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**Preparatory Commission for the International  
Criminal Court**

**Working Group on Elements of Crimes**

New York

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**Proposal submitted by Colombia**

**Comments on the documents submitted by Egypt  
(PCNICC/1999/WGEC/DP.42), Germany and Canada  
(PCNICC/1999/WGEC/DP.36), and Bahrain, Iraq, Kuwait, Lebanon,  
the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan,  
the Syrian Arab Republic and the United Arab Emirates  
(PCNICC/1999 WGEC/DP.39)**

**Crimes against humanity of imprisonment or other severe  
deprivation of physical liberty, torture, sexual crimes  
and persecution**

1. As to document PCNICC/1999/WGEC/DP.42 submitted by Egypt:
  - 1.1. Regarding the general provision for all crimes against humanity we must say: Paragraph 2 of the proposal requires knowledge not only of the attack, as provided for in the Statute, but also of its widespread and systematic nature. In the view of our delegation, the latter are elements that relate to the context and the Statute does not require knowledge of them. Accordingly, we agree with the statement in paragraph A.5 of the German and Canadian proposal (PCNICC/1999/WGEC/DP.36).
  - 1.2. According to paragraph 3 of the proposal, the attack must be both massive and also carried out with considerable seriousness and directed against a multiplicity of victims. It can be — and often is — established during the trial that these terms do apply; however, they are not requirements under the Statute and therefore the proposal goes beyond the Statute.

1.3. The Spanish text of the first part of paragraph 4 requires that the systematic attack “haya sido realizado en su totalidad” [was executed completely]; that is not what the English text says. In any event, we do not agree with either English or Spanish text since complete execution is a situation that has nothing to do with the structure of the crime against humanity; complete execution is an aspect of proof, of result of the commission of the crime, not an element thereof, according to the Statute.

2. As to document PCNICC/1999/WGEC/DP.39 submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and the United Arab Emirates, we have the following comments:

The elements listed under the heading “chapeau” as applying to all crimes contain expressions — such as: the act or acts were committed on a multiple basis, the act or acts were part of a military attack, the act or acts were knowingly committed, the act or acts were committed without justification or excuse — that go beyond the Statute. It is therefore worth drawing attention, once again, to the necessity for the elements to be true to the spirit and the letter of the protection enshrined in the Statute.

3. With regard to document PCNICC/1999/WGEC/DP.36 submitted by Germany and Canada, we should like to state that:

### **3.1. Crime against humanity of imprisonment or other severe deprivation of physical liberty**

We agree with the terms of this proposal and should like to point out two interesting aspects: (a) the subject is not characterized at all, in other words the conduct can have been that of anybody; and (b) the severity, which is a matter of interpretation, relates to the means used, the duration or conditions of the deprivation and so forth.

### **3.2. Crime against humanity of torture**

The proposal reiterates to some extent the elements of the war crime of torture outlined in article 8 (2) (c) (i)-(4) (see discussion papers proposed by the Coordinator (PCNICC/1999/L.4/Rev.1, annex IV, appendix)), and it adheres to the Convention against Torture.

In our view it is important to make a distinction between this crime and the war crime referred to above, because in this case there is no need for a purpose; if a purpose must be stated, we would suggest that it be drafted, for example as was done in the last part of paragraph 3, that is to say, “or for any reason based on discrimination of any kind.”

It must be pointed out that the proposal, in referring to physical or mental pain or suffering, does not rule out the possibility that the victim of the torture may be a third party. We agree with this approach.

### **3.3. Crime against humanity of rape**

3.3.1. As stated in documents PCNICC/1999/WGEC/DP.16 of 19 July 1999 and PCNICC/1999/WGEC/DP.30 of 10 November 1999, the extensive definition contained in point 1, which is taken word-for-word from the crime of rape (article 8 (2) (b) (xxii)-1 (see discussion paper proposed by the Coordinator (PCNICC/1999/WGEC/RT.6)), is confusing and does not reflect the protection that must exist in relation to the legally protected right of sexual freedom or freedom to exercise control over one’s body.

The main verb that should be used here is “to have access” to another person, without distinction of gender and specifying violence as the means used. The description

must be open and not refer to the part of the body violated. The case law of the criminal tribunals for the former Yugoslavia and Rwanda contains these clarifications.

The use of the main verb “to have access” makes it possible to differentiate rape from the crime against humanity of sexual violence, since in the latter, the conduct would consist of the violent sexual act as distinct from carnal access. The verb “invade”, because of its indefinite character, seems to us to raise many difficulties from an evidentiary point of view.

3.3.2. We feel that the term “genuine consent” is ambiguous. It would be more appropriate for the footnote to be included in the element, or to simply refer to “consent”, for a vitiated consent is not genuine consent, for the purposes of the crime.

#### **3.4. Crime against humanity of sexual slavery**

We agree with the points established in the proposal submitted by Canada and Germany. It is proposed that the list contained in the first paragraph should be open, so as to cover any new form of slavery.

#### **3.5. Crime against humanity of enforced prostitution**

Except with regard to genuine consent, in relation to which we reiterate our comments about rape, we agree with the proposal, noting that enforced prostitution differs from sexual slavery because of the pecuniary or other advantage involved.

#### **3.6. Crime against humanity of forced pregnancy**

We agree with the proposal.

#### **3.7. Crime against humanity of enforced sterilization**

A crime exists only when the means used is force, and therefore any personal or voluntary decision concerning birth control is excluded. With the exception already stated in relation to “genuine” consent, we agree with the proposal.

#### **3.8. Crime against humanity of sexual violence**

We reiterate the argument presented by our delegation with regard to the main verb of rape and sexual violence as war crimes (PCNICC/1999/WGEC/DP.30), that is, that the difference between the two would be “access” for the first crime and the sexual act as distinct from carnal access, for the second.

The comparable gravity referred to in paragraph 2 of the proposal should not apply to sexual crimes alone, but to all crimes against humanity.

Similarly, with regard to the proposed provision referring to “genuine” consent, we repeat the comments we have already made on genuine consent, namely, that the word “consent” should not be qualified, since it either exists or does not exist.

#### **3.9. Crime against humanity of persecution**

We agree with the elements contained in the proposal. We should like to make two points, however: the last part of article 7 (1) (h) reads as follows: “(...) in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”. The term “connection” may be interpreted as a substantial connection, i.e., between

crimes, or as an evidentiary connection, i.e., that the persecution may be demonstrated with evidentiary factors common to another crime under the jurisdiction of the Court.

In relation to the first type of connection, it may be said that it allows for the existence of an actual concurrence of crimes, or an apparent concurrence where one crime is subsumed under another, depending on the gravity of the crimes. Accordingly, we believe that this is the way to interpret paragraph 3 of the proposal, which states that “the persecution occurred in connection with any prohibited act or any crime within the jurisdiction of the Court”.

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