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**Preparatory Committee on the the Establishment  
of an International Criminal Court**

16 March-3 April 1998

**Proposal submitted by the United States of America****Elements of offences for the International Criminal Court**

1. The attached reference paper is submitted to the Preparatory Committee as an illustration of how a set of criminal elements, annexed to the Statute, might appear.
2. The March-April and August 1996 proceedings of the Preparatory Committee reported that "[t]here was general agreement that the crimes within the jurisdiction of the Court should be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality (*nullum crimen sine lege*)." Significant attention was given to the concept that articles dealing with crimes should identify "the essential elements of the offences and the minimum qualitative and quantitative requirements." The Committee reported that, "[t]he definition of war crimes should clearly indicate in what circumstances, by which perpetrators and against which victims certain acts would constitute such crimes."<sup>1</sup>
3. The United States believes that elements of the crimes should be set forth in an annex to the statute to provide the clarity and precision required to adequately instruct the Prosecutor and Court, to ensure respect for the rights of the accused. Current formulations of crimes in the Zutphen draft statute (A/AC.249/1998/L.13) tie norms to treaty formulations but fail to provide a useful tool to the practitioner. We believe criminal elements can give teeth to the concept of *nullum crimen sine lege*.
4. The task of listing elements of offences is logically accomplished subsequent to reaching consensus on the list of crimes. However, at this juncture, such consensus may not be achieved prior to the diplomatic conference. Therefore, the United States has prepared the present document to serve as a potential template for a parallel effort in establishing elements for the eventual list of crimes under the Court's jurisdiction. This effort could facilitate agreement on a list of crimes by removing the fear that ambiguous terminology will be unfavourably interpreted by a judge. The existence of elements could provide a level

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<sup>1</sup> Official Records of the General Assembly, Fifty-first Session, Supplement No. 22 (A/51/22), vol. 1, paras. 52 and 53.



of assurance that will allow consensus to develop for certain crimes and bolster the credibility of the Court.

5. These elements were drafted for a list of some 52 offences found in the Zutphen draft that we believe are fairly widely accepted. They are consolidated here in a list of 32 substantive offences. Reference to the statute's formulation can be found in the "definition" section of each listing in the present document. However, this is not meant to be a statement of support for or against any crime. Likewise, we are not necessarily bound to the substance of the provisions herein. Our goal is to facilitate discussion to reach what we believe is an achievable goal, and one that may allow many more countries eventually to join the statute.

## Annex

### Elements of offences for the International Criminal Court

#### A. Genocide

- (a) **Definition:** Any of several acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.
- (b) **Elements:**
  - (i) That the accused committed one or more of the following acts against a person in a national, ethnic, racial or religious group, because of that person's membership in that group:
    - a. Killing;
    - b. Causing serious bodily or mental harm;
    - c. Deliberately inflicting conditions of life calculated to bring about physical destruction of the group in whole or in part;
    - d. Imposing measures intended to prevent births within the group; or
    - e. Forcibly transferring children of the group to another group.
  - (ii) That when the accused committed such act, the accused had the intent to take part in a plan to destroy such group in whole or in part.

#### B. Crimes against humanity

##### 1. General comments

The following comments apply to all of Part B:

- (a) A crime against humanity means any of the following acts when committed as part of a widespread or systematic attack against a civilian population: extermination, murder, torture, arbitrary imprisonment, arbitrary deportation, enslavement, rape and other forms of sexual abuse, including enforced prostitution, and enforced disappearance of persons.
- (b) In contrast to war crimes, crimes against humanity need not take place during an armed conflict.
- (c) All crimes against humanity require deliberate and purposeful action. Additionally, they share the element of being crimes constituent within a widespread or systematic attack. The accused need not be personally responsible for the widespread or systematic nature of the entire attack.
- (d) "Widespread" means the attack is massive in nature and directed against a large number of individuals.
- (e) "Systematic" means the attack constitutes or is part of, consistent with or in furtherance of, a policy or concerted plan, or repeated practice over a period of time.

**2. Murder**

(a) **Definition from Statute:** Murder.

(b) **Elements:**

- (i) That the accused intended to kill or cause death to one or more non-combatant persons;
- (ii) That the accused killed or caused the death of one or more persons;
- (iii) That the killing was arbitrary and without lawful justification; and
- (iv) That the killing was carried out as part of a widespread or systematic attack.

