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Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court

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Introduction

The recently negotiated treaty to establish the International Criminal Court (ICC)[1] faces a wide array of controversial jurisdictional and procedural issues that will have to be resolved before the Court can function effectively. To date, attention has focused primarily on the Court's jurisdictional mechanism, which involves such politically charged issues as U.S. foreign policy in the emerging world order, international relationships among states, and political relationships between states and the Court. In contrast, procedural issues involving the Court's technical operations and its relationship with individuals have received comparatively little attention.

This Symposium's second panel, entitled "From Paper to Practice: Institutional Arrangement and Preparatory Work," addresses these often overlooked procedural issues. While a discussion of the practical aspects of implementing a functioning ICC might seem inconsequential or mundane in comparison with the first panel's jurisdictional focus,[2] it would be an acute error to trivialize the Court's procedural development. Elements of Crimes and Rules of Evidence and Procedure are the nuts and bolts of any criminal justice system. They also provide normative guidelines that help establish a court's subordinate status with respect to the rule of law and consequently the moral authority of its decisions. If and when the ICC

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1. *Rome Statute of the International Criminal Court*, U.N. GAOR, 53d Sess., U.N. Doc. A/CONF.183/9 (1998), *reprinted in* 37 ILM 999 (1998) [hereinafter ICC Statute]. The final form of the Statute contains technical modifications to the original text adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome, Italy, June 15-July 17, 1998 [hereinafter Diplomatic Conference].

2. The first panel was entitled "Acquisition of Jurisdiction: Triggering Mechanisms & Crimes."

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begins to conduct business, the Elements of Crimes and Rules of Evidence and Procedure will be of foremost importance to those dealing directly with the Court.[3]

This Article is designed to explain the significance of the work being done by the ICC's PrepCom, the body responsible for drafting these rules and elements.[4] In particular, the Article will focus on the development of the Elements of Crimes and the challenges facing that nascent endeavor. The Article will also describe how the seemingly pedestrian preparatory work of developing Elements of Crimes and Rules of Evidence and Procedure fit into the larger policy debate surrounding the ICC and the United States' response to it.

I. U.S. Intent in Establishing Elements of Crimes

The ICC's authority rests on two equally important foundations: the powers granted to it by the ICC Statute, and broad-based international acceptance. Since achieving wide support for the ICC often depended on limiting its powers, the Court's proponents faced the challenging task of balancing these conflicting sources of authority.[5] Unfortunately, many states have viewed the accommodations made to strike that balance as weakening the Court, particularly when those accommodations were directed at the United States. In fact, the jurisdictional and procedural checks and balances sought by the United States strengthen the Court's credibility because they ensure that the Court is operating within the rule of law.[6]

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3. Anyone who has stood before a judge as a criminal defense lawyer is well aware that, to a criminal defendant, Rules of Evidence and Procedure may be technical, but are certainly not trivial. Likewise, the Elements of Crimes may seem mundane to the casual observer, but they are critical in the eyes of the accused. For the parties standing before the Court, jurisdictional issues (which are of particular concern to States) pale in comparison to the facts of their case and how these facts will be adduced.

4. The PrepCom was established in the Final Act of the Diplomatic Conference. Paragraphs 5 and 6 of Resolution F of the Final Act require the PrepCom to draft Rules of Procedure and Evidence and Elements of Crimes before June 30, 2000. *See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, U.N. GAOR, 53d Sess., Annex 1, Res. F, para. 5-6, U.N. Doc. A/CONF.183/10 (1998) [hereinafter Resolution F]. Other PrepCom duties include drafting the following: a relationship agreement between the Court and the United Nations; basic principles governing a headquarters agreement to be negotiated between the Court and the host country; financial rules and regulations; an agreement articulating the privileges and immunities of the Court; a budget for the first financial year; and rules of procedure for the Assembly of States Parties. Philippe Kirsch, Chairman of the PrepCom, has scheduled open working group negotiating sessions solely for Elements of Crimes and Rules of Evidence and Procedure. Other issues are being handled informally by designated "friends of the Chair." The PrepCom met February 16-26 and July 26-August 13, 1999; a third meeting is scheduled for November 29-December 17, 1999. *See Establishment of an International Criminal Court*, G.A. Res. 53/105, U.N. GAOR, 53d Sess., at 2, U.N. Doc. A/RES/53/105 (1999).

