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

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Now I shall say some words about article 8, paragraph (2)(b)(x), which penalizes subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned, nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons.

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 conflicts.

The chapeau moreover adds “within the established framework of international law”, “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.”

The crime is based on article 11 of the 1977 Additional Protocol (I) to the 1949 Geneva Conventions. It is a basic rule in article 11, paragraph 1 that “it is prohibited to subject the persons described in this article to any medical procedure, which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.”

In paragraph 2 it says that “it is, in particular, prohibited to carry out on such persons, even with their consent:

- a) Physical mutilations;
- b) Medical or scientific experiments;
- c) Removal of tissue or organs for transplantation,

except where these acts are justified in conformity with the conditions provided for in paragraph 1”.

The provision in Additional Protocol I protect persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of an international armed conflict. This goes somewhat beyond the definition of “protected persons” in the 1949 Geneva Conventions. The war crime as defined in the ICC Statute extends its protection solely to persons who are in the power of an adverse party (which is basically those persons whom the Geneva Conventions protect). Thus, it does not protect nationals of the territorial State itself, of neutral States or of co-belligerent States.

The Elements of Crimes split this crime into two sub-crimes.

The first is the war crime of mutilation. The act of “physical mutilation” is defined as “permanently disfiguring the person or persons, or by permanently disabling [or removing] an organ or appendage.” The definition is not exhaustive.

Removal of tissue or organs for transplantation might fall under the definition of “physical mutilation”. The Additional Protocol I provides, however, an exception for donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient. Such procedures are clearly not criminal.

Mutilation carried out in the interest of the patient is not forbidden. Amputation of a gangrenous limb is a typical example.

To be criminal it’s a requirement that the conduct caused death or seriously endangered the physical or mental health of such person or persons. “Mental” is included as a clarification.

The second sub-crime is the war crime of medical or scientific experiments.

“Biological experiments” on persons protected under the 1949 Geneva Conventions is criminalized under article 8, paragraph (2)(a)(ii). This crime overlaps with the sub-crime presently discussed.

It’s required that the experiment seriously endangered the physical or mental health or integrity of the person subjected to it, and that the intent of the experiment was non-therapeutic and that it was neither justified by medical reasons nor carried out in the person’s interest. The crime does not require that death or serious bodily or mental harm be caused, only that it is endangered.

Consent is generally not a defense. It can, however, justify experimental treatment in the interest of the patient. Thus, the prohibition of medical experiments does not prohibit new therapeutic methods which are justified on medical grounds and aimed at improving the patient’s condition.

Thank you.