(c) **Comment.** Since this offence requires deliberate and purposeful action, the thought of taking life must be consciously conceived and the act or omission by which it was taken must be intended.

**3. Extermination**

(a) **Definition:** Extermination.

(b) **Elements:**

- (i) That the accused intended to kill or cause to be killed a group of people, a population, or a large portion of a population;
- (ii) That the accused killed or caused to be killed one or more people;
- (iii) That the killing was deliberate and premeditated; and
- (iv) That the killing was carried out as part of a widespread or systematic attack.

(c) **Comments:**

(i) An accused may be found guilty of this offence if he imposed unlawful living conditions that were intended to be seriously injurious to health and safety and that were calculated to bring about the death of a large portion of a population. An intentional failure to provide essential food, shelter and medical care may be sufficient for a conviction. A siege or embargo conducted according to the laws of armed conflict is not extermination under this Statute.

(ii) Extermination is distinguished from genocide in that it does not require targeting the population to be based solely on nationality, race, ethnicity or religion.

**4. Enslavement**

(a) **Definition:** Enslavement.

(b) **Elements:**

- (i) That the accused intended to own or cause to be owned one or more persons and the fruits of their labour;
- (ii) That one or more persons was forced to do labour without any compensation;
- (iii) That the accused exerted ownership rights over one or more persons so as to deprive them of all individual rights; and
- (iv) That the enslavement was carried out as part of a widespread or systematic attack.

(c) **Comment.** The detention or internment of protected persons, defined in accordance with the Geneva Conventions of 1949, does not constitute enslavement under this Statute.

## 5. Unlawful imprisonment

- (a) **Definition:** Imprisonment in flagrant violation of international law or fundamental legal norms.
- (b) **Elements:**
  - (i) That the accused intended to imprison or cause to be imprisoned a group of people, a population or part of a population, with the knowledge that such imprisonment was unlawful;
  - (ii) That the accused unlawfully imprisoned or caused to be imprisoned one or more persons;
  - (iii) That in carrying out the imprisonment, the accused systematically conducted or caused to be carried out arrests, detentions or the use of sham legal process that departed substantially from established indispensable governing norms; and
  - (iv) That the imprisonment was carried out as part of a widespread or systematic attack.
- (c) **Comments:**
  - (i) Upon a prima facie showing by the defence, the Prosecutor has the burden of proving that imprisonment was not carried out for some lawful purpose. The following cases do not constitute arbitrary imprisonment: the lawful detention of persons after conviction by a competent court; the lawful arrest or detention of persons for non-compliance with the lawful order of a court or in order to secure fulfilment of any obligation prescribed by law; and the lawful detention of persons for the prevention of the spreading of infectious diseases or to otherwise safeguard health and safety.
  - (ii) Since this offence requires deliberate and purposeful action, a good faith belief that the imprisonment was lawful would undermine the intent element of the offence.

## 6. Torture

- (a) **Definition:** Torture.
- (b) **Elements:**
  - (i) That the accused intended to cause death, serious injury or severe pain to one or more persons;
  - (ii) That the accused committed acts resulting in the infliction of severe physical or mental pain or suffering upon one or more persons;
  - (iii) That the accused, at the time of such acts, had the intent to inflict severe physical or mental pain or suffering;
  - (iv) That the acts did not arise from or were not inherent in or incidental to lawful sanctions; and
  - (v) That the acts were carried out as part of a widespread or systematic attack.

**7. Deportation**

- (a) **Definition:** Deportation or forcible transfer of population.
- (b) **Elements:**
  - (i) That the accused intended to wrongfully deport or transfer a population or group of people from their lawful place of residence;
  - (ii) That the accused knew of the population or group's lawful residence in the place from which the accused expelled them;
  - (iii) That the accused caused a population or group to be forcibly moved from their lawful place of residence without justification based on security considerations or other imperative reason of public welfare; and
  - (iv) That the forcible movement was carried out as part of a widespread or systematic attack.
- (c) **Comment.** The "wrongfulness" of the intent element and the lack of justification for the movement preclude prosecution for justified movements such as:
  - (i) Any movement of a population according to article 49 of the first Geneva Convention of 1949;
  - (ii) Any movement in case of an emergency or calamity threatening the life or well-being of the population;
  - (iii) Any service of punishment lawfully imposed;
  - (iv) Any movement required as a necessary adjunct of a lawful internment.

