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Topic: ICC Statute Article 8(2)(b)(xi)

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Now I shall say some words about article 8, paragraph 2 (b) [xi], which penalizes killing or wounding treacherously individuals belonging to the hostile nation or army.

The crimes under article 8, paragraph 2(b) are “serious violations of the laws and customs applicable in international armed conflict”, which means that they may be derived from customary or treaty law applicable in such conflict.

The chapeau moreover adds “within the established framework of international law”, which serves to underline that the offences must be interpreted in line with established law, possibly to exclude an all too progressive interpretation of certain offences. This understanding is in line with the provision in article 22, paragraph 2 of the Statute, which says:

The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted, or convicted.

This war crime is based on article 23 (b) of the 1907 Hague Regulations and article 37 of the 1977 Additional Protocol I and article 37 of the 1977 Additional Protocol I to the 1949 Geneva Conventions. It is closely related to the crime of making improper use of certain emblems resulting in death or serious personal injury, penalized in article 8, paragraph 2 (b) (vii) of the ICC Statute, but there are differences.

One difference is that the perpetrator in the war crime of killing and wounding treacherously must have an intention to betray the confidence of the opponent, which is not necessary for the war crime of improper use of emblems. Another difference is that the crime presently discussed is open-ended as to the means of deceiving the opponent - not limiting itself to the misuse as to the means of deceiving the opponent - not limiting itself to the misuse of certain emblems.

The exact scope of this crime as defined in The Hague Regulations is unclear. In literature, assassination is mentioned among the various modes of treacherous killing, an act that does not necessarily fall under the crime as defined in the Elements of Crimes.

These define the crime largely along the lines of article 37 of the Additional Protocol I, in that an essential element is that the perpetrator invited the confidence or belief of one or more persons that they were entitled to or were obliged to accord protection under rules of international law applicable in armed conflict.

Assassination of a particular individual is not in itself inviting such confidence, if carried out by ordinary combatants. A well-known example of what one today could call a ‘targeted killing’ is the ambush of the Japanese Admiral Yamamoto on 18 April 1943. The Americans had broken the code of the Japanese fleet and knew that the Admiral would be flying from Rabaul of New Guinea at 6:00 a.m. (Tokyo time) Guinea at 6:00 a.m. (Tokyo time) in a medium bomber escorted by six fighters and would arrive at the Ballale Island at 8:00 a.m. Sixteen long-range P-38 fighter planes were sent from Henderson Field at Guadalcanal with the intention of shooting down the Admiral’s aircraft, which they succeeded in doing. A more recent example is the killing of Osama Bin Laden on May 2, 2011 in Abbottabad, Pakistan by special forces from the United States of America.

If, on the other hand, an assassination is made by one or more persons in civilian clothing, thus inducing the victim to believe that the assassins are civilians that are entitled to protection under international law, this would fall under the crime of treacherous killing.

More typical acts that may constitute this crime would be to kill or wound under the cover of protective emblems. Capturing a person by such treacherous means is, however, not a war crime under this provision, although it is included in the prohibition in article 37 of the Additional Protocol I.

This can be explained in two ways. One is that several States object to including ‘capturing’ in the prohibition, claiming that is not customary law and therefore not binding on non-parties to the Additional Protocol I. The ICC Statute does not generally aim to go beyond generally accepted norms when defining war crimes. The other possible explanation is that the ICC Statute generally aims at penalizing the most serious breaches of the Law of Armed Conflict. It could be seen as a less serious breach to capture than to kill or wound a person, and it could therefore be left out of the definition without taking a position on whether capturing by perfidy is prohibited on a customary law basis or not.

Only completed acts qualify. Attempts that do not result in the death or injury of one or more persons are not war crimes under this provision.

Thank you.