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PREPARATORY COMMITTEE ON THE
ESTABLISHMENT OF AN INTERNATIONAL
CRIMINAL COURT

1-12 December 1997

Working Group on Definitions and Elements
of Crimes

Reference Paper on War Crimes
submitted by Germany

With reference to the definition of war crimes as adopted by the Working Group on the Definitions and Elements of Crimes on 12 December 1997 (see document A/AC.249/1997/L.9/Rev.1, Annex) and taking into account the deliberations on the issue of war crimes during the session of the Preparatory Committee held from 1 to 12 December 1997, the following text circumscribes, in the view of the German delegation, a useful basis for further work towards a possible compromise.

The German delegation would welcome it if other delegations could consider co-sponsoring this text.

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For the purpose of this Statute, war crimes means the crimes listed in this article:

A. Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering, or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by

- (e) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (f) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement;
- (h) taking of hostages.

B. Other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law, namely any of the following acts:

- (a) intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities;
- (b) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be excessive in relation to the concrete and direct overall military advantage anticipated¹;
- (c) attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended;
- (d) killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- (e) making improper use of flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (f) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies;
- (g) intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places

¹It has been accepted that it will be necessary to insert a provision, probably in the general principles section, which sets out the elements of knowledge and intent which must be found to have existed for an accused to be convicted of a war crime. For example, "in order to conclude that an accused had the knowledge and criminal intention required to be convicted of a crime, the Court must first determine that, taking account of the relevant circumstances of, and information available to, the accused at the time, the accused had the requisite knowledge and intent to commit the crime".

where the sick and wounded are collected, provided they are not being used at the time for military purposes;

(h) subjecting persons who are in the power of an adverse Party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and which cause death to or seriously endanger the health of such person or persons;

(i) killing or wounding treacherously individuals belonging to the hostile nation or army;

(j) declaring that no quarter will be given;

(k) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(l) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(m) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(n) pillaging a town or place, even when taken by assault;

(o)

Option I

(o) employing the following weapons, projectiles and material and methods of warfare which are calculated to cause superfluous injury or unnecessary suffering:

(i) poison or poisoned weapons,

(ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,

(iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,

(iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,

(v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction;

Option II

(o) employing the following weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering:

- (i) poison or poisoned weapons,
- (ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,
- (iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,
- (iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,
- (v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction,
- (vi) such other weapons or weapons systems as become the subject of a comprehensive prohibition pursuant to customary or conventional international law;

Option III

(o) employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate;

(p) committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(p bis) committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(q) utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(r) intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;

(e) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(t) forcing/recruiting children under the age of fifteen years to take direct part in hostilities.

* * *

Sections C and D of this article apply to armed conflicts not of an international character and thus do not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

C. In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(c) taking of hostages;

(d) 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.

D. Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(a) intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities;

(b) intentionally directing attacks against buildings, material, medical units and transports, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;

- (c) intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;
- (d) pillaging a town or place, even when taken by assault;
- (e) committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (e bis) committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
- (f) forcing/recruiting children under the age of fifteen years to take direct part in hostilities;
- (g) ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- (h) killing or wounding treacherously a combatant adversary;
- (i) declaring that no quarter will be given;
- (j) subjecting persons who are in the power of another Party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and which cause death to or seriously endanger the health of such person or persons;
- (k) destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

(l)

Option I

No provision on prohibited weapons.

Option II

A reference to arms, in the light of the discussion on paragraph B (o).

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Elsewhere in the Statute:

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court shall have

jurisdiction in respect of the crimes listed in article X (war crimes) in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

Art. Y

(relating to the part of the Statute dealing with the definition of crimes)

Without prejudice to the application of the provisions of this Statute, nothing in this Part of the Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law.