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Genocide, Crimes against Humanity and War Crimes as They Apply to Nuclear Operations

There can be no doubt that the international crimes of genocide, crimes against humanity and war crimes do not suddenly cease to have relevance simply because nuclear weapons are involved. Nuclear weapons might be the instrument, or one of the instruments, through which such crimes come to be committed. Equally, such crimes may be perpetrated against a nuclear-armed State. It is the purpose of the present Section to have a brief look at the crimes that appear to be of greatest relevance to a book concerned with nuclear weapons and associated operations, with a view to assessing how those crimes should be understood in that particular context. This Section is not intended to be a comprehensive treatment of international criminal law; neither does it comprise an in-depth consideration even of the crimes that are mentioned here. Rather, it is intended to give a general indication of the kinds of crime that might be relevant in the context of nuclear weapons.

The Section will briefly summarise the evolution of these crimes during the period since the end of World War II by referring to relevant provisions in the statute of the Nuremberg International Military Tribunal and in the statutes of three ad hoc tribunals. Recognising that the Rome Statute of the International Criminal Court was intended by its eminent negotiators and drafters to be based on generally accepted rules of customary law, particular attention will then be devoted to the terms in which some relevant crimes are defined in that treaty.

To add flesh to those somewhat bare definitions, the elements of the chosen Rome Statute crimes, also drafted by eminent experts, will be set forth, and the Section will conclude with a brief assessment of some of the important subsidiary provisions in the Statute dealing, for example, with modes of participation, defences and the mental element in crimes. Throughout, the purpose is to seek to identify where the threshold of criminality lies. It is well understood that many States, including numerous nuclear weapon-relevant

States, are not parties to the Rome Statute. Nevertheless, to the extent that the provisions discussed in this Section reflect customary law, it is hoped that the discussion will be useful.

Article 9 of the Rome Statute describes the function of the Elements of Crimes as being to 'assist the Court in the interpretation and application of the crime provisions of the Statute (i.e. Articles 6, 7, 8 and 8bis). Article 21(1)(a) then requires the Court to apply in the first place the Statute, the Elements of Crimes and the Rules of Procedure and Evidence. In working out the meaning of any specific offence in its application to nuclear weapons, it is therefore vital that the relevant Elements of Crimes be properly taken into account.

In relation to some of the Rome Statute offences, examples are given of nuclear operations that might come within the scope of the provisions discussed. They are but examples; other nuclear-related circumstances may also give rise to the offences in question. Whether a particular circumstance actually does constitute such a crime will, inevitably, depend on the circumstances and on the available evidence.

H.1 CRIMES WITHIN THE JURISDICTION OF THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG

The Charter of the Nuremberg International Military Tribunal¹ granted to the Tribunal the power to try and punish crimes against peace, war crimes and crimes against humanity. So far as is relevant to the present volume, crimes against peace were defined as 'planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'.² War crimes are described as 'violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, . . . , wanton destruction of cities, towns or villages, or devastation not justified by military necessity'.³ The Charter's definition of crimes against humanity includes 'murder . . . committed against any civilian population, before or during the war'.⁴

¹ The Charter of the Nuremberg International Military Tribunal is annexed to the Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the prosecution and punishment of the major war criminals of the European Axis, signed at London, on 8 August 1945 (IMT Charter).

² IMT Charter, Article 6(a).

³ *Ibid.*, Article 6(b).

⁴ *Ibid.*, Article 6(c).

Certain general principles associated with international criminal law were set forth in the Charter. They deserve mention here. Article 6 provided that '[l]eaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan'. Under Article 7, '[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment'. Thirdly, '[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires'.⁵

So it can be seen that the notion of individual criminal responsibility was fully recognised in 1945.

H.2 CRIMES PROVISION IN THE STATUTES OF THE AD HOC TRIBUNALS

On 25 May 1993, the UN Security Council adopted Resolution 827/1993 and, with it, adopted the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), which was annexed to a report from the UN Secretary-General.⁶ The Statute listed grave breaches of the 1949 Geneva Conventions, violations of the laws and customs of war, genocide and crimes against humanity as the offences over which the Tribunal would have jurisdiction. Of these, it is noteworthy, for the purposes of the present book, that violations of the laws and customs of war, listed in Article 3 of the Statute, included 'employment of poisonous weapons or other weapons calculated to cause unnecessary suffering' and 'wanton destruction of cities, towns or villages, or devastation not justified by military necessity'. Article 4 defined genocide as constituted by 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'. The listed acts included 'killing members of the group' and 'causing serious bodily or mental harm to members of the group'. Article 5, under the heading 'Crimes against humanity', gave the Tribunal the power to prosecute listed crimes, which included murder, 'when committed in armed conflict, whether international or internal in character and when directed against any civilian population'.