**8. Rape, sexual abuse, or enforced prostitution**

- (a) **Definition:** Rape or other sexual abuse of comparable gravity, or enforced prostitution.
- (b) **Elements:**
  - (i) That the accused intended to attack a person or persons through acts of a sexual nature;
  - (ii) That the accused committed or caused to be committed one of the following acts by force:
    - a. Rape;
    - b. Sexual abuse; or
    - c. Enforced prostitution; and
  - (iii) That the acts were committed as part of a widespread or systematic attack.
- (c) **Comments:**
  - (i) "Rape" is the forcible penetration, however slight, of any part of the body of another by the accused's sexual organ, or forcible penetration, however slight, of the anal or genital opening of another by any object.
  - (ii) "Sexual abuse" is any contact of a sexual nature by force or threat of force of comparable gravity to rape. It specifically includes the offences of sexual mutilation, enforced pregnancy and enforced sterilization.
  - (iii) "Sexual mutilation" is forcibly causing serious physical injury to the victim's sexual organs.

- (iv) "Enforced prostitution" is intentional sexual enslavement wherein the "forcible" element need not be present for each individual sex act, but is generally present regarding a mandated occupation that involves acts of a sexual nature related to rape or sexual abuse.
- (v) "Committed by force" means the sexual act was accomplished by force or threat of force against the victim or a third person. The threat of force can be either express or implied, and must place the victim in reasonable fear that he or she or a third person will be subjected to violence, detention, duress or psychological oppression if the victim does not comply. Evidence of consent may negate the necessary force element. However, consent may not be inferred if resistance would have been futile, if the victim was forcibly detained, where resistance is overcome by threats of death or great bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties.

## 9. Persecution

- (a) **Definition:** Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural or religious grounds and in connection with other crimes within the jurisdiction of the Court.
- (b) **Elements:**
  - (i) That the accused intended to deprive an identifiable group of persons of life, liberty or security of person;
  - (ii) That the accused unlawfully and directly deprived one or more members of that group of life, liberty or security of person;
  - (iii) That the deprivation caused death, serious physical or mental injury or a complete loss of human dignity;
  - (iv) That the deprivation was motivated by the target group's political, racial, national, ethnic, cultural or religious affiliation;
  - (v) That the deprivation was carried out in conjunction with one or more of the other crimes against humanity described in this Statute and as part of a widespread or systematic attack.
- (c) **Comments:**
  - (i) The "directly" requirement in the second element of this offence necessitates that the accused's actions be the proximate cause of any deprivation. Crimes of omission such as allowing starvation to take place would not be crimes against humanity under this section.
  - (ii) The intent element of this offence requires both an intent to deprive and a motivation that is based on a group's political, racial, national, ethnic, cultural or religious affiliation.

## C. War crimes

### 1. General comments

The following comments apply to all of part C:

- (a) *Military necessity.* The principle of military necessity authorizes that use of force, not otherwise specifically prohibited by the law of armed conflict, required for mission accomplishment or submission of the enemy.
- (b) *Collateral damage.* Collateral Damage includes that incidental injury or additional damage that was not intended by an attack or course of action. It is not unlawful to cause incidental injury or death to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective. The principle of *proportionality*, however, may prohibit some attacks on legitimate military objectives that would cause excessive collateral damage or injury.
- (c) *Proportionality.* The principle of proportionality prohibits attacks which are expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be clearly excessive in relation to the overall military advantage anticipated.
- (d) *Evaluation of intent element in war crimes.* In several cases, there is a particular *mens rea* requirement for war crimes which involves a level of knowledge of the commander or other accused. Decisions by military commanders and others responsible for planning, deciding upon or executing attacks can only be judged on the basis of their assessment of the information reasonably available to them under the circumstances at the relevant time.

