

THE INTERNATIONAL CRIMINAL COURT:

Preliminary comments concerning the elements of war crimes other than grave breaches of the Geneva Conventions - Part I

This paper is the second in a series of short papers to be issued concerning proposals on the elements of crimes for the Preparatory Commission for the International Criminal Court (Preparatory Commission). It will be provided to delegates at the second session of the Preparatory Commission's second session (26 July to 13 August 1999).¹

Article 9 (1) of the Rome Statute of the International Criminal Court (Rome Statute or Statute), adopted at a diplomatic conference on 17 July 1998, provides that "[e]lements of crimes shall assist the Court in the interpretation and application of articles 6 [genocide], 7 [crimes against humanity] and 8 [war crimes]" and be adopted by a two-thirds majority of the Assembly of States Parties. The Preparatory Commission is charged under Resolution F of the Final Act of the diplomatic conference with preparing a draft of the Elements of Crimes for consideration and adoption by the Assembly of States Parties. Article 21 (a) of the Statute provides that "[t]he Court shall apply . . . (A) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence", which makes it essential that the Elements of Crimes be drafted with great care to ensure that the intent of the Statute not be undermined.

Amnesty International welcomes the three excellent papers in the study of war crimes other than grave breaches of the Geneva Conventions of 1949 made available to government delegations by the International Committee of the Red Cross (ICRC). The first paper, issued on 28 May 1999, covered Article 8 (2) (c) of the Statute (common Article 3). The second paper, issued on 18 June 1999, addresses certain violations of international humanitarian law in international armed conflict included in Article 8 (2) (b) (viii - transfers and deportation), (x - mutilation and experiments), (xiii - destruction or seizure of property), (xiv - abolishing or suspending legal rights), (xv - compelling military service), (xvi - pillaging), (xxi - outrages upon personal dignity), (xxii - rape and other sexual violence) and (xxvi - conscripting or enlisting children). The third paper, issued on 29 June 1999, addresses violations of international humanitarian law in non-international armed conflict included in Article 8 (2) (e): (v - pillaging), (vi - rape and other sexual violence), (vii - conscripting or enlisting children), (viii - displacement of civilian population) and (xi - mutilation and experiments).

Amnesty International also largely endorses the detailed proposals by Costa Rica, Hungary and Switzerland based upon that study. Therefore, this paper is limited to preliminary comments about some concerns about these proposals, but does not attempt to repeat the legal analysis in the ICRC study. The paper also notes some of the serious problems with another government proposal concerning the articles addressed in the three ICRC papers and the Costa Rica, Hungary and Switzerland proposals. The absence of comments on particular provisions in proposals does not necessarily mean that Amnesty International has no concerns about those provisions.

¹ The first paper in this series was entitled, *The International Criminal Court: Fundamental principles concerning the elements of genocide*, February 1999 (AI Index: IOR 40/01/99), and distributed to delegates at the first session of the Preparatory Commission (16 to 26 February 1999).

In addition to this short paper for the second session of the Preparatory Commission on the elements of particular crimes, Amnesty International has issued two other papers specifically for this session, *The International Criminal Court: Ensuring an effective role for victims*, July 1999 (AI Index: IOR 40/10/99), and *The International Criminal Court: Drafting effective rules concerning the trial, appeal and revision*, July 1999 (AI Index: IOR 40/12/99). The organization is also making available to delegates at this session copies of two other documents of interest, *Appeal by Amnesty International to all states to ratify the Statute of the International Criminal Court as soon as possible*, 13 May 1999 (AI Index: IOR 40/07/99), and *14 Principles on the Effective Exercise of Universal Jurisdiction*, May 1999 (AI Index: IOR 53/01/99), both of which were issued on 13 May 1999 at the Hague Appeal for Peace 1999.

PRELIMINARY COMMENTS CONCERNING THE ELEMENTS OF WAR CRIMES OTHER THAN GRAVE BREACHES OF THE GENEVA CONVENTIONS

I. Basic principles relevant to elements of all crimes

1. All elements of crimes must be fully “consistent” with the requirements of the Statute in order to protect the integrity of the Statute, as required by Article 9 (3).

