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

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Now I shall say some words about article 8, paragraph 2, sub-paragraph (b)(iii), which penalizes intentionally directing attacks against personnel, installations, material, units, or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international Law of Armed Conflict.

The crimes under article 8(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 international armed 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 the 1994 UN Convention on the Safety of United Nations and Associated personnel. Article 9 of the Convention criminalizes *inter alia* murder, kidnapping, or other attack upon the person or liberty of any United Nations and associated personnel, as well as violent attack upon the official premises, the private accommodation, or the means of transportation of any United Nations and associated personnel likely to endanger his or her person or liberty.

The crime is also based on article 71 of the 1977 Additional Protocol I to the 1949 Geneva Conventions, which stipulates that personnel participating in relief actions shall be respected and protected.

The term ‘attack’ is defined for Law of Armed Conflict purposes as acts of violence against the adversary, whether in offence or in defence. It makes no difference whether you are fighting

an offensive or defensive war under *jus ad bellum*, or whether your unit for the moment is on the offensive or is fighting a defensive rear guard action.

‘Acts of violence’ normally means use of physical force, including blast and fire. It also includes the use of chemical weapons. Cyber operations can be attacks if they result in consequences in the physical world that are comparable to results of using ordinary weapons. What defines an ‘attack’ is not the violence of the means, but the violence of the results.

According to article 2 of the 1994 Convention, the protection of the Convention does not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

This requires some explanation. Traditional peacekeeping missions are usually under UN command. The personnel wear blue berets or blue helmets and installations, vehicles, and aircraft are painted white. The intention is to show presence, not to have low visibility for tactical reasons. By contrast, peace enforcement missions have usually been under national command, and uniforms, vehicles, etc. are in combat colours such as green or sand.

United Nations peacekeeping missions are based on the consent of the parties and are mandated to use force only in self-defence. In other words, they do not represent a threat to any of the parties to the conflict. It is this type of mission that the 1994 Convention aims at protecting.

The mandates of UN peacekeeping missions have, however, at times been extended to include, for instance, protection of the civilian population and the concept of self-defence has been extended to include “defence of the mandate”. At a certain point, which may be difficult to define, a UN peacekeeping mission can have crossed the threshold of armed conflict and become a Party itself. It would not be logical to retain the protection against attack, since such protection would give the UN mission a legal monopoly on the use of force, like the police has in national law of most countries.

In the Elements of Crimes this has been made clear in paragraph 4, where it says that the protection applies when such personnel, installations, material, units, or vehicles were entitled to that protection given to civilians or civilian objects under the international Law of Armed Conflict. This applies both to the UN mission and to humanitarian assistance missions.

Humanitarian assistance missions are not defined, but they are supposed to be intended to alleviate the suffering of the civilian population. Guidance can be found in the 1977 Additional Protocol I article 70, which accords certain privileges to relief actions which are humanitarian and impartial in character and conducted without any adverse distinction and has the agreement of the Parties concerned. If, however, a particular relief action is not found to fulfil these criteria - it is, for instance, not impartial - an attack on the personnel may still be a war crime under article 8, paragraph 2, sub-paragraph (b)(i), which prohibits intentionally directing attacks against civilians not taking direct part in hostilities.

The penalized act is intentionally directing attacks on humanitarian assistance or peacekeeping missions. It is no requirement that any persons or objects are hurt, killed, or objects are hurt, killed, damaged, or destroyed. The attack may fail due to malfunction of weapons or poor aiming but will still be a war crime.

Thank you.