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**Preparatory Commission for the
International Criminal Court**
Working Group on Elements of Crimes
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**Proposal submitted by Algeria, Bahrain, Comoros, Djibouti,
Egypt, Jordan, Iraq, Kuwait, Lebanon, the Libyan Arab
Jamahiriya, Mauritania, Morocco, Oman, Qatar, Saudi Arabia,
the Sudan, the Syrian Arab Republic, Tunisia, the United
Arab Emirates and Yemen**

**Comments on the proposal submitted by the United States
of America concerning war crimes**

Article 8: War crimes

The present paper contains comments on some of the elements set forth in paper PCNICC/1999/DP.4/Add.2.

General note

As already stated in part I of the Arab Group's comments, it is not acceptable that the definitions given in article 8 of the Rome Statute should be modified by means of so-called "elements of crimes".

I. Article 8.2(a)(i): War crime of murder

1. It is noted that the paper uses the term "war crime of murder" while the Statute, which has primacy, uses "wilful killing". This is a departure from the terminology of the Statute.

2. Element 1 is that the act took place in the course of international armed conflict. This is tautological, given the provisions of article 8.2 of the Statute. Moreover, it does not define what is meant by saying that the act "took place in the course of international armed conflict", as implying a causal relationship between the act and the state of war or that the perpetrator of the crime is a combatant and the victim one of the "protected persons" under the

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rules of international humanitarian law. There is an error in the Arabic text of this paragraph, because the expression "armed conflict" alone is used. The Arabic text should thus be revised to bring it into line with the other versions.

3. Element 2 should be in keeping with the definition given in the Statute to the effect that what is meant by this kind of killing is wilful killing, which requires specific criminal intent. This element does not make that stipulation and restricts itself to general intent alone. This prompts the question whether specific intent is not required to commit wilful killing. In that case, element 2 would suffice and element 3 could be deleted.

4. Element 4 should be deleted, because part 3 of the Statute (on general principles of criminal law) sets forth grounds for excluding criminal responsibility.

II. Article 8.2(a)(ii)-1: War crime of torture

1. The paper uses the expression "war crime of torture" while the Statute, which has primacy, uses the word "torture" alone. The original formulation should be retained.

2. The notion of torture in the United States paper does not accord with the letter or spirit of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which does not permit torture in any form or under any circumstances whatever.

3. We reiterate our comment on article 8.2(a)(i) in connection with element 1.

4. We have no comments to make on elements 2, 4 and 5.

5. The comment to the effect that "The effects of weapons, the use of which is not prohibited by the Statute, do not constitute 'severe physical or mental pain or suffering'" would exclude cases in which such weapons are used for the purpose of torture or for the purpose of causing severe physical or mental pain or suffering.

III. Article 8.2(a)(ii)-2: War crime of inhuman treatment

1. It is noted that the paper separates inhuman treatment from biological experimentation while the Statute, which has primacy, does not. There is no call for such separation.

2. We reiterate our comment under article 8.2(a)(i).

3. Element 2 stipulates subjection to extreme physical or mental pain, which makes it overlap with the crime of torture. It is, however, sufficient to bring about the crime in question that its material element should give rise to the causing of suffering or of a physical or mental injury that violates human dignity. This would be in keeping with the Geneva conventions. The same element stipulates that the act should be "grossly inconsistent", while it is

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sufficient that it should be "inconsistent". In another respect, there is no objective standard for what is to be considered "grossly" inconsistent.

4. The statement concerning "lawful justification or excuse" with regard to the other elements is repeated again in element 3.

5. Element 4, by stipulating that the act caused death or serious bodily or mental harm, overlaps with other crimes such as wilful killing and torture.

IV. Article 8.2(a)(ii)-3: War crime of biological experimentation

1. The paper, unlike the Statute, treats biological experimentation as a crime separate from the crime of torture or inhuman treatment, and this is to be regarded as a violation of article 9. It should rather have elucidated the difference between biological and medical experimentation, unless the meaning is obvious.

2. Elements 3 and 4 should be combined in view of the fact that they complement each other, since the free consent of the person on whom experimentation is carried out must be obtained in order to disprove specific criminal intent.

3. Element 5 is a repetition, and the same applies to it as to "lawful justifications and excuses" in connection with previous elements.

4. Element 6 lays down conditions that are excessive. It stipulates that the experimentation should cause death or serious bodily or mental harm to the person or persons. These conditions are entirely incompatible with the principles of humanitarian law, and for such experimentation to be a crime it is enough that the material element should be present (i.e. that the crime should take place) without there being an adverse consequence. It would be better if the criterion here were a positive one and if the best interests of and medical benefits to the person on whom the experimentation is carried out were stipulated instead.
