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Proposal submitted by Canada and Germany on article 7

NOTE: An introductory comment, based on the comment appearing in the Chairman's discussion paper on Article 8, specifically addressing the general mental element requirements, should be positioned so as to encompass the elements of crimes against humanity. Such comment should also observe that:

To the extent that an element is of a normative character (eg. referring to the illegality of an act or its 'inhumane' nature or its similarity to other prohibited acts), it need not be proved that the accused completed the correct normative evaluation. In general it is sufficient that the accused was aware of the relevant factual circumstances. This is without prejudice to the exclusion of criminal responsibility where the conditions of Article 32 (mistake of law) are satisfied.

NOTE: Delegations should also discuss the inclusion of a general comment affirming that conduct may fall within the definitions of more than one offence, and a particular example should affirm that acts of sexual violence in Art. 7(1)(g) may also fall within the definitions of other offences and may be charged and prosecuted as such.

A. GENERAL APPROACH COMMON TO ALL CRIMES AGAINST HUMANITY

The final element in each of the offences requires that "the conduct was committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". This element, read in conjunction with the other elements of each of the following offences, should be understood as producing the following analytical approach:

1. The accused committed a prohibited act.

In this document, "prohibited act" means an act referred to in paragraph 1 of article 7 of the Statute.



- 2. An attack directed against any civilian population, namely a course of conduct involving the multiple commission of prohibited acts against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack, took place.**

The term “attack” in this context therefore includes not only a military attack but also more generally a campaign or operation against a civilian population.

The term “any civilian population” refers to a substantial number of persons, irrespective of their nationality, who have taken no direct part in hostilities, or have ceased to do so, including former combatants who have laid down their arms and persons placed hors de combat. The presence of a few non-civilian individuals does not cause the population to lose its civilian character. The term “civilian population” excludes legitimate attacks directed against military objectives during an armed conflict in accordance with the laws and customs applicable in armed conflict, as reflected in Article 8 of the Statute.

The existence of a policy may be inferred on the basis of the available evidence as to the facts and circumstances. It is not necessary to prove that a policy has been formally adopted.

- 3. The attack was widespread or systematic.**

The term “widespread” refers to an attack that is carried out on a large scale and directed against a substantial number of victims.

The term “systematic” refers to an attack that is thoroughly organized and that follows a regular pattern or involves the use or planned use of substantial public or private resources.

- 4. The conduct of the accused was part of the widespread or systematic attack directed against any civilian population.**

Article 7 does not require that the prohibited act or acts committed by the accused be of the same type of prohibited act that forms the primary basis of the attack.

- 5. The accused had knowledge of the attack.**

It must be established that the accused was aware of sufficient objective circumstances to indicate the commission of multiple prohibited acts directed against a civilian population. It is not necessary to prove that the accused knew the precise details of the attack or that the accused personally drew the inference of the existence of a policy.

B. ELEMENTS OF PARTICULAR CRIMES AGAINST HUMANITY

Article 7(1)(a): Crime against humanity of murder¹

1. The accused² killed³ one or more persons.
2. The conduct was committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Article 7(1)(b): Crime against humanity of extermination

1. The accused killed one or more persons, whether directly or by inflicting conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.
2. The accused intended to exterminate or destroy in whole or in part a civilian population or group, or was aware of a State or organizational policy to do so.⁴
3. The conduct was committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Article 7(1)(c) Crime against humanity of enslavement

1. The accused exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or

¹ **Explanatory note:** Element one, including its footnotes, is based on the Elements for Art. 8(2)(a). Where footnotes appear, it will be necessary to discuss whether the observations contained therein should be reflected in comments, and if so, wording must be discussed. In the following elements, the “threshold element” is listed as the final element. We believe it is clearer to list the conduct of the accused before other circumstances such as the threshold element. One of the advantages of this approach is that the reference to “the conduct” has an established point of reference.

² The term “accused” has been used provisionally and needs to be discussed to ensure consistency with the Statute.

³ The term “killed” is interchangeable with the term “caused death”.

⁴ **Explanatory note:** The intent or policy to exterminate or destroy a population or group distinguishes extermination from murder.

persons, or by imposing on them a similar deprivation of liberty.⁵

2. The conduct was committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Enslavement includes the exercise of such power in the course of trafficking in persons, in particular women and children.

Article 7(1)(d) Crime against humanity or deportation or forcible transfer of population

1. The accused deported or forcibly displaced one or more persons by expulsion or other coercive acts from the area in which they were present.
2. The persons concerned were lawfully present in the area from which they were deported or displaced.
3. The deportation or displacement was without grounds permitted under international law.
4. The conduct was committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Deportation refers to the forcible removal of the persons concerned to the territory of another State. Forcible transfer of population refers to the forcible transfer of groups of persons concerned to another location, within the same State. This provision is not intended to criminalize deportations or transfers which are in technical violation of relevant international law; it deals with serious departures from fundamental rules of international law warranting individual criminal responsibility.

