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Proposal submitted by Colombia

Comments on the proposal submitted by Costa Rica, Hungary and Switzerland on Article 8, paragraph 2 (c), of the Rome Statute of the International Criminal Court (PCNICC/1999/WGEC/DP.10)

Our position on this discussion paper is as follows:

1. The tense used in the articles proposed in the document in question does not accurately reflect the intent behind the establishment of these prohibitions. Our delegation considers that it would be best to use the present tense, which covers both past and future events. Therefore, this proposal will use that tense in preference to the one used in the document which is the subject of these comments.
2. In order to standardize the terminology relating to offenders, a single term should be used to refer to such persons; the term “perpetrator” or “author” should be replaced. For technical legal reasons, we would suggest the word “agent”, which conveys the idea of the person committing the prohibited act.
3. The context in which accusations of war crimes are made is one of non-international armed conflict as defined under international humanitarian law. Non-international armed conflict should be defined according to article 3 common to the Geneva Conventions of 1949 and article 1 of Additional Protocol II thereof. It should be borne in mind that, as stated in the commentaries to article 3 common to the Geneva Conventions and Additional Protocol II:

Los sujetos que se enfrentan difieren según la categoría del conflicto. En un conflicto armado no internacional se enfrentan partes cuyo estatuto jurídico es fundamentalmente desigual. Los insurrectos, es decir, la mayoría de las veces una parte de la población, luchan contra el Gobierno establecido, que actúa en el ejercicio del poder público originario.¹ [The warring parties vary according to the type of

conflict. Non-international armed conflict involves a confrontation between parties whose legal status is fundamentally unequal. The dissidents, who are, in most cases, part of the population, are fighting against the established Government, which is exercising governmental authority.]

We therefore suggest that rather than speaking of “persons taking part in the hostilities”, it would be better to speak of “Parties to the conflict” in accordance with the wording used in article 3 common to the four Geneva Conventions of 1949.

This means that offences committed during situations of internal disturbances and tensions (article 8.2 (d)) do not lie within the Court’s competence.

4. After these general remarks, we will comment on each of the crimes.

4.1 **Article 8.2 (c) (i):** “*Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture*”.

4.1.1 **Murder.**

Murder shall be considered to have been committed where:

(a) The conduct takes place in the context of and is associated with an armed conflict not of an international character.

(b) The perpetrator causes the death of a person.

(c) The act is committed with the intent to cause death or to inflict bodily harm upon the victim with the knowledge and acceptance of the fact that such harm could cause death.

Commentary:

(a) The terminology of paragraph (b) has been corrected.

(b) Paragraph (c) has been simplified in order to express in simple language what is known in continental law as “*dolo eventual*” (implicit malicious intent). Thus, an act may be committed with *dolo directo* (malicious intent) where there is an intent to kill a person or with *dolo eventual* where death is caused by acts committed with the intent to inflict harm but in the knowledge that such harm could cause the person’s death, without this fact having prevented the perpetrator from committing the act in question, the consequences of which he accepts.

4.1.2 **Mutilation**

(a) The conduct takes place in the context of and is associated with an armed conflict not of an international character.

(b) The perpetrator mutilates a person through acts such as dismembering or the removal of organs.

Commentary:

The wording is made more specific in order to *give examples* of acts which could be considered mutilation in order to avoid begging the question or setting up a tautology.

4.1.3 **Cruel treatment**

(a) The conduct takes place in the context of and is associated with an armed conflict not of an international character.

(b) The perpetrator causes serious physical or mental suffering or injury upon the person or commits a serious attack on human dignity.

Commentary:

(a) The Spanish text of paragraph (a) has been amended to correspond to the wording of the Rome Statute.

(b) In paragraph (b), the word “serious” has been added to the Spanish text before “attack” in order to distinguish such acts from outrages upon personal dignity.

4.1.4 Torture

In the interests of better understanding, we have commented separately on each of the elements of this crime.

(a) The conduct takes place in the context of and is associated with an armed conflict not of an international character.

Commentary:

As in the previous case, the Spanish text of this paragraph has been amended to correspond to the wording of the Rome Statute.

(b) The perpetrator inflicts severe physical or mental pain or suffering upon the victim.

Commentary:

It should be emphasized that the Rome Statute represents a major change in the concept of responsibility. Responsibility falls on individuals, regardless of whether it also falls on the State and on whether such individuals acted as agents of the State or in their own capacity.

To seek to bring the definition of such conduct into line with that contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 would be to take a step backward since the acts mentioned in the Convention are committed during peacetime against persons in a situation of subjection as subjects of a State. Only in this context is the condition of being an “*agent of the State*” relevant: the Convention focuses on protecting individuals from violence committed by State officials.

