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Now I shall say some words about article 8, paragraph 2(b)(vii), which penalizes 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. These are the distinctive emblems of the Geneva Conventions.

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.

It is a requirement that the conduct took place in the *context of* and was *associated with* an international armed conflict. Improper use of emblems of the Geneva Conventions in peacetime shall be prohibited by national law, pursuant to article 54 of the First Geneva Convention.

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.

For emblems to function, they must be protected from improper use. What ‘improper use’ is may, however, be disputed and the concept has undergone some developments over the years.

The crime of improper use of emblems, etc., can be seen as an amalgamation of articles 38 and 39 of the 1977 Additional Protocol I to the [1949] Geneva Conventions that prohibit improper use in itself, and article 37 of the Additional Protocol I that prohibits to kill, injure, or capture by resort to perfidy. Perfidy is, however, explicitly treated in sub-paragraph (xi), which is about killing or wounding treacherously individuals belonging to the hostile nation or army.

The present crime covers only some instances of conduct that are of a perfidious nature or are bordering to perfidy. ‘Perfidy’ is when you, by certain improper use of emblems or by other means, invite the confidence of an adversary with the intent to betray that confidence. The present

crime does not require such perfidious intent. The Additional Protocol's article 37 on perfidy is considered reflective of customary international law, with the exception of capture. 'Capture' is for this reason not included in the definition of neither the present crime or of the crime of perfidy in the ICC Statute.

The Elements of Crimes splits this crime into several sub-crimes.

The first sub-crime is the use of the flag of truce (the white flag) in order to feign an intention to negotiate when there was no such intention on the part of the perpetrator.

The second sub-crime is making use of a flag, insignia, or uniform of the hostile party *while engaged in an attack*. This means that enemy uniforms could be used under other circumstances. Under the Additional Protocol I such use would be unlawful also when it is done in order to shield, favour, protect, or impede military operations, but such conduct would not constitute a war crime under the ICC Statute. Neither was it considered criminal in the *Otto Skorzeny and Others* case in the aftermath of the Second World War. At the beginning of the Ardennes offensive in December 1944, Skorzeny had taken a German unit through American lines wearing American uniforms. It was, however, not proved that they had fired upon American troops while wearing these uniforms. All were acquitted.

The third sub-crime is improper use of a flag, insignia, or uniform of the United Nations. This crime is not dependent on whether the perpetrator [...] whether the perpetrator is misusing the flag, etc. while engaging in attacks, or even in order to shield, favour, protect, or impede military operations. One may, however, question whether this absolute prohibition can be understood literally if the United Nations is Party to the conflict. The HPCR Manual on Air and Missile Warfare takes in the commentary to its Rule 112 (e) the position that in that case unauthorized use would be similar to the improper use of military emblems or uniforms of the enemy.

The fourth sub-crime is improper use of the distinctive emblems of the Geneva Conventions. These emblems are, as I showed you, the red cross, the red crescent and the red crystal. The red lion and sun indicated in the first Geneva Convention has fallen into disuse. It is prohibited to make such use for combatant purposes in a manner prohibited under the international law of armed conflict. This would also include acts to shield, favour, protect, or impede military operations.

For all four sub-crimes, it is a requirement that the conduct resulted in death or serious personal injury. The death or injury does not, however, have to be intended. It is sufficient that the perpetrator knew that the conduct *could* result in death or serious personal injury. This is a lower threshold than the general threshold in article 30, paragraph 2(b) where the general requirement of intent is that the person means to cause that consequence or is aware that it will occur in the ordinary course of events.

Article 38 in Additional Protocol I prohibits use also of "other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property." Moreover, article 39 prohibits to make use of flags or military emblems, insignia, or uniforms of neutral or other States not Parties to the conflict.

Apart from the flag of truce, misuse of these other emblems, etc. is not included in the present crime. Under the circumstances such misuse might, however, fall under the crime of perfidy in article 8 paragraph 2(b)(xi).

It should be noted that in naval warfare it is customarily permitted for warships to fly a false flag, provided that correct colours are shown before fire is opened. Such conduct would not amount to a war crime.

Thank you.