Article 7(1)(e) Crime against humanity of imprisonment or other severe deprivation of physical liberty

1. The accused imprisoned one or more persons or severely deprived one or more persons of physical liberty.
2. The imprisonment or severe deprivation of physical liberty was in violation of fundamental rules of international law.

⁵ **Explanatory Note:** This is derived from the Article 8(2)(b) element on sexual slavery; the authors remain open to improvements to the drafting of this provision.

3. The conduct was committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

The term "severe deprivations of physical liberty" includes situations such as house arrest. Severity may be determined by considering all relevant circumstances, such as the duration of the deprivation, the extent of the deprivation, and the conditions of the deprivation. This provision is not intended to criminalize imprisonment or deprivation which is in technical violation of relevant international law; it deals with serious departures from fundamental rules of international law warranting individual criminal responsibility.

Article 7(1)(f) Crime against humanity of torture

1. The accused inflicted severe pain or suffering, whether physical or mental, upon a person or persons.
2. Such person or persons were in the custody or under the control of the accused.
3. The pain or suffering was inflicted for such purposes as obtaining information or a confession, punishment, intimidation or coercion, or for any reason based on discrimination of any kind.⁶
4. The conduct was committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Torture does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions. The purpose of obtaining information or a confession, punishment, intimidation or coercion can relate to the victim or to a third person or persons.

⁶ **Explanatory Note:** A "purpose" element has been adopted for the sake of consistency with Article 8. However, the Article 8 Element deviates from Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. This proposed Element adheres to the latter authority; the Elements should be revisited for the sake of consistency.

Article 7(1)(g) - 1 Rape⁷

1. The accused invaded⁸ the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed~~ed~~ by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.⁹
3. The conduct was committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Article 7(1)(g)-2: Crime against humanity of sexual slavery

1. The accused exercised a power attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The accused caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

⁷ **Explanatory Note:** The elements for the following offences under Article 7(1)(g) are based on the draft elements for similar provisions in the Chairman's discussion paper on Article 8. The authors are open to improvements of these provisions.

⁸ The concept of "invasion" is intended to be broad enough to be gender-neutral.

⁹ It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.

Article 7(1)(g)-3: Crime against humanity of enforced prostitution

1. The accused caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.¹⁰
2. The accused or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Article 7(1)(g)-3: Crime against humanity of forced pregnancy

1. The accused confined one or more women.
2. Such woman or women had been forcibly made pregnant.
3. The accused intended to keep the woman or women pregnant in order to affect the ethnic composition of a population or to carry out another grave violation of international law.
4. The conduct was committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Article 7(1)(g)-4: Crime against humanity of enforced sterilization

1. The accused deprived one or more persons of biological reproductive capacity.¹¹
2. The conduct was neither justified by the medical or hospital treatment of the person or

¹⁰ *Ibid.*

¹¹ **Explanatory Note:** The footnote currently appearing in the Elements of Art. 8(2)(b)(xxii), needs to be carefully re-considered because, read literally, it appears to nullify the entire crime; since all sterilization involves "birth control measures".

persons concerned nor carried out with their genuine consent.¹²

3. The conduct was committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Article 7(1)(g)-6: Crime against humanity of sexual violence

1. The accused committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.¹³
2. The form of sexual violence was of a gravity comparable to the offences in Article 7(1)(g) 1 - 5.
3. The conduct was committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Article 7(1)(h): Crime against humanity of persecution

1. The accused severely deprived one or more persons of fundamental rights of persons by reason of their membership in an identifiable group or collectivity.
2. The persecution was committed on political, racial, national, ethnic, cultural, religious, gender as defined in Article 7(3) of the Statute, or other grounds that are universally recognized as impermissible under international law.
3. The persecution occurred in connection with any prohibited act or any crime within the jurisdiction of the Court.
4. The conduct was committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

¹² It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. [Explanatory Note: The wording of this Element has been adjusted to improve its grammatical structure (was..neither...nor), without changing its substance.]

¹³ Ibid.

Article 7(1)(h) Crime against humanity of apartheid

1. The accused committed an inhumane act, of a character similar to other prohibited acts, against a person or persons.
2. The conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups.
3. The accused intended to maintain that regime.
4. The conduct was committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Article 7(1)(i): Crime against humanity of enforced disappearance

1. The accused arrested, detained or abducted one or more persons.
2. The arrest, detention or abduction was carried out on behalf of, or with the authorization, support or acquiescence of, a State or a political organization.
3. The arrest, detention or abduction was followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons.
4. The accused intended to remove the persons from the protection of the law for a prolonged period of time, or was aware of a State or organizational policy to do so.
5. The conduct was committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Article 7(1)(j): Crime against humanity of other inhumane acts

1. The accused committed an inhumane act against a person or persons, intentionally causing great suffering, or serious injury to body or to mental or physical health.
2. The inhumane act was of a character similar to other prohibited acts.
3. The conduct was committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.