5. *See* Philippe Kirsch, Keynote Address, 32 CORNELL INT'L L.J. 437 (1999).

6. For example, the vast majority of the Court's proponents viewed the U.S. proposal to establish the Elements of Crimes as an unnecessary restraint, if not an outright threat to progressive judicial activism. The proposal actually aimed to give teeth to the fundamental legal principle of *nullum crimen sine lege*. *See* ICC Statute, *supra* note 1, art.

The jurisdictional checks and balances proposed by the United States pertain to the Court's status relative to states, to the Security Council, and to other international organizations.[7] Determining the Court's proper position *vis-à- vis* these bodies will require balancing multiple factors, including state sovereignty and the preservation of certain international structures on the one hand, and the enforcement of specific international legal norms on the other. However, a discussion of the Statute's controversial jurisdictional scheme is outside of the scope of this Article.

In contrast, procedural checks and balances (which pertain to the internal conduct of trials) should be easier to establish. Although the PrepCom will also need to balance an array of potentially controversial factors (i.e., weighing the interest in prosecuting wrongdoers against interests in protecting the rights of a defendant and preserving the fairness of the system), it can look to existing criminal law for guidance in developing rules and elements.[8]

For several reasons, the PrepCom's most important task in developing procedural checks and balances will be establishing the Elements of Crimes.[9] First, the drafters of the ICC Statute strove to clearly delineate the principles and statutory provisions governing the Rules of Evidence and Procedure.[10] Because of this early emphasis on many procedural and evi-

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22 (*Nullum crimen sine lege*) (requiring that crime definitions be "strictly construed"). More specifically, the U.S. proposal for Elements was designed to (1) be faithful to customary international law, (2) strike an appropriate balance in accommodating concerns expressed by interested states, and (3) interpret general international law norms with the specificity and rigor appropriate for criminal law.

7. For example, the United States has forcefully criticized the ICC Statute's assertion of jurisdiction over non-party nationals. This jurisdictional assertion is the most controversial characteristic of the ICC Statute, since the international community lacks clearly relevant historical precedents regarding analogous jurisdictional regimes. For a discussion of the U.S. position regarding ICC jurisdiction, see Michael F. Lohr & William K. Lietzau, *One Road Away from Rome: Concerns Regarding the International Criminal Court*, J. LEGAL STUD. (forthcoming 1999). *See also* David J. Scheffer, *U.S. Policy and the International Criminal Court*, 32 CORNELL INT'L L.J. 529 (1999).

8. National jurisdictions provide protections that ensure trials are just and fair, and safeguards that mandate adequate notice and preclude inappropriate judicial legislation. Consider, e.g., jurisprudence surrounding constitutional protections against ex post facto laws and forced self-incrimination.

9. The United States recognized the importance of developing Elements and Rules of Evidence and Procedure early in the negotiating process. Prior to the Rome Diplomatic Conference, the U.S. delegation identified those ICC issues having the greatest potential to affect U.S. interests. The Court's jurisdictional mechanism was usually identified as the leading issue, followed by the list of crimes subject to the Court's jurisdiction and their elements, and then by Rules of Evidence and Procedure. It is interesting to note that the Joint Chiefs of Staff, when briefed on various ICC issues, quickly recognized the importance of Elements of Crimes and Rules of Evidence and Procedure. Most generals and admirals have convened courts-martials, referred criminal matters to trial, and signed orders executing court judgments. Therefore, military leaders tend to be more familiar with criminal legal matters than most policy-makers. In contrast, most of the delegates at Rome were international lawyers (especially human rights lawyers) rather than experienced criminal litigators.

