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Comments by Colombia on document PCNICC/1999/WGEC/RT.6 proposed by the Coordinator

Article 8 (2) (b) (xxii)-1: War crime of rape

1. In point 1 of the Spanish version, the phrase “*estuvo asociada con el*” should be replaced by “*haya estado relacionada con el*” in order to harmonize it with the wording used in the case of the other crimes.

2. As we mentioned in document PCNICC/1999/WGEC/DP.16 of 29 July 1999, we consider that the extensive definition given in point 2 is confusing and does not reflect the protection which must exist in relation to the legally protected right of sexual freedom or freedom to exercise control over one’s body. The main verb which should be used here is to have access to another person, without distinction of gender, specifying the violent means in a general way. It should also be clear that the description must be open and not refer to the part of the body violated. It is suggested that the wording should be as follows: “The agent had sexual access to the victim”.

The foregoing wording would permit a better use of evidence and a significant development of jurisprudence, as in the case of the criminal tribunals for the former Yugoslavia and Rwanda. It should be recalled that the criminal tribunal for the former Yugoslavia, in the Furundzija case (IT-95-17/1-T10), stated that the central elements of the crime of rape cannot be captured in a mechanical description of objects or body parts, based on what was established in the *Akayesu* case by the criminal tribunal for Rwanda. The main objective is to refer not only to man-woman relations and to the sexual organ but to the possibility of rape regardless of the gender of the victim and the instrument used. This is so clear that the tribunal for the former Yugoslavia, in the judgement cited above (paragraph 184), stated that it is not contrary to the principle *nullem crimen sine lege* to charge an accused with rape in a case involving forcible oral sex.

In point 3 it is suggested that the word “invasion” should be replaced by the word “conduct”.

Article 8 (2) (b) (xxii)-2: War crime of sexual slavery

In point 1 of the Spanish version, the phrase “*estuvo asociada con el*” should be replaced by “*haya estado relacionada con el*” in order to harmonize it with the wording used in the case of the other crimes.

As we stated in document PCNICC/1999/WGEC/DP.16 of 29 July 1999, in the event that this conduct coincides with any other grave breach of the Geneva Conventions which is committed for sexual purposes, the present definition would take precedence. This distinction should be recorded as an element of the crime.

Article 8 (2) (b) (xxii)-3: War crime of enforced prostitution

In point 1 of the Spanish version, the phrase “*estuvo asociada con el*” should be replaced by “*haya estado relacionada con el*” in order to harmonize it with the wording used in the case of the other crimes.

Article 8 (2) (b) (xxii)-4: War crime of forced pregnancy

In point 1 of the Spanish version, the phrase “*estuvo asociada con el*” should be replaced by “*haya estado relacionada con el*” in order to harmonize it with the wording used in the case of the other crimes.

Points 2 and 3 could be combined and in the Spanish version the phrase “*se embarazaron por la fuerza*” should be replaced by “*fueron embarazadas por la fuerza*”.

In point 4 the description is confused with the intent: the text should therefore be amended to read as follows: “The confinement was carried out with the aim of affecting the ethnic composition of a population or carrying out other grave violations of international law”, which it would be useful to exemplify.

Article 8 (2) (b) (xxii)-5: War crime of enforced sterilization

In point 1 of the Spanish version, the phrase “*estuvo asociada con el*” should be replaced by “*haya estado relacionada con el*” in order to harmonize it with the wording used in the case of the other crimes.

Article 8 (2) (b) (xxii)-6: War crime of sexual violence

In point 1 of the Spanish version, the phrase “*estuvo asociada con el*” should be replaced by “*haya estado relacionada con el*” in order to harmonize it with the wording used in the case of the other crimes.

In point 2 it should be added that an act of a sexual nature is different from sexual access.

In point 3 the terminology of the Statute should be maintained, so that it would read “the conduct constitutes a grave breach of the Geneva Conventions”.
