

infliction of pain or suffering associated with the legitimate conduct of hostilities.

(B) Severe "mental pain or suffering" is the prolonged mental harm caused by or resulting from:

(1) The intentional infliction or threatened infliction of severe physical pain or suffering;

(2) The administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(3) The threat of imminent death; or

(4) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(C) "Prolonged mental harm" is a harm of some sustained duration, though not necessarily permanent in nature, such as a clinically identifiable mental disorder.

(D) Paragraph (a)(11)(i)(C) of this section does not require a particular formal relationship between the accused and the victim. Rather, it precludes prosecution for pain or suffering consequent to a lawful military attack.

(12) *Causing serious injury*—(i) *Elements*. (A) The accused caused serious injury to the body or health of one or more persons;

(B) The accused intended to inflict such serious injury;

(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*. "Serious injury" includes fractured or dislocated bones, deep cuts, torn members of the body, and serious damage to internal organs.

(13) *Mutilation or maiming*—(i) *Elements*. (A) The accused subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage;

(B) The accused intended to subject such person or persons to such mutilation;

(C) The conduct caused death or seriously damaged or endangered the physical or mental health or appearance of such person or persons.

(D) The conduct was neither justified by the medical treatment of the person or persons concerned nor carried out in the interest of such person or persons;

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

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

(ii) [Reserved]

(14) *Use of treachery or perfidy*—(i) *Elements*. (A) The accused invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under the law of war;

(B) The accused intended to betray that confidence or belief;

(C) The accused killed, injured, or captured one or more persons;

(D) The accused made use of that confidence or belief in killing, injuring, or capturing such person or persons; and

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

(ii) [Reserved]

(15) *Improper use of flag of truce*—(i) *Elements*. (A) The accused used a flag of truce;

(B) The accused made such use in order to feign an intention to negotiate, surrender, or otherwise to suspend hostilities when there was no such intention on the part of the accused; and

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

(ii) [Reserved]

(16) *Improper use of protective emblems*—(i) *Elements*. (A) The accused used a protective emblem recognized by the law of armed conflict;

(B) The accused undertook such use for combatant purposes in a manner prohibited by the law of armed conflict;

(C) The accused knew or should have known of the prohibited nature of such use; and

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

(ii) *Comments*. "Combatant purposes," as used in paragraph (a)(16)(i)(B) of this section, means purposes directly related to hostilities and does not include medical, religious, or similar activities.

(17) *Degrading treatment of a dead body*—(i) *Elements*. (A) The accused degraded or otherwise violated the dignity of the body of a dead person;

(B) The accused intended to degrade or otherwise violate the dignity of such body;

(C) The severity of the degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity; and

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

(ii) *Comments*. Paragraph (a)(17)(i)(B) of this section precludes prosecution for actions justified by military necessity.

(18) *Rape*—(i) *Elements*. (A) The accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;

(B) The invasion was committed by force, threat of force or coercion, or was committed against a person incapable of giving consent; and

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

(ii) *Comments*. (A) Paragraph (a)(18)(i)(B) of this section recognizes that consensual conduct does not give rise to this offense.

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

(C) The concept of "invasion" is linked to the inherent wrongfulness requirement for all offenses. In this case, for example, a legitimate body cavity search could not give rise to this offense.

(D) The concept of "invasion" is gender neutral.

(b) *Substantive offenses—other offenses triable by military commission*. The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to reflect conduct of the perpetrator. Each element need not be specifically charged.

(1) *Hijacking or hazarding a vessel or aircraft*—(i) *Elements*. (A) The accused seized, exercised control over, or endangered the safe navigation of a vessel or aircraft;

(B) The accused intended to so seize, exercise control over, or endanger such vessel or aircraft; and

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

(ii) *Comments*. A seizure, exercise of control, or endangerment required by military necessity, or against a lawful military objective undertaken by military forces of a State in the exercise of their official duties, would not satisfy the wrongfulness requirement for this crime.

(2) *Terrorism*—(i) *Elements*. (A) The accused killed or inflicted bodily harm on one or more persons or destroyed property;

(B) The accused:

(1) Intended to kill or inflict bodily harm on one or more persons; or

(2) Intentionally engaged in an act that is inherently dangerous to another