assist the International Criminal Court (ICC) in the interpretation and application of the articles of the ICC Statute defining the crimes under its jurisdiction. These will not only be of crucial importance for the future work of the ICC in interpreting the crimes provisions, but also for national courts, which have the primary responsibility in the prosecution of international crimes under the Rome Statute. This commentary provides a critical insight into the *travaux préparatoires* of the Preparatory Commission leading to the adoption of the elements of war crimes. It contains an analysis of existing case law related to each war crime in the Statute. The aim is to provide States, judges, prosecutors and international and national lawyers with the necessary background information to implement international humanitarian law in future cases dealing with war crimes under the ICC Statute. The book is a unique, indispensable tool for anyone working in international criminal law.

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## Foreword by Dr Jakob Kellenberger

*President of the International Committee of the Red Cross*

Under the regime of the 1949 Geneva Conventions and the 1977 Additional Protocols thereto, States undertook to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and Additional Protocols as defined in these instruments of international humanitarian law. More specifically, they incurred the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and to bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, hand such persons over for trial to another High Contracting Party. In addition, States agreed to take measures necessary for the suppression of all acts contrary to the provisions of the Conventions and Protocols other than grave breaches.

The decision to lay down specific rules on the penal repression of serious violations of international humanitarian law was founded on the conviction that a law which is not backed up by sanctions quickly loses its credibility. Those who drafted the Geneva Conventions and Additional Protocols felt that penal repression could best be ensured on the national level, leaving the primary responsibility of defining and setting up an appropriate system to national authorities. Nevertheless, ever since the founding of the United Nations, and especially in view of the trials that took place after the Second World War, there has been an ongoing debate on the need to create a permanent international criminal court competent to try international crimes, including serious violations of international humanitarian law. Despite early enthusiasm, attempts to achieve this aim slowed down considerably and were even suspended, notably owing to the difficult political situation during the Cold War. After the Cold War came to an end, discussions on the issue gained new momentum.

The tragic events that took place in the former Yugoslavia and Rwanda, involving extremely serious violations of international humanitarian law,

prompted new efforts to complete the work begun half a century before. After intensive discussions lasting several years, the goal was reached with the adoption of the Rome Statute on 17 July 1998. The Diplomatic Conference that drafted the Rome Statute had the difficult task of accommodating the views of about 160 different countries and creating a court that would be credible in the eyes of the world. A considerable number of thorny and extremely sensitive issues had to be resolved. This could be achieved only through an historic compromise which could not satisfy the wishes of all concerned but had to be generally acceptable. With a vote of 120 States in favour, 21 abstentions and only 7 votes against, the international community came out strongly in support of an international criminal court. This determination was confirmed by the fact that in the period during which it was open for signature 139 States signed the Statute. The process of ratification started quickly, and it is hoped that in the near future a number of ratifications well above 60 – the required number for entry into force – will make the Court truly universal. It is also encouraging that many States have proceeded so quickly in preparing national implementation legislation that takes into account the sometimes broader obligations stemming from the Geneva Conventions and Additional Protocols.

Throughout the negotiating process, the International Committee of the Red Cross (ICRC) supported and firmly defended the idea of an effective and independent permanent international criminal court. On the basis of its expertise in the field of international humanitarian law, it focused primarily on the negotiations relating to war crimes. It participated in the process, alongside governments, United Nations agencies and non-governmental organisations, in various ways, in particular through active involvement in the negotiations and the production of background materials. It felt that such a court could considerably improve the implementation of international humanitarian law, which, in addition to bringing aid and protection to victims of armed conflict, is one of the ICRC's primary objectives.

The trust placed in, and the credibility of, the future International Criminal Court will depend largely on the way it exercises its jurisdiction. The quality of its judgments will certainly come under close scrutiny by the international community, and it is therefore essential that the law is properly applied.

Bearing this in mind, the Rome Diplomatic Conference decided that elements of crimes should be drafted in order to provide the judges with an additional instrument which might help them with their interpretation of the definitions of crimes contained in the Statute.

The ICRC remained actively involved in the negotiations that took place after the Rome Diplomatic Conference, producing further working documents to contribute to the successful outcome of debates in the Preparatory Commission mandated to prepare the drafts on elements of crimes. In accordance with its role as guardian of international humanitarian law, the ICRC focused on war crimes. Its main contribution was an extensive study on the elements of war crimes, based in particular on existing case law from international and national courts.