10. *See, e.g.*, ICC Statute, *supra* note 1, arts. 22-33, 53-61, 63-76, and 81-85 (discussing various rights of the accused and trial issues frequently found in rules of procedure and evidence).

dentiary rules, the PrepCom's work in this area will be more technical than substantive. Second, the debate surrounding Rules of Evidence and Procedure is rooted less in philosophical differences than in mechanical differences between legal systems, most notably the civil law and the common law systems. Disagreement over evidentiary and procedural rules implicates efficiency concerns associated with the merging of judicial systems; however, such disagreement does not usually implicate fundamental issues of fairness, unlike much of the elements debate. Third, the proponents of the ICC are not attempting to further the interests of justice at the expense of procedural fairness. All of the negotiating delegations recognized (at least in theory) the importance of procedural due process protections, and there have been no efforts either to undermine the fundamental rights of the accused or to expand those rights so as to stymie the Court.[11]

In contrast, the Articles dealing with Elements of Crimes are unclear and strongly contested. The problem with the Statute's treatment of offenses (the "elements problem") is that the crimes listed in Articles 6, 7 and 8 are defined with insufficient precision and specificity[12] and thus conflict with the principle of *nullum crimen sine lege* articulated in Article 22.[13] In some cases, the offenses are defined ambiguously using verbiage derived from law of war treaty antecedents;[14] in others, the substantive offenses are duplicative.[15] The lack of well-defined elements also makes distinguishing specific intent crimes from general intent crimes or crimes with some other heightened *scienter* requirement nearly impossible. For example, Article 30 imposes criminal liability only when the "material elements are committed with intent and knowledge," and provides that

11. For example, while certain important initiatives (particularly in the area of victim's rights) are being furthered as these rules are drafted, no one is demanding evisceration of the right to remain silent or the right to cross examine witnesses.

12. For example, Article 8 includes "wilful killing" among its list of war crimes, but provides no definition of this offense. *See* ICC Statute, *supra* note 1, art. 8(2)(a)(i). In comparison, U.S. criminal statutes are normally drafted such that the elements are self-evident to any criminal lawyer.

13. *See supra* note 6.

14. Much of the language in Article 8 derives from the Hague and Geneva Conventions and uses esoteric terms that were neither widely understood nor consistently defined among the law of war experts negotiating in Rome (based on informal author poll). *See e.g.*, "treacherously" (art. 8.2 (b)(xi)), "pillaging" (art. 8.2(b)(xvi)), "quarter" (art. 8.2(b)(xii)). More significantly, many of these same terms were originally negotiated with known or intended ambiguities. The meaning of "imperatively demanded by the necessities of war" (art. 8.2(b)(xiii)) has evaded agreement for years. Similarly, "buildings which are undefended" (art. 8.2(b)(v)) has been subject to several national definitions. The difference between "poison" (art. 8.2(b)(xvii)) and "poisonous or other gases, and all analogous liquids, materials or devices" (art. 8.2(b)(xviii)), or between "biological experiments" (art. 8.2(a)(ii)) and "medical or scientific experiments" (art 8.2(b)(x)) is not widely recognized. These are but a few of the imprecise terms used in one portion of the war crimes list; *see also infra* notes 27, 30-33 and accompanying text. The crimes against humanity listed in Article 7 are somewhat better defined than the Article 8 war crimes, but still suffer from similar ambiguities.

15. Duplication can be found throughout the war crimes in Article 8. *See, e.g.*, crimes defined in Articles 8.2(a)(iv), 8.2(b)(xiii), 8.2(b)(xvi), 8.2(c)(v), and 8.2(e)(xii) (describing destruction or appropriation of property); and Articles 8.2(b)(vi), 8.2(b)(xi), and 8.2(e)(ix) (describing treacherous killing or wounding).

