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**Preparatory Commission for the International Criminal Court**
Working Group on Elements of Crimes
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**Proposal by Algeria, Bahrain, Comoros, Djibouti, Egypt, Jordan, Iraq, Kuwait, Lebanon, Libyan Arab Jamahiriya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic, Tunisia, United Arab Emirates and Yemen**

# Comments on the proposal submitted by the United States of America concerning terminology and the crime of genocide (PCNICC/1999/DP.4)

## I. General comments

No legal system in the world recognizes the concept of "elements of crimes" as a separate crime definition. Article 9 of the Rome Statute of the International Criminal Court was therefore intended merely to assist the Court in the interpretation of articles 6, 7 and 8 of the Statute. It can also be said that a further aim of article 9 was to provide a link between articles 6, 7 and 8 and the articles under Part 3, General Principles of Criminal Law, concerning criminal responsibility.

There is no question that article 9 can change in any way the definition of crimes given in articles 6, 7 and 8 of the Statute. Therefore, in the case of any conflict or disparity between the provisions of those articles and article 9, the provisions of articles 6, 7 and 8 will at all times take precedence, since they contain the first principles, and what is defined as elements of crimes is subsidiary. This subsidiary represents, upon reflection, elements of proof rather than elements of crimes, since the elements of crimes are specified in their definitions.

From another point of view, the so-called elements of crimes do not assist the judge, who has the absolute right to apply international norms and the general principles of law, as stated in article 21 of the Statute, entitled "Applicable law".

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The Arab Group therefore considers that the basic principles that have been put forward should be set out at the beginning of the report of the Preparatory Commission for the International Criminal Court and in the introduction to the section concerning the elements of crimes in order to make these basic principles clear to all.

## II. Methodological comments

1. It is not only unnecessary but also undesirable for the so-called elements of crimes to repeat what was set forth in articles 6, 7 and 8.

2. The terminology employed must be absolutely clear, and not open to doubt or ambiguity.

3. No reference should be made to anything on which consensus could not be reached by the States taking part in the meetings, in particular when there is doubt as to the compatibility of such references with the norms of international customary or conventional law.

4. No reference should be made to any restrictions on the application and development of the norms of international customary law and the general principles of law.

5. Any definition of terminology or setting of standards to verify elements of crimes must proceed on an objective rather than a subjective basis. The standards themselves must be objective, not subjective, in order to permit the judge to apply them with the same objectivity.

6. Failure to take the foregoing methodological comments into account will create confusion for the national judges of States parties when they compare their usual methodology, which is based on their interpretation of international custom, with the general principles of law, since, in accordance with the Statute, the jurisdiction of the International Criminal Court is complementary to the national criminal jurisdictions of States parties. The concept of complementarity on which the International Criminal Court is based is not compatible with innovative judgement but, rather, with methodological development consistent with the general customs and principles of law.

## III. Specific comments on the definition of terminology

1. With respect to terminology, the Arab Group sees no need for this matter to be raised, since the terminology has been well established both in the 1949 Geneva Conventions and the 1977 Additional Protocols and in international norms. Any addition to the provisions of those instruments will create an unnecessary sense of contradiction or inconsistency.

2. Furthermore, any additions will diminish the role of the judge who will apply the prevailing norms, set legal precedents, and develop such precedents on a case-by-case basis. This is well illustrated in the instrument of the General Committee of the International Federation of Red Cross and Red Crescent Societies, which clearly shows how international judges involved in trials spanning the Nuremburg and Tokyo trials and the trials of war criminals in the former Yugoslavia and Rwanda have been able to apply and develop the norms of customary and conventional law without the assistance of any guide to the definition of terminology. This affirms the role of international legal interpretive judgement in developing the norms of international criminal law.

3. It should be noted that much of the terminology set forth in the proposal submitted by the United States of America (PCNICC/1999/DP.4), such as that in paragraphs 9, 11, 14, 15 and 17, differs greatly from and occasionally contradicts that of the 1949 Geneva Conventions and the two 1977 Protocols. This is clear if a comparison is made between these paragraphs and Professor Jean Pictet's commentaries on the aforementioned Geneva Conventions and those of Professor Sandoz and his colleagues in the General Committee of the International Federation of Red Cross and Red Crescent Societies on the 1977 Protocols.

4. Most importantly, paragraph 12 of the proposal submitted by the United States introduces justification or excuse based on security, military or operational considerations or other imperative reasons of public welfare or other specific lawful authorization or requirement. Such justifications have no objective support in international humanitarian law.

5. Paragraph 19 of the same document conflicts with the provisions of the 1925 Geneva Protocol prohibiting the use of poisonous gases.

6. Paragraph 20 has omitted sexual violations intended to outrage women's personal dignity such as were perpetrated in Bosnia and Herzegovina.

7. In paragraph 24 there is a conflict between the terms "widespread" and "massive in nature", since any violation may be massive in nature without being widespread and vice versa.

## IV. Article 6: Crimes of genocide

1. Article 6 of the Statute is taken verbatim from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The Arab Group therefore considers it inappropriate to append anything thereto or detract from it. It should be noted that the explanatory note to this Convention states that it is impossible to enumerate all the means devised by the human mind in order to commit the crime of genocide, thereby leaving the door open for judges' interpretive judgement. This statement was affirmed by the judges involved in the International Criminal Tribunal for Rwanda in their Judgement on Jean-Paul Akayesu, where they stated that rape may be considered a type of genocidal crime (paragraph 731 [sic] of the Judgement).

2. Use of the phrase "widespread or systematic" in the draft elements of crimes submitted by the United States of America is confusing, since it is used in contexts other than crimes against humanity as provided for in article 7 of the Statute. Furthermore, this term does not appear in the article of the Statute that refers to genocide.

3. The legal element of this crime is the criminal intention of its perpetrator, which must be proved, whether or not the crime is widespread or systematic.

4. The words "totally or partially" should be added to part III, article 6 (b), element 4, so that it reads: "... practice aimed at totally or partially destroying such group".

5. In the United States proposal, part III, article 6 (c), does not deal with the practice of ethnic cleansing as a means of genocide. This confirms the difficulty of enumerating all the so-called elements of crimes. It is more than likely that future events in the world will reveal other forms of genocide that have not been mentioned in this or similar proposals.

6. The Arab Group sees no reason to adopt "person under the age of fifteen" as the definition of a child, since the Convention on the Rights of the Child considers a child as

under the age of 18. The Arab Group also objects to the use of the term "lawful residence", since international protection is not dependent upon the child's presence in his lawful residence, but extends to his actual place of residence, wherever that may be.

7. It is well known that the crime of genocide is perpetrated by three groups of persons: decision makers, the executing group and a group that mediates between the first two groups. The Arab Group considers that the moral elements of those belonging to each group should be defined, since the first two groups are high-profile, whereas less is known about the intermediary group which conveys orders from the point of origin to the executing group and finds the means of implementation. For example, a soldier who carries out an order to kill a person cannot be considered as implementing a genocidal crime unless that act was committed with the particular intention that, by committing this act, the soldier was carrying out State policy to commit the crime of genocide. As a further example, the decision maker may not openly acknowledge his intention to commit the crime of genocide. The criminal intent necessary to establish this crime would therefore not exist other than through circumstantial evidence relating to the taking of the decision and the means of implementation. The activities of this intermediary group and its criminal responsibility therefore need to established.

The Arab Group reserves the right to submit observations on other so-called elements of crimes in subsequent documents.

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