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Discussion paper proposed by the Coordinator

Article 7 (Crimes against humanity)

Chapeau for Crimes against humanity

The following general paragraphs would be included as an introduction to the Elements of Article 7.¹

“Consistent with the general principles of law defined in article 30, it is presumed that all conduct described in the elements must be intentionally committed and the elements do not repeat the general intent implied in each action. Likewise, the elements presume that the conduct is not otherwise legally justified under applicable law referred to in article 21, paragraph 1(b) and (c), of the Statute. Hence, the element of “unlawfulness” that exists in the Statute and in the jurisprudence of many of these offences has not been repeated in the elements of crimes. Absence of a lawful justification for a particular action need not be proved by the Prosecutor unless the issue is raised by the accused.

The first two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, this element should not be interpreted as requiring proof that the accused had knowledge of all characteristics of the attack or the precise details of the plan or policy of the state or organization. In the case of an emerging widespread or systematic attack against a

¹ The inclusion of general paragraphs and footnotes in this text is without prejudice to the final structure of Elements of Crimes. There is still some concern regarding the formulation of these general paragraphs. There is also an appreciation that a reconsideration could have an impact on the substance of the elements.

civilian population, the intent clause of the second element indicates that the *mens rea* is satisfied

if the accused intended to further such an attack. As always, existence of knowledge or intent can be inferred from relevant facts and circumstances.

“Attack directed against a civilian population” in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that a “policy to commit such attack” requires that the State or organization actively promote or encourage such conduct as an attack against a civilian population.

Article 7(1)(a): Crime against humanity of murder

1. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
2. The accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
3. The accused² killed³ one or more persons.

Article 7(1)(b): Crime against humanity of extermination

1. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
2. The accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
3. The accused killed⁴ one or more persons as part of, or in the context of, a mass killing of members of a civilian population, either directly or indirectly, *inter alia*, by inflicting conditions of life calculated to bring about the destruction of part of a population.⁵
4. The accused intended the conduct to be part of such mass killing.⁶

Article 7(1)(c): Crime against humanity of enslavement

1. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
2. The accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
3. The accused exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.⁷

² The term “accused” has been used provisionally and needs to be discussed to ensure consistency with the Statute.

³ The term “killed” is interchangeable with the term “caused death”.

⁴ Ibid.

⁵ Some delegations believe that death is not required. Other delegations believe that the accused must cause multiple deaths. In the latter case, the fourth element might not be necessary.

⁶ This element is intended to provide the nexus between the *actus reus* (killing one or more persons) and the specific context of this crime (a mass killing of members of the civilian population). It is not related to the concept of “specific intent” as understood in relation to genocide.

⁷ It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

Article 7(1)(d): Crime against humanity of deportation or forcible transfer of population

1. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
2. The accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
3. The accused deported or forcibly transferred⁸ one or more persons to another State or location, by expulsion or other coercive acts.
4. Such person or persons were lawfully present in the area from which they were so deported or transferred and the accused was aware of the factual circumstances that established the lawfulness of such presence.⁹

Article 7(1)(e): Crime against humanity of imprisonment or other severe deprivation of physical liberty

1. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
2. The accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
3. The accused imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty.
4. The gravity of the conduct was such that it was in violation of fundamental rules of international law and the accused was aware of such gravity.¹⁰

Article 7(1)(f): Crime against humanity of torture

1. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
2. The accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
3. The accused inflicted severe physical or mental pain or suffering upon one or more persons.
4. Such person or persons were in the custody or under the control of the accused.
5. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions, and the accused was so aware.¹¹

⁸ “Deported or forcibly transferred” is interchangeable with “forcibly displaced”.

⁹ Consistent with the general approach in the document on the Elements of Crimes, no element is listed here specifically requiring that the act is “without grounds permitted under international law”. Some delegations prefer to explicitly list this element in relation to this crime. In addition, some delegations indicated that the mental element relating to the lawfulness of the presence needed further clarification.

¹⁰ Some delegations want to add the concept of universal recognition to qualify “fundamental rules of international law”.

¹¹ Some delegations prefer to include a purpose element.

