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Draft elements of crimes

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I. General comments

1. The Elements of Crimes are intended to assist the Court in the interpretation and application of articles 6, 7 and 8 of the Statute. They should also provide a tool for the Prosecutor and defense counsel to identify appropriate issues during litigation. Specifically, the Elements of Crimes describe the factual findings that would establish culpability and justify conviction for each offence under the Statute.
2. The Elements of Crimes derive from the definitions found in articles 6, 7 and 8. They do not change the definition of any offence; they do not alter the jurisdiction of the Court; and they are consistent with the Statute. Any question of interpretation must be resolved consistently with the Statute. The Elements do not replace the general principles of law found in other articles in the Statute. In some instances, the Elements clarify the specific manner in which general principles of criminal law would be applied to a specific offence. For example, article 30 clarifies that material elements of offences must be committed with intent and knowledge. This obviates the need to have the Elements state that the accused "intentionally" committed a certain act. However, many offences also have a *mens rea* element requiring specific intent. In those instances, the Elements may provide the separate element that explains the requisite motivation or consequential intent for that particular offence (e.g., killing with the specific intent to destroy a population as opposed to merely intentionally killing).
3. Each offence defined as a crime in the Statute is listed below with an accompanying set of elements. Since some crime definitions in the Statute duplicate what is essentially the same offence (e.g., deportation under article 8.2(a)(vii) and under 8.2(b)(viii)), cross-references are used to avoid duplicating elements lists. In some instances, a particular paragraph in the Statute subsumes several different offences (e.g., the several distinct sexual offences found in article 8.2(b)(xxii)). In those cases, separate sets of elements are provided for each offence or crime covered by the paragraph. Unless stated otherwise, all element lists are cumulative prerequisites to establish guilt.
4. Articles 25 and 28 describe theories of culpability that do not always involve completed criminal acts committed by the accused's own hand (e.g., attempts, command responsibility). The elements listed for articles 6, 7 and 8 would appear to be inapplicable to instances where the act is incomplete or liability is vicarious. Therefore, an "Inchoate offences" section is provided which explains the application of the crime-specific elements to situations covered by articles 25 and 28.

II. Terminology

The following meanings should be applied to terms as used within this Elements of Crimes annex:

1. *Appropriate (v.)* means to exercise dominion over an object belonging to another person, against that person's will, for the purpose of making it serve one's own use or pleasure.
2. *Attack* means any activity directly intended to harm or cause harm to the victim(s) through use of force or compulsion. It does not necessarily involve military operations.
3. *Attack directed against any civilian population* means a course of conduct involving the multiple commission of the act in question against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

4. *Civilian object* means any object that is not a military objective.
5. *Collateral damage* means that incidental injury or additional damage that was not intended by an attack or course of action. Incidental injury or death to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective is not per se unlawful. However, the norm codified in article 8.2(a)(iv) (sometimes referred to as the principle of proportionality) may prohibit some attacks on legitimate military objectives that would cause collateral damage or injury that is clearly excessive in the light of the overall military advantage anticipated.
6. *Committed by force* means that the sexual act was accomplished by coercion or force or threat of force against the victim or a third person. The threat of force can be either express or implied and must place the victim in reasonable fear that he or she or a third person will be subjected to violence, detention, duress or psychological oppression if the victim does not comply. Besides direct threats by the perpetrator, this term encompasses situations where the accused takes advantage of immediate conditions that are shown to be inherently coercive. Evidence of consent may negate the necessary force element. However, consent may not be inferred if resistance would have been futile, if the victim was forcibly detained, if resistance is overcome by threats of death or great bodily harm or if the victim is unable to resist because of the lack of mental or physical faculties.
7. *Conditions of life* means circumstances involving the deprivation of resources indispensable for survival. They would include deprivation of food, water, shelter or medical supplies.
8. *Conscript or enlist (v.)* means to cause to enter into military service.
9. *Hors de combat* means a combatant who: (a) is in the power of an adverse party to a conflict; (b) has clearly expressed an intention to surrender; or (c) has been rendered unconscious or otherwise incapacitated owing to wounds or sickness, and therefore is incapable of defending himself. This status only applies provided that he or she exhibits no hostile intent, abstains from any hostile act and does not attempt to escape.
10. *Imprison* means to detain or confine to a particular place without consent, either directly or through the imposition of some other severe deprivation of physical liberty.
11. *In the course of armed conflict* and *in the course of international armed conflict* mean in direct association with the conduct of military operations arising from a total or partial military occupation or from hostilities in which the scope, duration and intensity of the use of force amounts to that of an armed conflict under international law. The presence of this element requires, for war crimes, that the alleged acts be closely related to the hostilities. For example, common crimes that occur among or between troops within a unit would not be war crimes merely because the offences occurred during a time period when armed conflict was taking place; the offence must be associated with a military operation.
12. *Lawful justification or excuse* means justification based on security, military or operational considerations or other imperative reasons of public welfare or other specific lawful authorization or requirement. For example, where authorized by the law of armed conflict, military necessity constitutes "lawful justification or excuse". An element requiring an absence of lawful justification or excuse is included in situations where the *actus reus* of the offence is similar or identical to a lawful act. It is, in effect, a defence that is specific to certain offences, i.e., a lawful purpose for a particular act relieves the accused of criminal responsibility. The *scienter* requirement of knowledge of a justification's inadequacy permits a defence, especially