"'knowledge' means awareness that a circumstance exists."[16] A strict reading of this provision with respect to grave breaches might require, inter alia, proof that an accused *knew* their victim was a protected person under the Geneva Conventions, which make the victim's status as a protected person a material element.[17] On its face, Article 30 could conceivably be read to exonerate perpetrators unfamiliar with that term of art. Such a reading would clearly defeat the intent of Article 30, and also would violate the principle that "ignorance of the law is no excuse" expressed in Article 32. The PrepCom has since formulated the knowledge element of grave breach offenses to avoid such an absurd result,[18] but the example nevertheless highlights the need for detailed elements.

Unfortunately, not everyone in Rome agreed that the Statute's offenses were insufficiently defined, and the United States expended a significant amount of negotiating capital in securing the references to Elements of Crimes now found in Articles 9 and 21 of the ICC Statute.[19] Many delegations argued that any problems arising from the ambiguity of the elements should be addressed by the judges. This is the method used in the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY).[20] However, the ICTY differs substantially from the ICC; for example, the ICTY's jurisdiction is both temporally and geographically limited, and it is subject to the oversight of the United Nations Security Council. Moreover, the ICTY is a special remedial tribunal established in response to a discrete

16. ICC Statute, *supra* note 1, art. 30, paras. 1 and 3.

17. The Geneva Conventions define grave breaches to include "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly," where those acts were "committed against persons or property protected by the Convention." Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, art. 50, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention for the Amelioration of the Condition of the Wounded and Sick].

18. The PrepCom definition of the knowledge element for grave breaches requires that "such [victim or victims] were protected under one or more of the Geneva Conventions of 1949 and the accused was aware of the factual circumstances that established this status." *See* Discussion Paper Proposed by the Coordinator on Article 8: War Crimes, U.N. Doc. PCNICC/1999/WGEC/RT.2 (1999).

19. A variety of political and practical constraints prevented the drafters from defining the crimes falling within the Court's jurisdiction with sufficient precision for criminal law purposes. Therefore, the U.S. delegation proposed that Elements of Crimes be negotiated during the PrepCom meetings; elements were to be negotiated by states prior to anyone standing trial before the Court.

20. *See Statute of the International Tribunal, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, Annex, U.N. Doc. S/25704 (1993), *reprinted in* 32 ILM 1159, 1192 (1993) [hereinafter ICTY Statute]. The Statute was adopted by the Security Council on May 25, 1993. *See* SC Res. 827, U.N. Doc. S/RES/827 (1993), *reprinted in* 32 ILM 1203 (1993). *See also* Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 87 (1999) (claiming that the ICTY and relevant treaties on international humanitarian law do not describe "various elements that should be found in order to determine whether the crime was committed").

body of easily identified, egregious war crimes that (for the most part) had already been completed.

In contrast, the ICC is a permanent Court that exercises worldwide jurisdiction and will adjudicate an amorphous body of future crimes. There are over ninety substantive offenses listed in the ICC Statute,[21] not including various formulations involving vicarious liability. The task of negotiating multiple elements for each of these crimes is certainly daunting, and for many of the delegates, the Nürnberg,[22] Yugoslov, and Rwandan[23] Tribunals provided ample precedent for simply ignoring the task.[24]

In addition, many delegations sought open-ended elements in order to expand the discretion of the Court. These states envisioned a Court that would not only adjudicate criminal cases, but also could define the law and thus foster its evolution. However, judicial activism of this nature conflicts with the most fundamental principles of criminal law, and it is arguably inconsistent with the Burkean conservative character of most English-speaking judges. While the Court should ensure greater accountability for perpetrators of the most serious violations of international law, it should not accomplish this goal by leaving the elements problem to judicial discretion; several hundred years of experience recommend against imbuing judges with legislative power.