2. All elements of crimes must be fully consistent with other international law.

3. Each element of a crime should clarify what must be proved, but not increase the difficulties for the Prosecutor in proving guilt beyond reasonable doubt in accordance with the requirements of a fair trial. Elements should be sufficiently clear so that the defendant can prepare his or her defense to the charges.

4. The elements of crimes must “assist the Court in its interpretation of articles 6, 7 and 8”, as required by Article 9 (1).

II. Introduction

There is an extensive literature on the history and definition of war crimes in international law other than grave breaches of the Geneva Conventions which can assist the delegates in preparing draft elements of these crimes. In particular, the International Committee of the Red Cross has published the *Commentary on the Additional Protocols of 1977 to the Geneva Conventions of 1949* and the *Commentary: Definition of War Crimes for the Preparatory Committee on the Establishment of an International Criminal Court* (December 1997).

Amnesty International included a commentary on such war crimes before the adoption of the Rome Statute which it distributed to delegates at the Preparatory Committee at its third session (10 to 21 February 1997), *The international criminal court: Making the right choices - Part I: Defining the crimes and permissible defences and initiating a prosecution*, January 1997 (AI Index: IOR 40/01/97). In addition, there is a useful commentary, with a bibliography, on Article 8 of the Statute by Michael

Cottier, William Fenrick & Andreas Zimmerman, *Article 8*, in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (1999) (forthcoming).

As the study by the International Committee of the Red Cross demonstrates, since the 19th century, war crimes have been repeatedly recognized in international instruments and in international and national jurisprudence as part of international customary, as well as conventional, law, with considerable consistency in their definition, including the extensive and detailed jurisdictional definition of these crimes in Article 8 of the Rome Statute. Nevertheless, in the light of some of the differences in these definitions, devoting a section of the Elements of Crimes to crimes against humanity could "assist the Court in the interpretation and application of article . . . 8".

III. General points

No requirements to prove accused knew that conduct was without lawful justification or excuse. There is no requirement that the Prosecutor prove that the accused knew that it was without lawful justification or excuse. Such a requirement would create an impermissible defence, not authorized by the Statute, and create an added hurdle for the Prosecutor.

Conduct, not acts. Article 30 (2) (a) makes clear that the Court has jurisdiction over conduct - which includes both acts and omissions - not just acts.

IV. War crimes in international armed conflict - Article 8 (2) (b)

In the context of and associated with an international armed conflict. Common Element 1 of the Costa Rica, Hungary and Switzerland paper, that "[t]he conduct took place in the context of and was associated with an international armed conflict", is sufficiently broad to avoid definitional problems which plagued the jurisprudence of the International Criminal Tribunal for the former Yugoslavia until the recent decision by the Appeals Chamber in the *Tadić* case.²

The common element 1 proposed in the United States paper, that "the act took place in the course of international armed conflict", is too narrow and could result in a lack of clarity whether violations of international humanitarian law during an occupation after a truce or murder of prisoners of war held after the end of hostilities fell within the Court's jurisdiction.

Deportation or transfer - Article 8 (2) (b) (viii). The current wording of Element 2 (b) concerning deportation or transfer by the perpetrator of all or parts of the population of the occupied

² *Prosecutor v. Tadić*, Judgement, Case No. IT94-1-A, 15 July 1999 (Appeals Chamber).

territory within or outside this territory appears to give the Court sufficient guidance.³ It will be up to the Court to determine in a particular case what constitutes a part of the population.

There is no requirement that the accused have intended to transfer one or more persons from their lawful place of residence, as in Element 3 of Article 8 (2) (a) (vii) in the United States paper, which it incorporates by reference in the elements of Article 8 (2) (b) (viii). There is also no requirement that the Prosecutor prove that “the accused knew that it was without . . . lawful justification or excuse”, as in Element 4 of Article 8 (2) (a) (vii) in the United States paper, which it incorporates by reference in the elements of Article 8 (2) (b) (viii).