⁵ *Ibid.*, Article 8.

⁶ UNSC, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/27504 (3 May 1993).

On 8 November 1994, acting under Chapter VII of the UN Charter, the UN Security Council adopted Resolution 955 (1994) establishing the International Criminal Tribunal for Rwanda (ICTR), whose Statute was annexed to the Resolution.⁷ The Statute grants the Tribunal the power to prosecute persons who committed genocide, crimes against humanity, violations of Article 3 common to the Geneva Conventions and of APII. Genocide, so far as relevant, is defined in exactly the same terms as under the ICTY Statute.⁸ Article 3 of the ICTR Statute describes crimes against humanity as including, *inter alia*, murder ‘when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds’.

It was an agreement dated 14 August 2000 between the United Nations and the Government of Sierra Leone pursuant to UN Security Council Resolution 1315 (2000) that established the Special Court for Sierra Leone. Under the heading ‘Crimes against humanity’, Article 2 of the Statute of the Special Court grants the Court the power to prosecute persons who committed, for example, murder ‘as part of a widespread or systematic attack against any civilian population’. Article 3 addresses violations of Article 3 common to the Geneva Conventions and of APII. Under the heading ‘Other serious violations of international humanitarian law’, Article 4 grants the Court the ‘power to prosecute persons who committed the following serious violations of international humanitarian law’. The associated list of three offences includes ‘[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities’.⁹

H.3 INTERNATIONAL CRIMES PROVISION IN THE ROME STATUTE

The Rome Statute sets forth the offences over which the International Criminal Court has potential jurisdiction in Articles 6 (‘Genocide’), 7 (‘Crimes against humanity’), 8 (‘War crimes’) and 8bis (‘Crime of aggression’). The ways of committing such crimes that seem to be of greatest potential relevance in connection with nuclear operations will be considered under the relevant headings below. Before looking at what appear to be the most relevant provisions, however, it is right to consider the declarations made by certain relevant States when becoming parties to the Rome Statute, and which States have yet to become parties to it.

⁷ Statute of the International Criminal Tribunal for Rwanda, 8 November 1994.

⁸ *Ibid.*, Article 2(2)(a) and (b).

⁹ Statute of the Special Court for Sierra Leone, Article 4(a).

H.4 POSITIONS TAKEN BY STATES ON THE ROME STATUTE

H.4.1 *France*

Having asserted that the provisions of the Statute do not preclude France from exercising its inherent right of self-defence in accordance with Article 51 of the UN Charter, France then made a statement of direct relevance to nuclear weapons. The statement is as follows:

The provisions of article 8 of the Statute, in particular paragraph 2(b) thereof, relate solely to conventional weapons and can neither regulate nor prohibit the possible use of nuclear weapons nor impair the other rules of international law applicable to other weapons necessary to the exercise by France of its inherent right of self-defence, unless nuclear weapons or the other weapons referred to herein become subject in the future to a comprehensive ban and are specified in an annex to the Statute by means of an amendment adopted in accordance with the provisions of articles 121 and 123.¹⁰

This statement therefore excludes, so far as France is concerned, the application to the possible use of nuclear weapons of all war crimes provisions under the Statute. That position would only change if a comprehensive ban of nuclear weapons is achieved. While the Treaty on the Prohibition of Nuclear Weapons was adopted on 7 July 2017, such a prohibition, it is suggested, can only be regarded as ‘comprehensive’ for the purposes of the French statement if all, or virtually all, States that currently possess nuclear weapons become parties to that treaty. Moreover, according to the terms of the statement, such weapons would need to be included in an annex adopted under Articles 121 and 123 of the Statute – a circumstance that is not likely to arise in the foreseeable future.