After the successful completion of the diplomatic negotiations within the Preparatory Commission – the draft on elements of crimes was adopted by consensus – and in view of the very positive response to its study, the ICRC decided, by means of this commentary, to make available to the public at large the material collected and a description of the substantive discussions of the Preparatory Commission. We feel that this commentary may be especially useful for judges, prosecutors and defence lawyers in their important task of applying humanitarian law in criminal proceedings, not only on the international but also on the national level. Given that the Rome Statute is based on the principle of complementarity – the International Criminal Court will exercise its jurisdiction only when a State is unwilling or unable genuinely to carry out the investigation or prosecution – the main responsibility for the prosecution of international crimes will remain with national jurisdictions.

The ICRC is pleased to have been part of the concerted effort made by the international community to draft the Rome Statute and to prepare, in the context of the Preparatory Commission, the instruments annexed to the Statute, in particular the document on elements of crimes. It remains committed to contributing through its various activities, the publication of this commentary being one among many others, to work for the faithful and effective implementation of international humanitarian law in the interests of victims of armed conflict.



## Foreword by Philippe Kirsch, QC

*Canadian Ambassador to the Kingdom of Sweden; Chairman of the Preparatory Commission for the International Criminal Court; former Chairman of the Committee of the Whole, United Nations Diplomatic Conference on the Establishment of an International Criminal Court*

On June 30, 2000, the Preparatory Commission for the International Criminal Court (ICC) adopted by consensus the draft Elements of Crimes, elaborating upon the definitions of genocide, crimes against humanity and war crimes contained in the ICC Statute. The Elements document, to be adopted by the ICC Assembly of States Parties, was the culmination of a remarkable codification process by the international community. The negotiations involved experts from a variety of diverse fields, including military lawyers, human rights lawyers and criminal lawyers, working together to reconcile their conflicting perspectives, priorities and backgrounds, to create a single statement on these serious international crimes.

The development of the Elements of Crimes has proven to be a very useful exercise. Because of the general agreement that the definitions of crimes in the ICC Statute were to reflect existing customary international law, and not to create new law, states relied heavily on accepted historical precedents in crafting the definitions in Articles 6 to 8 of the ICC Statute. This approach ensured the widespread acceptability of the definitions, but resulted in an assortment of provisions drawn from different sources and different eras. As a result, terminology was frequently inconsistent and often outdated. The Elements of Crimes negotiations provided the opportunity to unify these provisions in a single coherent structure, reflecting consistent and modern terminology. It was also an opportunity to resolve difficult problems and ambiguities surrounding the interplay of general legal principles, such as the *mens rea* requirement for particular provisions. By providing additional clarity, the Elements have helped garner greater acceptance for international criminal law and the ICC.

The ICRC was at the heart of the negotiations on the war crimes provisions, given its respected role as a guardian of international humanitarian law. The extensive ICRC study on the relevant jurisprudence, which forms

the basis for this text, was an early and indispensable contribution. Since it was generally agreed that the Elements must be consistent with existing law and existing precedents, the ICRC study quickly became a basic reference point for all subsequent discussions.

The ICRC not only contributed the jurisprudential study, but carried on to play a pivotal role in the Elements negotiations. Knut Dörmann and other ICRC delegates were leading participants in the protracted negotiations on how best to reconcile the demands of military necessity, the strictures of criminal law, and the humanitarian aims of these laws, and to integrate them into a coherent approach. The imprimatur of the ICRC can be seen throughout the Elements of Crimes.

The present study will therefore be of great interest to the judges of the ICC, first, because it was a major influence on the Elements negotiations, second, because it collects and analyses the relevant case law, and third, because it provides valuable insights into the considerations and debates that shaped the Elements. This study should also prove extremely useful to other judges and lawyers engaging in national or international war crimes prosecutions. Although the Elements document is not legally binding, it is worth recalling that each of the provisions of the Elements of Crimes was subjected to extensive review and debate by diverse experts and officials, taking into account various concerns and aspirations, and the outcome reflects the balance achieved on these difficult issues by the international community as a whole. It is true that the document contains various compromises that will be considered by some as too narrow and others as too broad, but it is precisely *because* it is a compromise document, indeed a consensus document, that it is so valuable: it is a unified statement by the international community on these legal issues. Moreover, cross-fertilization and convergence between the ICC, the ad hoc Tribunals and national courts is inherently desirable. If international criminal law is to continue to gain in credibility and effectiveness, it must be *one* law, a coherent corpus of law.

This thorough and balanced study will make a very important contribution to the process of building this edifice of law. By illuminating both the jurisprudence and the practical underpinnings of war crimes law, it will serve as an invaluable reference for anyone involved in the enforcement and vindication of international humanitarian law.



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