Mutilation and experiments - Article 8 (2) (b) (x). Element 4 of physical mutilation in the Costa Rica, Hungary and Switzerland proposal is more restrictive than Element 4 of medical or scientific experiments in that it omits serious dangers to the “integrity of a person”. Since there could be mutilations which do not “seriously endanger the physical or mental health” of particular victims, such as the branding of millions of concentration camp inmates with numbers, Element 4 of physical mutilation should include serious endangerment of the “integrity of a person”. Element 5 of both physical mutilation and of medical or scientific experiments is too restrictive as it appears to adopt a national, rather than an international, standard of medical treatment. It is also worded awkwardly in a way which suggests that one factor is whether the person conducting the procedure is at liberty or not. This element should be amended to clarify that “generally accepted medical standards” should be the higher of the standards applicable in that country or internationally. It should not be a defence that the generally accepted medical standards in a country where the regime had killed many of the medical professionals, as in Cambodia in the 1970s, were minimal. Of course, international standards would not require the standards of the most economically developed countries in the world.

It is not an element of the crime of mutilation, as in Element 2 of Article 8 (2) (a) (ii) in the United States paper, which is incorporated by reference in the elements of Article 8 (2) (b) (x), that the victim have been “forcibly subjected . . . to extreme physical or mental suffering grossly inconsistent with universally recognized principles of humanity and generally accepted rules of international law”. To establish the crime of mutilation, the Prosecutor should not have to prove, as in Element 3 of Article 8 (2) (a) (ii) in the United States paper, which is incorporated by reference in the elements of Article 8 (2) (b) (x), that “the accused knew it was committed without . . . lawful justification or excuse”. The same rationale applies to Element 4 of the United States paper with respect to the crime of committing prohibited medical or scientific experiments.

It is not an element of the crime of mutilation or conducting prohibited medical or scientific experiments that there be an act or that the conduct of the accused cause “death or serious bodily or mental harm to the person or persons”, as in Element 4 of the crime of mutilation and Element 6 of the

³Element 2 of the Costa Rica, Hungary and Switzerland proposal needs to be amended to reflect that the crime within the Court’s jurisdiction is one committed by an individual, not a state. The phrase, “parts of *its* own population in the territory *it* occupies”, refers to state, not individual responsibility.

crime of prohibited medical or scientific experiments, as in the elements of Article 8 (2) (a) (ii) in the United States paper, which is incorporated by reference in the elements of Article 8 (2) (b) (x).

Destruction or seizure of property - Article 8 (2) (b) (xiii). The elements set forth in the Costa Rica, Hungary and Switzerland paper appear to be sufficient, given the extensive interpretation in international law of the meaning of the war crime of destroying or seizing property of the adversary.

The use of the word “appropriated” in Element 3 of Article 8 (2) (a) (iv) in the United States paper, which is incorporated by reference as an element of Article 8 (2) (b) (xiii), appears to be unwarranted given the different meanings of appropriated and seized, as explained in the ICRC paper. The requirement that the Prosecutor prove that the accused knew that the conduct “was without lawful justification or excuse”, as in Element 4 of Article 8 (2) (a) (iv) of the United States paper, incorporated by reference as an element of Article 8 (2) (b) (xiii), is not acceptable for the reasons discussed above. The comment to Article 8 (2) (b) (iii) stating that “the threshold for war crimes . . . should preclude prosecution for any destruction or appropriation that is not extensive” is not a correct interpretation of the threshold, which simply indicates that greater attention should be given to war crimes of a certain scale, not that only war crimes which were “committed as part of a plan or policy or as part of a large-scale commission of such crimes”.

Abolishing or suspending rights - Article 8 (2) (b) (xiv). Element 2 of the Costa Rica, Hungary and Switzerland paper restates the definition, but changes “hostile party” to “adverse party”. In the absence of any clarification of the term, the wording of the original text should be retained. This element leaves the interpretation of the crime to the Court. If further clarification in the element is desired, it should make clear that the broader German or Continental interpretation of its scope, not the restrictive Anglo-American interpretation, should be followed.