H.4.2 *United Kingdom*

On ratification of the Rome Statute, the United Kingdom made the following statement:

The United Kingdom understands the term ‘the established framework of international law’, used in article 8(2)(b) and (c), to include customary international law as established by State practice and *opinio iuris*. In that

¹⁰ Interpretative declaration made by France on ratification of the Rome Statute on 9 June 2000, para. 2. UN Treaty Collection, Status of Treaties, Chapter XVIII, No. 10, viewed on 2 September 2021.

context the United Kingdom confirms and draws to the attention of the Court its views as expressed, *inter alia*, in its statements made on ratification of relevant instruments of international law, including the Protocol Additional to the Geneva Conventions of 12th August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8th June 1977.¹¹

This statement draws the Court's attention, *inter alia*, to the United Kingdom's nuclear statement made on ratification of API and is clearly intended to indicate to the Court that, so far as the United Kingdom is concerned, the Rome Statute, insofar as it reflects rules introduced by API, has no application to the use of nuclear weapons.¹² Arguably, it would be for the Court to determine whether a rule, reflected in a specific charge, was indeed introduced by API. This may be a complex issue. Article 8(2)(b)(iv) includes reference to environmental damage as part of the crime of excessive incidental death, injury or damage. Arguably, the characterisation of the natural environment as being, in principle, a civilian object was not a rule introduced by API, so the crime as expressed in Article 8(2)(b)(iv) would not be affected by the UK statement. An equally interesting question is whether the elaboration of the prohibition of indiscriminate attacks in the form of the proportionality rule in Article 51(5)(b) of API was a new rule for these purposes. Although sentiments similar to the proportionality rule were expressed in 1923 in Article 24(4) of the Draft Hague Rules of Aerial Warfare, the rule's first appearance in its modern form was in API. In some quarters, it may therefore be argued that, as a rule that is distinct from the general rule prohibiting indiscriminate attacks, the proportionality rule was indeed a new rule introduced by API and therefore inapplicable to nuclear weapons for those States that made statements to that effect, such as the United Kingdom. For such States, however, the prohibition of indiscriminate attacks does apply, and an attack that is expected to cause civilian deaths, injuries and/or damage that are excessive in relation to the anticipated military advantage is likely to be considered indiscriminate irrespective of the applicability or otherwise of the proportionality rule. What this does not of course change is the potential inapplicability of the offence under Article 8(2)(b)(iv) of API.

Japan became a party to the Rome Statute on 17 July 2007 without making a statement of the kind discussed above.

¹¹ Declaration made by the United Kingdom on ratification of the Rome Statute on 4 October 2001, UN Treaty Collection, Status of Treaties, Chapter XVIII, No. 10, viewed on 2 September 2021.

¹² See the UK statement (a) made on ratification of API on 28 January 1998 and reproduced in the Commentary accompanying Rule 64.

The following nuclear-relevant States and potentially nuclear-relevant States have not yet become parties to the Rome Statute: China, Democratic People's Republic of Korea, India, Iran, Israel,¹³ Pakistan, the Russian Federation¹⁴ and the United States.¹⁵

H.5 GENOCIDE

So far as relevant to the present discussion, genocide is defined in the Rome Statute as follows:

For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;¹⁶

While there are five ways in which the crime may be committed, the two listed methods would seem to be of most obvious relevance to nuclear weapon use and they will be considered here. For the first crime – killing members of the group – the elements are:

- 1 The perpetrator killed one or more persons.
- 2 Such person or persons belonged to a particular national, ethnical, racial or religious group.
- 3 The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
- 4 The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.¹⁷

So, for a nuclear attack to amount to genocide by killing, the nuclear weapon would have to be aimed at members of a specific national, racial,

¹³ In August 2002, Israel notified the UN Secretary-General that it had no intention of becoming a party to the Rome Statute and that its signature to the treaty text involves no legal obligations.

¹⁴ In a communication dated November 2016 the Russian Federation informed the UN Secretary-General that it had no intention of becoming a party to the Rome Statute, noting that, in accordance Article 18(a) of the Vienna Convention on the Law of Treaties of 1969, it was no longer obliged by the fact of having previously signed the Statute to refrain from acts that would defeat its object and purpose.

¹⁵ In a communication dated May 2002, the United States informed the UN Secretary-General that it had no intention of becoming a party to the Rome Statute and that its signature to the treaty text involves no legal obligations.

¹⁶ Rome Statute, Article 6.

