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Draft elements of crimes

Addendum

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VI. Inchoate offences

Article 25.3 (b): Solicitation

An order, solicitation or inducement to commit an offence under the Statute does not require a modification to the elements for the offence in question. In such instance, the following elements would simply be added as a prerequisite for considering the offence:

1. That the accused intended to cause one or more persons to commit the offence in question.
2. That the accused ordered, solicited or induced through offer of some benefit one or more persons to commit the offence in question.
3. That the order, solicitation or inducement caused the crime to occur or to be attempted.

When these three elements are satisfied, the accused is considered to be a principal actor, and the actus reus is imputed directly to the accused for purposes of considering the elements of the specific offence under articles 6, 7 or 8 or the elements of attempt under article 25.3 (f). Thus, for example, an accused who orders a treacherous killing under article 8.2 (b) (xi) is simply considered to have “killed” the victim for purposes of the applicable element.

Article 25.3 (c), (d): Aiding and abetting

Like solicitation in article 25.3 (b), an accused who aids, abets or otherwise assists the commission or attempted commission of a crime is simply considered a principal and the actus reus is imputed directly to the accused when considering the elements of the offence under articles 6, 7 or 8. The following elements should be added as a prerequisite to the imposition of liability for aiding and abetting an offence:

1. That the accused intended to contribute to the commission of the offence in question.
2. That the accused intentionally performed some act that had the effect of contributing to the commission or attempted commission of the offence in question.

When these two elements have been satisfied, the accused is considered to be a principal actor, and the actus reus is imputed directly to the accused for purposes of considering the elements of the substantive offence under articles 6, 7 or 8.

Article 25.3 (e): Incitement

For crimes of genocide, an accused is vicariously liable if he or she “directly and publicly incites others to commit genocide”. Like solicitation, incitement to commit an offence under the Statute does not require a modification to the elements for the genocide offence in question. In such instance, the following elements would simply be added as a prerequisite for considering the offence:

1. That the accused intended to cause one or more persons to commit the crime of genocide in question.
2. That the accused committed a public act that had the direct effect of causing one or more persons to commit the crime of genocide in question.

When these two elements have been satisfied, the accused is considered to be a principal actor and the actus reus is imputed directly to the accused for purposes of considering the elements of the offence of genocide in question.

Article 25.3 (f): Attempts

Attempted commissions of the various crimes listed in articles 6, 7 and 8 involve a change to the elements of the offences listed in this document. For a crime of attempt to take place, the actus reus element of the particular offence in question need not take place. However, an additional element regarding an act constituting a substantial step must be inserted. The elements for the offence of attempted commission of a particular crime are:

1. That the accused committed a certain act.
2. That the act was committed with the intention of committing a crime under the Statute (such intention would include the intention to meet all the elements of the given offence under articles 6, 7 or 8).
3. That the act amounted to a substantial step in commencing the execution of the crime.
4. That the crime does not occur due to circumstances independent of the accused's intentions.

The "substantial step" requirement for this offence means that the act must amount to more than mere preparation. The fact that the crime must fail to occur owing to circumstances independent of the accused's intentions means that no offence of attempt exists if the crime failed to occur because the accused completely and voluntarily gave up the criminal purpose and abandoned the effort to commit the crime.

Article 28.1: Command responsibility

Vicarious liability due to command responsibility would not require a change to the elements of the offence in question; the elements would operate in the same way as a solicitation or order. In such instance, the following elements would simply be added as a prerequisite for considering the offence:

1. That the accused was a military commander or a person effectively acting as a military commander.
2. That forces under the accused's effective command and control or authority and control committed one or more crimes under articles 6, 7 or 8 of the Statute.
3. That the crime or crimes in question would not have occurred had the accused effectively exercised proper control over his or her forces.
4. That the accused knew, or owing to circumstances at the time should have known, that the forces were committing or about to commit such crime or crimes.
5. That the accused failed to either take necessary and reasonable measures within his or her power to prevent or repress the commission of the offence or offences.
or to submit the matter to competent authorities for investigation and prosecution.

When these five elements are satisfied, the accused is considered to be a principal actor, and the actus reus is imputed directly to the accused for purposes of considering the elements of the specific offence under articles 6, 7 or 8.

**Article 28.2: Superior responsibility**

Vicarious liability due to superior responsibility should be considered in the same way as command responsibility, but with the following prerequisite elements:

1. That the accused had effective authority and control in a superior and subordinate relationship, but was not a military commander or a person effectively acting as a military commander.

2. That subordinates under the accused’s effective authority and control committed one or more crimes under articles 6, 7 or 8 of the Statute.

3. That the crime or crimes in question involved activities within the effective responsibility and control of the accused.

4. That the crime or crimes in question would not have occurred had the accused effectively exercised proper control over his or her subordinates.

5. That the accused knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crime or crimes.

6. That the accused failed to either take necessary and reasonable measures within his or her power to prevent or repress the commission of the offence or offences, or to submit the matter to competent authorities for investigation and prosecution.

When these six elements are satisfied, the accused is considered to be a principal actor, and the actus reus is imputed directly to the accused for purposes of considering the elements of the specific offence under articles 6, 7 or 8.