

individual civilians not taking direct or active part in hostilities;

(C) The accused intended the civilian population as such or individual civilians not taking direct or active part in hostilities to be an object of the attack; and

(D) The attack took place in the context of and was associated with armed conflict.

(ii) *Comments.* The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

(3) *Attacking civilian objects.*—(i) *Elements.* (A) The accused engaged in an attack;

(B) The object of the attack was civilian property, that is, property that was not a military objective;

(C) The accused intended such property to be an object of the attack;

(D) The accused knew or should have known that such property was not a military objective; and

(E) The attack took place in the context of and was associated with armed conflict.

(ii) *Comments.* The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

(4) *Attacking Protected Property.*—(i) *Elements.* (A) The accused engaged in an attack;

(B) The object of the attack was protected property;

(C) The accused intended such property to be an object of the attack;

(D) The accused knew or should have known of the factual circumstances that established that protected status; and

(E) The attack took place in the context of and was associated with armed conflict.

(ii) *Comments.* The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

(5) *Pillaging.*—(i) *Elements.* (A) The accused appropriated or seized certain property;

(B) The accused intended to appropriate or seize such property for private or personal use;

(C) The appropriation or seizure was without the consent of the owner of the property or other person with authority to permit such appropriation or seizure; and

(D) The appropriation or seizure took place in the context of and was associated with armed conflict.

(ii) *Comments.* As indicated by the use of the term “private or personal use,” legitimate captures or appropriations, or seizures justified by military necessity, cannot constitute the crime of pillaging.

(6) *Denying quarter.*—(i) *Elements.* (A) The accused declared, ordered, or otherwise indicated that there shall be no survivors or surrender accepted;

(B) The accused thereby intended to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted;

(C) It was foreseeable that circumstances would be such that a practicable and reasonable ability to accept surrender would exist;

(D) The accused was in a position of effective command or control over the subordinate forces to which the declaration or order was directed; and

(E) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments.* Paragraph (a)(6)(i)(C) of this section precludes this offense from being interpreted as limiting the application of lawful means or methods of warfare against enemy combatants. For example, a remotely delivered attack cannot give rise to this offense.

(7) *Taking Hostages.*—(i) *Elements.* (A) The accused seized, detained, or otherwise held hostage one or more persons;

(B) The accused threatened to kill, injure, or continue to detain such person or persons;

(C) The accused intended to compel a State, an international organization, a natural or legal person, or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons; and

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments.* Consistent with § 11.4(b), this offense cannot be committed by lawfully detaining enemy combatants or other individuals as authorized by the law of armed conflict.

(8) *Employing poison or analogous weapons.*—(i) *Elements.* (A) The accused employed a substance or a weapon that releases a substance as a result of its employment;

(B) The substance was such that exposure thereto causes death or serious damage to health in the ordinary course of events, through its asphyxiating, poisonous, or bacteriological properties;

(C) The accused employed the substance or weapon with the intent of utilizing such asphyxiating, poisonous, or bacteriological properties as a method of warfare;

(D) The accused knew or should have known of the nature of the substance or weapon; and

(E) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments.* (A) The “death or serious damage to health” required by paragraph (a)(8)(i)(B) of this section must be a direct result of the substance’s effect or effects on the human body (e.g., asphyxiation caused by the depletion of atmospheric oxygen secondary to a chemical or other reaction would not give rise to this offense).

(B) The clause “serious damage to health” does not include temporary incapacitation or sensory irritation.

(C) The use of the “substance or weapon” at issue must be proscribed under the law of armed conflict. It may include chemical or biological agents.

(D) The specific intent element for this offense precludes liability for mere knowledge of potential collateral consequences (e.g., mere knowledge of a secondary asphyxiating or toxic effect would be insufficient to complete the offense).

(9) *Using protected persons as shields.*—(i) *Elements.* (A) The accused positioned, or took advantage of the location of, one or more civilians or persons protected under the law of war;

(B) The accused intended to use the civilian or protected nature of the person or persons to shield a military objective from attack or to shield, favor, or impede military operations; and

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) [Reserved]

(10) *Using protected property as shields.*—(i) *Elements.* (A) The accused positioned, or took advantage of the location of, civilian property or property protected under the law of war;

(B) The accused intended to shield a military objective from attack or to shield, favor, or impede military operations; and

(C) The conduct took place in the context of and was associated with armed conflict.

(ii) [Reserved]

(11) *Torture.*—(i) *Elements.* (A) The accused inflicted severe physical or mental pain or suffering upon one or more persons;

(B) The accused intended to inflict such severe physical or mental pain or suffering;

(C) Such person or persons were in the custody or under the control of the accused; and

(D) The conduct took place in the context of and was associated with armed conflict.

(ii) *Comments.* (A) Consistent with § 11.4(b), this offense does not include pain or suffering arising only from, inherent in, or incidental to, lawfully imposed punishments. This offense does not include the incidental