### 2. Wilful Killing

- (a) **Definition.** Wilful killing; killing or wounding a combatant who, having laid down his arms or no longer having a means of defence, has surrendered at discretion; violence to life and person, in particular murder of all kinds.
- (b) **Elements:**
  - (i) That the alleged offence took place during the course of an international armed conflict;
  - (ii) That a certain person, protected under one or more of the Geneva Conventions of 1949, is dead;
  - (iii) That at the time of the act or omission, the accused knew or should have known that the victim was protected under one or more of the Geneva Conventions of 1949;
  - (iv) That the death resulted from the act or omission of the accused; and
  - (v) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon the victim or another similarly protected person.
- (c) **Comments:**
  - (i) This offense requires deliberate and purposeful action. The act or omission must have been accompanied by an intent to kill or cause great bodily harm, accompanied by knowledge of the intended victim's status.
  - (ii) Wilful killing encompasses faults of omission. The omission must have been intended to cause death or great bodily harm. Again, if death is the foreseeable consequence



of such omission, intent can be inferred. Examples include giving instructions for food rations of prisoners of war to be reduced to such a point that malnutrition causes death and allowing wounded persons to die for want of reasonably available medical care.

### 3. Torture

(a) **Definition:** Torture; violence to life and person, in particular cruel treatment and torture; wilfully causing great suffering, or serious injury to body or health.

(b) **Elements:**

- (i) That the alleged offence took place during the course of an armed conflict;
- (ii) That the accused committed acts resulting in the infliction of severe physical or mental pain or suffering upon one or more persons;
- (iii) That the accused, at the time of such acts, had the intent to inflict severe physical or mental pain or suffering;
- (iv) That the acts did not arise from or were not inherent in or incidental to lawful sanctions.

### 4. Inhuman treatment

(a) **Definition:** Wilfully causing great suffering or serious injury to body or health; violence to life and person, in particular mutilation; inhuman treatment, including biological experimentation; subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind that are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and that cause death to or seriously endanger the health of such person or persons; committing outrages upon personal dignity, in particular humiliating and degrading treatment.

(b) **Elements:**

- (i) That the alleged offence took place during the course of an armed conflict;
- (ii) That the accused committed an act against a certain person or subjected that person to a particular medical or biological procedure or treatment;
- (iii) (*for inhuman treatment*) That the act was intended to, and did in fact, subject the victim to mutilation, severe indignities, pain, or extreme suffering grossly out of proportion to the treatment expected of one human being from another; or
- (iv) (*for biological experimentation*) That the intent of the procedure or treatment was non-therapeutic and was neither justified on medical grounds nor carried out in the victim's interest; and
- (v) (*for both inhuman treatment and biological experimentation*) That the act or treatment caused death or serious injury to the mental or physical health of the victim.

### 5. Extensive destruction or wrongful appropriation

(a) **Definition:** Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict; pillaging a town or place, even when taken by assault.

(b) **Elements:**

- (i) That the alleged offence took place during the course of an armed conflict;
- (ii) That the accused wilfully or recklessly destroyed, damaged or appropriated certain real or personal property; and
- (iii) That the amount of destruction, damage or wrongful appropriation was clearly excessive, not justified by military necessity and carried out wantonly.

(c) **Comments:**

- (i) The wantonness requirement takes this offence beyond a mere intentional destruction or appropriation in excess of that required by military necessity and necessitates proof of a significantly heightened malice or arbitrary disregard for the rights of the victims.
- (ii) Causing collateral damage cannot constitute this offence. Likewise, destruction or appropriation justified by military necessity is not unlawful.
- (iii) "Wrongful appropriation" means taking property from its lawful owner, or any other person with a greater possessory interest than the accused, with the intent to permanently deprive.

**6. Compelling hostile acts**

(a) **Definition:** Compelling a prisoner of war or other protected person to serve in the forces of a hostile power; compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

(b) **Elements:**

- (i) That the alleged offence took place during the course of an international armed conflict;
- (ii) That the accused coerced a certain person, by act or threat, to engage in hostile acts against that person's own country; and
- (iii) That the person coerced was a prisoner of war or a civilian protected by one or more of the Geneva Conventions of 1949.

(c) **Comment:** Implicit in the second element is the fact that the acts compelled do not constitute lawful prisoner of war or civilian labour as defined by articles 49 to 57 of (the third) (Geneva) Convention Relative to the Treatment of Prisoners of War of 1949 and articles 51 and 52 of (the fourth) (Geneva) Convention Relative to the Protection of Civilian Persons in Time of War of 1949.