¹⁷ Elements of Crimes, Article 6(a) (footnote omitted).

ethnic or religious group and the attacker must intend to destroy either the whole of that group or at least a part of it – almost certainly a substantial part. In addition, either this kind of attack must be associated with a clear pattern of similar behaviour also targeting the same group, or the attack alone must have had the capability of achieving that outcome (i.e. destroying the whole or a significant part of the group). Depending on the nature, extent and level of geographical concentration of the relevant group, it is conceivable that an attack using a nuclear weapon with a sufficiently large footprint of effect may indeed have the capacity to destroy a substantial part of such a group.

Similar conduct might, for these purposes, consist of other nuclear attacks or, it is suggested, might include other bombardments aimed at the group but not necessarily involving the use of nuclear weapons. If the nuclear attack did not take place in the context of other similar conduct, the language of the fourth element suggests that it suffices that the nuclear attack is capable of having that effect, regardless of whether or not that effect actually materialised. It is suggested, therefore, that clear evidence of a genocidal intent is required to support such a charge.

However, if evidence of genocidal intent is absent, the available evidence may support other charges under the Statute.

The second offence, causing serious bodily or mental harm to members of the group, comprises the following elements:

- 1 The perpetrator caused serious bodily or mental harm to one or more persons.^[18]
- 2 Such person or persons belonged to a particular national, ethnic, racial or religious group.
- 3 The perpetrator intended to destroy, in whole or in part, that national, ethnic, racial or religious group, as such.
- 4 The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.¹⁹

It will be noted that elements 2, 3 and 4 are identical to the corresponding elements of genocide by killing. They do not therefore need further discussion here. In the nuclear context, consider, for example, the use of a dirty bomb to direct nuclear contamination, and thus grave levels of sickness, at members of

¹⁸ A footnote indicates that '[t]his conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence, or inhuman or degrading treatment'. Such activities, when combined with certain nuclear-related operations such as of the kind mentioned in the discussion of this offence, might, if taken together, amount to this form of genocide.

¹⁹ Elements of Crimes, Article 6(b).

a specific national, ethnical, racial or religious group. Such an act would potentially come within the scope of this offence if, but only if, the remaining elements of the crime are present. Alternatively, using a dirty bomb that, for example, causes severe sickness among some members of such a group, while also engaging in other activities that cause mental harm to other members of the same group, may collectively have a sufficient effect to come within the scope of the offence, again provided that the other three elements of the crime are present.

Certain elements apply when considering both of these offences. The language 'in the context of' can apply to the initial acts in what becomes an emerging pattern of activity, while 'manifest' is an objective qualification, suggesting that it suffices if, viewed objectively, there was a clear pattern of genocidal action going on. The third introductory element under Article 6 of Elements of Crimes states as follows:

Notwithstanding the normal requirement for a mental element provided for in article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis.

This rather emphasises the point made earlier that the factual circumstances of each case will be of critical importance. In the opinion of the present authors, the cases in which nuclear-related operations form part of, or constitute, genocidal conduct are likely to be relatively rare. Nevertheless, the possibility of such conduct taking place cannot be excluded, so it is thought to have been useful to refer to these provisions, largely for completeness.

H.6 CRIMES AGAINST HUMANITY

For the purposes of the Rome Statute, and thus of the International Criminal Court, crimes against humanity comprise any one of certain listed acts 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.²⁰ Of the listed acts, the one of potential relevance in the nuclear context is the crime against humanity of murder. Article 7(2) then explains some of the important terms. So, 'attack directed against any civilian population' involves 'a course of conduct involving the multiple commission of [the listed acts] against any civilian

²⁰ Rome Statute, Article 7(1).

population, pursuant to or in furtherance of a State or organizational policy to commit such attack'.²¹

The elements of the crime against humanity of murder are as follows:

- 1 The perpetrator killed one or more persons.
- 2 The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- 3 The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.²²

The Introduction to Article 7 of Elements of Crimes notes that crimes against humanity 'are among the most serious crimes of concern to the international community', that they 'entail individual criminal responsibility' and that they 'require conduct which is impermissible under generally applicable international law'. There must be 'participation in and knowledge of a widespread or systematic attack against a civilian population'. The Introduction explains, however, that 'the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization'. Intent in the last element is satisfied 'if the perpetrator intended to further such an attack', meaning, the authors assume, a widespread or systematic attack. 'Attack directed against a civilian population' means a course of conduct involving the commission of multiple acts specified in Article 7(1) of the Rome Statute, such as murder, against a civilian population in furtherance of a State or organisational policy. The policy aspect presupposes the active encouragement or promotion by a State or an organisation of an attack against a civilian population.

