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**Preparatory Commission for the International Criminal Court
Working Group on Elements of Crimes**

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**Comments by Colombia on document
PCNICC/1999/WGEC/RT.5/Rev.1 submitted by the Coordinator**

**I. General comments concerning Elements of War Crimes committed in
the context of an armed conflict of a non-international character**

1. As we noted in document PCNICC/1999/WGEC/DP.23 of 9 August 1999, the Colombian delegation considers that, as a general rule, the conduct must take place in the context of an armed conflict and must also be related to the conflict. In the case of some crimes, however, such a dual relationship cannot exist, as the very nature of the crime makes clear. It is therefore our view that for crimes such as the conscription of children under the age of 15 and other crimes covered by the law of The Hague, such as pillage, denial of quarter and attacks on or bombing of defenceless populations, the relationship to the conflict is clear, and it is therefore unnecessary to specify it.

2. In addition, as we have noted many times in various documents, the terminology used to designate the author of the crime must be consistent.

3. We would insist on the proposal made in several documents submitted by the Colombian delegation that a distinction be made between those elements of crimes which are objective and the mental element or criminal intent.

The Statute of the Court clearly distinguishes between the Elements of Crimes in Part 2 (Jurisdiction, Admissibility and Applicable Law), which the Preparatory Commission is to draw up pursuant to resolution F adopted by the Conference of Plenipotentiaries in accordance with article 9, and the mental element, which appears in Part 3 (General Principles of Criminal Law, art. 30 ff.), in respect of which the Preparatory Commission has no mandate.

Consequently, the Elements of Crimes must not include any reference to the mental element, since the Elements of Crimes determine the Court's jurisdiction, whereas the

mental element must be demonstrated during the trial. To include it would result, in Colombia's view, in a violation of the Statute and an inexcusable limiting of the Court's jurisdiction.

4. In order to avoid any confusion, the wording of the Elements of Crimes must adhere strictly to the terminology used in the list of crimes in the Statute.

II. Comments on article 8, paragraph 2 (c) (i)

1. War crimes of murder

As noted in document PCNICC/1999/WGEC/DP.15 of 29 July 1999, article 8, paragraph 2 (c) (i), describes the crime of murder, which means that the elements must refer to death or to bodily harm that is intended to cause death. Point 3 in the Coordinator's document, which stipulates awareness of the victim's status as a protected person is not, in the light of the third general comment above, an element of crimes and should therefore be deleted. It is sufficient that the victim or victims are not participating directly or indirectly in the hostilities because they are civilians or *hors de combat*.

2. War crime of mutilation

Awareness of the circumstances establishing the victim's status as a protected person should be deleted from point 4 because it has no bearing on the nature of the crime of mutilation.

3. War crime of cruel treatment

Point 3, concerning awareness of the victim's circumstances, should be deleted because it has no bearing on the nature of the crime.

4. War crime of torture

To the extent that point 3 relates to awareness of the victim's circumstances, we would refer to our earlier comments.

III. Comments on article 8, paragraph 2 (c) (ii)

War crime of outrages upon personal dignity

Concerning point 3, we would refer to our earlier comments regarding awareness of the victim's circumstances.

Point 4 is a tautology and as such is unnecessary. In our view this crime must be distinguished from the crime of torture by including a clause to this effect: "The severity of the conduct shall not be such as to constitute the crime of torture".

IV. Comments on article 8, paragraph 2 (c) (iii)

War crime of taking hostages

Point 3 includes conduct which is not inherent to this crime and should therefore be deleted.

With regard to point 4, we refer to our earlier comments regarding awareness of the victim's circumstances.

V. Comments on article 8, paragraph 2 (c) (iv)

War crime of sentencing or execution without due process

The heading should be "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", which reflects the wording used in the Statute, rather than the wording that appears in the Coordinator's discussion paper.

With regard to point 3, we refer to our earlier comments regarding awareness of the victim's circumstances.

Point 5 adds circumstances of intent that have to do with evidence and indicates or suggests that judicial guarantees are open to interpretation, which is not the case. Judicial guarantees are obligatory; there can be no exceptions to them and they cannot be overlooked. Accordingly, this point should be deleted.