There simply is no basis even in the restrictive Anglo-American interpretation of this crime for three of the elements in the United States paper. In that paper, the crime is described as the war crime of denying judicial guarantees and the following three elements (incorporated from the United States elements of Article 8 (2) (a) (vi)): “the accused caused a punishment to be imposed on a prisoner of war or civilian”, “the accused intended to deprive the person of a fair and regular trial” and the “act was performed without according the person a fair and regular trial as prescribed by the Third and Fourth Geneva Conventions of 1949”. This approach excludes persons who do not fit into the protected persons categories applicable to the Geneva Conventions, requires a specific intent not found in the law, is limited to acts rather than applying to conduct and omits legislative and administrative measures depriving persons of their legal rights.

Compelling military service - Article 8 (2) (b) (xv). Element 2 of the Costa Rica, Hungary and Switzerland paper requiring the accused to have “compelled by pressure or coercion a national of an adverse party to take part in the operations of war directed against his or her own country”, appears to be acceptable, but the use of the term “adverse party” in place of “hostile party” without further explanation does not help to clarify the scope of the crime. Element 3, which requires proof that “[t]he compelled acts were not permissible as a prisoner of war or civilian labour, as defined under international humanitarian law”, is too narrowly defined since it would appear to permit an accused to compel labour in violation of International Labour Conventions, other human rights treaties and customary law.

The requirement in Element 5 of Article 8 (2) (a) (v) of the United States paper, which is incorporated by reference in the elements of Article 8 (2) (b) (xv), that the accused knew the conduct was without lawful justification or excuse is not acceptable for the reasons discussed above.

Outrages upon personal dignity, in particular humiliating and degrading treatment - Article 8 (2) (b) (xxi). Element 2 of the Costa Rica, Hungary and Switzerland paper, providing that, with respect to humiliating and degrading treatment, the conduct of the accused “constituted an attack on human dignity and caused - either in the eyes of others or in the eyes of the victim - humiliation or debasement attaining a minimum level of severity”, seems to be satisfactory. However, the failure to include elements of other outrages upon personal dignity not otherwise included in other crimes within the Court’s jurisdiction must not be read as limiting this crime to humiliating and degrading treatment.

The elements of the crime of committing outrages upon personal dignity, defined in the United States paper as the war crime of degrading treatment, are too restrictive. Element 3 requires that “[t]he accused have intended to humiliate and degrade one or more persons and thereby inflict severe mental pain or suffering upon them”. This level of severity is too high as it is the same as for torture under Article 1 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment. It is well settled that torture involves far greater pain and suffering than other ill-treatment. There is no requirement in this crime that the accused had custody of or control over the victim at the time of the crime, as stated in the United States paper. There is also no requirement that the conduct be limited to acts or that this conduct (or perhaps pain is meant) be inherent in or incidental to lawful sanctions as is found in the this paper. For the reasons stated above, there is no requirement that the accused knew that the conduct was without lawful justification or excuse.

Rape and other sexual violence - Article 8 (2) (b) (xxii). These crimes should have essentially the same definitions as found in Article 8 (2) (e) (war crimes in non-international armed conflict) and in Article 7 (crimes against humanity).

- ***rape.*** Element 2 of the crime of rape in the Costa Rica, Hungary and Switzerland paper for this crime is gender neutral, appears to be sufficiently clear and comprehensive and reflects current international law. However, it should use a term that is understood to reflect an attack on the integrity of a person, rather than one that reflects more restrictive and outdated notions of honour.⁴ Element 3 properly states that rape is committed “by coercion or force or threat of force against the victim or a third person”. As the Trial Chamber noted in the *Akayesu* judgment, “coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain

⁴ See, e.g., *Prosecutor v. Akayesu*, Judgement, 2 September 1998, Case No. ICTR-96-4-T, Appeals Chamber, Section 7.7 (“The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”); *Prosecutor v. Delalić („elibi fi”)*, Judgement, 16 November 1998, Case No. IT-96-21-T, Trial Chamber, para. 479 (citing this conclusion).

circumstances”.⁵ The determination of what circumstances are coercive in a particular case is a question of fact and it would seem inadvisable to list specific examples which are likely to prove either too restrictive or arbitrary in future cases.