in the case of obedience to a directive or fulfilment of a duty, when an accused may have reasonably believed that the excuse or justification was lawful. For a justification or excuse to be lawful, the activity in question must be consistent with applicable treaties and the principles and rules of general international law, including the established principles of the law of armed conflict, or general principles of law derived by the Court from national laws of legal systems of the world, where those national laws are not inconsistent with the present Statute and with international law.

13. *Liberty* means the freedom to move, act and make individual decisions as normally guaranteed by universally recognized rules of international law and the laws of the relevant State or society.
14. *Military necessity* means that which is required to accomplish a lawful military mission. The principle of military necessity authorizes that use of force, not otherwise specifically prohibited by the law of armed conflict, required for mission accomplishment or submission of the enemy. Since the evaluation is necessarily subjective, *ex post facto* analysis of a military necessity determination must focus only on the decision maker's perspective at the time of the decision.
15. *Military objective*, insofar as objects are concerned, means objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
16. *Military purpose* means any goal or function that makes an effective contribution to military action or offers a military benefit.
17. *Open for immediate, unresisted occupation* means that the locality has been declared by appropriate authorities to the forces of the accused to be undefended; all combatants, as well as mobile weapons and mobile military equipment, have been removed; no hostile use has been or is being made of any fixed military installations or establishments; no acts of hostility have been committed by its authorities or population; and no activities in support of military operations have been undertaken therein.
18. *Prolonged period of time* means a period in excess of six months.
19. *Poison* means any substance specifically designed to cause death through the toxic properties of toxic chemicals or agents which would be released as a result of the employment of munitions or devices. It does not include riot control agents designed to cause temporary incapacitation. It includes asphyxiating gases as well as any other analogous liquid, material or device.
20. *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).
21. *Systematic* means that the attack constitutes, is part of or is in furtherance of a preconceived plan or policy, or repeated intentional practice over a period of time. It excludes isolated offences.
22. *Taking no active part in hostilities* means abstaining from any hostile act and not otherwise directly supporting the conduct of military operations.
23. *Transfer* means to unlawfully displace, without consent, by expulsion or other coercive acts, from an area in which the transferee is lawfully present, to another area.

24. *Widespread* means the attack is massive in nature and directed against a large number of persons. It excludes isolated offences.

III. Article 6: Crimes of genocide

Article 6(a): Genocide by killing

Elements

1. That the accused intended to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.
2. That the accused killed one or more persons in that group in furtherance of that intent.
3. That the person or persons were killed in conscious furtherance of a widespread or systematic policy or practice aimed at destroying such group.

Article 6(b): Genocide by harming

Elements

1. That the accused intended to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.
2. That the accused committed an act against one or more persons in that group in furtherance of that intent.
3. That the act resulted in serious mental or physical harm.
4. That the person or persons were harmed in conscious furtherance of a widespread or systematic policy or practice aimed at destroying such group.

Article 6(c): Genocide by inflicting conditions of life

Elements

1. That the accused intended to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.
2. That the accused inflicted certain conditions of life upon one or more persons in that group in furtherance of that intent.
3. That the conditions of life were intended to physically destroy that group.
4. That the conditions of life contributed to the physical destruction of that group.
5. That the conditions of life were inflicted in conscious furtherance of a widespread or systematic policy or practice aimed at destroying such group.

Article 6(d): Genocide by preventing births

Elements

1. That the accused intended to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

2. That the accused forcibly imposed certain measures upon one or more persons in that group in furtherance of that intent.
3. That the measures imposed were intended to prevent births within that group.
4. That the measures imposed had the effect of preventing births within that group.
5. That the measures were imposed in conscious furtherance of a widespread or systematic policy or practice aimed at destroying such group.

Article 6(e): Genocide by transferring children

Elements

1. That the accused intended to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.
 2. That the accused forcibly transferred one or more persons under the age of fifteen from that person's or those persons' lawful residence in furtherance of that intent.
 3. That the person or persons were transferred in conscious furtherance of a widespread or systematic policy or practice aimed at destroying such group.
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