All of the crimes falling under the ICC's jurisdiction are based on customary international law offenses.[25] In drafting elements for these offenses, however, the PrepCom cannot merely restate customary norms with respect to genocide, crimes against humanity, and war crimes; these customary norms are too imprecise for the Court to function effectively. The general customary norms articulated in the Hague and Geneva Con-

21. The exact number is subject to debate depending how various Articles are parsed by practitioners. For example, at the July 26-August 13 PrepCom meeting, Article 8.2(a)(ii) ("[t]orture or inhuman treatment, including biological experiments") was divided into three distinct crimes for purposes of developing criminal elements.

22. Charter of the International Military Tribunal for the Trial of the Major War Criminals, appended to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, *as amended*, Protocol to Agreement and Charter, Oct. 6, 1945 [hereinafter Nürnberg Charter].

23. *Statute of the International Criminal Tribunal for Rwanda*, Annex, U.N. Doc. S/RES/955 (1994), *reprinted in* 33 ILM 1598, 1602 (1994) [hereinafter ICTR Statute].

24. Like the ICTY Statute, the Nürnberg Charter and ICTR Statute do not clarify Elements of Crimes. When assessing the relevance of this fact, however, one should consider that these tribunals were established *ex post facto* and their subject matter jurisdiction presumed crimes so firmly established that detailing elements was not necessary.

25. *See, e.g.*, 1 *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22, at 16, U.N. Doc. A/51/22 (1996) (referencing the customary international law status of the definitions of crimes in the Statute and noting that several delegations argued that the Statute should codify customary international law but not create new substantive law). To speed the drafting process, the negotiators decided that only those crimes having a foundation in customary international law would be listed in the Statute. Otherwise, achieving agreement on the list of offenses would have substantially delayed negotiations.

ventions and other relevant treaties were intended to be implemented and enforced by states through domestic legislation. But in the case of the ICC, the international community must create that implementing legislation and recast the broad norms of customary international law into specific provisions relevant to criminal lawyers and judges. In particular, *international* norms must be translated into *criminal* provisions; *general* proscriptions must be reduced to *specific* elements of proof; and law directed at *states* must be converted into prerequisites for *individual* criminal culpability. These are the most important tasks directly associated with taking international criminal law from theory to practice. By enhancing certainty and predictability, it should also make the law more relevant for government officials and military personnel.

Developing elements that are consistent with prevailing U.S. standards will require a tedious review of potential factual scenarios to ensure that guilt attaches only when the accused is genuinely culpable. When going through that process, one cannot help but recognize the delicate nature of the balancing act. Developing elements that close loopholes while precluding prosecution for justified acts of violence will be no easy task, especially in warfare scenarios where violence and aggression necessarily lie at the root of state action.

Some examples are instructive in this regard. One of the first war crimes listed in Article 8 is that of "[w]ilfully causing great suffering, or serious injury to body or health."[26] While the Geneva Conventions[27] and Pictet's Commentary[28] provide some interpretive guidance, the substance of this and other offenses is much in question. Few criminal offenses are defined simply by result. Moreover, "great suffering," even among persons "protected" under the Geneva Conventions, is a common result of warfare. During recent PrepCom negotiations in New York, even those negotiators who initially claimed that law of war principles could provide a wealth of interpretive guidelines could not easily identify the nature of this offense. Other examples of ambiguously or poorly defined offenses include "wounding treacherously,"[29] "attacking . . . buildings which are undefended,"[30] and "persecution," defined as "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."[31] There is a manifest need to clarify

26. ICC Statute, *supra* note 1, art. 8, para. 2(a)(iii).

27. *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick, *supra* note 17, arts. 49-51; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, arts. 50-52, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 102, 105-08, 129-131, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, arts. 146-48, 6 U.S.T. 3516, 75 U.N.T.S. 287.

28. 1 COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (Jean S. Pictet ed., 1952).