Element 4 of the crime of rape as suggested in the United States paper, which limits the crime to penetration by force, would exclude a large number of cases where rape is committed by other forms of coercion or by threats of force. The comment in the United States paper noting that “the existence of specific crimes of sexual violence in articles 8.2 (b) (xxii) and 8.2 (e) (vi) does not undermine the fact that those same acts might constitute the essential element of some other offence under the Statute” is a useful reminder which should be incorporated in some fashion in the Elements of Crimes.

- **sexual slavery.** Element 2 of the crime of sexual slavery as defined in the Costa Rica, Hungary and Switzerland paper is too narrow. The concept of “exercising any or all of the powers attaching to the right of ownership” must not be read restrictively in the meaning of ownership rights recognized in national laws permitting slavery. Sexual slavery as a crime against humanity has been described as follows:

“[i]t should be considered as a particular form of enslavement which includes various forms of slavery. The word ‘sexual’ in the current paragraph [Article 7 (1) (g)] denotes the result of this particular crime of enslavement: limitations on one’s autonomy, freedom of movement and power to decide matters relating to one’s sexual activity.

Sexual slavery thus also encompasses situations where women and girls are forced into ‘marriage’, domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by their captors. According to the Special Rapporteur of the Working Group on Contemporary Forms of Slavery ‘[p]ractices such as the detention of women in ‘rape camps’ or ‘comfort stations’, forced, temporary ‘marriages’ to soldiers and other practices involving the treatment of women as chattel, are both in fact and in law forms of *slavery* and, as such, violations of the peremptory norm prohibiting slavery.’”⁶

Element 2 of the crime of sexual slavery as proposed in the United States paper confuses war crimes and crimes against humanity by requiring the Prosecutor to prove an “attack”, which is a concept found in the Statute only in Article 7, which defines the scope of the Court’s jurisdiction over crimes against humanity. It has no place in defining the Court’s jurisdiction over war crimes.

- **enforced prostitution.** Element 2 of the crime of enforced prostitution as defined in the Costa Rica, Hungary and Switzerland paper is very general and does not appear to distinguish this crime adequately from other crimes of sexual violence.

⁵ *Id*

⁶ Machteld Boot, Rodney Dixon & Christopher Keith Hall, *Article 7*, in Otto Triffterer ed., *Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes, Article by Article* (Advance Copy, 17 February 1999), 26-27 (footnotes omitted, emphasis in original).

Element 2 of the crime of enforced prostitution as proposed in the United States paper confuses war crimes and crimes against humanity by requiring the Prosecutor to prove an “attack”, which is a concept found in the Statute only in Article 7, which defines the scope of the Court’s jurisdiction over crimes against humanity. It has no place in defining the Court’s jurisdiction over war crimes. Element 4 of the crime of enforced prostitution as proposed in the United States paper is odd, since it suggests that the *accused* have received a pecuniary or other material benefit in exchange for or in connection with the sex acts with the victim. If the *victim* rather than the accused was intended, then this element reflects outdated concepts and suggests that the victim is to some extent implicated in the crime. It has no place in the Statute.

- forced pregnancy. Elements 2 and 3 of the crime of forced pregnancy as defined in the Costa Rica, Hungary and Switzerland appear to reflect accurately the definition of the crime as stated in Article 7 (2) (f).

Element 5 of the crime of forced pregnancy as proposed in the United States paper, that the imprisonment of the victim have been without lawful justification or excuse and that the accused knew it was without lawful justification or excuse is not acceptable.

- enforced sterilization. Element 2 of the crime of enforced sterilization as defined in the Costa Rica, Hungary and Switzerland paper appears to be satisfactory.