**7. Denying judicial guarantees**

(a) **Definition:** Wilfully depriving a prisoner of war or other protected person of the rights of a fair and regular trial; declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(b) **Elements:**

- (i) That the alleged offence took place during the course of an armed conflict;

- (ii) That the accused allowed judicial proceedings to be concluded which resulted in some punishment of a certain prisoner of war or civilian within the control of the accused;
  - (iii) That the accused intended to deprive the person of a fair and regular trial; and
  - (iv) *(for international armed conflicts)* That such act was performed without according the person a fair and regular trial as defined by the third and fourth Geneva Conventions of 1949; or
  - (v) *(for non-international armed conflicts)* That such act was performed without judgement by a regularly constituted court or without the most manifestly indispensable judicial guarantees.
- (c) **Comment:** For international armed conflicts, the substance of this offence is the violation of one or more of the penal provisions of articles 82 to 88; 99 to 108 of (the third) (Geneva) Convention Relative to the Treatment of Prisoners of War of 1949 and articles 64 to 78 of (the fourth) (Geneva) Convention Relative to the Protection of Civilian Persons in Time of War of 1949. For non-international armed conflict, the elements of the offence are only met when the combined violations of penal provisions rise to the level of indispensable judicial guarantees requisite for the most fundamental judicial norms, as provided in common article 3 (d) of the Geneva Conventions of 1949.

## 8. Deportation

- (a) **Definition:** Unlawful deportation, transfer or unlawful confinement; Ordering the displacement of a civilian population other than that represented by the forces of the accused.
- (b) **Elements:**
- (i) That the alleged offence took place during the course of an international armed conflict;
  - (ii) That the accused held, confined or otherwise restrained the liberty of a person or expelled a person from the territory in which that person resides for purposes other than lawful internment;
  - (iii) That the person was a civilian protected under one or more of the Geneva Conventions of 1949;
  - (iv) That the accused knew of the person's status as a lawful resident of the territory of the State; and
  - (v) *(for cases of deportation or transfer)* That the deportation or transfer was not conducted for security purposes or any other lawful reason; or
  - (vi) *(for cases of unlawful confinement)* That the restraint was not undertaken for security purposes and was effected without affording the procedural and substantive protections prescribed in the fourth Geneva Convention of 1949.
- (c) **Comment:** Occupying powers are authorized, for reasons of security, to intern civilians in some situations in accordance with articles 78 to 104 of (the fourth) (Geneva) Convention Relative to the Protection of Civilian Persons in Time of War of 1949. It is the Prosecutor's burden to prove that internment of civilians was not undertaken for security purposes once a prima facie case is made for that defence.

## 9. Taking hostages

(a) **Definition:** Taking of hostages.

(b) **Elements:**

(i) That the alleged offence took place during the course of an armed conflict;

(ii) That the accused seized, detained or otherwise held hostage a certain non-combatant person;

(iii) That the accused threatened to injure, kill or continue to detain such person; and

(iv) That the act was performed with the intent to compel a State, an international intergovernmental organization, a natural or juridical person, or a group of persons to do or refrain from doing any act as an explicit or implicit condition for the safe release of the person.

(c) **Comment:** This offence is distinguished from unlawful confinement by the additional element that the accused threatened to prolong the hostage's detention or to put him or her to death in exchange for some act by a third party. It is not constrained by the need for the victim to be a protected person or for the offence to take place during international armed conflict.

## 10. Attacking civilians

(a) **Definition:** Intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities.

(b) **Elements:**

(i) That the alleged offence took place during the course of an armed conflict;

(ii) That the accused intentionally directed an attack against one or more civilians;

(iii) That the accused intended the object of the attack to be one or more civilians;

(iv) That the civilian or civilians against whom the attack was directed were not taking part in hostilities or located in proximity to, or within, a lawful military objective at the time the attack was initiated; and

(v) That the attack resulted in death or harm to one or more civilians.

(c) **Comments:**

(i) Since this offence requires deliberate and purposeful action, causing incidental injury or collateral damage does not constitute attacking civilians.

(ii) *Military objective.* Military objectives are those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

## 11. Causing disproportionate damage

(a) **Definition:** Intentionally 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 that would be excessive in relation to the concrete and direct overall military advantage anticipated.

**(b) Elements:**

- (i) That the alleged offence took place during the course of an international armed conflict;
- (ii) That the accused launched an attack;
- (iii) That the attack resulted in collateral damage or incidental injury;
- (iv) That the collateral damage or incidental injury was manifestly excessive in relation to the overall military advantage anticipated;
- (v) That the accused knew that such collateral injury or damage would be disproportionate to the military advantage gained.