Here again, therefore, an isolated nuclear attack that erroneously attacks a civilian population centre is not going to amount to a crime against humanity. The required course of conduct and the knowledge required by the third element will both be lacking. However, a nuclear attack against a civilian population centre that is, for example, accompanied by other acts that are directed against the same civilian population may, taken together, satisfy the widespread or systematic attack requirement, may be indicative of a policy to commit such an attack and, if accompanied by the requisite intent and knowledge, might constitute the offence.

²¹ Rome Statute, Article 7(2)(a).

²² Elements of Crimes, Article 7(1)(a) (footnote omitted).

H.7 WAR CRIMES

Article 8(2)(b) of the Rome Statute lists a considerable number of war crimes associated with international armed conflicts. To come within the jurisdiction of the International Criminal Court on the basis of this provision, the offences must be 'serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law'.²³ While a number of the acts listed in Article 8(2)(b) are capable of being relevant in the context of nuclear operations, the following may be of greatest relevance.

H.7.1 War Crime of Attacking Civilians

This war crime consists of '[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities'.²⁴ The elements of this crime are:

- 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.
- 4 The conduct took place in the context of and was associated with an international armed conflict.
- 5 The perpetrator was aware of factual circumstances that established the existence of an armed conflict.²⁵

Certain points should be made. It is clear that making peaceable civilians the object of an attack is a clear breach of the distinction principle and that this prohibition applies also to the use of nuclear weapons. It will be for the Court to determine, by reference to the evidence, who in fact 'directed the attack'. Imagine a situation in which the head of the government of a nuclear-capable State directs that a nuclear attack be launched against a specific target. It will be at least arguable that it is the head of government who directed the attack, and that the military unit and its commander that actually fired the missile did not direct the attack. If the object of the attack was civilian persons who were taking a direct part in the hostilities, the second element of the offence will not have been satisfied. However, if the object of the attack was non-participating

²³ Rome Statute, chapeau to Article 8(2)(b).

²⁴ Rome Statute, Article 8(2)(b)(i).

²⁵ Elements of Crimes, Article 8(2)(b)(i).

civilians, the second element will indeed be made out. The object of the attack, for these purposes, will be the persons whom the attack is intended to kill, injure or disable.

For the offence to be proved, it must be shown that the accused person intended to make the civilian population or individual civilians not taking part in the hostilities the object of the attack. If, for example, a commander of a nuclear armed submarine receives instructions to fire a nuclear missile at geographical co-ordinates that are communicated to him or her, the third element of the crime will be proved against that commander only if the evidence shows that that commander intended to make peaceable civilians or the civilian population the object of the attack. If, for example, the commander did not and could not know the civilian nature of the persons represented by the transmitted co-ordinates, it follows that the commander cannot have formed the required intent and, on that basis, the presence of the third element will not have been established.

There may be occasions when a commander of a nuclear-armed platform such as a submarine or aircraft is unaware that a state of armed conflict is already in existence. That said, the firing of a nuclear weapon will, if no armed conflict previously existed, bring about such a state of affairs.

If, however, during an international armed conflict a senior military commander or political leader directs a nuclear attack intending that peaceable civilians or the civilian population shall be the object of the attack, that senior military commander or political leader may well have committed this war crime.

H.7.2 *War Crime of Attacking Civilian Objects*

This war crime consists of '[i]ntentionally directing attacks against civilian objects, that is, objects which are not military objectives'.²⁶ The elements of this crime are:

- 1 The perpetrator directed an attack.
- 2 The object of the attack was civilian objects, that is objects which are not military objectives.
- 3 The perpetrator intended such civilian objects to be the object of the attack.
- 4 The conduct took place in the context of and was associated with an international armed conflict.

²⁶ Rome Statute, Article 8(2)(b)(ii).

- 5 The perpetrator was aware of factual circumstances that established the existence of an armed conflict.²⁷

Making civilian objects the object of attack is clearly contrary to the principle of distinction, irrespective of the kind of weapon that is used to undertake the attack. To the extent that these elements use the same language as those relating to the previous war crime, they will have the same meaning, and thus will have the same significance for nuclear operations.