Element 5 of the crime of forced pregnancy as proposed in the United States paper, that the imprisonment of the victim have been without lawful justification or excuse and that the accused knew it was without lawful justification or excuse is not acceptable.

- other sexual violence also constituting a grave breach of the Geneva Conventions. Element 2 of the crime of other sexual violence as defined in the Costa Rica, Hungary and Switzerland paper needs further clarification with respect to what is a “psychological act” amounting to a war crime which could lead to life imprisonment. It is also not clear what is meant by an “act of a sexual nature” and whether this term is intended to have the same restrictive meaning as in the United States proposal:

“*Sexual nature* means involving the sexual organs and/or the intent to sexually arouse. An act of a sexual nature means an act of intentional touching of the sexual organs with the intent to sexually arouse either the accused, the victim or a third party when applicable (e.g., sexual slavery).”⁷

Unfortunately, the Costa Rica, Hungary and Switzerland paper does not clarify a regrettable ambiguity in the definition of the crime. The drafters intended that the phrase “also constituting a grave breach of the Geneva Conventions” simply mean that a person could be convicted of the prohibited conduct both for one of the crimes of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any

⁷ Proposal submitted by the United States of America: Draft elements of crimes, U.N. Doc. PCNICC/1999/DP.4, 4 February 1999.

other form of sexual violence, as appropriate, and for a grave breach of the Geneva Conventions. It was not intended that the Prosecutor have to prove that each of these specific crimes also constituted a grave breach of the Geneva Conventions, which would restrict the scope of the crime to persons protected by those treaties.⁸

Element 2 of the crime of other sexual violence as proposed in the United States paper confuses war crimes and crimes against humanity by requiring the Prosecutor to prove an “attack”, which is a concept found in the Statute only in Article 7, which defines the scope of the Court’s jurisdiction over crimes against humanity. It has no place in defining the Court’s jurisdiction over war crimes. The requirement in Element 3 of the crime of other sexual violence that it be committed “by force”, as urged by the United States in its paper, is too restrictive as it would exclude other forms of coercion and threats of force. Element 4 of the crime of other sexual violence as proposed in the United States paper, which requires that there be an “act” and that it be “of a sexual nature” is too narrow, for the reasons stated above.

Conscripting or enlisting children - Article 8 (2) (b) (xxvi). Elements 2 and 3 of the crime of conscripting or enlisting children as defined in the Costa Rica, Hungary and Switzerland paper reproduce the elements of the definition in the Statute and are, therefore, satisfactory. However, Element 4 is not acceptable. It requires that the Prosecutor prove that the accused “knew or was aware that the child was under the age of fifteen years” or that the accused “was wilfully blind to the fact that the child was under the age of fifteen years”. The accused must not be able to avoid his or her duty to investigate the age of all persons serving in the national armed forces, for example, by asking for proof of age or a statement by a parent or guardian.

Element 2 of the crime of conscripting or enlisting children as set out in the United States paper does not exactly reproduce the formulation of the crime in the Statute. It changes “using them to participate actively in hostilities” to “use them for active participation in hostilities”. Without further clarification of the new wording, the formulation in the Costa Rica, Hungary and Switzerland proposal is preferable. Element 3 of the crime as used in the United States paper refers to “act”, not “conduct”, and, therefore, is not acceptable. Element 4, which requires that “the accused knew that the person or persons enlisted, conscripted or used had not attained fifteen years of age” would allow persons to avoid all criminal responsibility by refusing to take any steps to verify the age of persons in the armed forces or participating actively in hostilities.

V. Common Article 3 - Article 8 (2) (c)

Persons protected. Common Element 1 of the crime of violating prohibitions found in common Article 3, which applies in non-international armed conflict, includes all persons protected by Article 8 (2) (c) and common Article 3.

⁸ See Christopher Keith Hall, *The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court*, Am. J. Int’l L. (1998), vol. 92, 334.

The comment in the United States paper indicates that it would not include all persons protected by Article 8 (2) (c) and common Article 3, but instead, by using part of the elements it proposed for Article 8 (2) (a), the grave breach of murder, would include only “civilians taking no active part in hostilities” and “combatants placed *hors de combat*”.

