

Swiss Proposal on the Elements of Crimes

Article 8 (2) (a) of the ICC Statute

General elements

- (1) The acts or omissions are committed in the context of an international armed conflict.
- (2) The acts or omissions are committed against persons or property protected under the provisions of the relevant Geneva Convention.
- (3) The terms "unlawful" or "lawful", refer to the lawfulness under international law.
- (4) The notion "wilful" includes "intent" and "recklessness", but excludes ordinary negligence. The term "knowingly" must be understood in the sense of Art. 30 ICC Statute which defines "knowledge" as meaning awareness that a circumstance exists or a consequence will occur in the ordinary course of events (cf. Art. 30 (3)).
- (5) In addition to military personnel, potential perpetrators may be members of Government, party officials and administrators, industrialists and businesspeople, judges, prosecutors, doctors and nurses, executioners as well as concentration camp inmates.

Art. 8 (2) (a) (i) - Wilful killing

- (1) The term "wilful killing" covers all cases in which a protected person is killed or the death of such a person was caused.
- (2) The death results from an unlawful act or omission committed by the perpetrator.
- (3) At the time of the killing the perpetrator had the intent to kill or inflict grievous harm upon the victim having known that such bodily

harm is likely to cause the victim's death, and is reckless whether death ensues or not.

Art. 8 (2) (a) (ii) - Torture or inhuman treatment, including biological experiments

Torture

- (1) The perpetrator inflicted, by act or omission, severe physical or mental pain or suffering upon the victim.
- (2) The perpetrator was himself an official, or acted at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity.
- (3) The perpetrator caused the pain or suffering intentionally and for the purpose of:
 - a) obtaining information or a confession from the victim or a third person;
 - b) punishing the victim for an act the victim or a third person has committed or was suspected of having committed;
 - c) intimidating or coercing the victim or the third person; or
 - d) for any reason based on discrimination of any kind.

Inhuman treatment

- (1) The act or omission of the perpetrator caused serious physical or mental suffering or injury upon the person or constituted a serious attack on human dignity.
- (2) The perpetrator acted wilfully.

Biological experiments

- (1) The offence was committed by act or omission.
- (2) The act or omission seriously endangered the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends.

(3) Biological experiments are unlawful, even with the consent of the victim, if they are not justified by the medical, dental or hospital treatment of the protected person concerned and not carried out in his interest, i.e. any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.

(4) The act or omission was committed wilfully.

Art. 8 (2) (a) (iii) - Wilfully causing great suffering, or serious injury to body or health

(1) The perpetrator committed a specified act or omission upon the victim.

(2) Great suffering or serious injury to the body or health was thereby unlawfully inflicted.

(3) The perpetrator committed the act or omission wilfully.

Art. 8 (2) (a) (iv) - Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly

(1) The perpetrator committed an unlawful act causing destruction or appropriation (such as taking, obtaining or withholding) without the consent of the owner of real or personal property from the owner.

(2) The act is committed with the intent to deprive another person of the use and benefit of the property or to appropriate the property for the use of any person other than the owner.

(3) The amount of destruction or appropriation is extensive and exceeds that required by military necessity under the circumstances.

Art. 8 (2) (a) (v) - Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power

(1) The perpetrator compelled a prisoner of war or a civilian, protected by the third/fourth GC, to serve in the forces of a hostile power.

(2) The compelled acts were not permissible as prisoner of war or civilian labour, as defined by the Geneva Convention.

Art. 8 (2) (a) (vi) - Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial

(1) The perpetrator committed an act or omission depriving the person of judicial guarantees as defined, in particular, in the 1949 Geneva Conventions III and IV.

(2) The act or omission was committed wilfully.

Commentary

The main judicial guarantees, which are an indication of what constitutes a fair trial, laid down in the 1949 Geneva Conventions and since then in their Additional Protocols of 1977, include, but are not limited to:

- the right of the accused to be judged by an independent and impartial court;
- the right of the accused to be promptly informed of the offences with which he is charged;
- the rights and means of defence, such as the right to be assisted by a qualified lawyer chosen freely and by a competent interpreter;
- the principle of individual criminal responsibility;
- the principle of *nullum crimen sine lege* (i.e. no crime without law);
- the presumption of innocence;
- the right of the accused to be present at his trial;
- the right of the accused not to testify against himself or to confess guilt;

- the principle of non bis in idem (i.e. no punishment more than once for the same act);
- the right of the accused to have the judgement pronounced publicly;
- the right of the accused to be informed of his rights of appeal.

Art. 8 (2) (a) (vii) - Unlawful deportation or transfer or unlawful confinement

Unlawful deportation or forcible transfer

- (1) The unlawfully deported or forcibly transferred a person from the territory where the person was present, to a place outside that territory.
- (2) The perpetrator acted wilfully and knowingly.

Unlawful confinement

- (1) The perpetrator unlawfully confined, or otherwise restrained, the liberty of a person.
- (2) Measures of assigned residence or internment constitute unlawful confinement if not absolutely necessary for reasons of security of the detaining party.
- (3) The confinement was effected without affording the victim with procedural and substantive protections, as prescribed in the Geneva Conventions.
- (4) The perpetrator acted wilfully and knowingly.

Art. 8 (2) (a) (viii) - Taking of hostages

- (1) The perpetrator seized or detained or otherwise unlawfully held hostage a person.

(2) The perpetrator threatened to kill or injure or continue to detain such person.

(3) The perpetrator performed these acts with the intent to compel a third party, including a State, an international organisation, a natural person or judicial person, or group of persons to act or refrain from acting as an explicit or implicit condition for the release of the hostage.