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Now I shall say some words about article 8, paragraph 2, sub-paragraph(b)(vi), which penalizes killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion.

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 international armed conflict.

The *chapeau* moreover adds “within the established framework of international law”, which serves to underline that the offenses must be interpreted in line with established law, possibly to exclude an all too progressive interpretation of certain offenses. 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 crime is based on article 23 (c) of the 1907 Hague Regulations and article 41 of the 1977 Additional Protocol I to the 1949 Geneva Conventions. It reflects customary international law.

Protected are not only those who have laid down their arms intentionally and clearly express an intention to surrender, but also those who due to circumstances have no longer means of defence. This could, for example, be persons who are incapacitated by wounds or sickness or unarmed sailors in a lifeboat. It covers all persons *hors de combat* - former combatants no longer taking part in combat. In order to be protected, a person *hors de combat* must abstain from any hostile act and not attempt to escape.

Attacks on persons parachuting from aircraft in distress is prohibited in article 42 of the 1977 Additional Protocol I. The prohibition reflects customary law. It is, however, not clear whether such attacks constitute a war crime under the ICC Statute. Unless they achieve to clearly signal their intention to surrender or apparently are wounded, such persons do not precisely fit into the definition of the crime we are discussing.

‘Killing’ or ‘wounding’ means that an unsuccessful attack is not sufficient to constitute the war crime; the result of the act must be death or physical injury. On the other hand, incidental death of or injury to persons *hors de combat* resulting from attacks on a lawful target is not covered, neither under this provision nor under article 8, paragraph 2, sub-paragraph(b)(iv) about causing excessive collateral damage, because that provision protects only civilians.

This may be illustrated with the following example: When the German battleship *Bismarck* had been overtaken by superior British naval forces in the morning of 27 May 1941 and was being pounded to a wreck by heavy artillery, there was no duty to cease shooting because of the increasing number of German sailors that were wounded and were likely to perish when the ship was finally sunk. As such, as long as the ship had not surrendered by, for instance, striking the flag.

One may, however, consider whether a field hospital or collection point for surrendered soldiers becoming prisoners of war should be protected against excessive collateral damage. The ICRC 2005 Customary Law Study has not identified any rule to this effect. Article 19 of the First Geneva Convention of 1949 says, however, that medical units and establishments should be situated in such a manner that attacks against military objectives cannot imperil their safety. Moreover, the HPCR Air and Missile Warfare Manual has concluded in its Rule 42 that military objectives should not be located near prisoner of war camps, etc., thereby implying that collateral damage to prisoners of war and field hospitals ought to be avoided.

This is not to say that attacks that result in killing or wounding prisoners of war or wounded and sick combatants of collateral damage is, or is likely to become, a war crime. It is only the most serious breaches of the Law of Armed Conflict that are criminalized in the ICC Statute, and only those that clearly follow from the established rules.

Thank you.