In armed conflicts not of an international character, the subject with which we are concerned, there may be one or more non-State parties to the conflict who are subject to the provisions of international humanitarian law, any of whom may be accused of committing acts of torture, provided that the victim is under their **power or control**, “control” being defined as de facto domination exercised by non-State armed groups.

The proposal submitted by the delegations of Costa Rica, Hungary and Switzerland which is the subject of the commentary is based on the judicial precedents of the International Criminal Tribunal for the Former Yugoslavia. This basis should be used with particular care since, as confirmed by those precedents, its context — a struggle between various groups with claims to Statehood — took on the appearance of an international armed conflict because of specific, definite characteristics which are not applicable to non-international armed conflicts.

(c) The perpetrator has power over or control of the victim.

Commentary:

It should be further stressed that the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 refers to a situation other than a non-international armed conflict. Therefore, listing purposes as is done in paragraph (4) of the section on torture in the proposal under consideration would raise the threshold of

protection for the victims of acts of torture committed for purposes other than those mentioned therein. It should be borne in mind that during armed struggles, there is often the possibility that the conflict may worsen and that gratuitous acts of torture may be committed by members of any of the parties to the conflict.

4.2 **Article 8.2 (c) (ii):** “*Committing outrages upon personal dignity, in particular humiliating and degrading treatment*”.

Humiliating and degrading treatment

(a) The conduct takes place in the context of and is associated with an armed conflict not of an international character.

(b) The conduct of the perpetrator constitutes an attack on human dignity and causes — either in the eyes of the victim or in the eyes of other people — humiliation or debasement of a magnitude which the victim deems significant.

(c) The act is not sufficiently serious to constitute the crime of torture.

Commentary:

(a) Paragraph (b) establishes the minimum threshold above which an act is considered to constitute humiliating or degrading treatment; thus, acts which do not cause considerable humiliation or degradation do not constitute that crime.

(b) Paragraph (c) sets an upper threshold in order to establish the point at which an act no longer falls into this category and is defined as the crime of torture.

4.3 **Article 8.2 (c) (iii):** “*Taking of hostages*”.

(a) The conduct takes place in the context of and is associated with an armed conflict not of an international character.

(b) The perpetrator seizes, detains or otherwise deprives a person of his freedom.

(c) The perpetrator commits the act in question in order to compel a third party to act or refrain from acting as a condition for the victim’s release.

Commentary:

(a) Paragraphs (2) and (3) of this section of the proposal under consideration have been amended because the taking of hostages consists of depriving a person of his freedom or threatening to do so, not, as stated in paragraph (3), of threatening to kill or injure him. For that reason, paragraph (3) has been deleted since it is covered by the general provisions of the Statute, particularly those which concern the attempted commission of a crime. In cases where there is no attempted commission because the threat was not carried out, the act would be punishable under the crime of terrorism.

(b) The wording of paragraph (c) has been simplified in our proposal in order to avoid repetition which might lead to confusion since the reference to a third party covers all the possibilities mentioned in the proposal.

4.4 **Article 8 (2) (c) (iv):** “*The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable*”.

(a) The conduct takes place in the context of and is associated with an armed conflict not of an international character.

(b) The sentence is passed or executed:

- (b.1) Without previous judgement being pronounced; or
- (b.2) By a court that is not regularly constituted; or
- (b.3) Without the judicial guarantees which are generally recognized as indispensable under international humanitarian law.
- (c) The acts mentioned in paragraph (c) are caused by the perpetrator.

Commentary:

(a) The acts described in paragraph (b) may be viewed as alternatives since any one of them is considered a crime.

(b) The judicial guarantees must be those recognized by international humanitarian law, which takes into consideration the nature of the war; it would be inappropriate to adopt those of international human rights law, which are intended to apply during peacetime. One instrument which may be useful in this regard is article 6, paragraph 2, of Additional Protocol II to the Geneva Conventions of 1949, which establishes an indispensable minimum of judicial guarantees during time of war.

(c) This avoids applying high thresholds appropriate to normal situations, such as those envisaged in the proposal under consideration, to states of emergency or of conflict.

(d) We do not consider the commentary annexed to the proposal under consideration to be appropriate for the reasons set forth above and because we anticipate future progress, including the development of additional guarantees.

Notes

¹ Comentario del Protocolo del 8 de junio de 1977 adicional a los Convenios de Ginebra del 12 de agosto de 1949 relativo a la protección de las víctimas de los conflictos armados sin carácter internacional y del artículo 3 de estos Convenios (Santafé de Bogotá, Plaza y Janés/International Committee of the Red Cross, 1998), p. 91.