29. ICC Statute, *supra* note 1, art. 8, para. 2(b)(xi).

30. *Id.* art. 8, para. 2(b)(v).

31. *Id.* art. 7, para. 1(h) and 2(g).

the elements of these harms.[32]

Many of the ICC negotiators argued that the elements problem could be resolved by merely applying the customary interpretive techniques found in Articles 31 and 32 of Vienna Convention on the Law of Treaties.[33] Unfortunately, these techniques (i.e., plain meaning analysis, recourse to negotiating history) will yield little dispositive guidance appropriate for a criminal courtroom. The terms of international treaties, especially those involving the laws of war, are negotiated so as to achieve consensus rather than clear, precise terminology. The ambiguity in treaty provisions is often deliberate rather than the result of poor drafting; for example, ambiguious terms may reflect a lack of agreed intent. Given these caveats, a close textual analysis of the Statute would be an ill-conceived effort.

The elements problem not only encourages disrespect for the Court and the rule of law generally, but also invites politically motivated abuse. Much of the United States' concern regarding the ICC's jurisdictional mechanism arises from the risk that the Court will be used as a tool to influence U.S. foreign policy, i.e., by exposing those who make and implement that policy to potential liability. When the *jus ad bellum* basis for a particular military action is questioned, we might find that judges will be less hesitant to question the *jus in bello* implementation issues raised by the actions of commanders and armed forces personnel.[34]

Although the development of elements is unpopular among those most optimistic about the ICC's deterrent effect, elements of proof provide a practical restraint on ignoble prosecutorial and judicial overreaching designed to achieve political ends. Ironically, the fear that elements may excessively circumscribe judicial authority is probably inverted. International judges frequently bind themselves by conservative rules to ensure they are not viewed as stepping outside the bounds of "customary" law. Unnecessary judicial restraint could result in a failure to convict when warranted. The articulation of specific elements may obviate the problem of inappropriate judicial hesitancy.

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32. See also *supra* notes 12 and 14 for additional examples of imprecision in Article 8.

33. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, 1155 U.N.T.S. 331, *reprinted in* 8 ILM 679. Article 31(1) provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Article 32 further provides that "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm [its] meaning."

34. Since the delivery of these remarks, events in Kosovo have provided a quintessential example of this dynamic. There is increasing political pressure for ICTY prosecutor Louise Arbour to investigate "war crimes" committed by NATO forces that are subject to ICTY jurisdiction. *See, e.g.*, Jonathan M. Miller, *International Law May Halt the Bombing*, L.A. TIMES, May 11, 1999, at A-13 (arguing that bombing as a form of pressure is illegal, and that NATO officials and military personnel possibly could be indicted for the war crime of "wanton destruction of cities, towns or villages, or devastation not justified by military necessity").

II. Initial Problems in Elements Negotiations

Negotiation of detailed specific elements that define criminal culpability is somewhat uncommon in the international context. The delegations opposing the development of specific elements rarely argued that it was bad idea; rather, they argued that it was either too hard or was unnecessary. Indeed, accomplishing the task before June 2000[35] will involve overcoming a number of hurdles. Listed below in no particular order are some of the PrepCom's most noteworthy challenges.

First, the concept of elements of proof has proved to be culturally and legally unintelligible for many delegations.[36] An exposition on comparative law is beyond the scope of this Article, but suffice it to say that civil law notions, like the French concept of "intimate conviction,"[37] do not conform well to our criminal law concept of elements of proof. In an effort to avoid judicial limitation, some states have recommended elements that are merely illustrative examples. Moreover, many states wanted to provide a list of factors the judges could require the prosecutor to prove in lieu of specific elements. Such concepts are completely inconsistent with the common understanding of elements within those states (such as the United States) that apply them.