**(c) Comments:**

- (i) The knowledge element is key to proportionality analysis for this offence. Since the evaluation is necessarily subjective, the proportionality knowledge threshold must be high and analysis must be based on the perspective of the accused prior to the attack.
- (ii) Military advantage includes all benefits ranging from tactical goals to overall campaign objectives.

**12. Attacking an undefended locality**

**(a) Definition:** Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings that are undefended.

**(b) Elements:**

- (i) That the alleged offence took place during the course of an international armed conflict;
- (ii) That the accused launched an attack against a certain undefended locality;
- (iii) That the attack was not justified by military necessity; and
- (iv) That at the time of the offence the accused knew that the object of the attack was an undefended locality.

**(c) Comments:**

An "undefended locality" is any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse party and has been declared undefended by appropriate authorities of a party to the conflict. This declaration shall be addressed to the adverse party and such a locality shall fulfill the following conditions:

- a. All combatants, as well as mobile weapons and mobile military equipment must have been evacuated;
- b. No hostile use shall be made of fixed military installations or establishments;
- c. No acts of hostility shall be committed by the authorities or by the population; and
- d. No activities in support of military operations shall be undertaken.

**13. Improper use of a flag, symbol or uniform**

- (a) **Definition:** Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury; Killing or wounding treacherously individuals belonging to the hostile nation or army.
- (b) **Elements:**
  - (i) That the alleged offence took place during the course of an international armed conflict;
  - (ii) That the accused wrongfully used a flag of truce, the flag of the enemy or of the United Nations or the distinctive emblems of the Geneva Conventions; or wrongfully used the military insignia and uniform of the enemy or of the United Nations while engaging in attacks;
  - (iii) That the wrongful use of one or more of these items was intended to cause death, serious personal injury, or capture; and
  - (iv) That death, serious personal injury or capture occurred as a direct result of the accused's actions or wrongful misrepresentations.

**14. Attacking protected objects**

- (a) **Definition:** Intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.
- (b) **Elements:**
  - (i) That the alleged offence took place during the course of an armed conflict;
  - (ii) That the accused directed an attack against one or more of the following: a building dedicated to religion, art, science or charitable purposes, a historical monument, or a hospital or place where the sick and wounded are collected;
  - (iii) That the accused specifically intended such attack and its natural consequences with respect to the object of the attack;
  - (iv) That the object of attack was not being used for military purposes at the time of the attack; and
  - (v) That the accused knew the object of attack was not being used for military purposes at the time of the attack.

**15. Perfidy**

- (a) **Definition:** Killing or wounding treacherously individuals belonging to the hostile nation or army; killing or wounding treacherously a combatant adversary.
- (b) **Elements:**
  - (i) That the alleged offence took place during the course of an armed conflict;
  - (ii) That the accused intended to kill or wound a combatant adversary;
  - (iii) That the accused committed an act resulting in the death or wounding of a combatant adversary;

- (iv) That the accused intended the death or wounding to be accomplished by securing the confidence of a military adversary to believe himself to be entitled to, or obliged to accord, protection under the law of war, with intent to betray that confidence; and
- (v) That the death or wounding occurred as a direct result of the accused's wrongful misrepresentations.

#### 16. Denying quarter

- (a) **Definition:** Declaring that no quarter will be given.
- (b) **Elements:**
  - (i) That the alleged offence took place during the course of an armed conflict;
  - (ii) That the accused was a person in command or had authority over certain forces;
  - (iii) That the accused declared to those subordinate forces that no quarter be given the enemy;
  - (iv) That in so declaring, the accused intended that his or her subordinates refuse quarter to the enemy; and
  - (v) That the refusal to accept surrender was not justified by military necessity.
- (c) **Comment:**
  - (i) "Denial of quarter" is the refusal to accept an enemy's surrender when it is reasonable to do so.
  - (ii) Bringing a preponderance of force to bear against enemy military objectives or enemy personnel does not constitute denial of quarter. Neither is a commander obligated to offer an opportunity to surrender before carrying out an attack, since surprise or speed may be critical to the success of the attack.