In the context of and associated with an international armed conflict. Common Element 1 of the Costa Rica, Hungary and Switzerland paper, that “[t]he conduct took place in the context of and was associated with an armed conflict not of an international character”, is sufficiently broad to avoid definitional problems which plagued the jurisprudence of the International Criminal Tribunal for the former Yugoslavia until the recent decision by the Appeals Chamber in the *Tadić* case.⁹

The common element 1 proposed in the United States paper, that “the act took place in the course of armed conflict”, is not consistent with Article 8 (2) (c), which uses the term “an armed conflict not of an international character”, and the requirement that an act - which should be the broader term “conduct” - could result in a lack of clarity whether violations of international humanitarian law after a truce or murder of persons detained in connection with the conflict held after the end of hostilities fell within the Court’s jurisdiction.

Murder. Elements 2, requiring that the accused have “killed a person”, and 3, requiring that “[a]t the time of the killing the perpetrator had the intent to kill, or inflict grievous bodily harm upon the victim with the knowledge that such harm was likely to cause the victim’s death, and was reckless whether death ensues or not”, appear to be consistent with international law.

Element 2 of the crime of murder as provided in the United States paper (incorporated by reference from its elements of Article 8 (2) (a) (i)), requiring that the accused have “intended to kill or cause death”, is too narrow since it leaves out the alternative element of intention to inflict grievous bodily harm where the accused knew that such harm was likely to cause the victim’s death and was reckless and death occurred as a result. Elements 2 and 3 are unacceptable because, as noted above, they fail to protect persons protected by common Article 3 and Article 8 (2) (c). The requirement in Element 4 that the acts be committed without lawful justification or excuse and that the accused knew they were without lawful justification or excuse is unacceptable for the reasons stated above. Although the comment to Article 8 (2) (a) (i) recognizes that the *actus reus* for this crime includes a failure to fulfil a duty, it would be better to use the statutory term “conduct”. Although it is true that if the death is the foreseeable consequence of a failure to fulfil a duty, then intent can be inferred, it is essential not to exclude situations where the accused knew that the death was likely and was reckless concerning whether death would result. The suggestion in the comment that “the killing of an escaping prisoner of war would not result in culpability for this offence” is not an accurate statement of the law in all cases; a warning must be given.

Mutilation. Element 2 of the crime of mutilation as defined in the Costa Rica, Hungary and Switzerland paper, reflects the statutory language.

⁹ *Prosecutor v. Tadić*, Judgement, Case No. IT94-1-A, 15 July 1999 (Appeals Chamber).

There is no discussion of this crime in the United States paper.

Cruel treatment. Element 2 of the crime of cruel treatment as defined in the Costa Rica, Hungary and Switzerland paper may set too high a threshold in the first alternative definition by requiring the accused to have “caused serious physical or mental suffering or injury upon the person”. The concept of “serious” pain or suffering must be interpreted as a lower threshold than “severe” pain or suffering, which amounts to torture. The alternative definition of the crime, “a serious attack on human dignity”, is acceptable.

The United States paper incorporates its proposed elements of the grave breach of inhuman treatment as elements of the crime of cruel treatment. However, under international law the crimes of torture, cruel treatment, inhuman treatment and degrading treatment are all separate crimes. Element 2 of the crime of inhuman treatment as urged in the United States paper sets an impermissibly high threshold of “extreme” pain or suffering, which is greater than for the crime of torture:

“That the accused committed an act against one or more persons that forcibly subjected the person or persons to extreme physical or mental pain or suffering grossly inconsistent with universally recognized principles of humanity and generally accepted rules of international law.”

Element 3, requiring proof of an act and that “the act was committed without, and the accused knew it was without, lawful justification or excuse”, is unacceptable for the reasons stated above. There is no requirement under international law to prove that an act caused death or serious bodily or mental harm to the person or persons as posited in Element 4 of the United States paper.