Objects are military objectives if they satisfy the definition in Article 52(2) of API (as to which, see Rule 34 in Section E). Accordingly, dual-use objects are military objectives. If objects fulfilling the definition of military objectives were intended by the accused person to be the object of the attack, this offence was not committed. If the object of the attack included both military objectives and civilian objects, it is not clear whether this offence is committed. The use of the definite article 'the' at the beginning of the second element might imply that the offence is only made out if the object of the attack consisted exclusively of civilian objects. That, it is suggested, is a matter on which the Court will have to rule, probably on a case-by-case basis. Importantly, if incidental damage was unintentionally caused to civilian objects, this offence will not have been committed.

H.7.3 *War Crime of Excessive Incidental Death, Injury or Damage*

This war crime consists of '[i]ntentionally 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'.²⁸ The elements of this crime are:

- 1 The perpetrator launched an attack.
- 2 The attack was such that it would cause incidental death or injury to civilians 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 overall military advantage anticipated.
- 3 The perpetrator knew that the attack would cause incidental death or injury to civilians 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

²⁷ Elements of Crimes, Article 8(2)(b)(ii).

²⁸ Rome Statute, Article 8(2)(b)(iv).

relation to the concrete and direct overall military advantage anticipated.

- 4 The conduct took place in the context of and was associated with an international armed conflict.
- 5 The perpetrator was aware of factual circumstances that established the existence of an armed conflict.²⁹

This offence is the war crime that corresponds to attacks that breach the proportionality rule as set forth in Article 51(5)(b) of API and as referred to in Article 57 of the same treaty.

Whereas the first element of the first two war crime offences referred to the perpetrator *directing* an attack, the first element in this offence refers to the perpetrator *launching* the attack. The launching of an attack would seem to involve the person who actually initiates the forceful act, as opposed to the perhaps more senior individual who gives directions that the attack is to take place. Three significant concepts are added to the Article 51(5)(b) wording. The first is that the offence can be committed by causing excessive damage to the natural environment. If, however, part of the natural environment has become a military objective, damage to that part would not be 'incidental' for the purposes of this offence. Moreover, the status of Articles 35(3) and 55 of API as new rules introduced by the treaty, to which the nuclear statements of NATO States referred to in the Commentary to Rule 64 apply, would suggest that, certainly so far as nationals of those States are concerned, this offence cannot, arguably, be committed through damage caused by a nuclear weapon to the natural environment, irrespective of whether or not the part of the natural environment that is involved has become a military objective.

The second added concept is that the incidental damage to civilians, civilian objects or the environment must be 'clearly' excessive. This suggests the existence of a margin of appreciation. The offence will not have been committed if the expected incidental injury and damage were only somewhat greater than the anticipated military advantage. The disparity must be such, it is suggested, that no reasonable decision-maker would have decided to proceed with the attack.

The third added concept is the reference to 'overall' military advantage. This seems likely to be an oblique reference to a statement made by a number of States when ratifying API to the effect that, when applying the proportionality rule, it is the military advantage anticipated from the attack considered as a whole that must be considered.³⁰

²⁹ Elements of Crimes, Article 8(2)(b)(iv) (footnotes omitted).

³⁰ Consider, for example, the statement made by the United Kingdom on ratification of API on 28 January 1998, para (i). See similar statements by Australia, Germany, Italy and the

The third element makes it clear that the perpetrator must know that the attack will cause excessive incidental injury and damage. Suspicion, or indeed any state of mind other than knowledge, will be insufficient, but knowledge can no doubt be inferred if the facts known to the accused make the excessiveness obvious.

The proportionality rule is of course concerned with the decision that is made in advance to undertake an attack. This must be borne in mind when interpreting the elements. So, the first element requires that the attack be actually launched. The second element, with its awkward wording about 'was such that it would', must, it is suggested, mean that the nature and circumstances of the attack, taking into account the information that was reasonably available to the perpetrator at the time when deciding to undertake the attack, were such as to make it clear that the attack would cause incidental death, injury and damage that would be clearly excessive in comparison to the anticipated military advantage.