#### 17. Sexual Offences

- (a) **Definition:** Committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization and any other form of sexual violence also constituting a grave breach of the Geneva Conventions.
- (b) **Elements:**
  - (i) That the alleged offence took place during the course of an armed conflict;
  - (ii) That the accused intended to commit a certain sexual act upon a certain person or forced that person to engage in a certain sexual act;
  - (iii) That the accused committed or caused to be committed one of the following acts by force:
    - a. Rape;
    - b. Sexual abuse; or
    - c. Enforced prostitution; and
  - (iv) That the acts were committed as part of a widespread or systematic attack.
- (c) **Comments:**

- (i) "Rape" is the forcible penetration, however slight, of any part of the body of another by the accused's sexual organ, or forcible penetration, however slight, of the anal or genital opening of another by any object.
- (ii) "Sexual abuse" is any contact of a sexual nature by force or threat of force of comparable gravity to rape. It specifically includes the offences of sexual mutilation, enforced pregnancy, and enforced sterilization.
- (iii) "Sexual mutilation" is forcibly causing serious physical injury to the victim's sexual organs.
- (iv) "Enforced prostitution" is intentional sexual enslavement wherein the "forcible" element need not be present for each individual sex act, but is generally present regarding a mandated occupation that involves acts of a sexual nature related to rape or sexual abuse.
- (v) "Committed by force" means the sexual act was accomplished by force or threat of force against the victim or a third person. The threat of force can be either express or implied, and must place the victim in reasonable fear that he or she or a third person will be subjected to violence, detention, duress or psychological oppression if the victim does not comply. Evidence of consent may negate the necessary force element. However, consent may not be inferred if resistance would have been futile, if the victim was forcibly detained, where resistance is overcome by threats of death or great bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties.

**18. Immunizing an area with protected persons**

- (a) **Definition:** Utilizing the presence of a civilian or other protected persons to render certain points, areas or military forces immune from military operations.
- (b) **Elements:**
  - (i) That the alleged offence took place during the course of an international armed conflict;
  - (ii) That at the time of the offence, the accused was defending a military objective from likely attack;
  - (iii) That the accused either caused the military objective, civilian personnel or other persons protected under one of the Geneva Conventions of 1949 to be moved so that the military objective and the civilian personnel, or other protected persons would be either located together or otherwise positioned so that an attack against the military objective would seriously endanger the civilian personnel or other protected persons; and
  - (iv) That the accused's actions were intended to shield military objectives from attack, to shield, favour or impede military operations or to otherwise undermine the adversary's will to attack or continue an attack.



**19. Attacking objects displaying a protective emblem**

(a) **Definition:** Intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions.

(b) **Elements:**

- (i) That the alleged offence took place during the course of an armed conflict;
- (ii) That the accused directed an attack against a building, material, a medical unit or transport, or person that was properly displaying a distinctive protective emblem of the Geneva Conventions;
- (iii) That the accused knew the object of attack was properly displaying a distinctive protective emblem of the Geneva Conventions;
- (iv) That the object of attack was not being used for a military purpose at the time of the attack; and
- (v) That the accused did not believe that the object of attack was being used for a military purpose at the time of the attack.

**20. Starvation**

(a) **Definition:** Intentionally using starvation of civilians as method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions.

(b) **Elements:**

- (i) That the alleged offence took place during the course of an international armed conflict;
- (ii) That the accused engaged in an act or omission calculated to attack, destroy, remove or render useless objects indispensable to the nourishment and survival of the civilian population;
- (iii) That the accused's act or omission was intended for the specific purpose of denying nourishment necessary for the survival of the civilian population of the adverse party; and
- (iv) That as a result of the accused's acts, one or more persons died from starvation.

**21. Using illegal weapons**

(a) **Definition:** Employing the following weapons, projectiles and material and methods of warfare which are calculated to cause superfluous injury or unnecessary suffering: (i) poison or poisoned weapons; (ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; (iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; (iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict; (v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction.

(b) **Elements:**

- (i) That the alleged offence took place during the course of an international armed conflict;
  - (ii) That the accused knowingly used one of the following weapons against an adversary in that armed conflict:
    - a. Poison or poisoned weapons;
    - b. Asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
    - c. *Bullets which expand or flatten easily in the human body;*
    - d. Bacteriological agents or toxins;
    - e. Chemical weapons; and
  - (iii) That at the time of the offence, the accused knew the weapon was banned under international law.
- (c) **Comments:**
- (i) "Chemical weapons" means chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction. It does not include riot control agents as they are defined in that Convention.
  - (ii) "Bacteriological agents or toxins" means any microbial or other biological agent or toxins, whatever their origin or method of production.
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