Torture. Element 2 of the crime of torture as defined in the Costa Rica, Hungary and Switzerland paper appears to be consistent with the Convention against Torture. Element 3, describing the persons who can be convicted of this war crime, appears to be broad enough to include persons involved with either party to the non-international armed conflict. Element 4 appears to be consistent with the Convention against Torture since it is clear from its wording that the list of prohibited purposes is non-exhaustive.

Element 2 of the crime of torture as presented in the United States paper imposes a difficult threshold of proof not required by the Convention against Torture by requiring the Prosecutor to prove beyond a reasonable doubt that “the accused intended to inflict severe physical or mental pain or suffering upon one or more persons”. The definition in the Convention against Torture makes it clear that the person need only have intended carry out conduct which did inflict severe pain or suffering, not also to have intended to inflict the severe pain or suffering. Element 3 of the crime as suggested in the United States paper imposes a requirement not found in the definition of torture under the Convention against Torture. Element 4, which is restricted to acts, not conduct, is, in any event, inconsistent with the definition in the Convention, which provides that torture “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”.

Failure to include other violence to life and person. Both the Costa Rica, Hungary and Switzerland paper and the United States paper fail to define the elements of the crime of other violence to life and person. It would be advisable to provide further clarity concerning the scope of this crime to

satisfy the fundamental principle of *nullum crimen sine lege* recognized in Article 22, but, in any event, this omission does not mean that this category is not a crime under the Statute.

Outrages upon personal dignity, in particular, humiliating and degrading treatment - Article 8 (2) (c) (ii). See discussion above of Article 8 (2) (b) (xxi).

Taking of hostages - Article 8 (2) (c) (iii). The definition in the Costa Rica, Hungary and Switzerland paper is largely satisfactory, but limiting the condition in Element 4 to the “safe release of the hostage” is too restrictive. It would exclude situations where the person detaining the hostage makes no promises concerning release, but only as to the safety of the hostage.

Element 3 of the United States paper, which is the same as that proposed for Article 8 (2) (a) (viii), that the conduct be without lawful justification or excuse and that accused knew the conduct was without lawful justification or excuse, is unacceptable for the reasons stated above. Element 5, like Element 4 of the Costa Rica, Hungary and Switzerland paper, is too restrictive in requiring a condition be release.

Unfair trials. The elements proposed in the Costa Rica, Hungary and Switzerland paper, which closely follow the Statute, are acceptable. The commentary makes clear that the list of rights is simply illustrative, not complete. In addition to the judicial guarantees mentioned in the ICRC paper and in the commentary, there are other rights. For a comprehensive statement of the scope of judicial guarantees which are generally recognized as indispensable, see Amnesty International, *Fair Trials Manual*, December 1998 (AI Index: POL 30/02/98).

VI. Other war crimes in non-international armed conflict - Article 8 (2) (e)

Rape and sexual violence - Article 8 (2) (e) (vi). See discussion above of Article 8 (2) (b) (xxii) - common Article 3

Conscripting or enlisting children - Article 8 (2) (e) (vii). See discussion above of Article 8 (2) (b) (xxvi).

Displacement of the civilian population - Article 8 (2) (e) (viii). The elements of the crime of displacement of the civilian population in the Costa Rica, Hungary and Switzerland paper appear to be consistent with the Statute.

Element 2 of the crime of displacement of the civilian population as defined in the United States paper, which requires that the accused have “intended to transfer a civilian population from its lawful place of residence”, is too restrictive and would permit states, as Nazi Germany did with Jews, Gypsies and others, to declare that a civilian population was no longer permitted under national law to remain in their homes. Element 3, requiring the Prosecutor to prove that “the accused caused a civilian population to be forcibly transferred . . . through expulsion or other coercive acts”, appears to add a requirement to the element of simply “ordering” such displacement. Element 4, requiring that the transfer be without lawful

justification or excuse and that the accused have known that it was without lawful justification or excuse, is not acceptable for the reasons discussed above.

Mutilation and experiments - Article 8 (2) (e) (xi). See discussion above of Article 8 (2) (b) (x).