The second problem area is closely related to the first. The ICC Statute provides for inchoate offenses,[38] including several forms of vicarious liability (e.g., command responsibility, solicitation, and incitement of genocide) as well as standard attempt, conspiracy, and aiding and abetting theories. Drafting elements that contemplate inchoate offenses yet remain internally coherent is only possible when elements are crafted to specifically cover the theories of liability found in Articles 25 and 28 of the statutes. The inchoate offenses section of the U.S. proposal simplifies the task of applying the Elements of Crimes when culpability is based on theories described in Articles 25 and 28 of the Statute. Thus, a rote application of the elements as written would appear nonsensical. In some instances, the Statute provides for liability regardless of the actual perpetrator of the act,

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35. *See supra* note 4.

36. An example of the difficulties caused by this unfamiliarity is found in the term chosen for the ICC Statute, "Elements of Crimes." The ICC Statute uses only the latter term to accommodate those who were concerned that the term "proof" implied more constraint on judges. However, the majority view now seems to be moving toward the American concept of the role of elements in defining criminal culpability.

37. French law does not use a "beyond a reasonable doubt" standard for criminal convictions but rather require that the trier of fact have an inner certainty (intimate conviction) of the defendant's guilt. Moreover, intimate conviction is based on the totality of the evidence presented; the trier of fact may give greater weight to some elements and find a defendant guilty even if the evidence supporting a particular element is weak, provided the evidence as a whole establishes the requisite inner certainty of guilt. In contrast, U.S. criminal law requires every element of a crime to be proved beyond a reasonable doubt to support a conviction.

38. Inchoate offenses are defined as "incipient crime[s] which generally lead to another crime." BLACK'S LAW DICTIONARY 761 (6th ed. 1990). As used in the U.S. proposal, the section refers to all instances involving criminal culpability when the accused themselves do not complete the *actus reus* of the offense in question.

or whether the act is completed. However, in such cases, the general principles of Articles 25 and 28 would require additional elements not necessary for direct culpability under the Article 6, 7, or 8 offenses. The inchoate offenses section of the U.S. proposal does not in any way change or affect the general principles of criminal law found in the Statute. It simply explains the application of additional elements when the theory of criminality does not flow directly from an *actus reus* perpetuated by the accused. But unfortunately, Article 9 only refers to the articulation of elements for crimes found in Articles 6, 7, and 8. Since other theories of criminal liability are found in Articles 25 and 28, many view the development of elements for these theories as *ultra vires* for the PrepCom.

A third problem is that many delegations adopted positions on what form the elements should take based on specific events; recent examples of humanitarian tragedy understandably animated much of the debate in Rome. However, elements drafted based on the facts of a particular event may not adequately encompass future scenarios. A single-minded *ex post facto* focus is clearly inappropriate for the ICC. Instead, the PrepCom mission should "imagine the past and remember the future."[39]

The fourth and fifth problems are closely related. One difficulty is that the U.S. proposals are viewed with extreme skepticism because the United States has clearly stated that it is unwilling to sign or support the current ICC Statute. Since the United States has yet to specify the minimum changes necessary to garner U.S. support for the Statute, many assume these changes are being introduced *sub rosa* through the Elements of Crimes proposals. The related problem is the assumption that the United State sought detailed elements in order to protect U.S. troops from prosecution. For example, many delegates viewed the U.S.-proposed elements for the crime of genocide[40] as an effort to raise the bar for prosecutors, since an element not readily apparent in the Statute itself was being added. The U.S. proposal in fact aimed to preclude prosecution of isolated hate-crimes under the genocide provisions.[41] These misperceptions, cou-

39. ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 13, *citing* Brown v. Board of Educ., 347 U.S. 483 (1954).

40. The 1949 Genocide Convention does not clearly identify the constituents that justify individual criminal liability for the crime of genocide. The Convention broadly defines genocide as

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, such as: a) Killing members of the group; b) Causing serious bodily or mental harm to members of the group; c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) Imposing measures intended to prevent births within the group; e) Forcibly transferring children of the group to another group.

Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. II, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

41. After heated negotiations, the informal working group handling the genocide elements ultimately agreed on a text that included an appropriate contextual element. The current working document for Article 6 now specifies the following elements: that "[t]he accused knew or should have known that the conduct would destroy, in whole or in part, such group or that the conduct was part of a pattern of similar conduct directed

pled with a general lack of understanding of the nature of criminal elements, have led to such comments as "if there is any doubt as to the need for an element, we should leave it out to avoid risk that we might prevent a prosecution."[42] This may be a logical policy for states that do not use elements, but it is an inconceivable approach for those states which rely on precisely articulated elements.

A sixth problem arising during PrepCom negotiations has already been mentioned: namely, the preference for ambiguity in international negotiations. Inducing 120 or more countries to reach agreement is understandably an extremely difficult task. Negotiating parties rarely will see eye-to-eye on all controversial issues. Therefore, diplomats have become adept at the use of ambiguous, nuanced terms to bridge the gaps between substantively different positions. This system works well when states interpret agreements for themselves and there is no ultimate authority to tell them when they are wrong. However, ambiguity and nuance do not work well in the criminal context. Criminal law employs extreme enforcement mechanisms and therefore requires precision and specificity. Equally significant, states (or state-approved arbitral panels) will not have the freedom to interpret ambiguous statutory provisions, as they can with other negotiated agreements. Finally, judges (not states) will be making life-changing decisions on the interpretation of the ICC Statute. This difficult conflict between the normal pattern for achieving international agreement and the need for statutory precision constitutes a major challenge for the PrepCom.

Finally, a seventh problem concerns the paradigm on which many ICC proponents base their opinions, i.e., the overly simplistic perspective that international humanitarian law progresses in a linear fashion, with progress equaling more law. Mr. Philippe Kirsch, chair of the Rome Diplomatic Conference's Committee of the Whole[43] and of the PrepCom, has described the ICC's vision as moving the international community from a culture of "impunity" to one of "accountability."[44] Unfortunately, this shift is sometimes crassly viewed as a simple movement to more prosecutions for more offenses. Anything that threatens to inhibit prosecutions or the expansion of the corpus of offenses is wrongly seen by some states as antithetical to progress. Criminal elements, to the extent they are viewed as a constraint on potential prosecutions and judicial discretion, are thus often perceived as handicapping the pursuit of justice.

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against that group." *See Discussion Paper Proposed by the Coordinator on Article 6: The Crime of Genocide*, U.N. Doc. PCNICC/1999/WGEC/RT.1 (1999).

42. By way of anecdote, one proposal during an informal session of the PrepCom was to delete certain questionable elements that might constrain the Court. Had these elements in fact been deleted, criminal culpability for "inhuman treatment" under Article 8(2)(a)(ii) could be established if only two elements were met: 1) that the accused's act occurred in the context of an armed conflict, and 2) that the act was directed against a "protected person." No limitation regarding the nature of the act was deemed necessary.

43. The Committee of the Whole was that body at the Rome diplomatic conference responsible for negotiating the ICC Statute.

44. Kirsch, *supra* note 5, at 437.

Conclusion

The ICC represents an attempt to fill an enforcement void in international humanitarian law. Unfortunately, the belief that movement in a given direction can adequately define progress yields a mistaken paradigm. The better metaphor would be the commonly seen symbol of justice – scales achieving a careful balance. The rights of the accused and the sovereign rights of states in our international community must be carefully balanced against the interests of justice. Elements of proof provide one of the checks that can assist in providing this balance. Many ICC proponents have frequently recited the mantra that "there is no peace without justice" (they are sometimes countered with the retort that "there is no justice without peace"). Ultimately, however, appropriate checks and balances (such as carefully drafted criminal elements and properly crafted rules of procedure and rules of evidence) are not oriented toward justice in any specific case or peace in any given conflict, but are rather directed toward establishing and preserving the rule of law. There can be neither peace nor justice except under a firmly established rule of law.