Article 7(1)(g)-1: Crime against humanity of rape¹²

1. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
2. The accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
3. The accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the¹³ body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
4. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.¹⁴

Article 7(1)(g)-2: Crime against humanity of sexual slavery

1. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
2. The accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
3. The accused exercised a power attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
4. The accused caused such person or persons to engage in one or more acts of a sexual nature.

Article 7(1)(g)-3: Crime against humanity of enforced prostitution

1. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
2. The accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
3. The accused caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.¹⁵
4. The accused or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.

Article 7(1)(g)-4: Crime against humanity of forced pregnancy

¹² Elements for crimes of sexual violence are based on the elements of corresponding war crimes. It is understood that the agreement on these formulations is predicated on the compromise regarding the *chapeau*.

¹³ The concept of "invasion" is intended to be broad enough to be gender-neutral.

¹⁴ It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.

¹⁵ *Ibid.*

1. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
2. The accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
3. The accused confined one or more women.
4. Such woman or women had been forcibly made pregnant.
5. The accused intended to keep the woman or women pregnant in order to affect the ethnic composition of a population or to carry out another grave violation of international law.¹⁶

Article 7(1)(g)-5: Crime against humanity of enforced sterilization

1. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
2. The accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
3. The accused deprived one or more persons of biological reproductive capacity.¹⁷
4. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.^{18 19}

Article 7(1)(g)-6: Crime against humanity of sexual violence

1. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
2. The accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
3. The accused committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.²⁰
4. The form of sexual violence was of a gravity comparable to the other offences in article 7, paragraph (1)(g), of the Statute.

Article 7(1)(h): Crime against humanity of persecution

1. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

¹⁶ Some delegations were of the view that this element may require further drafting.

¹⁷ The deprivation is not intended to include birth control measures. (The need for this footnote or its contents needs to be revisited.)

¹⁸ The wording of this element has been adjusted from the corresponding war crimes element to improve its grammatical structure, without changing its substance.

¹⁹ It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.

²⁰ Ibid.

2. The accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
3. The accused severely deprived one or more persons of fundamental rights.^{21 22}
4. The accused targeted such person or persons by reason of their belonging to an identifiable group or collectivity, or targeted the group as such.²³
5. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
6. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.

Article 7(1)(i): Crime against humanity of enforced disappearance of persons²⁴

1. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
2. The accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
3. The accused arrested, detained or abducted one or more persons, whether lawfully or unlawfully.^{25 26}
4. Such conduct was carried out on behalf of, or with the authorization, support or acquiescence of, a State or a political organization.²⁷
5. The accused subsequently refused, or was aware of a refusal, to acknowledge the deprivation of freedom or to give information on the fate or whereabouts of such person or persons.²⁸
6. The accused intended to remove such person or persons from the protection of the law for a prolonged period of time.

Article 7(1)(j): Crime against humanity of apartheid

1. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
2. The accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
3. The accused committed an inhumane act against one or more persons.

²¹ Some delegations want to add the concept of universal recognition to qualify “fundamental rights”.

²² Some delegations were of the view that targeting of groups should be included.

²³ Ibid.

²⁴ Some delegations were of the view that this crime requires further consideration to identify the *actus reus* of the accused.

²⁵ Some delegations were of the view that the reference to “lawfully or unlawfully” was not needed.

²⁶ Some delegations were of the view that the competence *ratione temporis* of the Court with respect to this crime should be clarified in the light of the relevant provisions of the Statute.

²⁷ Some delegations were of the view that the relationship between this element and the *chapeau* should be clarified.

²⁸ Some delegations believe this element is too restrictive. Some delegations believe this element is too expansive. Further drafting may be required.

4. Such act was an act referred to in article 7, paragraph 1, of the Statute, or was an act of a character similar to any of those acts.²⁹
5. The conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups.
6. The accused intended to maintain such regime by that conduct.

Article 7(1)(k): Crime against humanity of other inhumane acts

1. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
2. The accused knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.
3. The accused inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.³⁰
4. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.³¹

²⁹ It is understood that “character” refers to the nature and gravity of the act.

³⁰ Some delegations want to add the concept of universally recognized principles to qualify “inhumane act”.

³¹ It is understood that “character” refers to the nature and gravity of the act.