In the nuclear context, therefore, it is highly likely that if a nuclear weapon is fired, the pilot of the relevant nuclear-armed aircraft or the commander of the relevant nuclear-armed submarine would be the person, or at least would be among the persons, who would be treated as having launched the attack. It will, in relation to the second element, then be a question of fact whether the circumstances of the attack were indeed such that it would be expected to cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment that is clearly excessive when compared with the concrete and direct overall military advantage that the attack is anticipated to yield. The state of mind of the pilot or commander then comes into play when we consider the third element. This element requires the pilot or commander to know that the attack would cause excessive incidental death, injury or damage of the sort referred to in the offence. If the pilot or commander has not been informed of the circumstances in the target area, it would seem unlikely that he or she is in any position to know those things. Clearly if a pilot or commander, while preparing to execute such a mission, receives information that causes him or her to suspect that the incidental injury or damage may prove to be excessive, they ought to postpone the attack and seek further information. However, it must be emphasised that for the war crime to be made out, knowledge as to the excessiveness of the incidental injury or damage is what is required, and doubt or suspicion are not sufficient. So, if, for example, during a pre-mission

Netherlands and the statement made by France on ratification of the Rome Statute on 9 June 2000, para. 5.

briefing it becomes clear to the pilot of a nuclear strike mission that the incidental injury or damage will be excessive in relation to the anticipated military advantage, the mission should be called off.

H.7.4 *War Crime of Employing Poison or Poisoned Weapons*

The war crime consists of '[e]mploying poison or poisoned weapons'.³¹ The elements of this crime are:

- 1 The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.
- 2 The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.
- 3 The conduct took place in the context of and was associated with an international armed conflict.
- 4 The perpetrator was aware of factual circumstances that established the existence of an armed conflict.³²

The open question in relation to this crime is whether the nuclear contamination that is released as a result of the detonation of a nuclear weapon is to be regarded as a poison for the purposes of Article 8(2)(b) (xvii). It is clear that the explosion of a nuclear weapon does indeed release radiation and radioactive debris. It is equally clear that exposure to radioactivity can, depending on the degree and duration of such exposure, cause illness and/or death. It would be arguable that it is the toxic properties of the radioactive debris and radiation that, 'in the ordinary course of events', cause death or serious damage to health. It remains to be seen whether the Court will conclude that the use of a nuclear weapon in the context of an international armed conflict amounts to a breach of Article 8(2)(b)(xviii) of the Rome Statute.

If, as the authors believe, those negotiating the Rome Statute and its Elements of Crimes intended the provisions to reflect customary law, it is difficult to imagine that the interpretation put forward in the previous paragraph can indeed be correct. After all, the most important global military powers possess nuclear weapons and have established doctrine setting forth the (very limited) circumstances in which they would use them. It is highly unlikely that those powers consider that a decision to resort to the use of nuclear weapons will, automatically, amount to a war crime of employing

³¹ Rome Statute, Article 8(2)(b)(xvii).

³² Elements of Crimes, Article 8(2)(b)(xvii).

poison or poisoned weapons. If that assumption is correct, it is difficult to see how characterising nuclear weapons as ‘poison or poisoned weapons’ can properly be regarded as reflecting the general practice of States accepted as law.

H.7.5 *War Crime of Employing Weapons, Projectiles or Materials or Methods of Warfare Listed in the Annex to the Statute*

The war crime consists of ‘[e]mploying weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and materials and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute . . .’³³ At the time of writing, no weapons, projectiles or material or methods of warfare have been included in an annex to the Statute. This is therefore an offence which is not yet complete and cannot therefore yet be made the subject of a charge.

The Introduction to Article 8 of Elements of Crimes explains that war crimes must be interpreted within the established framework of the law of armed conflict. In relation to the last two elements of each crime, it is also noted, inter alia, that there is no requirement for a legal evaluation as to the existence or nature of the armed conflict. However, the factual existence of a situation of armed conflict is of course an essential requirement for the commission of a war crime.

While the negotiators may have intended that the Rome Statute should reflect customary law and thus reflect rules and crimes that, respectively, bind and apply to all States, it is worthy of note that, at the time of writing, two P5 States are parties to the Statute – namely, France and the United Kingdom – while the remaining P5 States – namely, China, the Russian Federation and the United States – are not. Other nuclear weapon-relevant States that are not parties to the Statute include India, Iran, Israel, North Korea and Pakistan.

³³ Rome Statute, Article 8(2)(b)(xx).